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

Overview

Of the practices of the Council of Europe member states in introducing effective remedies to solve the problem of the excessive length of judicial proceedings

Strasbourg, March 2020

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I. Background

The present overview was commissioned by 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", which is funded by the Human Rights Trust Fund, and implemented in Ukraine by the Justice and Legal Co-operation Department of the Council of Europe. The author of the overview – Mr Oleksandr Ovchynnykov, an advocate of the Bar Council in Strasbourg (France).
This overview is a follow-up research to the previously elaborated report on the same matter[1]. It aims at providing additional and up-to-date information on the relevant case-law of the European Court of Human Rights (the "**European Court**") and the practice of the Committee of Ministers of the Council of Europe (the "**Committee of Ministers**") relating to the issue at hand for the period 2017-2020.

As the previous report, it is focused on the issue of effective remedy for arguable claims of violation of the right to trial within a reasonable time (the "**remedy**").

It should be noted that the setting-up of an effective domestic remedy to complain about the length of judicial proceedings is a legal obligation arising out of the numerous judgments delivered by the European Court against Ukraine which are currently pending execution before the Committee of Ministers of the Council of Europe (the *Svetlana Naumenko and Merit* groups).

During the latest examination of the above groups of cases by the Committee of Ministers[2], it was stressed that the Ukrainian authorities still have not achieved tangible results in the execution of these cases.

In order to contribute to the execution of these groups of cases, a meeting of the working group established under the guidance of the Supreme Court was held in Kyiv on 3 March 2020.

During the above meeting, the participants exchanges their views as to the further work strategy with a view to elaboration an effective domestic remedy (or remedies) to complain about the excessive length of judicial proceedings. They have also discussed at length the root causes of the problem at hand and the possible ways to solve it. In this context, the issue of remedy presents major legal challenges.

As regards the experience of other Council of Europe member states, it should be noted that legal orders in each of these states are different, and any recommendation based on foreign experience might do not yield the expected results.

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[1] Submitted on 25 July 2017 in the framework of the Project "Support to the implementation of the judicial reform in Ukraine".
[2] 1362th DH meeting, December 2019.

Moreover, as the practice demonstrates, the introduction of any new legal mechanism in the legal order of particular state might fail to fully solve the problem at issue owing to various factors[3]. That is the reason why special caution should be recommended in respect of the new remedy.

That being said, it is undoubtedly possible to benefit from a variety of legal instruments developed within the Council of Europe in the area of the excessive length of proceedings.

Furthermore, it would be useful to learn from the experience of those member states of the Council of Europe that have introduced successful remedies which have been recognised as effective by the Committee of Ministers, or the European Court (or both).

II. General observations

(i) Definition

It should be recalled that, pursuant to Article 13 of the Convention:

> "*Everyone whose rights and freedoms as set forth in this Convention are violated should have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity*".

According to the well-established case-law of the European Court, Article 13 of the Convention requires that where there is an "arguable" claim of a violation under the Convention, a remedy shall exist at the domestic level. It is essential that such a remedy shall allow both to have an "arguable" claim decided and subsequently to obtain appropriate relief.

As applied to the problem of the excessive length of judicial proceedings, the above principles transform into the existence of a mechanism, judicial or not, which would allow the proceedings to be accelerated, or to provide a reparation to the injured party if those proceedings are terminated[4].

(ii) Categories of remedies

Typically, the are two main types of remedies in respect of excessive length of judicial proceedings:

(1) Acceleratory, or preventive, and
(2) Compensatory.

The *preventive* remedy, as its name suggests, allows to accelerate the proceedings which are still pending. It can be relied upon when a breach of the reasonable time requirement has already occurred, or even before it[5].

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[3] Several examples can be cited from the recent practice of the Committee of Ministers (including the remedy to complain about the excessive length of proceedings in Italy, or the remedy for the non-enforcement or delayed enforcement of domestic judicial decisions in Ukraine).
[4] A combination of both mechanisms is possible.
[5] Where there is an objective indication that it *might* occur soon.

