



*Promoting social human rights as a key
factor of sustainable democracy
in Ukraine*

*Further support for the execution
by Ukraine of judgements in respect of Article 6
of the European Convention on Human Rights*

EXPERT DISCUSSION

On improving socially-oriented legislation

**(in the context of the execution of the European
Court of Human Rights judgements in the Yurii
Nikolaevich Ivanov v. Ukraine and Burmych and
others v. Ukraine group of cases)**

21 July 2020

Video conferencing

HANDOUT MATERIALS

This event is organised jointly by the Council of Europe project "Further support for the execution by Ukraine of judgements in respect of Article 6 of the European Convention on Human Rights" funded by the Human Rights Trust Fund and the Council of Europe project "Promoting social human rights as a key factor of sustainable democracy in Ukraine"

OBJECTIVES OF THE EVENT:

- To present and discuss expert conclusions on main issues of the socially-oriented legislation and consider legal and regulatory measures necessary to take in order to eliminate identified issues in the context of the execution of judgements of the European Court of Human Rights judgements in the cases of Yurii Nikolaevich Ivanov v. Ukraine and Burmych and others v. Ukraine;
- To discuss the social welfare payments prescribed by legislation and articulate consistency between them and envisaged state budget allocations;
- To exchange opinions on the improvement of accounting and collection of statistical data on social welfare payments, which will allow to further calculate the total amount of social debt;
- In response to the decision of the Committee of Ministers of the Council of Europe of 3-5 March 2020, to suggest recommendations and propose further steps that the respective Ukrainian authorities should assume to eliminate deficiencies in the socially-oriented legislation and to ensure consistent and uniform application of the respective legislation by courts.

PARTICIPANTS:

- Judges and representatives of the Supreme Court;
- Representatives of the Verkhovna Rada of Ukraine and the Ukrainian Parliament Commissioner for Human Rights;
- Representatives of the Ministry of Justice of Ukraine, the Ministry of Social Policy of Ukraine, the Pension Fund of Ukraine, the Ministry of Finance of Ukraine, the State Treasury Service of Ukraine;
- Representatives of the civil society and international organisations;
- Representatives and experts of the Council of Europe.

EXPECTED RESULTS:

- Participants discussed the proposed changes to the socially-oriented legislation in the context of the execution of the European Court of Human Rights judgements in the Ivanov/Burmych group of cases;
- Participants discussed the examples of best practices on the introduction of mechanisms/procedures for improving the socially-oriented legislation and on the development of an efficient data collection system on social payments;
- Participants formulated recommendations on measures to be adopted for eliminating the identified issues by amending national legislation and improving judicial and administrative practices.

PROGRAM

14.00 – 14.20 Opening remarks

Ms Olena Lytvynenko, Deputy Head of the Council of Europe Office in Ukraine

Mr Andrii Kavakin, Project Co-ordinator, Justice and Legal Co-operation Department of the Council of Europe

Ms Margarita Galstyan, Project Manager, Department of the European Social Charter of the Council of Europe

14.20 – 14.40 Requirements of the Committee of Ministers of the Council of Europe for the effective execution of judgments in cases on social benefits

Ms Yulia Gendlina, Lawyer of the Department for the Execution of Judgments of the European Court of Human Rights of the Directorate General for Human Rights and the Rule of Law of the Council of Europe

14.40 – 15.00 Best practices of the Council of Europe member states as to the introduction of effective mechanisms for improving socially-oriented legislation and the development of an efficient data collection system on social payments

Mr Lilian Apostol, International Expert 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"

15.00 – 15.20 Conclusions regarding problematic issues of the socially oriented legislation of Ukraine and recommendations on their elimination

Ms Alla Fedorova, national expert of the Council of Europe project "Promoting social human rights as a key factor of sustainable democracy in Ukraine"

15.20 – 16.30 General discussion

- Supreme Court
- Verkhovna Rada of Ukraine
- Ukrainian Parliament Commissioner for Human Rights
- Ministry of Justice of Ukraine
- Ministry of Social Policy of Ukraine
- Ministry of Finance of Ukraine
- Pension Fund of Ukraine, State Treasury Service of Ukraine
- International organisations and civil society

16.30 Concluding remarks, closing of the event

— **Moderators:** **Ms Marta Basistiuk**, Senior Project Officer, the Council of Europe project "Further support for the execution by Ukraine of judgements in respect of Article 6 of the European Convention on Human Rights" and **Ms Siuzanna Mnatsakanian**, Senior Project Officer, Council of Europe Project "Promoting social human rights as a key factor of sustainable democracy in Ukraine"

1369th meeting, 3-5 March 2020 (DH)

H46-36 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Applications No. 40450/04, 56848/00, 46852/13)

Supervision of the execution of the European Court's judgments

Reference document

https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Notes/1369/H46-36

Decisions

The Deputies

1 recalled that this group of cases, the first judgment of which became final in 2004, concerns a complex and multifaceted problem of non-enforcement or delayed enforcement of domestic judgments given against the State and the lack of effective domestic remedies in this respect, one aspect of the major deficiencies affecting the functioning of the justice system, and thus the rule of law, in Ukraine;

2 stressed the obligations undertaken by Ukraine under Article 46 of the Convention and reiterated their previous findings that the measures taken by the authorities are insufficient to ensure full compliance with the present judgments;

As regards individual measures

3 noted with interest the progress made in the full enforcement of individual domestic judicial decisions in the Zhovner/Yuriy Nikolayevich Ivanov group of cases; decided to close the examination of seven cases in this group for which no further individual measures are required, given that the domestic judgments have been enforced and the just satisfaction has been paid, and adopted Final Resolution CM/ResDH(2020)46; invited the authorities to submit further information regarding the execution of the other judgments within this group, including information on the enforcement of the domestic decisions with in-kind obligations;

4 noted the progress made in the payment of compensation to the applicants in the Burmych case; deeply regretted the significant delays in ensuring payment and called upon the authorities to speed up their payment process to all the applicants in this case in line with the previous indications given by the Committee;

As regards general measures

5 noted the recent legislative amendments and other measures undertaken; reiterated however their utmost concern at the lack of further tangible action in adopting the relevant institutional, legislative and other practical measures for the execution of this group of cases and expressed serious concern that since the previous examination by the Committee the authorities have not submitted any information on the adoption of the National Strategy, the mandate of the Legal Reforms Commission and the body, at the highest political level, which should be responsible for taking the lead in this matter; reiterated their call to submit the information mentioned above;

6 strongly encouraged the authorities to cooperate with other international partners, including the World Bank, the International Monetary Fund and the European Union, and invited them to provide information on the progress achieved;

7 strongly encouraged the authorities, in particular the Higher Council of Justice and the State Judicial Administration, to establish a comprehensive system of judicial data collection so that the overall picture as regards the enforcement of the judgments against State may be readily ascertained;

8 noted the parliamentary hearing on “Problems of Ukraine's implementation of the judgments of the European Court of Human Rights” scheduled on 25 March 2020 and encouraged the authorities to include this issue on the Rada’s agenda, in view of the need to elaborate and adopt a comprehensive legislative package, as previously requested by the Committee;

9 underlined that, in order to fulfil their obligations under Article 46 of the Convention, it is crucial that the Ukrainian authorities now demonstrate sustained political commitment at the highest political level to fully resolve this problem; called upon the authorities to achieve rapid progress and introduce all necessary measures until this problem is fully resolved; reiterated that the delay in the full implementation of general measures raises serious concern in view of the deadline set by the Court of 12 October 2019;

10 given the urgent need for progress in the execution of these judgments, urged the authorities to provide the information requested above by 15 June 2020 at the latest, and decided to resume examination of these groups of cases at their 1383rd meeting (September 2020) (DH); instructed the Secretariat to prepare a draft interim resolution for examination at that meeting in the event that the information received does not demonstrate concrete progress, in particular the adoption and implementation of the National Strategy;

11 in view of the urgency and importance of the matter, invited the Minister of Justice to attend the 1383rd meeting for the next examination of these cases.



MINISTERS' DEPUTIES

Notes on the Agenda CM/Notes/1369/H46-36

1369th meeting, 3-5 March 2020 (DH) Human rights

H46-36 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Applications No. 40450/04, 56848/00, 46852/13)

Supervision of the execution of the European Court's judgments

Reference documents

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680998895
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809988be
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805acb13
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ad6d5
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805af27a
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae02c
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c9119
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168071e6fd
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168097d40f

Action – Item proposed for adoption without debate

To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
40450/04	YURIY NIKOLAYEVICH IVANOV	15.10.2009	15.01.2010	Pilot judgment
56848/00	ZHOVNER GROUP (List of cases CM/Notes/1369/H46-36-app)	29.06.2004	29.09.2004	Complex problem
46852/13+	BURMYCH AND OTHERS	12.10.2017	Grand Chamber (Striking out)	

Case description

These cases relate to the major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions, mostly delivered against entities owned or controlled by the State, and to the lack of an effective remedy in this respect (violations of Articles 6 § 1 and 13 of the Convention, Article 1 of Protocol No. 1).

In October 2010, the Court delivered a pilot judgment in the Yuriy Nikolayevich Ivanov case. It stressed that specific reforms in Ukraine's legislation and administrative practice should be implemented without delay to resolve this problem, and it set a deadline of 15 July 2011 for the creation of an effective domestic remedy in this respect. The Court invited the respondent State to settle on an ad hoc basis all similar applications lodged with it before the delivery of the pilot judgment (1,600) and decided to adjourn the examination of similar cases. Given that the measures called for by the Court in its pilot judgment were not adopted within the deadline set, in February 2012 the Court decided to resume examination of the frozen applications raising similar issues.

On 12 October 2017, the Grand Chamber delivered its judgment in the Burmych case. It noted that despite the significant lapse of time since the Ivanov pilot judgment, the Ukrainian Government had still not implemented the requisite general measures capable of addressing the root causes of the systemic problem identified by the Court nor provided an effective remedy securing redress to all victims at national level, so that the problem of non-enforcement could be resolved.

¹ This document has been classified restricted until examination by the Committee of Ministers.
 Website: www.coe.int/cm

Bearing in mind that it had dealt with Ivanov-type cases for over 18 years,² the Court concluded that nothing was to be gained, nor would justice be best served, by the repetition of its findings in a lengthy series of comparable cases, which would place a significant burden on its own resources, with a consequent impact on its considerable caseload. Accordingly, it decided to strike the Ivanov follow-up applications (12,148 applications³) out of its list of cases.

It found that the grievances raised in these applications had to be resolved in the context of the general measures to be introduced by the authorities at national level, as required by the execution of the Ivanov pilot judgment, including the provision of appropriate and sufficient redress for the Convention violations, such general measures being subject to the supervision of the Committee of Ministers. The Court envisaged that it might be appropriate to reassess the situation within two years of the delivery of the Burmych judgment, i.e. by 12 October 2019.

Status of execution

Previous examination by the Committee

At its 1348th meeting (June 2019) (DH) the Committee welcomed the completion of the authorities' work on identification of root causes and noted with interest the draft of the comprehensive strategy identifying the institutional, legislative, financial and other practical measures required. At its last examination of these cases (1355th meeting (September 2019) (DH)), the Committee expressed serious regret that the National Strategy had still not been officially adopted, either as a recommendation for action or as a legally binding strategy. It also invited the authorities to provide further information regarding the mandate of the Legal Reforms Commission with respect to the implementation of the measures required for the execution of the Court's judgments. The Committee regretted the lack of further tangible action in adopting the relevant institutional, legislative and other practical measures and invited the authorities to provide additional information about the timeline for implementation of the outstanding measures. The Committee stressed once again the need to ensure sustained political commitment at the highest political levels to fully resolve this problem, and called upon the authorities to achieve rapid progress and introduce all necessary measures.

In response to the Committee's decision, the authorities submitted an updated action plan with annexes on 17 January 2020, a summary of which is set out below (for full details see DH-DD(2020)54 and DH-DD(2020)54-add).

Individual measures

The authorities provided information on the payment of just satisfaction and enforcement of domestic judgments for the majority of the cases of the Zhovner group.⁴ They submitted that the remaining unenforced domestic decisions concern mainly in-kind obligations and that it was therefore impossible to calculate the outstanding amount of debt represented by these.

General measures

It may be useful to recall the legal, financial and institutional root causes that have been identified by the authorities, in particular the following groups of problems:

- insufficient budgetary allocations for certain social payments and also complex budgetary and financial regulations which block and delay automatic enforcement of such judgments;
- a superfluous system of re-verification of the findings of the courts, which is tantamount to de facto disrespect for the finality of judgments and for independent judicial decision-making due to the excessive discretionary powers of state bailiffs and other authorities to suspend, terminate or refuse to act on the basis of court judgments, as well as inadequate sanctions for deliberate non-enforcement;
- complex legal rules for the seizure and attachment of state property and excessively formalistic procedures for initiating enforcement of judgment debts against the state as well as the lack of systemic and coherent coordination between various state bodies and the electronic registers and databases supporting enforcement action, including between the registers of judicial decisions and the enforcement registers;

² *Beginning with Kaysin and Others v. Ukraine*, Nos. 46144/99, 3 May 2001.

³ 12,143 applications and five more applications pending in the *Burmych and Others v. Ukraine*.

⁴ They submitted that out of 4,635 domestic decisions in this group 4,464 were fully enforced

- the inability to launch and finalise bankruptcy proceedings concerning entities owned or controlled by the state and moratoriums⁵ that shield enterprises controlled by the state from liability and protect them from enforcement action in certain economic sectors (e.g. fuel and energy, municipalities, etc.);
- a multitude of complaints procedures that call into question the findings of the domestic courts and block enforcement action and at the same time the lack of acceleratory or compensatory remedies for non-enforcement or delays in enforcement.

In the light of the identified root causes, the authorities drafted the National Strategy⁶ identifying the measures needed to deal with them, as reported at the June 2019 Meeting. For the present meeting, the authorities did not submit any information about the progress made in the formal adoption of the strategy. They reiterated the possible solutions envisaged:

- To calculate all the existing and potential debts under the judgments
- To introduce a scheme to repay the debts (for example, a bond scheme)
- To lift existing moratoriums
- To limit the period to six months for enforcement under the programme 4040
- To develop a unified electronic database combining all relevant information
- To introduce a simplified automatic system of enforcement.

The authorities also provided information on recent developments and legislative changes which in their view will have a positive effect on the systemic problem here.

On 4 October 2019 the Parliament of Ukraine approved the Cabinet of Ministers Resolution “The Programme of Activities in 2020-2024”.⁷ In this context, the Ministry of Justice envisages, in particular, to:

- lift the maximum number of prohibitions and obstacles in enforcement proceedings;
- ensure the transparency of procedures for sale of debtors’ property through the e-bidding system;
- introduce remedies against abuse of rights by the parties and find the legal tools to encourage the debtors to enforce the judgments;
- digitise the process of enforcement of judgments;
- improve access to the profession of state bailiff.

For its implementation the Ministry of Justice has prepared a draft Resolution of the Cabinet of Ministers “On Establishment of a Commission for Execution of the European Court of Human Rights Judgments.” The authorities did not provide a text of this draft. The authorities also provided information on other recent developments relevant to the issue:

a) Privatisation

The authorities submitted that privatisation of state-owned companies is one of the priorities of the new government.⁸ This would reduce the number of state-owned and state-controlled entities, and consequently the burden on the State budget. It will also limit application of the moratoriums.

b) Budgetary discipline

On 26 June 2019 the Cabinet of Ministers approved the “Local Borrowing Procedure”, which, inter alia, will allow the local authorities to implement local external borrowings. The authorities also referred to a “Concept of Implementation of Public Policy in the Field of Reform of the Public Financial Control System by 2020”, which aims to identify the directions and mechanisms of development of the public financial control system. The implementation of the Concept will create a coherent and effective system of public financial control.

c) Verification procedure:

The authorities submitted that they actively apply “the Procedure for Verification and Monitoring of Pensions, Benefits, Subsidies and Other Social Benefits Payable by Public Funds”, which aims to verify the entitlement of the person concerned to a social benefit.

As a result of these controls, more than UAH 50 million were identified as wrongfully allocated. This amount can thus be redistributed among other recipients of social payments.

⁵ There are approximately eight moratoriums, which prevent the enforcement of domestic decisions against state-owned companies. For more details see, for example, 1331st meeting Notes: CM/Notes/1331/H46-34.

⁶ For the text see p. 9 in the authorities’ submissions for the June 2019 meeting DH-DD(2019)632

⁷ No. 849 of 29 September 2019.

⁸ More than 1,400 State enterprises were identified in 2019 for privatisation.

d) 2019 Statistics:

The authorities provided some recent statistics⁹ as regards the implementation of the budget programme 4040¹⁰ in 2019.

They indicated that they continue to work with the applicants listed in Appendix I to the Burmych judgment (cases which were communicated to the government – 7,641 applicants), and that they have closed the enforcement proceedings in 1,426 cases, enforcing judgments debts to the value of EUR 3,4 million.

The authorities also submitted some recent statistical data as regards the activity of the State Bailiff's Service. In particular, they mentioned that 17.5% of the judicial decisions within responsibility of the Service were actually enforced in the first nine months of 2019, while enforcement proceedings were terminated¹¹ in 44% of the cases.

The authorities also emphasised that the enforcement of judicial decisions against the State comes within the competence of the state bailiffs and that the newly created private bailiffs service does not have any powers in this domain.

e) Cooperation activities:

On 1 October 2019 the Second Annual Forum "Execution of judgments of national courts in Ukraine" took place in Kyiv. The event included discussion of the status of execution of the Yuriy Nikolayevich Ivanov and Burmych judgments, as well as measures and priorities that are to be implemented within the next year for the execution of these two judgments, along with a wider discussion about eliminating the problem of non-enforcement of domestic judgments. The Forum also provided an opportunity for representatives of the legislative, executive and judicial branches, civil society and international organisations to debate on proposals and further necessary actions. The Forum developed and adopted recommendations for further reform in the area of enforcement of judgments.

