



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

Report

**Of the expert discussions on the issue
of non-execution of national judgments conducted over the period of June-
September 2020**

*(in the context of the execution of the European Court of Human Rights judgements in the
cases of “Yuriy Nikolayevich Ivanov v. Ukraine” and “Burmych and others v. Ukraine”)*

Kyiv, October 2020

Introduction

Following consultations with the Ukrainian authorities, the Council of Europe (CoE) project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights”, which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Cooperation Department of the Council of Europe (Project), held a series of events aimed at discussing the issues around the non-execution of judgments and suggesting the recommendations on necessary general measures to be implemented within the framework of the relevant legislation and case law in order to eliminate the problem of non-execution of national judgments in Ukraine. The Project asked Mr Andrii Avtorgov, who is a private enforcement agent, to participate in these project events and prepare the respective report.

The report outlines the issues related to the three thematic areas of the non-execution of national judgments and proposes possible solutions to the identified problems within the framework of the related legislation and practices in the context of the execution of the judgments of the European Court of Human Rights (ECtHR) in the cases of “*Yuriy Nikolayevich Ivanov v. Ukraine*”¹ and “*Burmych and Others v. Ukraine*”.²

During the examination of the mentioned cases, the Committee of Ministers of the CoE at its 1369th meeting of 3-5 March 2020³ recalled that this group of cases concerned a complex and multifaceted problem of non-execution or delayed execution of national judgments rendered against Ukraine and the lack of effective domestic remedies in that respect. This problem reflects one of the major deficiencies affecting the functioning of the government and justice systems, and, thus, the rule of law in Ukraine.

Expert discussions were conducted online on 2 July, 21 July and 11 September 2020. These events brought together representatives of the Supreme Court, the High Council of Justice, the State Judicial Administration of Ukraine, the National School of Judges of Ukraine, appellate and district courts, representatives of the Ministry of Justice of Ukraine, the Ministry of Finance of Ukraine, the State Treasury Service of Ukraine, the Ministry of Social Policy of Ukraine, the Pension Fund of Ukraine, representatives of the Verkhovna Rada of Ukraine, representatives of civil society and international organisations, as well as representatives and experts from the Council of Europe.

Topics of discussion:

- Implementation of effective bankruptcy proceedings for the state-owned and state-controlled enterprises and revision of the system of moratoriums that shield these enterprises from liability.
- Improvement of socially-oriented legislation.
- Introduction of effective mechanisms of judicial control over the execution of national judgments.

Achieved outputs:

- Participants discussed problematic issues related to the bankruptcy proceedings of state-owned and state-controlled enterprises as well as the imposed moratoriums, and proposed recommendations for eliminating these problems by revising relevant legislation and judicial practice.

¹ Pilot judgment *Yuriy Nikolayevich Ivanov v. Ukraine* (no. 40450/04), judgment of 15/10/2009, final on 15/01/2010

² *Burmych and Others v. Ukraine*, (Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14), judgment of 12/10/2017

³ Please see the 1369th meeting of the Committee of Ministers of the Council of Europe as of 3-5 March 2020, H46-36 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Applications No. 40450/04, 56848/00, 46852/13), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809cc94f

- Participants discussed the relevant practices of the CoE member states on mechanisms for improving socially-oriented legislation, considered the proposed changes to the Ukrainian legislation and formulated recommendations on measures to be adopted to eliminate the identified problems and improve socially-oriented legislation.
- Participants discussed issues concerning the application of judicial control mechanisms over the execution of judgments in the context of the Ukrainian legislation and respective court practice, as well as of the practices of the CoE member states. Based on this discussion, the participants developed recommendations for solving the identified problems within the framework of Ukrainian legislation and court practice.

Main conclusions and recommendations

1. Implementation of effective bankruptcy proceedings for state-owned and state-controlled enterprises and revision of the system of moratoriums that shield these enterprises from liability

The imposed restrictions and moratoriums that shield enterprises controlled by the state from liability make the execution of national judgments rendered against them impossible under both enforcement and bankruptcy proceedings.

The Constitution of Ukraine guarantees the judicial protection of rights and provides that all judgments are mandatory and must be duly executed. The constitutional rights cannot be limited. Moreover, Article 6 of the European Convention on Human Rights (ECHR) ensures the right of execution of judgments within a reasonable time as an integral element of the right to a fair trial.

Therefore, the mentioned restrictions and moratoriums violate the principle of equality of all enterprises and holders of ownership rights as different rules are in place for performing imposed obligations by judgments depending on the ownership of a debtor or its field of activity.