The *compensatory* remedy implies that a breach of the reasonable time requirement has already occurred, irrespectively of the fact whether or not the proceedings are still pending or not. In the former case, this remedy can be used jointly with the acceleratory one.

In practice, until the proceedings are terminated, a breach of the of the reasonable time requirement may occur *several times*, which would warrant a multiple use of the above remedies[6].

(iii) Benefits / shortcomings of each category of remedies

As regards the *preventive remedy*, its main and obvious benefit is related to the fact that is supposed to repair the breach of the right to a fait trial within a reasonable time shortly before it occurred, or even prior to that. Its main shortcoming is the lack of compensation for the violation occurred.

In criminal proceedings, certain countries provide for specific preventive remedies aiming at expediting the investigatory stage. Typically, a request for acceleration of the investigation is lodged with the superior investigative authority, or the court. If allowed, such requests, may result in fixing a time limit for concluding the investigative stage or appropriate hierarchical instructions between prosecutors, for example on specific investigation acts to be performed.

It is less common to take specific preventive measures relating to the trial stage of criminal proceedings.

In civil or administrative proceedings, parties may typically complain either to a superior court or to independent body, or to the court examining the case itself. The measures in response may include:

- the fixation of an appropriate time limit for the relevant court to take appropriate procedural steps;
- the decision to examine the case on the merits, thus substituting itself to the court at the origin of the delay;
- the decision to transfer the case for examination to another court;
- the decision to terminate the case, if possible.

As regards the *compensatory remedy*, its main benefit is its capacity to offer reparation, financial or not, to the injured party. Its main shortcoming relates to the fact that no compensation alone is capable of acceleration judicial proceedings.

As it will be demonstrated in the subsequent parts of the present overview, the choice of a remedy, or remedies, depends on the multitude of factors specific to each country, including the root causes of the excessive length of proceedings.

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[6] See, for instance: *Apicella v. Italy* [GC], 29 March 2006, § 113; *Rotondi v. Italy*, judgment of 27 April 2000, §§ 1416; *S.A.GE.MA S.N.C. v. Italy*, judgment of 27 April 2000, §§ 12-14; Tengerakis v. Cyprus, judgment of 9 November 2006, § 68.

III. Guidelines for the remedy

The primary guideline for the remedy is the Convention and the case-law of the European Court.
According to the European Court's case-law, a combination of two types of remedies, one designed to expedite the proceedings and the other to afford compensation, **seems to be the best solution** for the redress of breaches of the "reasonable time" requirement (see *Scordino* case, appl. no. 36813/97, judgment of 29 March 2006 [GC], §§ 186-187).

In practical terms, however, it is possible to take inspiration from the Recommendation CM/Rec(2010)3 of the Committee of Ministers on effective remedies for excessive length of proceedings[7] (the "**Recommendation**") and the Draft Recommendation CM/Rec(2010)…of the Committee of Ministers to member states on effective remedies for excessive length of proceedings "Guide to Good Practice" of the Steering Committee for Human Rights[8] (the "**Guide to Good Practice**").

The Recommendation provides general guidelines for the elaboration of the remedy. It addresses both preventive (acceleratory) and compensatory remedies.

The Guide to Good Practice explains the basic legal principles underlying the Recommendation. It further details each of the provisions of the Recommendation providing concrete examples of their implementation in various member states.

Within the Venice Commission, a report on the effectiveness of national remedies in respect of excessive length of proceedings was adopted in 2006[9]. This document provides a comparative review of the existing domestic remedies in the Council of Europe member states. It also outlines the requirements of Article 13 of the Convention in respect of unreasonably lengthy proceedings. Based on this review, the report concludes that, in order to be effective, the relevant legal enactments are typically drafted with sufficient detail to address a variety of legal situations. Furthermore, they make references to the case-law of the European Court, notably as regards the standards relating to the pecuniary reparation. Significantly, these legal enactments are supposed to address specifically those root cases which are at the origin of the judicial delays in particular countries.