As a follow-up to the Forum, on 31 October 2019 an expert meeting took place in Strasbourg on issues related to execution of the present case group, with the involvement of the Ministry of Justice, researchers, civil society as well as experts and officials of the Council of Europe. As a result of discussions, seven areas for future work were identified:

- Calculation of the total amount of debts represented by the judgments of the domestic courts vis-à-vis entities controlled or owned by the state, and debts under cases pending execution (with a focus on recording of debts in the electronic registers administered by the State Judicial Administration and the Higher Council of Justice);
- Review of the current system of enforcement of judgments and implementation of automatic execution of judgments, notably through synchronising approaches to voluntary and non-voluntary execution against the State and ensuring that State-owned or -controlled debtors enforce judgments directly without undue delay;
- Judicial control over the execution of judgments, in order to facilitate execution, avoiding excessive formalism, ensuring acceleration of execution and compensation for delays (further amending and developing ideas on the basis of the constitutional amendments of 2016 and the 2012 Law on the State Guarantees for Enforcement of Judgments);
- Review of the system of state liability, bankruptcy of state enterprises, management of state enterprises, moratoriums, etc.;
- Financing and budgeting of execution, identification of debts and producing information on judicial debts in a transparent manner, notably through the use of the modern methods of accounting;
- Introduction of a proper mixed system for execution of judgments, with similar professional requirements for private and state bailiffs;
- Simplification of the execution process via the electronic processing of execution writs, ensuring simplified execution of judicial orders and judicial injunctions, issuance of execution writs in a simplified manner, avoiding repetitive steps in enforcement measures, etc.

⁹ Currently there are 90,000 judgments pending, representing in total UAH 4,697,000,000. As of December 2019, more than 73,000 judgments were enforced, to the value of UAH 469,000,000.

¹⁰ For more details about this programme see for example [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22DH-DD\(2018\)1011E%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)1011E%22]})

¹¹ Enforcement may be terminated on other grounds than full enforcement.

Individual measures:

As regards the judgments of the Zhovner group, the authorities' efforts to enforce outstanding judgments of the Court can be noted with interest. The supervision of seven cases can be closed insofar as the individual measures have been resolved (through enforcement of the domestic decisions and payment of just satisfaction). A draft final resolution is attached. The authorities are invited to provide updated information on the individual measures in the remaining cases, in particular those with in-kind obligations.

General measures:

It should be recalled that the problems revealed by the present cases have been under the supervision of the Committee since 2004. Together with the issues examined in the Volkov and Merit/Svetlana Naumenko groups, they reveal one of the most important aspects of the serious systemic deficiencies in the functioning of the justice system in Ukraine. It should be noted in this respect that the justice system has been undergoing major structural reform since early 2014 and that non-resolution of this complex issue seriously affects the rule of law and access to justice in Ukraine.

It is to be regretted that the authorities did not submit any information on the progress of the adoption of the draft National Strategy for implementation of general measures for execution of the pilot judgment in the cases of Yuriy Nikolayevich Ivanov v. Ukraine and Burmych and Others v. Ukraine, which was developed with the assistance of the Human Rights Trust Fund, and was previously noted positively by the Committee. The same concern should be expressed about the lack of information regarding the mandate of the Legal Reforms Commission and whether it will be focusing on the reform of the system of execution of judgments delivered against entities owned or controlled by the State. The authorities should clarify which body, at the highest political level, is responsible for taking the lead in this matter.

On 25 March 2020 a parliamentary hearing on "Problems of Ukraine's implementation of the judgments of the European Court of Human Rights" will take place in the Rada. The authorities should be encouraged to include this issue on the Rada's agenda, in view of the need to elaborate and adopt a comprehensive legislative package, as previously requested by the Committee.

As regards the applicants in the Burmych and Others judgment, the increase in the number of the payments to the applicants in the Burmych list should be noted, and the authorities should be encouraged to speed up the payment process, including to the applicants in the Appendix II.

The efforts of the authorities to provide some statistics can also be noted. However, it is a matter of deep concern that the actual enforcement rate is so low. The number of judgments against the State pending enforcement and the total State debt has still not been ascertained, notwithstanding repeated requests by the Committee. It is to be noted with deep concern that the coherent compensation scheme long promised by the authorities has never been introduced. It appears that even for future debts there is no comprehensive system of calculation, management and control over the debts accumulated vis-à-vis the State. The Committee should therefore encourage the authorities, in particular, the Higher Council of Justice and the State Judicial Administration, to establish a comprehensive system of judicial data recording and collection so that the overall picture as regards the enforcement of the judgments against the State may be readily ascertained.

The authorities' reflections and some recent legislative and political developments – privatisation of state companies to reduce the scope of state liability for essentially private law acts and verification of debt procedures – can be noted. However, the information submitted by the authorities with regard to the general measures does not alleviate the major concerns voiced by the Committee. The seriousness of the situation is underlined by the lack of concrete action in respect of the general measures called for by the Committee. It is even more worrying in view of the expiry of several deadlines previously set by the Court and the Committee of Ministers in these cases, including the most recent deadline of 12 October 2019, which has not been complied with. There is no clear further strategy, with clearly identified deliverables, timeframes and results. The authorities should be encouraged therefore to incorporate the elements elaborated during the meeting on 31 October 2019 into the roadmap for implementation of the National Strategy, which should be adopted and properly implemented.

Despite some positive developments mentioned above, the impact of these measures remains to be demonstrated and immediate further resolute action at the highest political level is still needed to ensure full compliance by Ukraine with its obligations under Article 46 of the Convention. The authorities should therefore continue their efforts, in coordination with the various domestic actors involved.

The authorities are again invited to urgently look into the issues at stake jointly with other international partners, including the World Bank and the International Monetary Fund, as well as the European Union through its projects, which are assisting in the reform of public finance and the system of enforcement of judgments, and also in cooperation with the Secretariat. They should provide information to the Secretariat as to the measures taken.

In the light of all of the above, and the pressing need for progress in this group of cases, it is proposed to urge the authorities to provide information demonstrating concrete progress, in particular as regards the adoption and implementation of the National Strategy, by 15 June 2020, with a view to resuming the examination of these groups of cases at their 1383rd meeting (September 2020) (DH). In the event that the authorities are not in a position to report concrete progress by that time, the Deputies might wish to instruct the Secretariat to prepare a draft interim resolution for examination at that meeting.

In view of the urgency and importance of the matter, the Committee might also wish to invite the Minister of Justice of Ukraine to attend the next meeting when this group of cases will be examined.

Financing assured: YES

Draft decisions

The Deputies

1. recalled that this group of cases, the first judgment of which became final in 2004, concerns a complex and multifaceted problem of non-enforcement or delayed enforcement of domestic judgments given against the State and the lack of effective domestic remedies in this respect, one aspect of the major deficiencies affecting the functioning of the justice system, and thus the rule of law, in Ukraine;

2. stressed the obligations undertaken by Ukraine under Article 46 of the Convention and reiterated their previous findings that measures taken by the authorities are insufficient to ensure full compliance with the present judgments;

As regards individual measures

3. noted with interest the progress made in the full enforcement of individual domestic judicial decisions in the Zhovner / Yuriy Nikolayevich Ivanov group of cases; decided to close the examination of seven cases in this group for which no further individual measures are required, given that the domestic judgments have been enforced and the just satisfaction has been paid, and adopted Final Resolution CM/ResDH(2020)xxx; invited the authorities to submit further information regarding the execution of the other judgments within this group, including information on the enforcement of the domestic decisions with in-kind obligations;

4. noted the progress made in the payment of compensation to the applicants in the Burmych case; deeply regretted the significant delays in ensuring payment and called upon the authorities to speed up their payment process to all the applicants in this case in line with the previous indications given by the Committee;

As regards general measures

5. noted the recent legislative amendments and other measures undertaken; reiterated however their utmost concern at the lack of further tangible action in adopting the relevant institutional, legislative and other practical measures for the execution of this group of cases and expressed serious concern that since the previous examination by the Committee the authorities have not submitted any information on the adoption of the National Strategy, the mandate of the Legal Reforms Commission and the body, at the highest political level, which should be responsible for taking the lead in this matter; reiterated their call to submit the information mentioned above;

6. strongly encouraged the authorities to cooperate with other international partners, including the World Bank, the International Monetary Fund and the European Union and invited them to provide information on the progress achieved;

7. strongly encouraged the authorities, in particular the Higher Council of Justice and the State Judicial Administration, to establish a comprehensive system of judicial data collection so that the overall picture as regards the enforcement of the judgments against State may be readily ascertained;

8. noted the parliamentary hearing on "Problems of Ukraine's implementation of the judgments of the European Court of Human Rights" scheduled on 25 March 2020 and encouraged the authorities to include this issue on the Rada's agenda, in view of the need to elaborate and adopt a comprehensive legislative package, as previously requested by the Committee;

9. underlined that, in order to fulfil their obligations under Article 46 of the Convention, it is crucial that the Ukrainian authorities now demonstrate sustained political commitment at the highest political level to fully resolve this problem; called upon the authorities to achieve rapid progress and introduce all necessary measures until this problem is fully resolved; reiterated that the delay in the full implementation of general measures raises serious concern in view of the deadline set by the Court of 12 October 2019;

10. given the urgent need for progress in the execution of these judgments, urged the authorities to provide the information requested above by 15 June 2020 at the latest, and decided to resume examination of these groups of cases at their 1383rd meeting (September 2020) (DH); instructed the Secretariat to prepare a draft interim resolution for examination at that meeting in the event that the information received does not demonstrate concrete progress, in particular the adoption and implementation of the National Strategy;

11. in view of the urgency and importance of the matter, invited the Minister of Justice to attend the 1383rd meeting for the next examination of these cases.

NATIONAL STRATEGY

**FOR IMPLEMENTATION OF GENERAL MEASURES
FOR EXECUTION OF THE PILOT JUDGMENT IN
THE CASE 'YURIY NIKOLAYEVICH IVANOV V.
UKRAINE' AND THE GRAND CHAMBER
JUDGMENT IN THE CASE 'BURMYCH AND
OTHERS V. UKRAINE'**

DRAFT VERSION

29 May 2019

EXECUTIVE SUMMARY

The National Strategy for the implementation of general measures for execution of the pilot judgment in the case 'Yuriy Nikolayevich Ivanov v. Ukraine' and the judgment in the case 'Burmych and Others v. Ukraine' (further – the National Strategy) aims at bringing the Ukrainian legislation and practice further in line with standards of the Council of Europe in the area of enforcement of national judicial decisions. It focuses on the findings of the European Court of Human Rights (ECtHR) and decisions/resolutions of the Committee of Ministers of the Council of Europe (CM), as well as recent developments of national practice and legislation.

The National Strategy is aimed to guide Ukrainian authorities on the issues of the provision of the essential element of the right to a fair trial, which is the enforcement of decisions of national courts. The National Strategy is drafted with the assistance of the Council of Europe project "Supporting Ukraine in execution of judgments of the European Court of Human Rights" financed by the Human Rights Trust Fund.

Besides the executive summary and the introduction, the National Strategy consists of two main parts. One of the parts takes into account the ECtHR and CM recommendations and addresses the political and financial issues within the general measures of the execution of the Ivanov/Burmych judgments. Such measures cover legislative, institutional, financial and statistical aspects. The other part addresses the current situation and the root causes identified with thin the three large thematic categories of the Ivanov/Burmych types of cases: legislation establishing state debts uncovered by budgetary allocations (social benefits); artificially extended state liability for judgment debts and state immunity against enforcement (debts of state-owned enterprises); and difficulties in enforcement of certain categories of judgments (judgments with in-kind obligations).

The major steps suggested by the National Strategy within these two parts are as follows.

General measures to ensure prevention and non-repetition of non-execution of judgments against the state

1. Legislative and regulatory measures

- strict rules as to the review of the draft legislation needs to be established in the Verkhovna Rada to filter out the proposals that do not take into account necessary budget allocations;
- the liability of the state should be limited with regard to the essentially private commercial debts;
- the moratoria on the enforcement of national judicial decisions needs to be limited or removed;
- the regulatory barriers that impede an automatic execution of judgments need to be removed;
- clear and effective bankruptcy procedures need to be established.

2. Specific institutional measures

- an authoritative and efficient coordination needs to be established for the state authorities involved in the execution of judgments;
- functioning of the State Bailiff Service needs to be improved, including the removal of the excessive discretionary powers and the introduction of a mixed system of state and private bailiffs;

3. Financial measures

- the budgetary procedures need to be reviewed to ensure an efficient allocation and disbursement of funds necessary to enforce a judicial decision;
- an automatic disbursement of payments, as defined by a judicial decision, needs to be established; automatic compensations for delayed enforcement of judgments needs to be introduced;

4. Statistical and fact-finding measures

- the functioning of the unified register of judicial decisions and of enforcement proceedings needs to be monitored, the data of previous registers need to be connected to the new system.

5. Establishing remedies

- efficient acceleratory and compensatory remedies for delays in the execution of national judgments needs to be established by amending the existing procedures in the law on guarantees;
- various types of liability of public officials and bankruptcy administrators need to be strengthened concerning the non-enforcement of court decisions.

Thematic categories: proposed solutions

1. Legislation establishing state debts uncovered by budgetary allocations: social benefits
 - an overall review and amending of socially-oriented legislation to be undertaken;
 - an efficient unified data collection system to be developed with regard to the cases on the non-payment of social benefits;
 - simplified procedures of enforcement with an automatic execution of judgments to be introduced.
2. Artificially extended state liability for judgment debts and state immunity against enforcement: debts of state-owned enterprises
 - the mechanism of moratoria on a variety of financial obligations of the state to be reviewed significantly;
 - the existing moratoria need to be lifted;
 - options and solutions alternative and/or transitional with regard to the moratoria to be offered;
 - the immunity of the state budget related to the execution warrants against the state-owned enterprises to be cancelled.
3. Difficulties in enforcement of certain categories of judgments: judgments with in-kind obligations
 - the legislation regulating a default conversion of an in-kind obligation into a monetary equivalent to reviewed and amended;
 - the judicial practice as to the in-kind obligations need to be improved;
 - the scope of the 4040 budget programme of the State Treasury of Ukraine to be broadened for it to cover both monetary and in-kind obligations.

The draft of the National Strategy will be further discussed with the involved national stakeholders. On the basis of the discussions an action plan with the identification of the timelines and institutions in charge will be developed. It is planned that the National Strategy would first be adopted as a recommendation by the Inter-Ministerial Working Group and then as a binding action plan for the Government of Ukraine.

I. INTRODUCTION

In its 2009 pilot judgment¹ in the Yuriy Nikolayevich Ivanov case, the ECtHR stressed that the adoption of specific legislative and administrative reforms was urgent to resolve the systemic problem of the non-enforcement or delayed enforcement of national court decisions in Ukraine. The ECtHR set a deadline of 15 July 2011 for the creation of an effective national remedy in this respect. On 12 October 2017 the Grand Chamber of the ECtHR delivered a judgment in the case of 'Burmych and Others v. Ukraine'. In this judgment the ECtHR found the absence of the required general measures and of an effective remedy with regard to the non-enforcement of national judicial decisions. The ECtHR stressed that the root causes of the problems were of a fundamentally financial and political nature and that the legal issues under the European Convention on Human Rights (ECHR) concerning the prolonged non-enforcement of domestic decisions in Ukraine were already tackled by the ECtHR pilot judgment 'Yuriy Nikolayevich Ivanov v. Ukraine'. Accordingly, the ECtHR decided to strike the Ivanov-type applications (a total of 12,148 cases) out of its list of cases and to reassess the situation within two years of the delivery of the judgment 'Burmych and Others v. Ukraine', which is by 12 October 2019.

The problem of non-enforcement or delayed enforcement of judicial decisions still remains unresolved in Ukraine, notwithstanding six interim resolutions of the CM, stressing the need for the authorities to speed up the process of enforcing court decisions and repeatedly urging them to adopt, as a matter of priority, the general measures required. The general measures adopted in this group of cases, the case-law of the Court since 2004 and the guidance given by the Committee of Ministers are briefly summarised in the H/Exec (2018)2 Memorandum of 6 December 2018 prepared by the Council of Europe's Department for the Execution of Judgments².

The Ukrainian authorities identified three thematic groups of cases related to the non-enforcement of national court decisions: (a) in-kind obligations; (b) social benefits; and (c) the debts of state-owned enterprises. Further analysis of the root causes has taken place within these three groups. The CM at its 1340th meeting on 12-14 March 2019 noted: "... The thematic examination of root causes is useful. However, the authorities should also be guided by the Court's analysis of the root causes (financial and political issues) ... and follow the guidance previously given by the Committee. They should focus in particular on the following elements, which still appear to block the execution of judgments given against entities owned or controlled by the State:

¹ The judgment became final on 15 January 2010.

² See H/Exec(2018)2: Group of cases Zhovner and case Yuriy Nikolayevich Ivanov v. Ukraine.

- complex budgetary and financial regulations which do not establish the requisite allocations to cover the liability of the State and thus block automatic enforcement of such judgments;
- the lack of systemic and coherent coordination between various state bodies responsible for compliance with these judgments;
- complex and excessively formalistic procedures for initiating enforcement of judgment debts against the State;
- the system of re-verification of the findings of the courts, which is tantamount to de facto disrespect for the finality of judgments and for independent judicial decision-making;
- excessive discretionary powers of state bailiffs and other authorities in suspending, terminating or refusing to act on the basis of court judgments;
- complaints procedures that call into question the findings of the courts and block enforcement action;
- moratoriums that shield enterprises controlled by the State from civil liability and protect from enforcement action those engaged in certain economic sectors (e.g. fuel and energy, municipalities, etc.);
- the inability to launch and finalise bankruptcy proceedings concerning entities owned or controlled by the State;
- the lack of acceleratory or compensatory remedies for non-enforcement or delays in enforcement”³.

The National Strategy follows the guidance of the CM and the document consists of two major parts – a description of the required action as to the general measures, in line with the above recommendation of the CM, and a description of the root causes and the respective required action within the three thematic groups of cases.

The National Strategy is drafted with the assistance of the Council of Europe project "Supporting Ukraine in execution of judgments of the European Court of Human Rights" financed by the Human Rights Trust Fund.⁴

II. GENERAL MEASURES

General measures to be undertaken by the Ukrainian authorities to ensure prevention and non-repetition of non-execution of judgments against the state

The description of general measures in this part of the National Strategy follows, in a more generalised way, the recommendation of the CM to refer to the ECtHR judgment ‘Burmych and Others v. Ukraine’, with the view of the political and financial issues beyond the root causes leading towards a massive non-execution of judgments of national courts.