The low effectiveness of moratoriums should be acknowledged. They have been applied for a long time with little or no positive impact on the relevant enterprises.

Therefore, it is proposed that the following necessary measures are implemented:

- Cancel in full or in part the established bans on bankruptcy proceedings for the state-owned or state-controlled enterprises (in other words, where the share of state property in authorised capital exceeds 50 per cent).
- Cancel the existing bans and moratoriums on enforcement and bankruptcy proceedings that relate to debt recoveries from certain types of enterprises.
- Refrain from adopting any new moratoriums or bans.
- Introduce a list of conditions, under which an owner of a state-owned or controlled enterprise has an obligation to liquidate it.
- Extend the powers of private enforcement agents by enabling them to enforce judgments imposing recoveries on state-owned or state-controlled enterprises.
- Amend Article 214(3) of the Commercial Code of Ukraine and Article 96 of the Bankruptcy Code of Ukraine in terms of the ban on courts ordering of a judicial recovery procedure or closing down a state-owned enterprise or an enterprise where the share of state property in authorised capital exceeds 50 per cent.
- Note that the statutory ban on compulsory enforcement measures concerning state-owned or state-controlled enterprises, which are not subject to privatisation, is incompatible with the CoE standards and the ECtHR practice. This statutory ban (moratorium) on compulsory enforcement concerning state-owned or state-controlled enterprises, effective until 20 October 2022, should be cancelled based on the requirements of Article 6 of the ECHR.
- Introduce in the national legislation a fair “limitation of liability” of the state for the actions of legal persons where the state has a share of the property.
- Introduce the Unified Judiciary Information and Telecommunication System (UJITS) and produce statistical reports on the level of judicial debt of state-owned or state-controlled enterprises.

- Develop more efficient mechanisms for the pre-judicial recovery of state-owned or state-controlled enterprises.
- Protect creditors of state-owned or state-controlled enterprises more efficiently with regard to their salaries.
- Develop an effective mechanism of control over the fulfilment by relevant bodies, who are competent to manage state property, of their obligations and take timely actions to prevent the bankruptcy of such enterprises.
- Introduce control over the meeting of executives responsible for the management of an enterprise with regard to their obligations to inform on indications of bankruptcy and file with a commercial court a petition to initiate bankruptcy proceedings if there is a risk of insolvency.
- Establish terms for the approval of recovery plans by authorities competent to manage state property and provide for the consequences of failing to commit such actions.

2. Improvement of the socially-oriented legislation

The experts emphasised that in the current situation, it is necessary to eliminate the root causes of filing claims to courts on social matters. The main reason for bringing such claims is the financial inability of the state to comply with its obligations. If not resolved, the number of new judgments in favour of claimants will increase and, thus, their non-execution will continue.

The ECtHR ruled out in the case of “*Suk v. Ukraine*”⁴ that it was within the state’s discretion to determine what benefits were 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.

Therefore, the effective way to prevent new claims to national courts related to the failure to pay the social benefits provided for in the current legislation due to the lack of adequate funding is to analyse in detail, systematise, and review all social payments, supplements, benefits, compensations, etc. to be paid from the state budget and to reduce the number and the types of monetary and other benefits from the state budget by channelling funds to assist the most vulnerable categories.

Only those categories that are really in need of social benefits, should receive them, and the state’s ability to make payments should be taken into account.

Therefore, it is proposed that the following actions are implemented:

- An analysis should be conducted on how the social benefits system functions and the appropriateness of some of the social benefits should be reviewed.
- Analyse and systematise all payments and benefits made from the state budget (both directly and through subventions to regions) and identify the amount of each payment or benefit.
- In the framework of this analysis, to review and cancel by-laws that provide multiple payments to certain categories and consider an increase of the main benefit payable to them.
- Review the system of social payments provision and propose that it should be of a merely targeted nature.
- Introduce time frames for the process finalisation of the process with respect to payments, which the government plans to make targeted in the future.
- Consider changing the structure of the supplement on the expenditure budget to ensure its transparency in terms of all social benefits and beneficiaries. To ensure that the funds for each social benefit provided for by the current legislation are strictly balanced against

⁴ The ECtHR judgment in the case of *Suk v. Ukraine* (application 10972/05), Strasbourg, 10 March 2011.

the number of beneficiaries and the established amount of payment in each annual budget. If adequate resources are not allocated, the draft budget should envisage an obligatory review and amendments to the current legislation to decrease the amounts of payments or cancel/suspend them on a non-discriminatory basis (with relevant measures to increase public awareness).