In addition to the Recommendation and the Guide to Good Practice, several documents prepared within the CEPEJ[10] can be relied upon by the working group, notably the "Compendium of 'best practices' on time management of judicial proceedings"[11] and the "Checklist for promoting the quality of justice and the courts," which includes a section on the "Management of timeframes"[12].

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7 Adopted by the Committee of Ministers on 24 February 2010 at the 1077th meeting of the Ministers' Deputies.
8 Prepared by the GR-H at its meeting of 2 February 2010.
9 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)036rev-e.
10 European Commission for the Efficiency of Justice.
11 CEPEJ (2006)13.
12 CEPEJ (2008) 2, section II.6.

IV. Examples of remedies

The Guide to Good Practice provides considerable number of examples from member states (§§ 51, 52, 60, 63, 66, 68, 77, 80, 87, 93, 104, 105, 115…).
Most recent examples can be also examined, notably regarding the following member cases/groups of cases:

- **in civil proceedings** (**Albania**: Mishgjoni, Final Resolution (2018)73; **Bulgaria**: *Finger/Dimitrov* and Hamanov, Final Resolution (2015)154; **Cyprus**: *Buj*, Final Resolution (2011)47; **Estonia**: *Saarekallas Oü*, Final Resolution (2014)286; **Germany**: *Rumpf*, Final Resolution (2013)244; **Greece**: *Michelioudakis*, Final Resolution (2015)231; **Italy**: *Andreoletti*, Final Resolution (2015)246; **Montenegro**: *Stakic and 2 other cases*, Final Resolution (2017)38; **Portugal**: *Oliveira Modesto and Others*, Final Resolution (2016)149, *Martins de Castro*, Final Resolution (2016)99; **Romania**: *Nicolau*, Final Resolution (2016)151; **Slovenia**: *Lukenda*, Final Resolution (2016)354; **The former Yugoslav Republic of Macedonia**: *Atanasovic and Others*, Final Resolution (2016)35; **Turkey**: *Ormanci and Others*, Final Resolution (2014)298); the **Russian Federation**: *Kormacheva and 105 other cases*, Final Resolution (2017)168;
- **in criminal proceedings** (**Austria**: *Donner and 5 other cases*, Final Resolution (2016)212; **Bulgaria**: *Finger/Dimitrov and Hamanov*, Final Resolution (2015)154; **Germany**: *Rumpf*, Final Resolution (2013)244; **Greece**: *Michelioudakis*, Final Resolution (2015)231; **Lithuania**: *Sulcas*, Final Resolution (2014)291; **Luxembourg**: *Schuhmacher*, Final Resolution (2014)216; **Portugal**: *Oliveira Modesto and Others*, Final Resolution (2016)149, *Martins de Castro*, Final Resolution (2016)99; the **Russian Federation**: *Kormacheva and 105 other cases*, Final Resolution (2017)168; **Romania**: *Nicolau*, Final Resolution (2016)151; **Serbia**: *Ristić*, Final Resolution (2014)18[13].

Croatia introduced, in 2002, a remedy for expediting proceedings in the form of a ***constitutional complaint*** under Section 63 of the Constitutional Act on the Constitutional Court, which reads as follows:

> "(1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court has not decided within a reasonable time a claim concerning the applicant's rights and obligations or a criminal charge against him ...
>
> (2) If the constitutional complaint ... under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits...".

In **Poland**, the Law of 17 June 2004 provides for both types of remedy – expedition and compensation – in relation to pre-trial, judicial and enforcement/ execution proceedings. Under the Law, a party to proceedings may lodge a complaint that their right to trial within a reasonable time has been breached if the proceedings last longer than is necessary to examine

[13] See also, for the "civil" proceedings before administrative courts: 10th Annual Report of the Committee of Ministers "*Supervision of the execution of judgments and decisions of the European Court of Human Rights 2016*".

the factual and legal circumstances of the case or to conclude enforcement/ execution proceedings. The criteria for examining unreasonable delay are based on the case law of the European Court. When appropriate, the court examining the complaint is obliged to issue, within two months of the complaint being filed, an instruction to the relevant court or prosecutor to take appropriate action within a fixed time-limit.