1. Legislative and regulatory measures of preventive nature (aimed at establishing a long-lasting solution)

- *The process of review of the draft legislation needs to be improved by strengthening the obligatory expert role of the Verkhovna Rada Secretariat in filtering out the legislative proposals that establish budgetary allocations without sufficient funding or do not take into account the necessity of such budgetary allocations.*

Current situation

One of the identified root causes concerns a discrepancy between social entitlements provided for by different laws and those allocated by the state budget. It is the situation when judicial decisions against the state continue to emerge without the possibility of enforcement, which is aggravated by the state further assuming new social obligations without necessary financial backing.

According to article 93 of the Rules of Procedure of the Verkhovna Rada, draft laws are assigned to a profile committee and forwarded, among others, to the budget and finance committee, for the expertise of their possible impact on budgetary indicators and compliance with the budgetary laws (the legislative filter). The budget and finance committee assesses draft laws in cooperation with the Cabinet of Ministers of Ukraine (the executive filter). Following an initial review of the draft laws, the profile committee advises on their placement in the agenda of a parliamentary session. The opinion of the profile committee shall be accompanied by, among other things, the opinion of the budget committee. In this process, the Secretariat⁵ of the Verkhovna Rada plays an important role by carrying out legal expertise of draft laws and participating in their elaboration throughout the first, second and third readings.

³ <http://hudoc.exec.coe.int/eng?i=004-47973>

⁴ *The drafting of the National Strategy was supported by the Council of Europe’s consultants Mr Mamuka Longurashvili and Mr Lilian Apostol.*

⁵ *See Регламент Верховної Ради України and Положення про Апарат Верховної Ради України.*

Proposals for improvement

To reinforce the role of the Secretariat of the Verkhovna Rada in the above-mentioned legislative process, Article 93 of the Rules of the Verkhovna Rada shall be amended specifying that if draft laws providing social benefits do not appear to be backed by the necessary budgetary funding following the preliminary examination procedure described above, such draft laws must be rejected and not put for examination by the Rada.

- *The liability of the state needs to be limited concerning essentially private commercial debts*

Current situation

The state is still liable for “private law commercial transactions” of legal entities that should not be normally regarded as state-owned or controlled, in view of the state’s shareholding in these entities or other managerial, regulatory or financial measures of control. On the other hand the state’s commercial activities should not be subject to the state immunity, and the state should be involved in commerce on equal footing with private business, unless for exceptional reasons.

Proposals for improvement

Legislative amendments shall be introduced to resolve the issue of liability of the state for minority shareholding and for commercial acts of non-public nature related to activities of the companies created by the state.

- *The moratoria on the enforcement of national judicial decisions needs to be limited as follows:*
 - *a ban on adoption of new legislation establishing further moratoria concerning the assets of the state or state-owned enterprises must be introduced;*
 - *the moratoria related to the procedures of bankruptcy and privatisation of state-owned or controlled enterprises must be lifted;*
 - *other moratoria should be reviewed and lifted, simultaneously with bankruptcy or privatisation measures as regards the state-owned entities.*

Current situation

According to the authorities, draft law No. 8533 establishing an initial mechanism for the enforcement of judgments with historical debts, submitted to Parliament in June 2018 and still pending for adoption, envisages lifting the bans on the execution of judgments currently subject to moratoria and those imposed on enforcement against fuel and energy enterprises⁶. The CM expressed its concerns about delays in the adoption of the draft law and encouraged the authorities to follow up on the intentions expressed in the draft law to lift restrictions on the enforcement of judgments, including moratoria⁷.

Proposals for improvement

Further to lifting currently existing moratoriums, such practice shall be abolished either by the Verkhovna Rada through legislative amendments or by a Constitutional Court’s ruling. Additional legislative adjustments may as well be needed to establish a list of state assets which cannot be seized (e.g. those manifestly necessary for the performance of state duties) thus opening clear possibilities for compulsory execution in the case of non-execution of judicial decisions by the state or its entities.

- *Regulatory barriers precluding automatic execution of judgments need to be removed, if such barriers are introduced by executive bodies of power, including the procedures of re-verification and re-approval of judicial awards within a judgment.*

⁶ See DD(2019)61.

⁷ See CM/Notes/1340/H46-29 / 14 March 2019, 1340th meeting (March 2019) - H46-29
Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Application No. 40450/04).

Current situation

A person seeking enforcement against the state has to obtain the court's decision and the writ of execution, seeking non-voluntary enforcement. This execution writ is further submitted to the Bailiff Service, which has discretionary review powers. They may refuse the enforcement due to errors or lack of information in the documents submitted or due to "unclear" formulation in the courts' decisions. For the same reason, the documents may be rejected by the State Treasury. Bailiffs Service has wide discretion in suspension and termination of enforcement also in view of lack of funds of the debtor.

Proposals for improvement

In March 2019, the CM reiterated its firm call upon the authorities to develop a comprehensive legislative package, ensuring inter alia "automatic enforcement" of judgments. In this respect, firstly, at the executive level, removal of the excessive barriers to enforcement proceedings for the cases with debts awarded against the state appear to be most appropriate. Creation of the infrastructure for joint use in e-enforcement and e-justice as envisaged by the draft law No. 8533 would be an important step forward in this direction. However, further improvements are needed to ensure the automatic transmission of the courts' decisions to the State Treasury, for actual payment, avoiding additional formalistic obstacles. In addition, the execution writs can be either incorporated into the judgments themselves or the courts should use the "judicial orders", which will lead towards a direct enforcement towards debtors.

Secondly, at the judicial level, a quality of judicial decisions needs to be improved, including through clearer identification of a remedy, non-declaratory and prima facie enforceable formulations with regard to the subject of enforcement (payment) and enforcement procedure. Such practice may be developed on the basis of the Constitutional amendments of 2016, introducing the mechanism of "judicial control" over execution of judgments. The 15 May 2019 judgment of the Constitutional Court of Ukraine recognised the non-constitutionality of the obligation to pay the enforcement fee for enforcement of judgments against the state debtors. This judgment could serve the constitutional basis for further development of national legislation and judicial practice related to the automatic enforcement of judicial decisions.

- *Clear and effective procedures for initiating bankruptcy of state-owned or state-controlled entities need to be introduced*

Current situation

The new Code of Ukraine on bankruptcy procedures⁸ entered into force on 18 October 2018 and abrogated the 1992 law "On the restoration of a debtor's solvency or declaration of bankruptcy". Article 96 of the new Code concerns bankruptcy of state enterprises and enterprises where the state holds more than 50% of shares (contrary to 25% as provided by the abrogated law).

Proposals for improvement

Further implementation of the new Code needs to be monitored, especially with regard to the efficiency of initiating the bankruptcy proceedings towards the state-owned or state-controlled enterprises.

- *A system of judicial control over debt payments following judicial decisions against the state needs to be introduced*

Current situation

The law "On the judiciary and the status of judges" states that judgments that entered into force shall be binding to all state authorities, bodies of local self-government and their officials and employees, private individuals and legal entities and associations throughout Ukraine. A failure to comply with court decisions shall entail legal liability as stipulated by law.

Proposals for improvement

The procedural legislation related to the judicial control needs to be reviewed, including its practical application by courts. Further legislative amendments need to be developed.

⁸ See Кодекс України з процедур банкрутства.

2. Specific institutional measures

- *Systemic and coherent coordination should be established among the state bodies involved in the execution of judgments*

Current situation

Ukrainian authorities established an Inter-Agency Working Group within the Cabinet of Ministers of Ukraine and a parliamentary sub-committee on the execution of judgements of the ECtHR. Both these institutions have not had a strong impact on the respective process of execution of the Ivanov and Burmych judgments of the ECtHR.

Proposals for improvement

The good practices of other countries, such as Greece or Poland, need to be analysed and adopted in Ukraine. Also, in future arrangements of the coordination, the judiciary (possibly the Higher Council of Justice and the State Judicial Administration) and the State Bailiffs Department should be directly involved in the reform process.

The functioning of the Bailiff Service needs to be changed, including:

- *the excessive discretionary powers of the State Bailiff Service need to be reviewed and these should be limited in order to remove any possibility to question the binding force and finality of the court judgments; the involvement of the state bailiffs in the enforcement against the state should be exceptional, limited to situations of real refusals to voluntarily comply with the judgments by the state debtors;*
- *the national system of private bailiffs needs to be further strengthened to introduce a mixed system of enforcement, including the broadening of their remit to enforcement against the state-owned companies involved in commercial sphere;*
- *the management of the state bailiffs needs to be decentralised, their institutional independence from the Ministry of Justice should be ensured.*

Current situation

The state bailiffs have wide discretionary powers and may refuse enforcement referring to formal reasons or more general lack of funds. Such bureaucratic barriers pose a serious threat to the effective functioning of the justice system and contribute to further accumulation of new delayed or unenforced decisions, prolonging, as a consequence, the uncertainty for the claimants.

Proposals for improvement

The role of the State Bailiffs shall be limited to the intervention in exceptional situations only during the enforcement against the state. The role and powers of the private bailiffs need to be strengthened in this regard. Alternatively, given the specific nature of the enforcement of decisions against the state, efficiency of the State Bailiff Service needs to be improved, including through mechanisms of inter-agency groups consisting of bailiffs and members of the police to ensure the enforcement of decisions as to the state budget⁹. Institutional independence of bailiffs in matters relating to enforcement of judgments should be ensured, with decision-making and operational powers decentralised from direct control of the Ministry of Justice.

3. Financial measures

- *A review of budgetary procedures needs to be effectuated to ensure sufficient allocation of funds for payments following a judgment against the state, the state-owned or controlled entity.*
- *A system of budgetary allocations should be introduced to establish cover for potential state liability, ensuring immediate and automatic availability of funds for execution against the state.*

⁹ See Final Resolution CM/ResDH(2011)108.

Current situation

Currently, the enforcement of judicial decisions is financed from various budgetary programmes¹⁰, which disperse funds and liability of the state, with some budgetary programmes overlapping and some budgetary gaps uncovered. Furthermore, there are at least 4 budgetary programmes concerned with ensuring payment of debts confirmed by the court judgments, among them are the programmes related to 2012 Guarantees Law (the 4040 budgetary programme and the 1370 enforcement of the ECtHR judgments).

Proposals for improvement

In March 2019, the CM considered that instead of allocation of funds from one budgetary programme to another, a real, comprehensive solution to the problem on non-enforcement is required. To ensure public authorities' compliance with their payment obligations arising from judicial decisions, simplification of existing complex financial regulations and introduction of an automatic enforcement mechanism appears to be necessary. To this end, various budgetary programmes shall be replaced by an integrated single budgetary fund to reimburse previous years' state debts and enforce judicial decisions (including domestic and international courts). This fund shall be incorporated into the state budget, and its amount shall be reviewed on an annual basis¹¹. The fund can be later used for accumulated budgetary "historical debts", based on the debts already confirmed by the final and binding judgments.

- *An automatic delivery of payments defined by a court decision needs to be achieved, automatic compensations for delayed enforcement of judgments need to be installed*

Current situation

The 2012 law on State Guarantees imposes an obligation on state authorities to enforce the judgments delivered by the national courts against the state bodies and companies. According to this law, the decisions of domestic courts must be enforced within three months from the date on which the applicant submits all the necessary documents to the State Treasury. When a decision remains unenforced for more than three months, the State is obliged to compensate the person by paying 3% per annum of the outstanding debt per year. The inflation losses in view of delays in enforcement should also be taken into account. Currently the delays in enforcement against the state, for judgments pending enforcement before the State Treasury, may reach up to 5-7 years.

Proposals for improvement

Compensations for delayed enforcement of judgments may be achieved in different ways: indexation, default interest or damages. In certain circumstances sanctions may be required to provide an adequate protection against unjustified delays or payment refusals. Just an indexation, even if automatically applied to state debts, may not be sufficient as it appears only to cover inflation losses. Default losses need to be taken into account. A mechanism for automatic compensation for delays in execution needs to be introduced when an appropriate default interest is determined by a specific legal provision and reviewed at regular intervals to remain at a reasonable rate. In ideal, this compensation should safeguard the value of the judicial award.

4. Statistical and fact-finding measures

- *The functioning of the unified register of judicial decisions and enforcement proceedings needs to be reviewed as to its efficiency. A connection of its data to those of the previous unified registers of judicial decisions and other registers needs to be established, permitting the collection of data on enforcement of judgments*

Current situation

The 2016 Law on Enforcement Proceedings¹² has introduced the Electronic System of the Enforcement Proceedings, in which all the relevant documents shall be drafted, registered and stored by the enforcement officers. The System allows access to the state of enforcement proceedings, procedural decisions adopted and other documents with the possibility of receiving their copies. Furthermore, the Ukrainian authorities are now introducing a unified State Register of Court Decisions and Enforcement Proceedings.

¹⁰ See DD(2019)61 - Communication from the Ukrainian authorities - Action plan - 15.01.2019.

¹¹ See for example the similar mechanism introduced in Georgia: Final Resolution CM/ResDH(2011)108.

¹² Закон України Про виконавче провадження.

Proposals for improvement

The unified electronic communication system shall allow exchange and analysis of information and access, through a unique web portal, among relevant electronic registers (for example, the registers of notarial acts, of immovable property, of entrepreneurs, of commercial legal entities, of insolvency/bankruptcy proceedings, etc.).

5. Establishing remedies via legislative amendments

- *Acceleratory and/or compensatory remedies for the delays in the execution of national judgments needs to be established by amending the existing procedures of debt payment under the law on guarantees*

Current situation

The law on guarantees provides certain categories of decisions subject to immediate enforcement: decisions awarding an employee the salary/compensation, decisions reinstating of a wrongfully dismissed or transferred employee.

Proposals for improvement

As regards acceleratory remedies, the provisions of the 2012 Law on Guarantees may be expended to all other matters, if the delay of enforcement caused by extraordinary circumstances may inflict substantial damage to the requesting party, or if the delay may render the enforcement impossible.

- *Criminal, administrative, disciplinary or civil liability of public officials, bankruptcy administrators and trustees needs to be strengthened concerning the non-enforcement of court decisions*

Current situation

According to the Law “On the Judicial System and the Status of Judges”, judgments shall be binding on all state authorities, bodies of local self-government and their officials and employees, private individuals and legal entities and associations throughout Ukraine. Failure to comply with the court decisions shall entail legal liability as stipulated by law. The Code of Administrative Justice permits the imposition by the courts of a fine on the head of the state authority responsible for the non-enforcement of the decision. The Civil Procedural Code stipulates that failure to comply with court decisions is the basis for the liability established by law. The Criminal Procedural Code foresees sanctions for the non-execution of judicial decisions.

Proposals for improvement

These provisions constitute a solid basis for state officials’ responsibility concerning the non-enforcement of judicial decisions. The practice of their application, coherent with the development of rules and judicial practice as to the “judicial control” over execution of judgments, needs to be further developed.

III. THEMATIC CATEGORIES: ROOT CAUSES AND SPECIFIC MEASURES

The three thematic categories follow the respective distribution of cases within the Ivanov and Burmych judgments, as suggested by the Ukrainian authorities. Each of the thematic groups constitutes a generally homogenous number of cases, having similar root causes of appearance and thus similar prevention mechanisms for such causes. As mentioned above, the CM at its 1340th meeting on 12-14 March 2019 already examined the thematic approach and noted that, while it was useful for further research into the matter, the authorities should still be guided by the ECtHR’s analysis of the root causes and follow the guidance previously given by the Committee, in order to transform all of the elements above into a comprehensive strategy.

1. Legislation establishing state debts uncovered by budgetary allocations: social benefits

Current situation

Most cases in this group concern the non-payment of social benefits by the state, which is caused by a lack of financial coverage of the socially-oriented legislation. The rapid growth in the number of such cases

resulted in a situation where most of these could not be properly documented. The authorities attempts to divide this category into sub-groups, e.g. on types of social benefits, salaries etc., did not bring an added value but further complicated the case-file management and registration of such debts before various entities.

The appearance of this group resulted from the following contributing factors:

- **Highly socially-oriented and rather populist laws uncovered by financial funding.** Back in 2011 and afterwards, the Ukrainian authorities adopted a number of laws awarding a variety of social benefits to certain social groups, thus determining legitimate expectations. This legislation has been economically unfeasible and unrealistic in terms of the executive branch's financial possibilities.
- **Lack of commitment to repeal the socially-oriented package of laws and ineffective implementation.** Attempts to amend or to repeal these laws failed lacking political consensus. The executive branch, facing financial default, amended them with its own by-laws changing the provisions to the contrary, leading to a growing number of litigations in courts.
- **Low quality of legal drafting generated incoherent practice and confusing interpretation in courts as well as pending the execution stage.** The executive branch intervened by its by-laws however it had a reverse effect and amplified the problem. Both the judiciary and the bailiffs note the low quality of legislation and regulatory acts in terms of legal drafting.
- **Absence of a clear and unique system of recording and collection of statistics concerning the payments of social benefits and enforced judicial decisions.** The judiciary and the executive branch, each recorded its own statistics according to their own criteria. With growing number, the cases with similar patterns have been either lost in different databases or doubled in many others. Attempts to combine already existed data into one have failed because of still continuous flow of cases.
- **The temporary solution in the format of the 4040 budgetary programme is limited by a lack of appropriate budgetary planning.** This limitation is a direct consequence of impossibility to plan budgetary outcomes due to the unreliability of the statistical data. The 4040 budgetary programme is one of the solutions to the problem but it will hardly cope with the exponentially growing number of cases.

Proposed solutions

- **An overall review and amending of socially-oriented legislation**

The socially-oriented legislation needs to be reviewed taking into account the availability of financial resources and particular budgetary constraints, with due respect to other international obligations of Ukraine. Also, a due regard to the legislative quality must be given: the legislation should be of such a quality in terms of clearness and foreseeability so as to avoid incoherent interpretation and inadequate application. The courts should contribute to coherent interpretation of such legislation.

- **Development of a unified data collection system**

An overall amount of payments to be paid in the future, including for pending cases, needs to be calculated. The proper data collection system needs to have a single database combining all flows of information in one hand. This can be achieved either through an effective data exchange between various institutions or by introducing a single body that would collect all execution writs and where all claims will be stored.