- Consider the issues related to the ban, established by the decrees of the President of Ukraine and the resolutions of the Cabinet of Ministers of Ukraine, on the introduction of supplementary payments, compensations, monetary allowances or any social payments made from the state budget which are not provided for by the current legislation and on the increase of the amounts of existing payments exceeding the volume of funds provided for in the state budget for the current year.
- Review the powers of the Cabinet of Ministers of Ukraine established under many social laws (due to the amendments introduced after 2011) to identify at its own discretion the amounts of supplements and payments to certain categories exclusively within the resources provided by the state budget. However, such discretion should be applied only for those vulnerable categories, which are already provided with the subsistence minimum.
- Review the appropriateness of reducing/cancelling current social payments and supplemental payments to certain categories of employees (civil servants) and reducing supplements to pensions, including those already assessed, with due regard to the ECtHR case law related to reforms of pension and social laws in other states.
- Conduct the population census.
- Develop, by involving a broad pool of experts and public, the methodology of subsistence level calculation which would make it possible to cover the main basic needs of a person and provide a decent standard of living with due regard to the recommendation made at the Parliamentary Hearing “Problems related to subsistence level calculation in Ukraine” of 19 May 2020.
- Re-calculate the subsistence minimum under the new methodology and analyse the financial ability of the state to guarantee it.

3. Introduction of effective mechanisms of judicial control over the execution of national judgments

The existing institution of “judicial control” needs to be expanded in accordance with the ideology and principles of the ECtHR, its case law and the practice of the Committee of Ministers of the CoE, and the CoE standards. Furthermore, “judicial control” should be supplemented by the requirements of the ECtHR case law related to remedies as provided for Article 13 of the ECHR.

The ideology of the judicial control and the participation of courts in the execution of their judgments should be modified, and the limitations on the role of the judiciary and courts in the execution of judgments should be clearly defined.

However, it should be taken into account that according to the Law of Ukraine “On enforcement proceedings”, judgments related to the recovery of funds from state authorities, state and local budgets or public-sector entities should be executed by entities that provide budgetary and treasury services. Such provision is further regulated by Article 3(1) of the Law of Ukraine “On state guarantees regarding the enforcement of judgments”. In particular, judgments on the recovery of funds from indebted state authorities shall be executed by the central executive authority which implements public policies with regard to treasury servicing of budget funds, within the relevant budgetary discretion and through writing off funds from the account of such a state authority, and if a state authority lacks budgetary discretion, then it shall be done through funds provided under the budgetary programme intended to ensure the execution of judgments.

However, the State Treasury Service of Ukraine is neither an enforcement body nor a participant to enforcement proceedings, and, in particular, a party to them. Therefore, it does not apply measures to execute judgments as provided for by the procedure established in the Law of Ukraine “On enforcement proceedings”. The State Treasury Service of Ukraine is the authority,

which, in particular, directly writes off money under judgments to recover funds from the state budget and local budgets.

Therefore, if there is no budget funding for the programmes intended to ensure the execution of judgments, such judgments will remain unenforced. The introduction of effective mechanisms of judicial control will not eliminate this problem, as its source is the lack of funds in the budget.

At the time, the plenary session of the High Administrative Court of Ukraine paid attention to this issue in its Resolution No. 13 of 29 September 2016 “On the synthesis of the practice of administrative courts related to disputes emerging due to the enforcement of court decisions, under which state authorities or state institutions, enterprises or organisations are debtors, to recover funds”.

Considering the information mentioned above, it is recommended that the following actions are implemented:

- Establish the obligatory mechanisms of judicial control over the execution of all court decisions under which the state or a state body is the debtor.
- The scope of the institution of judicial control should not be limited only to persons enforcing the judgment (public or private enforcement agents) but the execution of judgments as a whole.
- The suspension by another court of the execution of a judgment, which has been legally entered into force, as an injunctive remedy or as part of judicial control over the enforcement of judgments should not be allowed.
- Public or private enforcement agents should be given more powers in terms of allowing, while executing judgments, postponement or instalment options to parties, if mutually agreed.
- Judicial control over the actions of enforcement agents should be combined with professional control.
- Parties and participants to enforcement proceedings should have an obligation to co-operate and should be subject to severe sanctions if they fail to comply with the enforcement requirements.