



Report

On the expert discussions concerning the implementation of necessary measures for the execution of the European Court of Human Rights judgments in the cases of “Yuriy Nikolayevich Ivanov v. Ukraine” and “Burmych and Others v. Ukraine”

Kyiv, March 2021

The Project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights” is funded by the Human Rights Trust Fund

Introduction

Based on the results of consultations with Ukrainian state authorities, the Council of Europe project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights” (the Project), which is funded by the Human Rights Trust Fund and implemented by the Department for the Implementation of Human Rights, Justice and Legal Co-operation Standards, organised two public events. These events were aimed at discussing the latest developments and priorities in the context of the execution of general measures necessary for the implementation of the judgments of the European Court of Human Rights (ECtHR) in the cases of *Yuriy Nikolayevich Ivanov v. Ukraine* and *Burmych and Others v. Ukraine* (*Burmych* group of cases). In addition, these events contributed to the improvement of the National Strategy for “Resolving until 2022 the problem of non-execution of court decisions where a State authority or a State-owned enterprise, institution, organisation is a judgment debtor” (National Strategy) and the Action Plan of its implementation. The Project requested Mr Andrii Avtorhov, Ph.D. in Law and a Private Contractor, to participate in these discussions and prepare a report on the results.

The report presents the main conclusions of the discussions during the project events, with regard to:

- the latest documents of the Council of Europe, namely the decision of the Committee of Ministers of the Council of Europe as of March 2021 on the execution by Ukraine of the judgments in the *Burmych* group of cases, and the Memorandum on the implementation of these decisions, which is prepared by the Department for the Execution of ECtHR Judgments. The latter document contains the analysis of the National Strategy and suggests measures that should be taken in order to fully execute the general measures on the basis within the judgments of the *Burmych* group of cases;
- the need to adopt an agreed package of legislative and institutional actions defined by the National Strategy and in accordance with the requirements of the decisions and interim resolutions of the Committee of Ministers of the Council of Europe to improve the system of enforcement proceedings in Ukraine in line with relevant standards of the Council of Europe;
- proposals on further steps for the Ukrainian authorities in order to ensure the effective execution of general measures within the *Burmych* group of cases.

The Committee of Ministers of the Council of Europe at the 1398th meeting, on 9-11 March 2021, called on Ukraine to take decisive measures to address this long-term and important problem by moving without further delay to the adoption of a full package of legislative and institutional reforms to address all of the root causes identified and set out in the National Strategy, and allocate sufficient funding. The Committee of Ministers also urged the Ukrainian authorities to co-operate in this endeavour with the Council of Europe and other international partners, including the World Bank, the International Monetary Fund, the Organisation for Economic Co-operation and Development and the European Union.

The Memorandum prepared by the Department for the Execution of ECtHR Judgments as of March 2021, contains a detailed legal assessment of the information provided by the authorities, on general measures, the adoption of which continues to be required by the pilot judgment in the *Yuri Nikolayevich Ivanov* case and the judgments in the *Zhovner / Burmych and Others* group of cases. The Memorandum analyses the approved 2020 National Strategy and the general measures that have already been taken and those that have yet to be taken in order to fully execute these judgments.

Expert discussions took place online on 23 March and 26 March 2021. These events were attended by judges and representatives of the Supreme Court; the Verkhovna Rada of Ukraine; 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

Department of Ukraine and the like; representatives of civil society and international organisations; representatives and consultants of the Council of Europe.

Discussion topics:

- The latest decision of the Committee of Ministers of the Council of Europe as of March 2021 on the implementation by Ukraine of the judgments in the *Burmych* group of cases;
- The Memorandum on the implementation of the decisions in the *Burmych* group of cases, prepared by the Department for the Execution of ECtHR Judgments, in which the 2020 National Strategy was analysed, including measures that were taken, as well as measures that require urgent execution for the full implementation of these decisions;
- Presentation and discussion of expert opinions and recommendations for improving the adopted National Strategy for "Solving the Issue of Non-Execution of Court Decisions, the Debtors of which are a State Body or a State Enterprise, Institution, or Organisation by 2022" and the Action Plan for its Implementation.

Results achieved:

- The participants discussed the measures and priorities that should be implemented in 2021 in order to execute the decisions on the *Burmych* group of cases and eliminate the issue of the non-enforcement of decisions delivered by the national courts in Ukraine;
- The participants developed proposals for further steps for the Ukrainian authorities to carry out in order to ensure the effective implementation of general measures consistent with the standards of the Council of Europe, the requirements of the decisions of the ECtHR, the European Convention on Human Rights and the ECtHR practice, the practice of the Committee of Ministers of the Council of Europe and recommendations for the implementation of decisions in the *Burmych* group of cases, and also discussed possible obstacles and challenges that could threaten the implementation of the decisions of the ECtHR in the *Burmych* group of cases.