- **Introduction of a simplified procedure of enforcement with an automatic execution of judgments**

A new decision of the Constitutional Court of Ukraine opens an opportunity to introduce an 'automatic execution system' requiring no additional input from the creditor to bring additional enforcement proceedings against the state. In certain types of payments, in particular concerning small amounts, the procedure needs to be simplified at minimum.

2. Artificially extended state liability for judgment debts and state's immunity against enforcement: debts of state-owned enterprises

Current situation

The systemic tolerance of the state towards the unaccountability for debts generated by state-owned or state-controlled enterprises, although marked as essentially private, resulted in the accumulation of judgments pending execution domestically as well as the respective judgment debts. Using the mechanism of moratoria on related payments, the state, or its owned or controlled entities, acquired immunity from enforcement. The number of unenforced judgments in this category of cases is relatively low but the overall financial impact of these debts is important. The authorities' freeze on the state enterprises' assets initially meant to be temporary. However, as a result the state responsibility, for certain debts, has shifted to the state budget.

Proposed solutions

- **The mechanism of moratoria on a variety of financial and pecuniary obligations attributed to the state must be reviewed**

- **The existing moratoria on financial and pecuniary obligations attributed to the state need to be lifted**

The issue of repealing of the existing moratoria is seen as highly sensitive and controversial in Ukraine. However, they should be lifted as the result is that the overall credibility to the authority of judicial decisions has become low, in particular among parliamentarians.

- **Provision of alternative solutions and transitory options**

Mechanisms alternative to the moratoria need be developed both from the legal point of view and concerning the economic tools and institutional solutions.

- **Refusal from the immunity of the state budget**

The immunity from execution warrants against the state-owned enterprises with an exceptional status in the domestic legal order should be cancelled.

3. Difficulties in enforcement of certain categories of judgments: judgments with in-kind obligations

Current situation

This category of cases includes a variety of judgments, declaratory and weakly reasoned, with unclear conclusions leading to unenforceable obligations, mostly in-kind in character. The execution of such judgments is seen as problematic and challenging. A majority of such judgments reflects the obligations of the authorities to re-calculate and increase pensions, salaries or various social benefits. Such recalculations are requested in the manner that is difficult for the authorities in charge to provide. Another type of the in-kind judgments orders the authorities to provide goods or pecuniary assets, other than money. However, it appears that these could be easily transformed into a monetary equivalent and thus be eventually enforced.

The contributing factors are:

- **Imperfect legislation that results in the judicial practice leading to confusion in terms of execution. In particular,** Ukrainian judges, literally upholding the domestic law, usually confine themselves to simple quoting of relevant legislation without appropriate adaptation of their rulings to particular circumstances in a given case. Often operative part and reasons are unclear in supporting a given decision ordering in-kind obligation. They would follow the well-established pattern of previous cases without in casu assessment. In some judicial decisions the judges do not take into account the perspectives of the follow-up execution.

- **Confusion between the procedures to be employed for execution of the in-kind duties and other types of obligations.** The Ukrainian enforcement system at the present state does not envisage an easy transfer of the execution from the in-kind obligations to that of the monetary debts. The current executorial procedure is mainly "monetary-payment" oriented.

Proposed solutions

- **Review and amendment of the legislation ensuring a default conversion of in-kind obligations into a monetary equivalent**

The related legislation needs to be reviewed to provide for appropriate regulation of transformative in-kind obligations. These legislative amendments could set up an “automatic” or “optional” procedure for replacement of in-kind obligations with monetary equivalent, under certain conditions and guarantees.

- **Improvement of judicial practice**

The judicial practice needs to be developed in line with the specific demands for execution of the in-kind type of obligations. Judgments ordering an in-kind obligation could be worded with alternative solutions as to the methods of settling or compensation by including a monetary award as an option.

- **Broadening the scope of the current 4040 budget programme to include judgments with in-kind obligations, allowing the authorities to transform these judgments into a monetary equivalent**

This solution is seen as temporary to address the post-Ivanov and post-Burmych types of cases. It would provide the necessary regulatory framework for resolving current backlog of cases. The data accumulated in the current execution proceedings, should the authorities extend the application of the 4040 budget program to the in-kind-obligation-type of judgments, may serve the purposes of further development of the Ukrainian enforcement system.

IV. ACTION PLAN AND TIMELINE

The Action Plan with a concrete timeline will be developed and agreed by the Ukrainian authorities following the approval of the draft of the National Strategy by the Inter-Ministerial Working Group.

**DIRECTORATE GENERAL
HUMAN RIGHTS AND RULE OF LAW**

DIRECTORATE OF HUMAN RIGHTS

**DEPARTMENT FOR THE EXECUTION OF JUDGMENTS
OF THE EUROPEAN COURT OF HUMAN RIGHTS**



H/Exec(2018)2 – 6 December 2018

CASES EXAMINED BY THE COMMITTEE OF MINISTERS CONCERNING THE NON-ENFORCEMENT OR DELAYED ENFORCEMENT OF DOMESTIC JUDICIAL DECISIONS IN UKRAINE (CASE OF YURIY NIKOLAYEVICH IVANOV AGAINST UKRAINE AND GROUP OF CASES OF ZHOVNER AGAINST UKRAINE)

**MEMORANDUM PREPARED BY THE DEPARTMENT
FOR THE EXECUTION OF JUDGMENTS OF THE ECHR
(DIRECTORATE GENERAL OF HUMAN RIGHTS AND THE RULE OF LAW)**

The opinions expressed in this document are binding on neither the
Committee of Ministers nor the European Court.

EXECUTIVE SUMMARY

The authorities' continuous failure to ensure the enforcement of domestic court judgments given against the State and state owned or controlled enterprises/entities, a structural problem revealed since the very first decision rendered against Ukraine in 2001, constitutes an important danger for the respect of the rule of law, undermining people's confidence in the judicial system and putting into question the credibility of the State.

The Committee has over the years tried to assist the authorities in finding solutions in numerous ways, notably through extensive guidance in decisions and resolutions and encouragement to use Council of Europe expertise and cooperation programs.¹

The authorities have also tried to respond to the important challenges posed and have undertaken several legislative and institutional reforms in this regard. These have included, in particular, attempts to improve domestic remedies (by for example the adoption of the law "On State guarantees concern execution of judicial decisions" in 2012). However, the necessary results have not been achieved.

Confronted with this failure, notably manifested through large numbers of repetitive cases, the Court concluded in the *Burmych* judgment of 12 October 2017 that "the execution process ... has remained ineffective", despite the guidance given by the Committee.²

This memorandum provides an overview of the execution process so far in order to assist the Ukrainian authorities in the implementation of the further important general measures required, bearing in mind the deadline of October 2019 set by the Court in the *Burmych* judgment.³

¹ The present group of cases identifies Convention-based complex and structural problems in relation to non-enforcement of judgments delivered against the State under Articles 6 § 1, 13 and Article 1 of Protocol No. 1). The pilot judgment further specifically requires establishing an effective remedy for such complaints.

² The Court has examined a total of approximately 29,000 similar applications since the first application in 1999 (§ 44 of *Burmych* judgment). As to the Committee's examination, the present group, has been examined on almost 50 occasions, with the six interim resolutions adopted

I. Introduction: Current state of affairs- *Burmych* situation

1. The present group of cases relates to the longstanding failure of the Ukrainian State to ensure that state authorities and state owned or controlled enterprises/entities are put in a position to be able to honour domestic court judgments rendered against them without the necessity of any special enforcement measures. This failure has revealed itself to be a very important structural problem with many ramifications in law, practice and budget procedure.
2. The Committee has repeatedly found that this continuing failure constitutes an important danger for the respect of the rule of law, undermining people's confidence in the judicial system and putting into question the credibility of the State.
3. The different cases demonstrate breaches of the right to effective judicial protection and the right to the peaceful enjoyment of possessions (violations of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1). They also demonstrate an absence of effective remedies at the domestic level in case of non-enforcement or delays in enforcement (violation of Article 13).
4. The problem was brought before the Committee for the first time in the *Kaysin* case in 2001, a friendly settlement rapidly closed on the basis of the undertakings given by the Ukrainian authorities that they would solve the problem. The absence of results led to the present group of cases, with the *Zhovner* case as the first and leading case in 2004.
5. The group of cases, steadily increasing due to the absence of progress, has been examined by the Committee on almost 50 occasions, including six interim resolutions adopted between 2008 and 2017 expressing the Committee's grave concerns. In the meantime, the Court also intervened with the pilot judgment in the *Ivanov* case of 2009, stressing in particular – although as matters have developed, in vain - the necessity of the speedy adoption of effective remedies.
6. A total of about 29,000 *Ivanov*-type applications have been submitted to the Court since the first application in 1999.⁴ The Court has since adopted some 424 judgments (including grouped ones with 250 applicants per case). Over 5,000 unilateral declarations have also been approved by the Court (relating to a much larger number of applications).
7. The absence of results led the Court to adopt a landmark judgment in October 2017 – the *Burmych* judgment – referring 12,000 pending applications back to the national level to be solved by the domestic authorities in a Convention compliant manner under the Committee's supervision.

1. 2017: *Burmych and Others v. Ukraine and its aftermath*

8. On 8 December 2015 the Chamber of the Court to which the cases related to the present problem had been allocated, relinquished jurisdiction in favour of the Grand Chamber.⁵

⁴. Par. 44 of *Burmych* judgment.

⁵. *Burmych and Others v. Ukraine*, (Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14).

9. On 12 October 2017, the Grand Chamber delivered its judgment in the *Burmych* case. It noted that, despite the significant lapse of time since the *Ivanov* pilot judgment, the Ukrainian Government had so far failed to implement the requisite general measures capable of addressing the root causes of the systemic problem identified by the Court and to provide an effective remedy securing redress to all victims at national level. Bearing in mind its efforts in examining *Ivanov*-type cases for over 17 years,⁶ the Court concluded that nothing was to be gained, nor would justice be best served, by the repetition of its findings in a lengthy series of comparable cases, which would place a significant burden on the Court's resources, with a consequent impact on its considerable caseload.
10. The Court thus decided to strike the *Ivanov* follow-up applications (12,143 cases) out of its list of cases and found that the grievances raised in these applications had to be resolved in the context of the general measures to be introduced by the authorities at national level, as required by the execution of the *Ivanov* pilot judgment, including the provision of appropriate and sufficient redress for the Convention violations, measures which are subject to the supervision of the Committee. The Court envisaged that it might be appropriate to reassess the situation within two years⁷ of the delivery of the *Burmych* judgment. The Court stressed that the root causes of the problems were of a fundamentally financial and political nature.⁸
11. As a reaction to the *Burmych* judgment a high level meeting was held on 17 November 2017 in Strasbourg, with the participation of the Ministry of Justice, the Presidential Administration and the Parliament, to discuss the creation of an *ad hoc* targeted redress mechanism for all applicants concerned by this judgment, which should go hand in hand with efforts to secure a long-lasting solution addressing the root cause of the problems.
12. It was followed up by discussions on 27 March 2018 at a High Level Round Table at the Verkhovna Rada held with the participation of the Minister of Justice, the Chair of the Verkhovna Rada's subcommittee on the execution of judgments of the European Court of Human Rights, the Ombudsman, the judiciary, civil society and other authorities as well as Council of Europe experts and officials, including the Director General of Human Rights and Rule of Law.

2. Awaited response to the *Burmych* judgment

a) *Ad-hoc* solution

13. In the light of the results of the high level meeting on 17 November 2017, at its 1302nd meeting (DH) in December 2017, the Committee urged the Ukrainian authorities to introduce a targeted mechanism at domestic level to provide redress to all actual *Burmych* applicants with valid complaints under the Convention.⁹
14. The Committee stressed that such a mechanism should provide, in line with the Convention requirements as developed in the Court's case-law, adequate and sufficient redress to all applicants with valid complaints.
15. The mechanism should take into account the following:

⁶. Kaysin and others v. Ukraine (dec.), nos. 46144/99 and Others, 3 May 2001.

⁷. October 2019

⁸. Par. 195 of the *Burmych* judgment.

⁹. Notes for the 1302th (DH) meeting.

- the requirement of securing enforcement of domestic court decisions that still remain enforceable;
 - the obligation to ensure payment of default interest to safeguard the monetary value of the domestic awards, and,
 - the need to ensure adequate and sufficient compensation for non-pecuniary damage and costs and expenses.
16. The *ad hoc* mechanism should also ensure a procedure for verification of claims and speedy administration of payments.
17. In addition the Committee stressed that such a mechanism must be provided with the necessary resources in order to carry out its functions. Thus the authorities should ensure that necessary staff and administrative resources are provided and that necessary budgetary allocations are made.

b) The long-term solution and the necessity of a root cause analysis

18. The necessity of ensuring the non-repetition of the past failures also calls for a series of more complex measures to ensure a long term solution so that in the future domestic judgments rendered against the State, or State-owned or controlled entities, are enforced automatically without any undue delays, excessive formalities or obstacles.
19. So far, apart from an indication that the Cabinet of Ministers and Ministry of Justice will elaborate an action plan to that end, the authorities have, however, not submitted any new information on this issue.
20. In its last decision the Committee thus expressed concern over this situation as it is imperative that the work on an ad-hoc solution operates in parallel with the efforts to secure a long-lasting solution to the problem.¹⁰
21. The Committee noted in this context the necessity of a detailed analysis of the root causes of the problems.
22. Work on such an analysis on the basis of available, up to date factual information was thus engaged rapidly after the meeting with support from the Human Rights Trust Fund ("HRTF") – see also below.
23. The Committee indicated that this expert analysis should incorporate a legal assessment of the substantive and procedural problems already identified in the Court's judgments and in the execution process before the Committee. It should also include, *inter alia*, statistical data relating to judgments delivered against the State (i.e. number and types of unenforced judgments, the types of cases awaiting enforcement, the types of obligations - monetary or in kind - arising from these judgments, enforcement and recovery rates). Furthermore, it should address the issue of simplification of the process of execution of judgments delivered against the State in the future, having regard to the case-law of the Court.

¹⁰. After delivery of the *Burmych* judgment the Court keeps striking out new similar applications (more than 300 cases as of June 2018).

c) Draft law 2018 in response to the *Burmych* judgment¹¹

24. In reply to the Committee's decision of December 2017 the Intergovernmental Working Group prepared a draft law, which was submitted to the Parliament in June 2018 to allow the *ad hoc* solution of the situation of the applicants within the *Burmych and Others* group of cases and amending the 2006 Law on "Execution of the judgments of the European Court of human rights", to clarify that the *Burmych* judgment falls within its scope. Among relevant proposals figure:

- a procedure for *disseminating information* to the applicants, including creditors residing on territories outside control of the authorities (i.e. Donetsk and Lugansk regions and Crimea), as regards the *ad hoc* solution, in particular publication of an announcement on the official website of the Ministry of Justice and in the official journal;
- a procedure for the *verification* of the applicants' claims by bailiffs, as well as a procedure and a time-limit for debt payment by the Central Executive Authorities;
- a *priority order for enforcement* of the court's judgments would be introduced: 1) pension, social payments, compensation for damage caused by injury or other health impairments; 2) labour disputes; 3) other judgments;
- a procedure for *replacement of obligations in kind* by its monetary equivalent by the Bailiffs Service if they are not enforced for more than 2 months by the debtor. A supervisory Commission on the implementation of the court decisions against the State shall be established with the Ministry of Justice for these purposes;
- a procedure for the *determination of the outstanding judgment debt* and the amount of compensation for *non-pecuniary damage* with respect to each applicant (10% of the outstanding debt, but not more than the amount of the minimum salary¹² if the enforcement is delayed for more than 15 months);
- a six month *time-limit for filing claims* and compensation under this mechanism for the judgments delivered before its entry into force, and three months if they are delivered following its adoption; if a duly notified creditor doesn't claim the amount of compensation within one year, the unclaimed amounts shall be transferred to the state budget;
- an adjustment of the state budget accordingly to allow for the payment of claims;
- as regards moratoriums on the forced realization of the State property and the fuel and energy enterprises, an exemption would be introduced. It would allow payment of the arrears arising from the execution of Court's judgments and the domestic courts' decisions within the framework of the Law "On State Guarantees Concerning Execution of Judicial Decisions".

3. HRTF "Supporting Ukraine in the execution of judgments of the European Court of Human Rights" project

¹¹. http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64316.

¹². 3 723.00 UAH (approx. 115 EUR) as on 17 October 2018.

25. In the light of the Committee's assessments, the Council of Europe launched a special HRTF project in 2018 in order to assist the authorities in defining rapidly a common vision of the root causes of the present problem, establish the solutions required and implement them within the deadline set by the Court.
26. The project is being implemented in Ukraine, in co-operation with Ukrainian counterparts – the Government Agent before the European Court of Human Rights, the Parliamentary Sub-Committee on the Execution of Judgments of the European Court of Human Rights, and the Supreme Court. The project is managed by the Justice and Legal Co-Operation Department of the Directorate General Human Rights and Rule of Law, in close cooperation with the Execution Department. One of the objectives of this project is to help the authorities to deliver the thorough expert analysis on the basis of updated factual information to identify all root causes.

II. Overview of the execution process in the *Zhovner/ Ivanov* group

A. Individual measures

27. According to Article 46 of the Convention, the respondent State has an obligation, beyond the payment of just satisfaction, to adopt under the Committee's supervision individual measures with a view to ensuring that the injured party is put, as far as possible, in the same situation as he/she enjoyed prior to the violation of the Convention (*restitutio in integrum*). In context of failure to enforce a domestic judgment, *restitutio in integrum* cannot be achieved unless and until the domestic judgment is fully enforced.