In the "**Former Yugoslav Republic of Macedonia**", the Court Act of 2006, as amended in 2008, introduced a remedy against excessive length of judicial proceedings. This remedy is aimed at excessive length of civil, labour, enforcement, criminal and administrative proceedings. Under the Court Act 2006, the Supreme Court has exclusive competence to decide upon the remedy. To that end, a special department was set up within the Supreme Court to deal with length-of-proceedings cases. An interested party can seek protection of his or her right to a hearing within a reasonable time while proceedings are pending, but not later than six months after the decision becomes final. The Supreme Court shall take a decision at two levels of jurisdiction within six months after the complaint is lodged. If it finds a violation, the Supreme Court awards compensation and, where appropriate, sets a time-limit for the court concerned to determine the case on the merits. Decisions at first level may be appealed against before the Supreme Court's second-instance panel. The compensation shall be paid to the successful claimant within three months after the Supreme Court's decision becomes final.

In **Lithuania**, the Supreme Court in a decision of 6 February 2007 acknowledged that when State liability for certain infringements was not regulated by national law, the court could establish State liability on the basis of the international treaties which constituted an integral part of the national legal system, in this case Article 6 § 1 of the Convention. Thus, the Lithuanian courts have applied the Convention and its case-law criteria when determining compensation in respect of length-of-proceedings cases. In assessing the reasonableness of the length of criminal, civil or administrative proceedings the Lithuanian courts examined the facts in accordance with the criteria established by the Court's case-law, namely the complexity of the case, the applicants' conduct and that of the investigating authorities or the courts.

Bulgaria introduced an administrative compensatory remedy for compensation of damages arising out of excessive length of civil and criminal proceedings which entered into force on in October 2012. This remedy is only accessible after the judicial proceedings have ended. Bulgaria has also adopted provisions introducing a judicial compensatory remedy which entered into force on in December 2012. The judicial compensatory remedy is available to persons who are parties to pending judicial proceedings, as well as to persons who have been parties to completed judicial proceedings. The second category of persons must have exhausted the abovementioned administrative remedy before they make recourse to the judicial remedy.

In **Cyprus**, Law 2(I)/2010 provides a domestic remedy for instances of excessive length of civil and administrative proceedings, at all levels of jurisdiction, which came into force on 5 February 2010. Persons who consider that their right to determination of civil rights and obligations within a reasonable time has been violated may institute a complaint either when the relevant proceedings have been concluded by a final court judgment or when they are still pending. They must institute this complaint within one year of the law coming into force. Actions and

applications brought under Law 2(I)/2010 are to be determined by a judge or judges, as the case may be, who did not participate in the proceedings of the case for which the complaint is made. In the event a breach is found, the plaintiff may be awarded just satisfaction for any pecuniary and non-pecuniary damage sustained as well as legal costs that have been proved to be incurred on account of the violation.

In **Denmark**, new specific acceleratory remedies, in addition to the already existing compensatory remedy, had been introduced to prevent excessive length of proceedings in 2007, according to which a party may request that the court fix a date for the main hearing if it is necessary to make sure that the case is heard within a reasonable time. A party may request that the court fix a time for e.g. the meeting of heirs, if it is necessary to ensure the fulfilment of Denmark's obligations under Article 6 of the Convention.

In **Norway**, the excessive length of criminal proceedings is taken into consideration when fixing sentence and can justify the imposition of a more lenient sentence or the award of compensation for pecuniary damages (Section 445 of the Criminal Procedure Act as amended in 2002) and, exceptionally, non-pecuniary damages (Section 447). As regards civil proceedings, compensation claims could be based on the regular compensation regime interpreted in the light of Article 13 of the European Convention.