1. Before the *Ivanov* pilot judgment

28. Prior to delivery of the *Ivanov* pilot judgment in 2009, the Court awarded pecuniary or/and non-pecuniary damage under the Article 41 on a case by case basis. Whereas in the first judgments the Court itself in general awarded the outstanding judgment debt with interest/indexation as part of pecuniary damage, it rapidly started to follow the practice developed in cases against other countries of limiting itself to simply insisting on the speedy execution of the domestic judgment at issue, at least where the State's outstanding obligation to enforce the domestic judgment was not in dispute.¹³ Accordingly, the Court considered that, if the Government were to pay the remaining debt owed to the applicant under the domestic judgment, it would constitute full and final settlement of the claim for pecuniary damage, and the Court thus dismissed claims for pecuniary damage. In the other cases¹⁴ the Court continued to consider that the Government should pay the applicant the unsettled judgment debt (including inflation loss, if requested by the applicant) by way of compensation for pecuniary damage and awarded both pecuniary and non-pecuniary damage.

2. After the *Ivanov* pilot judgment

29. After resuming examination of *Ivanov*-type cases in 2012 the Court adopted a unified approach as regards just satisfaction. It started to award the applicants, in respect of pecuniary and non-pecuniary damage, EUR 1,500 for delays of up to three years and

¹³. See, for example, *Sikorska v. Ukraine*, 34339/03, final 06/09/2007.

¹⁴. See, for example, *Derkach v. Ukraine*, 34297/02, final 06/06/2005.

EUR 3,000 for delays exceeding three years, stressing that the respondent State has an outstanding obligation to enforce the decisions which have not been enforced.¹⁵

30. From 20 June 2013 the Court adopted a policy¹⁶ of awarding fixed-rate sums of EUR 2,000 for pecuniary and non-pecuniary damage. As regards pecuniary damage, it also held that “the respondent State has an outstanding obligation to enforce the judgments which remain enforceable”.

3. State of affairs at the time of adoption of the *Burmych* judgment in 2017

31. In some cases, information relating to the payment of just satisfaction and, where applicable, the enforcement of domestic judicial decisions, is still missing (see the Appendix I to the memorandum). From the various information received in these individual cases, it appears that a number of the domestic judgments still remain unenforced without explanation, despite the repeated calls of the Committee to ensure their full enforcement. Information as to the payment of just satisfaction is also still lacking in some cases.¹⁷

4. After the *Burmych* judgment in 2017

32. On 12 October 2017, the Grand Chamber delivered its judgment in the *Burmych and Others* case. It decided to strike the *Ivanov* follow-up applications (12,148 cases) out of its list of cases and found that the grievances raised in these applications had to be resolved in the context of the general measures to be introduced by the authorities at national level. It referred to the requirements on execution of the *Ivanov* pilot judgment. It suggested the need for provision of appropriate and sufficient redress for the Convention violations to be introduced at the domestic level, subject to the supervision of the Committee.
33. In December 2017 the Ukrainian authorities were urged by the Committee to introduce a targeted mechanism at domestic level to provide redress to all applicants with valid complaints under the Convention in the *Burmych* group (see paragraph 13 of this Memorandum for more details as regards *an ad-hoc mechanism*).

B. General measures

1. 2001: First cases before the CM

34. The problem of non-enforcement of the domestic judgments in Ukraine was first raised before the Court as long ago as in 1999 in the case of *Kaysin and Others against Ukraine*,¹⁸ which was declared admissible. It was later struck out from the Court’s list of cases on 3 May 2001, following a friendly settlement reached by the parties. Although the judgment does not establish any violation, it nonetheless gave rise to a careful study of the problem of non-execution of judicial decisions in Ukraine by an expert group with participation of relevant authorities. This first study showed the need for adoption of administrative and legislative changes with a view to preventing situations similar to that at issue in the case of *Kaysin and Others*. Stress was in particular laid on the necessity of reinforcing, on the one hand, the State’s civil liability and, on the other, the disciplinary and criminal responsibility of the State officials, in cases of non-compliance with domestic court decisions. These

¹⁵. See, for example, *Kharuk and Others v. Ukraine*, 703/05, final 26/07/2012.

¹⁶. See, for example, *Pysarskyy and Others v. Ukraine*, 20397/07, final 20/06/2013.

¹⁷. See for more details : <https://www.coe.int/en/web/execution/payment-information>.

¹⁸. *Kaysin and Others against Ukraine* (No. 46144/99).

conclusions were supposed to be taken into account in the on-going reform of the Ukrainian legal system at that time.

2. 2004: The first judgment on the merits

35. In 2004 the Court established the first substantive violation of several provisions of the Convention concerning non-enforcement of domestic court decisions in the case of *Zhovner against Ukraine*.¹⁹ Violations found by the Court in subsequent cases concerned, *inter alia*, non-enforcement of domestic court decisions related to payment of salaries and allowances to employees of various public authorities (educational institutions, armed forces, the police / the Ministry of Interior, the State Security Service, prisons, courts, enforcement authorities, the Finance Ministry, the Tax Police, the government, village councils and municipal authorities, etc.) and State-owned enterprises (mine companies, “Atomspetsbud”, other State companies).

36. Among the reasons invoked for non-enforcement of judicial decisions were:²⁰

- the *lack of funds* on the debtors' accounts;
- the *impossibility of attaching any property of the State* or of bankrupt companies owned by the State according to the 2001 Moratorium on the Forced Sale of Property;
- the impossibility of attaching any property located in the Chernobyl area without the State's special authorization, previously denied; and
- more generally, the lack of the appropriate enforcement procedures.

3. 2007: CM's assessment of the general root causes

37. In order to assist the Committee and the Ukrainian authorities in reflection on the underlying problems the Secretariat prepared its first Memorandum on the non-enforcement of domestic judicial decisions in Ukraine²¹ which was issued and declassified at the 997th meeting (DH) in June 2007. The Memorandum took stock of the current situation in each area of concern and pointed out the issues that remained to be considered with a view to ensuring Ukraine's compliance with the European Court's judgments.

38. The Memorandum identified several major flaws where the problems related to the practice of enforcing domestic court decisions rendered against public authorities or State-owned companies in Ukraine take their root in:

- lack of appropriate budgetary financing for enforcement of judgments against public authorities or State-owned companies;
- complex legal rules for seizure and attachment of state-owned assets, including State accounts, which in addition are not effectively applied in practice;
- lack of appropriate and effective regulations ensuring effective compensation for delays;
- lack of any effective liability (criminal, administrative, disciplinary or civil) of civil servants for non-enforcement of court decisions and lack of any liability of bankruptcy and liquidation administrators and trustees for such failure to comply with court decisions;

¹⁹. *Zhovner against Ukraine* (No. 56848/00), judgment of 29/06/2004.

²⁰. See Notes of the 940th CM DH (October 2005).

²¹. CM/Inf/DH(2007)30rev.

- inefficient State Bailiffs' service.

39. The Memorandum focused on a number of avenues that appear to be of particular interest in the on-going search for a comprehensive resolution of the problem:

- improvement of budgetary procedures and better implementation of budget decisions to ensure the existence of necessary funds;
- ensuring effective compensation for delays (indexation, default interest, specific damages, possibility of reinforcing the obligation to pay in case of delays);
- increased recourse to judicial remedies to solve disputes and to control bailiffs;
- ensuring effective liability of civil servants for non-enforcement;
- development of existing rules for compulsory execution, including improved procedures for seizure of State assets;
- increasing the efficiency of Bailiffs, who are solely responsible for execution.

High Level Round Table

40. On 21-22 June 2007 a High Level Round Table on non-enforcement of domestic judicial decisions in member States²² took place in Strasbourg with the active participation of the Ukrainian authorities (including the Deputy Prosecutor General, the Deputy Minister of Justice, the Deputy Head of the Department for State Budget of Ministry of Finance, the Representative of the Office of the Government Agent before the Court, the Deputy Head of the State Bailiffs' Service).

41. The importance of rapidly pursuing the reform work was stressed in order to fully resolve the above-mentioned problems, notably through the legal and regulatory framework and introduction of remedies.

As regards the legal and regulatory framework preventing non-execution:

- ensuring a coherent legal framework and/or coherent practices for the control and restitution of property respecting the requirements of the Convention;
- improving budgetary planning, notably by ensuring the compatibility between the budgetary laws and the State's payment obligations;
- proper control over the use of the budgetary funds by the authorities responsible for payments;
- providing for specific mechanisms for rapid additional funding to avoid unnecessary delays in the execution of judicial decisions in case of shortfalls in the initial budgetary appropriations;
- setting up, where appropriate, a special fund or special reserve budgetary lines, to ensure timely compliance with judicial decisions, with a subsequent possibility of recovering from the debtor the relevant sums together with default interest;
- ensuring the individuals' effective access to execution proceedings by clearly identifying the authority responsible for execution and simplifying the requirements to be fulfilled by the execution documents;

As regards domestic remedies in case of non-execution:

²². CM/Inf/DH(2007)33.

- introducing, either in budgetary laws or in other laws, a general obligation to automatically compensate for delays in execution of judicial decisions through appropriate default interest at a reasonable rate (e.g. in line with the Central Bank's marginal lending rate);
- ensuring effective civil liability of the State for damages arising from the non-execution of domestic judicial decisions, which are not compensated by the default interest and providing, in appropriate cases, for the possibility of recovering awards made from the state agents responsible;
- guaranteeing the existence of effective procedures capable of accelerating the execution process leading to full compliance with the judicial decision;
- providing for increased recourse to money penalties and, where appropriate, the automatic increase of those money penalties when the authority concerned continues to delay execution;
- improving the personal responsibility of state agents in case of deliberate non-execution through efficient penalties or fines;
- further developing central procedures for the freezing of accounts held by debtor authorities in order to secure the honouring of payment obligations, including the possibility of freezing also the accounts of authorities subordinate to the debtor's authority;
- setting up or improving procedures and regulations allowing the seizure of state assets which are manifestly not necessary for the fulfilment of the missions of the authorities concerned and, where appropriate, drawing up necessary inventories;
- providing the bailiffs with sufficient means and powers so as to allow them to properly ensure, where appropriate, the enforcement of judicial decisions;
- strengthening the individual responsibility (disciplinary, administrative and criminal where appropriate) of decision makers in case of abusive non-execution and providing the responsible state authorities with the necessary powers to that effect;

42. The Ukrainian authorities were encouraged to give appropriate follow-up to the Conclusions adopted at that High Level Round Table.

4. 2007 CM's assessment of a sector-specific approach²³

43. The Ukrainian authorities had chosen to implement sector-specific approaches to resolve the funding problems at the basis of the present problems, awaiting a more general solution. These measures were positively assessed by the Committee in 2007.²⁴ As regards the education sector, state mines (coal industry employees), and a special situation in the Chernobyl area (Atomspetsbud subgroup concerning impossibility to attach any property in the Chernobyl zone), the respective Ministries developed several special sector plans to resolve the problem of arrears, the necessary funds were allocated in the state budget and then paid in full between 2005-2007.

5. 2008: First Interim resolution²⁵

44. In its first Interim Resolution CM/ResDH(2008)1 the Committee noted progress in the sector-specific measures adopted by Ukrainian authorities.

²³. The follow up according to the debtor/defendant involved in the domestic proceedings.

²⁴. See decisions of the 1007th CM DH (October 2007) and 1013d CM DH (December 2007).

²⁵. Committee of Ministers' Interim Resolution [CM/ResDH\(2008\)1](#) (March 2008).

45. At the same time the Committee recognized that the non-enforcement of domestic judicial decisions constituted a structural problem in Ukraine and underlined the Convention organs' consistent position that, while improving enforcement proceedings and/or their particular aspects is important, it is incumbent on the State to execute spontaneously all judicial decisions delivered against public authorities, without compelling the claimants to go through enforcement proceedings, and thus irrespective of the availability of funds.

6. 2009: The pilot judgment

46. As the Committee's attempts to find a solution to the problem with the Ukrainian authorities yielded no tangible result and the influx of new similar applications was increasing, in 2009 the Court adopted its pilot judgment in *Yuriy Nikolayevich Ivanov* against Ukraine.²⁶

47. The Court noted that the delays had been caused by a variety of dysfunctions in the Ukrainian legal system and a combination of factors, including:²⁷

- the lack of budgetary allocations;
- the bailiffs' omissions;
- shortcomings in the national legislation (including the introduction of bans on the attachment and sale of property belonging to State-owned or controlled companies).

48. Whilst the Court noted with satisfaction that the adoption of measures in response to the structural problems of prolonged non-enforcement and the lack of domestic remedies had been thoroughly considered by the Committee in cooperation with the Ukrainian authorities, it considered that Ukraine had demonstrated an almost complete reluctance to resolve the problems at hand.

49. The emphasis put in the pilot judgment on the necessity introduction of effective remedies is dealt with below (see E).

C. The special problem of moratoriums laws

50. Several specific remarks can be made as to the moratoriums on enforcement and extension of State liability for State-owned or controlled legal entities:

- a) The approach taken by the Court in its case-law with regard to the State-owned or controlled companies related to the moratorium imposed an obligation on the State for the enforcement of judgments against the legal entities where the State held more than 25% of shares. The case-law also established that the State was liable for the activities of separate legal entities in the event that it exercised effective managerial, financial or administrative control over operations of a particular legal entity²⁸ or even in the course of its liquidation.²⁹ It was also liable for such companies in the event it gave direct subsidies to payment of salaries and restructuring of the companies' debts.³⁰

²⁶. Pilot judgment in the case of *Yuriy Nikolayevich Ivanov* against Ukraine (no. 40450/04) , judgment of 15/10/2009, final on 15/01/2010.

²⁷. See §§ 83-84 of the judgment.

²⁸. *Mykhaylenko and Others v. Ukraine*, §46, nos. 35091/02; *Sokur v. Ukraine*, §33, no. 29439/02, 26 April 2005.

²⁹. *Fuklev v. Ukraine*, no. 71186/01, §68, 7 June 2005.

³⁰. *Romashov v. Ukraine*, no. 67534/01, § 41, 27 July 2004.

- b) The Court also established that the State is accountable for the debts of enterprises owned and controlled by its local or municipal authorities to the same extent as it is accountable for the debts of the State-owned enterprises.³¹
- c) As regards private debtors included in the Register of fuel and energy enterprises taking part in the procedure for recovery of debts pursuant to the 2005 Act on measures designed to ensure the stable functioning of fuel and energy enterprises,³² according to the Court, the State is only responsible for the period of non-enforcement when the debtor remained in the Register. The same applies to Private commercial banks in respect of which the National Bank applied a moratorium on satisfaction of its creditors' claims during insolvency proceedings. The State is likewise responsible only for the period of non-enforcement when the enforcement proceedings were suspended.³³ The State also remains liable for debts of its companies which are undergoing bankruptcy proceedings and are under liquidation proceedings, which has not yet terminated.³⁴

D. Note on the State's freedom to decide the level of social benefit

51. On 3 June 2014 the Court declared inadmissible the application in *Velikoda v. Ukraine*.³⁵ The applicant alleged a violation of Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 on account of the fact that, following a final judgment in the applicant's favour ordering the national authorities to pay a social benefit, legislation³⁶ that entered into force subsequently drastically reduced for all beneficiaries the amounts of the social payments in question for the future. The Court held, among other things, that the relevant legislative measures were not unreasonably disproportionate having been adopted as a result of economic policy considerations and the financial difficulties faced by the State.

E. Effective remedy

1. Exhaustion of domestic remedies and automatic execution of judgments against the State

52. The Court's case-law clearly establishes that in a situation of a State debtor or State-owned or controlled company compliance should be automatic and there should be no need to exhaust domestic remedies, for example, to complain of the Bailiffs' inactivity or inactivity of the State appointed liquidation commission in enforcement proceedings.³⁷ This is in contrast to the situation in which the debtor is a private party; as such a party would be required to exhaust domestic remedies against the Bailiffs.
53. There is also no obligation on the applicant's part to re-submit a writ of execution to the Bailiffs' if they have refused enforcement citing lack of funds of the State-owned company.³⁸

³¹. Otychenko and Fedishchenko v. Ukraine, nos. 1755/05 and 25912/06, § 26, 12 March 2009, Nuzhdyak v. Ukraine, 16982/05, § 26.

³². Konosh v. Ukraine (dec.) and Kukis v. Ukraine (dec.), nos. 24466/07 and 11063/09, 10 May 2012.

³³. *Kryshchuk v. Ukraine*, no. 1811/06, 19 February 2009.

³⁴. *Polovoy v. Ukraine*, no. 11025/02, 4 October 2005.

³⁵. *Velikoda and Others (dec.)*, no. 43331/12, 3 June 2014..

³⁶. The Cabinet of Ministers' Resolution no. 745 of 6 July 2011.

³⁷. See Romashov, cited above, § 31, Fuklev v. Ukraine, cited above, § 76, Yuriy Nikolayevich Ivanov v. Ukraine, 40450/04, §48.

³⁸. *Ishchenko and Others v. Ukraine*, nos. 23390/02, 11594/03, 11604/03 and 32027/03, 8 November 2005, § 22; *Kolosenko v. Ukraine*, no. 40200/02, § 13. 26 April 2007.

In addition, the applicant is not obliged to replace one State debtor with another in case of debtor change or change in the legal status of a State debtor.³⁹

54. It is incumbent on the State to execute spontaneously all judicial decisions delivered against public authorities, without compelling the claimants to go through enforcement proceedings, and thus irrespective of the availability of funds.⁴⁰

2. CM and Court's guidance as regards the remedy

55. In 2009 in the pilot judgment the Court found that there was no remedy at national level satisfying the requirements of Article 13 of the Convention.

56. The Court highlighted the structural nature of the problem and set a specific deadline for the setting-up of a domestic remedy in respect of the excessive length of enforcement proceedings. The Court also indicated that specific reforms in Ukraine's legislation and administrative practice should be implemented without delay. The Court further invited the respondent State to settle on an ad hoc basis all similar applications lodged with it before the delivery of the pilot judgment (there were 1,600 such repetitive applications at the time) and decided to adjourn the examination of similar cases.

57. During its 1108th meeting (DH) in March 2011,⁴¹ the Committee called upon the Ukrainian authorities to give priority to the adoption of the domestic remedy as required by the pilot judgment within the new deadline extended by the Court, 15 July 2011.

58. The Committee stressed that in order to be considered as effective, such a remedy should meet the core requirements of the Convention, namely that:

- no-one should be required to prove the existence of non-pecuniary damage as it is strongly presumed to be the direct consequence of the violation itself;
- compensation should not be conditional on establishing fault on the part of officials or the authority concerned as the State is objectively liable under the Convention for its authorities' failure to enforce court decisions delivered against them, within a reasonable time;
- the level of compensation must not be unreasonable in comparison with the awards made by the European Court in similar cases;
- adequate budgetary allocations should be provided so as to ensure that compensation is paid promptly.

59. Given that the measures called for by the Court in its pilot judgment were not adopted within the deadline set, in February 2012 the Court decided to resume the examination of the frozen applications raising similar issues (at that time there were approximately 2,800 such applications against Ukraine).

3. The attempts to introduce an effective remedy

³⁹. *Vasylyev v. Ukraine*, no. 10232/02, §§ 24-31, 21 June 2007, and *Chuykina v. Ukraine*, 28924/04, final 13/04/2011.

⁴⁰. *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, § 24, *Kontsevych v. Ukraine*, no. 9089/04, § 36.

⁴¹. 1108th

a) 2012: New remedy law

60. On 5 June 2012 the Ukrainian Parliament, in response to the numerous requests by the Committee adopted the remedy law “On State guarantees concerning execution of judicial decisions”.
61. It introduced a new specific procedure for the execution of domestic judicial decisions delivered against the State which were rendered after its entry into force; pecuniary debts were to be met by the State Treasury within certain deadlines if the debtor (State bodies, State companies, or legal entities whose property could not be subjected to a forced sale within enforcement proceedings) failed to pay them in due time. The law also provided for automatic compensation if the authorities delayed payments under this special procedure.
62. At its 1150th meeting (DH) in September 2012, the Committee noted that the above-mentioned law, which would enter into force on 1 January 2013, could constitute an effective domestic remedy in cases of non-enforcement of domestic judicial decisions which will be taken after the entry into force of the said law, provided that the outstanding questions identified in the Memorandum CM/Inf/DH(2012)29 were addressed, including the allocation of sufficient budgetary means.

b) 2013: Questions as regards new remedy law

63. The Committee, at its 1164th meeting (DH) in March 2013, raised⁴² a number of concerns in light of new developments, namely that the remedy law did not cover the problem of non-enforcement of judgments already rendered at the time of the entry into force of the new law (i.e. before 1 January 2013) and the authorities’ failure to enforce a decision of non-pecuniary nature. In addition, the Committee reiterated that questions persisted, most notably as regards the absence of adaptation of other legislation (in particular the moratorium laws) and the effectiveness of the measures taken to ensure execution within a reasonable time in all situations, notably because of the inflexibility of the new system, including the level of compensation.

c) 2013: Amendments to the remedy law

64. In response to the concerns raised, the Ukrainian Parliament adopted legislative amendments setting up a remedy in respect of the non-enforcement of domestic judicial decisions rendered before 1 January 2013. In this respect, at its 1186th meeting (DH) in December 2013 the Committee invited the Ukrainian authorities to take all the necessary measures to ensure the effective implementation of this remedy, and encouraged them to launch an appropriate information campaign on this new remedy for the attention of the persons concerned.
65. The Committee further invited the authorities to provide clarifications on all the outstanding issues as regards, in particular, the way in which the distribution of available funds would be assured between the beneficiaries of different order groups; the relationship between the remedy legislation and other special laws concerning different moratoria; the organisation of a public awareness-raising campaign amongst the creditors concerned in order to incite them

⁴². Information document (CM/Inf/DH(2013)11).

to benefit from the new legislation; and the availability of budget funds needed to finance the new remedy.⁴³

66. As regards specifically judicial decisions delivered after 1 January 2013, the Committee invited the authorities to submit an assessment on the impact in practice of the new legislation since its entry into force.

d) 2015: new remedy found ineffective

67. On 3 February 2015 the Court gave notice to the Ukrainian Government of *Filipov and 3 other applications* (no. 35660/13),⁴⁴ where the applicants complained that the remedy introduced by the 2012 Law was ineffective.

68. Subsequently, at its 1230th meeting (DH) in June 2015 the Committee concluded that the remedy introduced in 2013 appeared not to have solved the problem of non-enforcement or delayed enforcement of domestic judicial decisions.⁴⁵ The main immediate impediment to its effective implementation was the lack of sufficient budgetary allocations, a fact which was recognised by the Ukrainian authorities themselves.⁴⁶

F. 2016: « Three-step strategy » for a global solution

69. Despite several attempts made by the Ukrainian authorities, in particular the introduction of a remedy in 2013, the measures taken so far have not been successful in solving the problem. Consequently, the influx of applications lodged with the Court has continued to grow.⁴⁷

70. On 8 April 2016, the Special Advisor of the Secretary General on Ukraine at that time, Mr Christos Giakoumopoulos, addressed a letter to Minister of Justice of Ukraine, Mr Pavlo Petrenko, in which he conveyed the Committee's concerns on account of the lack of progress in taking the necessary measures for the execution of these cases and proposed to organise a consultation meeting with the relevant authorities as well as with other interested international organisations, such as the International Monetary Fund and the World Bank with a view to identifying avenues to solve this problem.⁴⁸

71. The Ukrainian authorities responded positively to this request. Consequently, a meeting took place on 12 May 2016 in Kyiv with the participation of the Vice-Ministers of Justice, Finance and Foreign Affairs of Ukraine, the Permanent Representative of Ukraine before the Council of Europe, the representatives of the Office of the Government Agent before the European Court and of the International Monetary Fund.

⁴³. For more details, see the notes prepared for the 1186th meeting (December 2013) (DH).

⁴⁴. Struck out in the *Burmych* judgment.

⁴⁵. In addition in its communication of 26 May 2015, the NGO "Ukrainian Helsinki Human Rights Union (UHHRU)" pointed out that the amount allocated in 2015 in the State budget for the purpose of repaying the debts under both the remedy law and the just satisfaction awarded by the Court – UAH 150,000,000 – represented only 1% of the total debt. It further contended that the real amount of the debt was much higher than the one indicated by the authorities. [DH-DD\(2015\)595](#)

⁴⁶. Notes for the 1230th DH meeting (June 2015). and Notes for the 1259th DH meeting, June 2016: As of June 2016 there were some 120,000 holders of unenforced judicial decisions waiting to receive compensation under the remedy law. The estimated amount of debt relating to the entirety of these decisions was around UAH 2.5 billion (around EUR 89 million).

⁴⁷. Notes for the 1259th DH meeting on 7-9 June 2016.

⁴⁸. DH-DD(2016)575.

72. As a result of these discussions and given that the Ukrainian authorities were not aware of the exact amount of debt that the State owes to the holders of domestic court decisions, during the Committee's 1259th meeting (DH) in June 2016 the Ukrainian authorities agreed to follow a so-called "three-step strategy":

- the first step that needed to be taken was to calculate the amount of debt arising out of unenforced decisions in Ukraine;
- the second step would be to introduce a payment scheme under certain conditions or containing alternative solutions to ensure that unenforced decisions were enforced;
- the third step would be to make the necessary adjustments in the State budget so that sufficient funds were made available for the effective functioning of the above-mentioned payment scheme, as well as the introduction of necessary procedures to ensure that budgetary constraints were duly considered when passing legislation⁴⁹ so as to prevent situations of non-enforcement of domestic court decisions rendered against the State or State enterprises.

73. Despite numerous assurances from the Ukrainian authorities, it does not appear that they put into effect the "three-step strategy", nor have they provided a timetable for its implementation. Clear information as to the scope of the problem was still lacking.

G. Other avenues to help resolving the issue of non-enforcement

1. Alternative mechanism of enforcement of judicial decisions (bond-scheme)

74. In April 2015, the Ukrainian authorities indicated that a new alternative mechanism for the enforcement of judicial decisions was being developed in Ukraine. From the information provided it appeared that the essence of this mechanism consisted in the transformation of debts from the non-enforced judicial decisions (the enforcement of which was guaranteed by the State and the European Court's judgments, accrued as of 1 January 2015 (totalling up to 7 544 562 370 UAH)) into treasury bonds payable over a period of seven years. It was envisaged that only a small part of the debt would be paid in cash (up to 10%), based on the limited funds provided to this end by the Law "On the 2015 State Budget".

75. The envisaged scheme was provided for in Article 23 of the Law "On the 2015 State Budget"⁵⁰ and required the adoption of special regulations which needed to be additionally developed.

76. At its 1230th meeting (DH) in June 2015 the Committee expressed its concern that this scheme, if not carefully designed, could run contrary to the authorities' efforts to introduce

⁴⁹. See for example *Velikoda v. Ukraine* cited above.

⁵⁰. This Article reads as follows: The Cabinet of Ministers shall have the right, according to the procedure established by it, to restructure the current debt in the amount of up to 7.544.562.370 UAH as of 1 January 2015 under the judicial decisions the enforcement of which is guaranteed by the State, and under the judgments of the European Court on Human Rights delivered following the examination of cases against Ukraine, by means of partial payment from the funds provided by the present Law to this end, in the amount of up to 10% of the sum indicated in the above-mentioned decisions, and the issuance for the outstanding amount of financial treasury bills (bonds) payable up to seven years, with the delayed payment of two years, with the interest rate of 3% per annum. The right to issue such bills (bonds) shall be given to authorities in charge of the treasury service of the budgetary funds.

an effective remedy for the present cases. The Committee therefore requested further information on the details of the scheme. Lastly, the Committee stressed that the envisaged scheme could not, in any case, be applied to the payment of the just satisfaction awarded by the Court, which should be done exclusively according to the terms set by the Court.

77. Nevertheless, the authorities subsequently indicated that this scheme was not applicable in practice and recalled that the total amount of debt associated with the judicial decisions that were supposed to be converted into bonds was around UAH 7.5 billion (around EUR 267 million according to the current exchange rate).⁵¹

2. Development of judicial control over the execution of judgments process

78. According to the amendments to the Constitution of Ukraine of 2 June 2016 the State ensures execution of a court decision in accordance with the procedure established by law. The domestic courts control the execution of their decisions. These amendments were noted with interest by the Committee at its 1280th meeting (DH) in March 2017 and the authorities were invited to explore this avenue with a view to strengthening the role of the judiciary in the execution process.

79. A specific form of judicial control was already put in place for the courts of administrative jurisdiction by Article 267 of the Code of Administrative Justice of Ukraine, which provided the courts with a right to:

- require the State authority to submit a report on the execution;
- set a new deadline for reporting on the progress in execution, upon consideration of such report, or providing information on the outcome of the enforcement proceedings. It further permitted the imposition of a fine on the head of the state authority responsible for the execution of the decision.

80. Judicial control over the execution of judgments process in the civil and commercial jurisdictions was provided by the new procedural codes adopted on 03/10/2017. The authorities have not provided any further information as to the application of these new provisions.

3. Reform of the State Bailiffs Service

81. The Ukrainian authorities informed the Committee about the on-going reform of the State Bailiffs Service, the purpose of which was to introduce a mixed system of enforcement of judicial decisions engaging private bailiffs. In particular, the new legislation provided for the establishment of private bailiffs as well as strengthening of the power of the bailiffs in the course of the enforcement of the judgments. The new law "On Enforcement Procedure" came into force on 05/10/2016. They expected that this new procedure would assist in overcoming the irregularities and loopholes of the existing enforcement system and would contribute to the lowering of the number of non-enforcement complaints, being brought before the Court.

82. However, private bailiffs are not empowered to deal with enforcement of judgments against the State, State-owned or controlled entities or with regard to the State social debts

⁵¹. Notes for the 1259th (DH) meeting June 2016.

identified in the group of judgments of *Ivanov / Zhovner*. Thus, these changes will not have a direct impact on the reform of the system of enforcement of judgments against the State.⁵²

III. Current domestic system of enforcement of judgments against the State

83. A person seeking enforcement against the State⁵³ shall apply to the State Treasury Service, which enforces judgments on a first-come basis. Requests for enforcement shall be lodged within 3 years after the judgment becomes final.⁵⁴ In case of omission, the time limit for lodging a request may be renewed by the court. The judgment is enforced within the limits of budgetary allocations and in case of lack of funds – in accordance with the relevant budgetary program to ensure execution of judgments. If available, the funds shall be transferred to the claimant within 3 months after receipt of all documents.
84. In case of execution of judgments against State-owned companies and legal entities protected from enforcement by moratoriums on sale of property, the claimant applies to the State Bailiff Service. If a judgment is not executed within 6 months after initiation of enforcement proceedings, execution shall be ensured by a special budgetary program through the funds made available to the State Treasury. The bailiff shall transfer the enforcement writs to the Treasury in case of a moratorium or lack of funds within 10 days after such circumstances have been revealed through the enforcement action. The funds, if available, shall be transferred to the claimant within 3 months after receipt of all abovementioned documents required for money transfer.⁵⁵ The bailiff shall inform the applicant on the procedure of withdrawal of funds and ensure their transfer within 10 days.
85. The Treasury shall submit to the Ministry of Finance proposals on amendments to the State budget in case of insufficient allocations. Claimants are entitled to compensation in the amount of annual interest rate of 3% of the unpaid sum if enforcement is delayed.
86. The law prescribes at least 30 different reasons for return, suspension or termination of enforcement proceedings.

⁵². Notes for the 1280th DH meeting.

⁵³. State institution, State-owned or controlled company or municipal entity, i.e. against State and local budgets.

⁵⁴. Such a request shall be accompanied by a writ of execution, court judgment itself, confirmation of payment to the State budget of claimed sums, if excessively paid by the claimant. It may also concern other documents. If funds are not withdrawn by the claimant within 1 year after their transfer, such funds shall be transferred back to the State budget.

⁵⁵. In case of absence of all required documents to provide transfer for claimant the funds shall be transferred to the bank account of the State Bailiff Service.

IV. **Appendix 1: Summary of the main issues identified in the course of supervision process**

	Issue identified	Assessed by the Committee (Reference to the CM's meeting/Notes)	Action taken by the authorities	Reassessment by the Committee (Reference to the CM's meeting/Notes)
1.	Lack of appropriate budgetary financing for enforcement of judgments against public authorities or State-owned companies	Notes of the 940th meeting (October 2005) Memorandum 997th meeting (June 2007)	<p>On 10/10/2005 the authorities provided a draft law dealing in particular with the enforcement of domestic judicial decisions within a reasonable time. At 992nd meeting (April 2007) they submitted that the Law was returned by the Government of Ukraine to the Ministry of Justice for amendments. The authorities did not provide any further information in this respect.</p> <p>In 2006 the President of Ukraine approved a number of policy papers, intended to define tasks, authorities in charge and terms with a view to eliminate problems arising from the Zhovner type of judgments:</p> <ul style="list-style-type: none"> • The Action Plan for Honouring by Ukraine of Its Obligations and Commitments to the Council of Europe, approved on 20/01/2006; • The Action Plan for the Improvement of the Judicial System and Ensuring Fair Trial in Ukraine in Line with European Standards, approved on 20/03/2006; • The Concept for the Improvement of the Judiciary and Ensuring Fair Trial in Ukraine in Line with European Standards, approved on 10/05/2006; • The National Action Plan for Ensuring Due Enforcement of Court Decisions, approved on 27/06/2006; • Analysis of the main problems causing a large number of repetitive violations of the Convention. <p>At the 982nd meeting (December 2006), the Ukrainian authorities indicated that following the Analysis mentioned above, the government had issued a special resolution ordering all state authorities concerned to consider it and provide the Ministry of Justice with proposals to solve or prevent similar problems. The authorities did not provide any further information in this respect.</p> <p>Alternative mechanism of enforcement of judicial decisions (bond-scheme) in 2015. The authorities subsequently indicated that this scheme was not applicable in practice. (Notes 1230th meeting (June 2015)).</p>	Notes 1007th meeting (October 2007): the Committee recalled its position that the setting up domestic remedies does not dispense states from their general obligation to solve structural problems underlying violations
2.	Impossibility of attaching any property located in Chernobyl area without the State's special authorization, previously denied	Notes of the 940th meeting (October 2005)	The authorities did not provide any further information in this respect.	Memorandum 997th meeting (June 2007): the Committee reiterated still complex legal rules for seizure and attachment of state-owned asserts, including State accounts, which in addition are not effectively applied in practice
3.	Impossibility of attaching any property of the State or of bankrupt	Notes of the 940th meeting (October 2005)	The authorities did not provide any further information in this respect.	Memorandum 997th meeting (June 2007): the Committee reiterated still complex legal rules for seizure and attachment of state-owned asserts,

	Issue identified	Assessed by the Committee (Reference to the CM's meeting/Notes)	Action taken by the authorities	Reassessment by the Committee (Reference to the CM's meeting/Notes)
	companies owned by the State according to the 2001 Moratorium on the Forced Sale of Property			including State accounts, which in addition are not effectively applied in practice
4.	Lack of appropriate enforcement procedures	Notes of the 940th meeting (October 2005)	At the 955th meeting (February 2006) the Ukrainian authorities indicated that an interdepartmental working group had been established within the Ministry of Justice by Government Resolution No. 784 of 31/05/2006 to examine possible administrative measures remedying the situation pending the adoption of legislative reform. The Group is in charge with assisting the Government Agent, in particular in matters related to enforcement of judgments of the European Court. The authorities did not provide any further information in this respect.	Interim Resolution CM/ResDH(2008)1(March 2008): The Committee stressed that it is incumbent on the State to execute spontaneously all judicial decisions delivered against public authorities, without compelling the claimants to go through enforcement proceedings, and thus irrespective of the availability of funds.
5.	Lack of any effective liability (criminal, administrative, disciplinary or civil) of civil servants for non-enforcement of court decisions and lack of any liability of bankruptcy and liquidation administrators and trustees for such failure to comply with court decisions	Memorandum 997th meeting (June 2007)	The authorities did not provide any further information in this respect.	
6.	Inefficient State Bailiffs' Service	Memorandum 997th meeting (June 2007)	1280 th meeting (March 2017): Introduction of judicial control over the execution of judgments process in the civil and commercial jurisdictions in the new procedural codes adopted on 03/10/2017. Reform of the State Bailiffs Service: the on-going reform of the State Bailiffs Service, the purpose of which was to introduce a mixed system of enforcement of judicial decisions engaging private bailiffs. The new law "On Enforcement Procedure" came into force on 05/10/2016. The authorities hoped that this new	The authorities did not provide any further information as to the application of these new provisions. The Committee noted that private bailiffs are not empowered to deal with enforcement of judgments against the State, State-owned or

	Issue identified	Assessed by the Committee (Reference to the CM's meeting/Notes)	Action taken by the authorities	Reassessment by the Committee (Reference to the CM's meeting/Notes)
			procedure would assist in overcoming the irregularities and loopholes of the existing enforcement system and would contribute to the lowering of the number of non-enforcement complaints, being brought before the Court.	controlled entities or with regard to the State social debts identified in the group of judgments of <i>Ivanov / Zhovner</i> . Thus, these changes will not have a direct impact on the reform of the system of enforcement of judgments against the State: 1280th meeting (March 2017). The authorities did not provide any further information in this respect
7.	Lack of appropriate and effective regulations ensuring effective compensation for delays and the need to introduce an effective domestic remedy which should meet the core requirements of the Convention, following the pilot judgment	Memorandum 997th meeting (June 2007) 1108th meeting (March 2011)	On 5 June 2012 the Ukrainian Parliament, in response to the numerous requests by the Committee, adopted the remedy law "On State guarantees concerning execution of judicial decisions".	1230th meeting (June 2015) the Committee concluded that the remedy introduced in 2013 appeared not to have solved the problem of non-enforcement or delayed enforcement of domestic judicial decisions. The main immediate impediment to its effective implementation was the lack of sufficient budgetary allocations.
8.	Lack of information as to the exact amount of debt that the State owes to the holders of domestic court decisions	1259th meeting (June 2016)	The Ukrainian authorities agreed to follow so-called "three-step strategy".	1288th meeting (June 2017). Despite numerous assurances from the Ukrainian authorities, it did not appear that they put into effect the "three-step strategy", nor had they provided a timetable for its implementation. Clear information as to the scope of the problem was still lacking.