In **Malta**, case-law of domestic courts developed a right to seek compensation in case of excessively lengthy proceedings.

On various dates, the Committee of Ministers has recognised the above remedies effective and decided to discontinue, fully or in part, the supervision of the execution of relevant cases.

Several other examples may be examined with a view to identifying those which could be the most suitable to the Ukrainian situation.

V. Proposed changes and recommendations on further steps

(i) Proposed changes

The Supreme Court has elaborated a number of legislative changes with a view to complaining about the excessive length of judicial proceedings. The above changes concern the Law of Ukraine "On Judiciary and Status of Judges" and the Criminal Procedure Code of Ukraine.

In essence, it is proposed that the relevant head of a local court shall have the right to examine complains about the alleged breach of a reasonable time requirement by other judges.

It should be noted that heads of local courts may have the powers to examine complaints for the non-compliance with the reasonable time requirements. This is specifically envisaged by the Opinion No. 19(2016) of the Consultative Council of European Judges (CCJE).

However, in the absence of a detailed ***procedure*** for the examination of the relevant complaints, and the ***specific powers*** of the courts' heads to order measures and/or to grant compensation, it is difficult to ascertain the compliance of the proposed amendments with the existing European standards.

(ii) Recommendations

- It should be reiterated that the remedy can be effective only if it is embedded in a **broader range of measures** ensuring that domestic courts examine cases within a reasonable time. **Preventive remedies** should be efficient as to avoid further recourse to compensatory remedies. **Compensatory remedies** should provide adequate and timely response to any violation of the right to trial within a reasonable time at the domestic level. The **combination of the both remedies** should ensure their complementarity and efficient interaction (for instance, mandatory exhaustion of the preventive remedy prior to any recourse to the compensatory remedy).

- Against this background, the working group might envisage the possibility of **introducing first the preventive remedy**, and the subsequent gradual introduction of the compensatory remedy, subject to sound financial and organisational analysis of the consequences of such introduction.

- Supposing the proposed remedy would empower **heads of local courts** to examine complaints about the unreasonable delays in their cases, particular attention should be made to the following:

  - As indicated in the above-mentioned Opinion No. 19(2016) of the Consultative Council of European Judges (CCJE), "*monitoring of the length of proceedings and actions to be undertaken by court presidents to speed up the disposition of cases must be balanced with the judges' impartiality, independence and with judicial confidentiality*" (§ 17);

  - The power to examine such complaints does not jeopardize the principle of judicial independence and does not render such examination a form of interference;

  - The procedure for the examination is clear, accessible and sufficiently detailed;

  - The scope of powers of the court's head is clearly defined in law;

  - Those powers may take various forms, ranging from a discussion with the relevant judge to the decision to assign the case to a different judge[14];

  - Should the court's head be empowered, in particular, to assign the case to another judge[15], it is essential that this is done in a manner compatible with the

[14] In *Germany*, heads of courts can approach the presiding council (all courts have this management board) with a view of relieving a judge or a panel from some of their caseload in order to enable them to deal with a backlog; in *Estonia*, the head of each court has a power of supervision and intervention to ensure compliance with the reasonable time requirement; each president must also refer cases lasting more than 3 years to the Minister of Justice; in *Poland*, heads of courts may make a written comment on the irregularity leading to the delay and request the removal of such irregularity.

[15] With a view to solving the delayed examination of the case.

existing electronic case assignment system and does not create an additional workload for "efficient" judges. As a possible option, it may be envisaged to consider such a "delayed" case as a new one and to assign it anew to any judge of the court (excluding the judge at the origin of the delay);

- The possibility to appeal again the decision taken is envisaged;

- Heads of courts might also have regular duty to monitor the situation relating to the time management of cases within their court; if such a duty is envisaged, special tools should be set up with a view to allowing the relevant head of courts to make it efficiently[16].

[16] In Slovenia, an electronic case management system was implemented since 2005, which allows to collect and reflect, in particular, the age of pending caseload.