V. **Appendix 2: List of cases in which information is awaited on the individual measures (payment of the just satisfaction and enforcement of the domestic judgment)**

	Application Number	Court Case Title English	Date of Definitive Judgment
1.	35087/02	Sharenok v. Ukraine	06/06/2005
2.	31095/02	Shcherbak v. Ukraine	28/06/2006
3.	39265/02	Fateyev v. Ukraine	06/12/2007
4.	19949/03	Glivuk v. Ukraine	20/12/2007
5.	903/05	Lopatyuk v. Ukraine	17/04/2008
6.	9177/05	Skrypnyak v. Ukraine	10/10/2008
7.	37758/05	Peretyatko v. Ukraine	27/02/2009
8.	30922/05	Stadnyuk v. Ukraine	27/02/2009
9.	36772/04	Krasovskiy v. Ukraine	12/06/2009
10.	34419/06	Khmylyova v. Ukraine	18/09/2009
11.	33959/05	Tereshchenko v. Ukraine	30/10/2009
12.	28070/04	Gvozdetskiy v. Ukraine	01/03/2010
13.	30675/06	Gimadulina and Others* v. Ukraine	10/03/2010
14.	8437/06	Osokin v. Ukraine	10/03/2010
15.	4510/05	Logachova v. Ukraine	10/05/2010
16.	21231/05	Panov v. Ukraine	10/05/2010
17.	703/05	Kharuk and Others* v. Ukraine	26/07/2012
18.	15729/07	Globa v. Ukraine	19/11/2012
19.	12405/06	Varava and Others* v. Ukraine	17/01/2013
20.	27617/06	Feya, Mpp v. Ukraine	21/02/2013
21.	22722/07	Shtabovenko and Others* v. Ukraine	25/04/2013
22.	11770/03	Kononova v. Ukraine	06/06/2013
23.	42953/04	Kiselyov v. Ukraine	13/06/2013

	Application Number	Court Case Title English	Date of Definitive Judgment
24.	65656/11	Tsibulko v. Ukraine	20/06/2013
25.	1270/12	Moskalenko and Others* v. Ukraine	18/07/2013
26.	72631/10	Necheporenko v. Ukraine	24/10/2013
27.	10319/04	Andrianova and Others* v. Ukraine	12/12/2013
28.	40934/06	Makara and Others* v. Ukraine	12/12/2013
29.	12895/08	Khaynatskyy and Others* v. Ukraine	09/01/2014
30.	7070/04	Semyanisty and Others* v. Ukraine	09/01/2014
31.	59834/09	Shchukin and Others* v. Ukraine	13/02/2014
32.	29266/08	Vasilyev and Others* v. Ukraine	13/02/2014
33.	25663/02	Yavorovenko and Others* v. Ukraine	17/07/2014
34.	12424/06	Filatova v. Ukraine	31/07/2014
35.	36762/06	Shtefan and Others* v. Ukraine	31/07/2014
36.	22611/12	Terletskiy v. Ukraine	19/11/2015
37.	79754/12	Gorodnichenko v. Ukraine	03/12/2015
38.	11632/13	Kobylynskyy v. Ukraine	16/06/2016
39.	15712/13	Burma v. Ukraine	18/05/2017

Awaiting information on default interest

	Application Number	Court Case Title English	Date of Definitive Judgment
40.	6155/05	Kyselyova and Others* v. Ukraine	09/01/2014
41.	35995/09	Malakhova and Others* v Ukraine	12/12/2013
42.	13977/05	Vinnik and Others*v. Ukraine	07/11/2013

* These are grouped judgments, with multiple judgments unenforced, relating to up to 250 individual applicants in each group of cases.



Not official translation from Ukrainian into English

THE BRIEF OVERVIEW OF PROPOSALS FOR THE EXECUTION OF JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE BURMYCH AND OTHERS V. UKRAINE GROUP OF CASES, OTHER ECTHR JUDGEMENTS ON THE NON-ENFORCEMENT OF DECISIONS OF THE UKRAINIAN NATIONAL COURTS ON SOCIAL ISSUES.

This overview is prepared by Alla Fedorova, the Council of Europe expert,
in the framework of the Council of Europe Project

**“PROMOTING SOCIAL HUMAN RIGHTS AS A KEY FACTOR
OF SUSTAINABLE DEMOCRACY IN UKRAINE”**

THE BRIEF OVERVIEW OF PROPOSALS FOR THE EXECUTION OF JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE BURMYCH AND OTHERS V. UKRAINE GROUP OF CASES, OTHER ECtHR JUDGEMENTS ON THE NON-ENFORCEMENT OF DECISIONS OF THE UKRAINIAN NATIONAL COURTS ON SOCIAL ISSUES.

Appropriate enforcement of national court decisions is one of the key requirements set out by Article 6 of the European Convention on Human Rights (ECHR) that enshrines the right to a fair trial. Shortly after Ukraine had ratified the ECHR, the European Court of Human Rights (ECtHR) started to deliver judgements against Ukraine on the non-enforcement or protracted non-enforcement of decisions of national courts. Back in 2004, the Ministry of Justice, while analysing applications to the ECtHR¹, pointed out that non-enforcement or protracted non-enforcement of court decisions became the most recurring problem and the most common subject of applications to the ECtHR against Ukraine (up to 90% of all applications). The authors of the analysis emphasised the need to amend laws, in particular, those related to bankruptcy proceedings, the moratorium on enforcements against property and enforcement proceedings, as well as the existence of “an urgent need to enhance legal guarantees to protect human rights in terms of ensuring the right of citizens to receive funds awarded to them by court decisions within a reasonable time”. The situation further aggravated year by year, which was evidenced by the pilot judgements in the Yuriy Nikolayevich Ivanov v. Ukraine case (2009) and Burmych and Others v. Ukraine case (2017). Therefore, non-enforcement of decisions of national courts is a rather chronic problem, so that innovative strategies and approaches are necessary to resolve it.

IN GENERAL, THE EXECUTION BY UKRAINE OF THE JUDGEMENT IN THE BURMYCH AND OTHERS V. UKRAINE CASE AND THE ELIMINATION OF THE EXISTING PROBLEM WOULD REQUIRE ADDRESSING THE FOLLOWING ISSUES COMBINED INTO TWO LARGE-SCALE GROUPS

1. The development and implementation of an effective mechanism for the enforcement of the national courts' decisions which provide for recoveries from the state in favour of claimants (with regard to social and labour disputes related to wage arrears, payments of social security benefits, pension payments, compensations, allowances, supplements, etc., payments awarded by court decisions where respondents are state enterprises, enterprises with 25% of shares belonging to the state and other companies subject to moratoria in force). Addressing this issue requires the execution of the ECtHR judgements where relevant ECHR violations have been established or those stricken out and transmitted directly to the Committee of Ministers of the Council of Europe as well as the execution of other national court decisions, where claimants did not apply to the ECtHR.

2. The development and adoption of legislative amendments aimed at eliminating deficiencies forcing Ukrainian citizens to apply to courts to be able to receive social benefits provided by the national legislation in force, which would lead to reducing and eventually eliminating the flow of national court decisions on recoveries from the state budget in favour of claimants. Addressing this issue would require a far-reaching and large-scale review of the system of social benefits, including pensions, the introduction of temporary limits due to acute financial crisis and the review of methodology for the subsistence level calculation.

Another issue is the review/cancellation of the moratorium on enforcement against property (of state enterprises and enterprises where the state possesses at least 25 % of the share capital), which might relate to the protection of labour rights of employees and other issues.

¹ The analysis of applications to the European Court of Human Rights. The Ministry of Justice of Ukraine. Valeriia Lutkovska, Deputy Minister of Justice of Ukraine, Commissioner for the Observance of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Irena Koval, chief specialist, Unit for the expert evaluation of draft laws and ECHR implementation, National Bureau of the Observance of the Convention for the Protection of Human Rights and Fundamental Freedoms. URL: https://minjust.gov.ua/m/str_4485

I. INTRODUCTION

A significant number of documents have been elaborated to address the issue of non-enforcement of national court decisions, among them, the National Action Plan on ensuring the appropriate enforcement of court decisions, the Concept of addressing problematic issues related to the emergence of the arrears in payments by the state awarded by court decisions, the Laws of Ukraine "On state guarantees for the enforcement of court decisions", "On authorities and individuals enforcing court decisions and decisions of other authorities", amendments to the Law of Ukraine "On enforcement proceedings", Resolutions of the Cabinet of Ministers of Ukraine "On approval of the procedures for the settlement of arrears in payments awarded by court decisions and guaranteed by the state" and "The issues related to the settlement of arrears in pensions awarded by courts", and the National Strategy of the implementation of general measures to execute the pilot judgement in the Yuriy Nikolayevich Ivanov v. Ukraine case and the Grand Chamber judgement in the Burmych and Others v. Ukraine case, etc. However, it has not yet led to any positive result, in particular, to the reduction of the amount of outstanding debt and the number of new judgements. Since the ECtHR judgement in the Burmych and Others case, new judgements appeared in the Kruchko and Others v. Ukraine case of 4 October 2018 and Dmytrenko and Bezdorozhnyi v. Ukraine case of 2 July 2020, which the ECtHR declared, in terms of claims related to non-enforcement of national court judgements, a follow-up of its judgement in the Burmych case, stroke out and transmitted them to the Committee of Ministers of the Council of Europe in order for them to be dealt within the framework of the general measures of execution of the Ivanov pilot judgment

Billions of hryvnias are needed to enforce all court decisions in Ukraine. According to the expert data, almost 2 billion UAH were needed in 2019 to execute all decisions on social benefits² and, according to the data provided by the Government Agent before the ECHR, outstanding payments, of which the state was liable, awarded by court decisions amounted in total to 31 billion UAH in 2018.³

In 2020, experts mentioned various figures of the total arrears in state payments awarded by all court decisions, including even up to 500 billion UAH. Such a situation may be remedied only by the establishment of a relevant unified register. As the level of arrears is not identified, it is difficult to anticipate the overall funding necessary to execute all decisions where the state is the respondent.

The laws of Ukraine on annual state budgets allocated different funds to execute court decisions where the state was the respondent: 600 million UAH was allocated to take actions to execute court decisions guaranteed by the state in 2019, and 1,797,000 UAH in 2020. However, on 13 April 2020 the Law of Ukraine "On the State budget of Ukraine for 2020" was amended to suspend incontestable recovery of funds from the state and local budgets by court decisions until 1 January 2021. Anyway, provided there is a political will to promptly approve the amendments proposed, the execution of court decisions in Ukraine will be a rather protracted process, conditional upon the state of development of Ukraine in terms of economy and finance.

The main recommendations provided by the experts were and still are related to the execution of the decisions already adopted, identification of the level of arrears and the procedures for their payment. However, the growth in the number of court decisions is unstoppable. According to the news about the consideration by the Supreme Court of cases between 13 and 17 July of 2020, the Court will continue to consider three model cases regarding calculation and payment of an outstanding annual one-time cash assistance, reduction in the volume of a pension, refusal to re-calculate a pension.⁴

In this situation the experts and professionals increasingly stress the necessity to address the root causes of applications to courts in social affairs and essentially the financial failure of the state to comply with its obligations, resulting in new positive court decisions and their non-execution. Also, the ECtHR pointed out in its judgement in the Burmych v. Ukraine case that preventive measures are more effective than compensations for the non-enforcement of court decisions.

² The report on the results of the analysis of root causes for the non-enforcement of judgements of the national courts in Ukraine. 2019. P. 4

<https://rm.coe.int/expert-report-following-a-series-of-expert-discussions-ukr/16808f2559>

³ The response to the request by S.I. Melnyk, member of the Verkhovna Rada, of 7 February 2018. The Ministry of Justice of Ukraine, the Government Agent before the ECHR, 1 March 2018

⁴ The Supreme Court. The Facebook page of the Supreme Court, information of 13 July 2020, 14:26
<https://www.facebook.com/supremecourt.ua/posts/734732350634986>

II. MAIN PROBLEMS AND THEIR RESOLUTION

According to the ECtHR well-established case-law, the state has full discretion in establishing the system of social care and decides of its own accord what benefits should be paid from the social care system, what are the sources of such payments and whether these are the state budget or funds... (Suk v. Ukraine, Sukhanov and Ilchenko v. Ukraine, Oleg Kolesnik v. Ukraine and Fakas v. Ukraine). The right to pensions and other benefits from the social security system cannot be interpreted, according to Article 1 of Protocol No. 1 to ECHR, as entitling a person to a pension of a particular amount (Kjartan Ásmundsson v. Iceland). However, the ECtHR has also considered within different ECHR articles the issues of ensuring a decent standard of living⁵, although for the time being it declared inadmissible the majority of applications.

The European Committee of Social Rights (ECSR) considers these aspects more in detail while interpreting the relevant provisions of the European Social Charter, in particular, its Article 12 (1) which places an obligation on the member states to establish or maintain a system of social security. The ECSR interprets the essence of the right to social security not only and not so much in terms of the existence and the number of types of payments or benefits established by national law, but through the lens of their sufficiency to satisfy basic needs and provide a decent and adequate standard of living. The European Code of Social Security that member states have to ratify in order to accede to Article 12(2) addresses the types and volumes of social payments and benefits, as does, in general, the ILO Convention No. 102. As of July 2020, Ukraine has not acceded to paragraphs 1 and 2 of Article 12 of the Charter, although it ratified the ILO Convention No. 102.

At the same time, the ECtHR stressed more than once in its judgements that the lack of money in a budget was not a sufficient argument to justify non-compliance of a state with its obligations.

The ECtHR recalled in paragraph 23 of the Suk v. Ukraine judgement that:

«... it is within the State's discretion to determine what benefits are to be paid to its employees out of the State budget. The State can introduce, suspend or terminate the payment of such benefits by making the appropriate legislative changes. However, once a legal provision is in force which provides for the payment of certain benefits and any conditions stipulated have been met, the authorities cannot deliberately refuse their payment while the legal provision remains in force...».

The ECtHR reiterated in its judgement in the Pichkur v. Ukraine case that if a Contracting State has legislation in force providing for the payment of a welfare benefit as of right, whether conditional or not on the prior payment of contributions, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for those satisfying its requirements.

The ECtHR has a clear-cut position that the lack of adequate budget resources in no way affects the obligations that have already been assumed. The ECtHR admits that a situation may arise when arrears accumulate in a certain year; however, they should be dealt with in the state budget for the next year.

Therefore, the only available avenues of preventing new claims to national courts as to non-provision of social benefits set out in the legislation in force due to lack of adequate funding are the detailed study, systematisation and review of all social payments, supplements, benefits, compensations, etc., paid from the state budget; the reduction in number and types of financial and other benefits provided from the state budget and allocation of funds to address the most vulnerable categories of persons.

The analysis and the systematisation prove the relevance of this proposal, despite its unpopularity. A prime example of this could be benefits to victims of the Chornobyl disaster, which were significantly reduced in recent ten years, while the number of sub-statutory regulatory acts introducing and regulating relevant benefits is too big and continues to multiply.

⁵ See: Pronina v. Ukraine judgement of 18 July 2006; Bogatova v. Ukraine, of 7 October 2010; Petrychenko v. Ukraine, of 12 July 2016; Pancenko v. Latvia, of 28 October 1999; Larioshina v. Russia, of 23 April 2002; Nencheva and Others v. Bulgaria, of 18 June 2013

For example, the Resolution of the Cabinet of Ministers of Ukraine No. 562 dated 12 July 2005 as amended in 2020 “On annual rehabilitation benefits to citizens suffered following the Chornobyl disaster” is still in force and provides for the sums of payments between 75 and 120 UAH. The amount of payments has not been changed since 2005. A question arises as to the expediency of the allocation and servicing of annual rehabilitation benefits amounting to two or four euros a year. The question of whether such benefits could really satisfy or even help to satisfy a person’s need in rehabilitation needs not to be answered.

The legislation also provides for medical care benefits (including prosthetics) for the citizens suffered from the Chornobyl disaster. However, according to the funds budgeted for 2020, about 136 UAH is provided per person.

At mid-year of 2020, there were 1,790,836 persons in Ukraine, who suffered from the disaster (all categories included).⁶ In general, in addition to pensions, supplements to pensions and supplemental pensions covering health damage to those suffering from the Chornobyl disaster, more than ten other payments and supplements are provided, and each of them is as a rule regulated by a separate sub-statutory regulatory act.

Among them are:

- one-time compensation to Chornobyl liquidators who became persons with disabilities due to the Chornobyl disaster;
- one-time compensation to children with disabilities due to the Chornobyl disaster
- one-time compensation to families who lost an income earner from among Chornobyl liquidators whose death is related to the Chornobyl disaster;
- annual rehabilitation benefits;
- reimbursement of the cost of independent therapeutic resort treatment;
- reimbursement of travel once a year to anywhere in Ukraine and back by car, or air, or rail, or water transport to persons classified in categories 1 and 2;
- compensation of 50 (25) percent of the cost of food in accordance with medical (physiological) norms established by the Ministry of Health of Ukraine, to citizens of categories 1 and 2;
- monetary compensation for children who are not fed in schools located in areas of radioactive contamination, and for children who are persons with disabilities due to the Chornobyl disaster and are not fed in schools, as well as for all days when they did not attend schools, etc.

2.3 billion UAH (1.3 billion UAH in 2020, about 700 UAH per person) is allocated in general in the state budget for the social security of citizens suffered following the Chornobyl disaster. Over 6 billion UAH was needed in 2011 to secure payment of all benefits provided by the legislation for the victims of the Chornobyl disaster. Failure to finance all benefits led to outstanding debts and amendments to the legislation that allowed the Government to apply relevant laws and set payment rates in accordance with the available financial resources in the state budget of Ukraine and the budget of the Pension Fund of Ukraine for a relevant year. The Constitutional Court declared such amendments and such governing of payment rates consistent with the constitution. The ECtHR held in the *Kjartan Ásmundsson v. Iceland* case that the right to benefits from the social security system and pensions could not be interpreted as entitling a person to a pension of a particular amount. On the other hand, such approach, being possibly subject to changes each year or depriving Chornobyl victims, persons born in the time of war and other categories of vulnerable people of any relevant benefits, leads to their vulnerability while there is a whole array of different regulations securing their social benefits. Moreover, their levels will depend on resources from both the state budget and the Pension fund of Ukraine.

⁶ <https://www.msp.gov.ua/news/17980.html>

The state budget financing of the latter increases year by year: it amounted to:

- 167.5 billion UAH in 2019,
- and over 170 billion UAH in 2020, equalling almost one-fifth of all state budget revenues.

It is deemed necessary in this situation to repeal the majority of regulations providing for multiple benefits for Chornobyl victims and other categories of individuals and to consider in parallel the increase in the main benefit rate, which should be of a targeted nature.

Moreover, the formation of the structure of budget expenditures should be changed to secure transparency and clear awareness of the volume of social transfers from the state budget.

However, the emphasis should be made on the explicit alignment of budget allocations for each benefit provided by law with the number of beneficiaries and the established benefit payment rates. Whenever adequate resources are not allocated in the draft budget, an obligatory review and amendment of the relevant legislation in force should be provided to reduce the benefit rate in question, cancel or suspend it, and appropriate clarification should be made for the public. The ECtHR case-law demonstrates that such measures could be introduced in a non-discriminatory manner⁷; however, the ECSR imposes stricter requirements as to possible cancellation or reduction of benefits.

Social expenditures provided for in the state budget should be protected from reducing in any circumstances, as it could be the question of life and death for a given person. Such a provision should be clearly prescribed by law, as different politicians have different levels of legal culture and different understanding of a welfare state. Recently, on 14 July 2020, the Verkhovna Rada adopted the amendments to the Law of Ukraine "On the state budget of Ukraine for 2020" with regard to additional measures to provide for the financial rehabilitation of the state enterprise "The Industrial Association Pivdennyi Machine Factory named after O.M. Makarov". The Budget Committee of the Verkhovna Rada considered the draft and pointed out that the increase in the share capital would lead to insufficient financing of social expenditures. This example testifies to the insecurity of the most vulnerable categories of people, even when the allocation of certain funds for various social benefits is protected. Therefore, taking into consideration the level of poverty in the country, the budget lines for social expenditures should be fully protected, and their reduction should not be permitted.

Social benefits for Chornobyl victims as well as for all other categories of beneficiaries should be of exclusively targeted nature to provide for the most efficient disbursement of funds available for each current period. A good example of a general approach could be the introduction, since 1 September 2018, of the so-called "baby packages", which are an irrevocable social benefit for each newborn baby and which value amounted to 5,000 UAH in 2020⁸. All citizens of Ukraine, foreign nationals and stateless persons residing in Ukraine on legal grounds, persons recognised as refugees or those in need of additional protection, who bore a live-born child, are entitled to a "baby package" (paragraph 4).⁹

286,777 babies were born in 2019. Accordingly, the government had to spend or spent ¹⁰ 1.4 billion UAH. Already in 2020, it is planned to purchase such packages for 331,000 persons. This benefit is provided for each newborn child irrespective of family/mother's income, including children born by foreigners residing in Ukraine on legal grounds, which hardly corresponds to current financial capabilities of Ukraine. Such benefits undoubtedly should encourage the support for young parents; however, they should be targeted for certain categories of children/parents in certain situations.

Another example of a wide number of social aid beneficiaries is free of charge urban public transport use, including for all students of general education schools. Local budgets allocate corresponding funding which is calculated depending on the number of students and not the number of those really in need of such aid. It is provided that such compensations and benefits should be targeted, but the Cabinet of Ministers prolongs the transition to targeted transport use benefits.

⁷ See, for instance, the ECtHR judgements in the *Khoniakina v. Georgia*, *Fábián v. Hungary*, *Koufaki and ADEDY v. Greece*, *Da Conceição Mateus v. Portugal*, *Santos Januário v. Portugal*, *Cichopek and others v. Poland*, *Markovics and Others v. Hungary*, *Aleksi Bakradze v. Georgia*, *Mockienė v. Lithuania*, *Aielli and Others* and *Arboit and Others v. Italy*

⁸ The Resolution of the Cabinet of Ministers No. 427 dated 30 May 2018 "Certain issues related to implementing the pilot social security project to protect families with children and support the promotion of responsible parenthood"

⁹ The procedures for the provision of newborn babies with the one-time payments-in-kind in the form of "baby packages" funded by the state budget. Approved by the Resolution of the Cabinet of Ministers of Ukraine No. 172 dated 3 March 2020

¹⁰ The Resolution of the Cabinet of Ministers of Ukraine No. 172 dated 3 March 2020 "Certain issues related to the provision of newborn children with the one-time payments-in-kind in the form of "baby packages" provides that packages will be distributed only after payments-in-kind for 2019 will have been provided to certain categories (outlined in the Resolution). Such provision in the Resolution confirms that as of March 2020 (Resolution adoption date) this social obligation has not been timely met with regard to 2019. зобов'язання не виконано вчасно.

Moreover, funds to purchase “baby packages” or compensate for them are allocated in 2020 within the budget programme “Payment of certain types of benefits, compensations, cash benefits and services compensations for certain categories of people” amounting to 61.5 billion UAH. It is not clear what do these certain types of benefits or cash benefits mean and what categories of people are planned to receive them. At the same time, there are no allocations at all with regard to some state budget expenditure lines, in particular, for cash compensations for victims whose houses have been destroyed due to wartime emergencies caused by the military aggression of the Russian Federation.

The basic issue in terms of the start of reforming and reviewing the social security system is the number of population and the clear awareness of the number of people experiencing difficult living conditions, unable for objective reasons to satisfy their basic needs and requiring aid from the government. To sum up, the number of people of certain categories should always be a basic prerequisite for the precise calculation of social expenditures, the development of effective social programmes and the reform of social protection, pension, health care and other systems.

The last population census in Ukraine was conducted in 2001; a total of almost 48.5 million people lived in Ukraine according to its results.¹¹ According to official data provided by the State Statistics Service of Ukraine, the population of Ukraine was 42,153,201 as of the beginning of 2019¹² and the average permanent population of Ukraine was 41,636,584 as of May 2020.¹³

Accordingly, the budget and its expenditures are planned by certain indicators calculated on the basis of the population. **At the same time, in January 2020 the Government announced that the real population of Ukraine was 37.3 million.¹⁴** And the population census planned for the end of 2020 has been postponed.

Thereby, precise information about the population in general and its number in terms of different groups and certain specific needs is necessary to reform the social protection system in Ukraine. Provision of reliable information will help to identify the real needs of those living under difficult conditions and in need of social aid.

The establishment of the real subsistence level is of no less value in reforming the social protection system to stop the flow of applications on social matters to national courts, where the state which fails to meet its social obligations is the respondent. Discussions about the need to undertake a major review of methodology for calculating the subsistence level, which is, in the expert opinion, significantly undervalued, protract for years.

On 19 May 2020, the Verkhovna Rada adopted its Resolution on Recommendations of the parliamentary hearing “Problems of calculation of the subsistence level in Ukraine”. The Recommendations state that “by ratifying the European Social Charter (Revised) (in part), the International Labour Organisation Social Policy (Basic Aims and Standards) Convention (No. 117) and Social Security (Minimum Standards) Convention (No. 102) and by signing the Association Agreement with the European Union, Ukraine undertook obligations to guarantee the standard of living for its people according to the international standards and guaranteed the social security level for each of its citizens of no less than the subsistence level provided for by the law, as well as protection from poverty and social exclusion”. Thus, the provision of funds equalling the subsistence level should protect individuals from poverty and social exclusion.

The Constitutional Court also pointed out the need to secure in practice decent living standards through the living wage amounting to the subsistence level in its decision of 22 May 2018 No. 5-r/2018.¹⁵ The Constitutional Court refers to the European Social Charter, which sets out that, with a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake to endeavour to raise the system of social security progressively to a higher level (Author’s note: Article 12(3), which Ukraine ratified in 2017); with a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake: to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion

¹¹ All-Ukrainian population census The State Statistics Committee of Ukraine. <http://2001.ukrcensus.gov.ua/>

¹² The Population of Ukraine in 2018. Demographic Yearbook. The State Statistics Service of Ukraine. http://database.ukrcensus.gov.ua/PXWEB2007/ukr/publ_new1/2019/zb_ukr_2018.pdf

¹³ The State Statistics Service of Ukraine http://database.ukrcensus.gov.ua/PXWEB2007/ukr/news/op_popul.asp

¹⁴ The Government published data on the real population of Ukraine https://zaxid.net/chiselnist_naselennya_ukrayini_na_gruden_2019_skilki_lyudey_v_ukrayini_n1496489

¹⁵ The decision of the Constitutional Court of Ukraine of 22 May 2018, No. 5-r/2018 in the case under the constitutional petition by 49 people’s deputies of Ukraine on the conformity with the Constitution of Ukraine (constitutionality) of Section I(12) of the Law of Ukraine “On amending and declaring invalid some legislative acts of Ukraine” dated December 28, 2014 No. 76-VIII

or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; to review these measures with a view to their adaptation if necessary (Author's note: Article 30, ratified by Ukraine). At the same time, the Constitutional Court reiterates in its decision mentioned above that, proceeding from available financial resources of the state and in order to maintain the fair balance between the interests of individuals and those of the society, the Verkhovna Rada may introduce, amend, cancel or renew such benefits as they are of no fundamental nature and therefore cannot be considered as constitutional rights, freedoms or their guarantees. This position is, in general, in line with the ECtHR case-law, as it was already mentioned above.

In addition to this, it should be noted that the function of the subsistence level as the fundamental instrument of social policy is reduced in Ukraine. Indeed, the Law of Ukraine "On the subsistence level" provides for the basic elements of the subsistence level, including housing and utility charges, in particular, the cost of water supply (drainage), heat supply, gas consumption and electricity. The housing costs were 0.22 UAH per square meter before 2017, and 2.25 UAH in 2020, that is, at least two times less than the real costs. The numbers and volumes established for some categories of consumer goods do not correspond to WHO minimal standards. Many elements are significantly undervalued. The fact that the subsistence level does not cover even housing costs is vividly demonstrated by the allocation of billions of hryvnias of subsidies and subventions to local budgets. In 2020, it is planned to allocate 47.5 billion UAH for benefits and housing subsidies designated to compensate for housing costs and the purchase of different heating fuels. Therefore, the calculation of a real subsistence level will provide for allocating the government funding to support the most vulnerable categories of people and those living under difficult conditions, as well as for reducing other expenditures.

The Recommendations of the parliamentary hearing on the problems of calculation of the subsistence level in Ukraine proposed to amend the Law of Ukraine "On the subsistence level" **to provide for authorising the Government to verify all social benefits** calculated on the basis of the subsistence level, approved by the Law of Ukraine "On the state budget for 2020" to identify the amounts of budgetary expenditures to fund them, separately under each type of social benefits and each category of their beneficiaries, and to inform the Verkhovna Rada of its results not later than 3 August 2020. Such an assignment demonstrates the absence of general information about all social benefits, their volumes and beneficiaries.

The payment of wage arrears and other arrears owed to employees are closely related to the social aspect of general measures in the *Burmych and Others v. Ukraine* case (or are included to them under the broad understanding of social security). The amendments to the state budget for 2020 adopted on 14 July 2020 and related to the additional measures to provide for financial rehabilitation of the state enterprise "The Industrial Association Pivdennyi Machine Factory named after O.M. Makarov" allocated funds to this enterprise, in particular, to pay arrears in wages and co-payments (210 billion of UAH)¹⁶ accumulated for over six months. The total governmental arrears in wages amounted to 3,142.8 billion UAH, as of June 2020. Such level of debt remains practically unchanged during the year, for it was 3,034.4 billion UAH in January and 2,964.2¹⁷ billion UAH in April, of which almost 40 % was accumulated at the state enterprises. At the same time, these statistics do not reflect whether such percentage includes arrears in wages at the partly state-owned enterprises (25 % of shares and more), subject to the moratorium, in force already for a long period of time, on enforcement against their properties. Such a debt demonstrates the inability of the state to guarantee the exercise by the employers of their two main obligations with regard to wages, that is, their payment in time and in full, as well as the ineffectiveness of Article 175 of the Criminal Code of Ukraine and the presence of the significant number of labour disputes relating to non-payment of wages by employers.

¹⁶ The State Statistics Service of Ukraine, 1998-2020.







<https://www.unn.com.ua/uk/news/1880456-vr-ukhvalila-zakonoproekt-pro-vidlennya-z-byudzhetu-koshtiv-dlya-pivdenmashu>







¹⁷ http://www.ukrstat.gov.ua/operativ/operativ2020/gdn/zvz/zvz_20_u.htm

In March 2020, the Committee on Social Policy and Protection of Veterans' Rights of the Verkhovna Rada of Ukraine held its meeting dedicated to the state of wage arrears payment. In particular, its participants pointed out the need for Ukraine to accede to Article 25 of the European Social Charter (Revised) which provides for the payment of wage arrears to workers in the event of the insolvency of their employer by a guarantee institution or by any other effective form of protection and that the Association Agreement between Ukraine and the European Union provides for alignment of the Ukrainian legislation with the Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer.

However, the appropriateness of introducing additional burdens on employers and/or the state budget in times of crisis is a controversial issue. Apart from the establishment of guarantee institutions, the cancellation of the moratorium on enforcements against properties of enterprises, protection of certain spheres of the economy and increasing the liability of employers should impact the payment of wage arrears owed to employees. In general, the problem of arrears in wages and other payments to employees is the source of another flow of claims to national courts and, accordingly, applications to the ECtHR.

III. RECOMMENDATIONS

- 1  Immediately after the quarantine limitations are cancelled, additional indicators should be designed to evaluate the needs of the people, and the population census should be conducted in Ukraine.
- 2  A new methodology should be developed with the broad participation of experts and civil society to calculate the subsistence levels, which would enable people to satisfy their basic needs and provide for their decent living standards, with due consideration to the Recommendations of the parliamentary hearing "Problems of calculation of the subsistence level in Ukraine" of 19 May 2020. The subsistence level should be re-calculated on the basis of a new methodology and the financial ability of the state to guarantee it should be analysed.
- 3  All benefits and types of assistance funded from the state budget, directly or through subventions to regions, should be analysed and systematised, and the rate of each benefit and assistance should be identified. Sub-statutory norms and regulations which provide for multiple benefits to certain categories of people should be reviewed and cancelled in the framework of this analysis, and the opportunity for an increase in the rates of the main benefits should be considered.
- 4  The social benefits system should be revised to provide for its exclusively targeted nature, at least, in times of financial crisis. With regard to benefits which the Government plans to convert into targeted ones, obligations should be assumed as to terms of duration and termination of such transition periods.
- 5  Amendments should be considered to the structure of budget expenditures to secure transparency of all social transfers and their beneficiaries. Explicit alignment of budget allocations for each benefit provided by law with the number of beneficiaries and the established benefit payment rates should be provided within each annual state budget. Whenever adequate resources are not allocated in the draft budget, obligatory review and amendment of the relevant legislation in force should be provided to reduce benefit rates, cancel or suspend benefits in a non-discriminatory manner, and an appropriate clarification should be made for the public.
- 6  A prohibition should be considered of establishing supplementary payments, compensations, allowances or any other social benefits to be paid from the state budget, which are not provided by the legislation in force, as well as of increasing extrabudgetary funds reprogrammed into a state budget for a current year by decrees of the President and resolutions of the Cabinet of Ministers.

- 7  The right of the Cabinet of Ministers, enshrined in many social laws due to amendments made since 2011, to establish at its discretion the rates for supplementary payments and benefits for certain categories of people exclusively within resources provided by the state budget and the Pension Fund should be revised to secure that such discretion is applied only to such categories of vulnerable individuals who are already provided with the minimum living wage.
- 8  The appropriateness of reducing or cancelling current social benefits and supplementary payments to certain categories of civil servants, as well as reducing pension supplements, including those already accrued, should be considered with due regard to the ECtHR case-law with regard to pension and social legislation reform and the austerity measures already introduced by various countries due to financial crisis.
- 9  The ratification of Article 12(1) of the European Social Charter (Revised) which provides for establishing or maintaining a system of social security, as well as of its Article 12(2), should be promoted.
- 10  A co-financing and a search for donor funding to support the most vulnerable categories of people should be provided.
- 11  The need for limiting the maximum level of salaries of civil servants, judges, top managers of state enterprises and all categories of employees receiving salaries from the state budget should be considered, with the adjustment of the maximum level of salaries to a certain number of minimum living wages.
- 12  The necessity of the design and introduction of a training course on social human rights, intended for civil servants, local administrations, judges, social workers, higher education students, should be analysed.