Major conclusions and recommendations

1. Preparation and submission to the Verkhovna Rada of Ukraine of a comprehensive legislative package in order to provide a systemic solution to the issue of non-execution and/or prolonged execution of decisions issued by national courts in Ukraine, as stated in the judgments of the ECtHR in the *Burmych* group of cases

The participants noted the need to prepare and submit for consideration by the Verkhovna Rada of Ukraine a number of legislative drafts, which should concern, in particular, the following aspects:

- determination of the total debt;
- automatic execution of judgments taken against the state;
- judicial control over the execution of judgments;
- revision of liability for the bankruptcy of state-owned enterprises;
- financing and budgeting for the programmes for the execution of court decisions;
- reduction of certain types of benefits that the state is unable to finance;
- establishment of a single special fund in Ukraine to control social payments, especially with regard to the debts of state-owned enterprises would help to more accurately control the amount of payments and the amount of existing debts;
- introduction of a fully-fledged system for the execution of court decisions, the provision of institutional independence to private executors, the provision of institutional independence of both public and private executors, due to the limitations of the

centralised, hierarchical control over their activities by the Ministry of Justice, in order to ensure the principle of separation of powers and the independence of the judiciary, equalisation of private and public executors' powers;

- full or partial cancellation of the established bans on bankruptcy proceedings for the state-owned enterprises and enterprises where the share of state property in authorised capital exceeds 50 percent;
- abolition of bans and moratoria that apply to enforcement proceedings and bankruptcy, in particular with respect to state entities and enterprises, due to the collection of debts for certain categories of enterprises. To refrain from adopting any new moratoria or bans;
- simplification of the process of execution of court decisions by reducing the stages for enforcement proceedings, non-repetition of actions, reviewing excessive formalisation of the execution process, automation of enforcement proceedings;
- introduction of a certain fair "limitation of liability" on the part of the state for the actions of legal entities with a share of state ownership in the national legislation, taking into account the principles of responsibility in the practice of the ECtHR.

2. Calculation of the total debt according to judgments

There are difficulties in calculating the total amount of debt, according to judgments where the state is the debtor, given that the Unified Judicial Information and Telecommunication System has not yet come into operation. This creates issues both with calculating debts for current court decisions and for future ones, too. This system is being prepared for launch in the second quarter of 2021, and the State Judicial Administration of Ukraine is responsible for its implementation.

Besides, the need to have a functioning accounting system for the already existing enforcement proceedings remains unresolved. It is also necessary to accurately calculate the amount of debt that exists at present. The available fragmentary data on the accumulated debt shows it to be in the area of UAH 4.9 billion¹ in accordance with Budget Programme No. 4040, but it is not known if this figure is accurate and relevant today (some participants of the events claim that there are debts in the amount of UAH 800 billion to UAH 1,500 billion²).

It remains essential to complete the introduction of a clear and understandable system for calculating debts on judgments where the debtor is the state as soon as possible.

3. Automatic execution of judgments against the state

The automation of enforcement proceedings, provided for in the National Strategy and the Action Plan, in no way implies the creation of institutions and mechanisms for the automatic execution of court judgments, where the debtor is a state authority or local self-government body, as well as for automated debt collection. The automatic execution of judgments does not mean the use of any advanced IT technologies. It only means that creditors in such cases should not be overwhelmed by unnecessary enforcement procedures. The superfluous procedures should be removed, and the execution procedures should be simplified. There must be a fast and efficient mechanism for enforcing such decisions.

The automatic execution should provide that the enforcement process begins without an official request from the creditor with the requirement to open enforcement proceedings on a writ of execution issued against the state or its affiliates. It should include the principle that the creditor with claims against the state should not be overloaded with unnecessary administrative proceedings. The state itself should introduce a proactive system, with the help of which such writs of execution will be automatically executed. In order to do this, it is

¹ Approximately 146 259 544,05 Euro

² Approximately 23 877 212 832,00 - 44 773 329,81 Euro

necessary to ensure appropriate procedures for the budgeting and financing of the execution of court decisions.

The participants recommended introducing efficient and effective mechanisms for the automatic payment of debts on judgments where the debtor is the state.

4. Financing of the National Strategy

The participants noted the unresolved issues of financing both the National Strategy and the Action Plan for their implementation.

The lack of funds creates risks to their actual implementation and calls into question the process of the execution of the prescribed measures. The National Strategy itself states that it does not require any budgetary allocations and does not deal with financial and budgetary procedures. This statement contradicts the conclusions of the national authorities on the root causes of a financial nature and recommendations of the Committee of Ministers of the Council of Europe on remedies and compensation for delays, as well as recommendations of the Council of Europe experts. In such circumstances, national courts will continue to issue judgments that debtors will not be able to comply with, and therefore a significant (additional) financial burden may be placed on the state budget. The money to be allocated to the National Strategy should correspond to those amounts of debt stated in the courts' decisions.

Budget payments on existing debts are very low, and the envisaged audit of the existing debts of the state on court judgments, the debtors of which are state-owned enterprises, is not able to provide a complete picture of the state of non-compliance with court judgments. Proposals to create a non-budgetary fund for guaranteeing the execution of court judgments in relation to enterprises subject to moratoria do not solve the issue of the non-execution of court judgments.

The participants concluded that the lack of support for the National Strategy with appropriate budgetary expenditures will not lead to a solution of the issue of the non-execution of judgments.

5. Implementation of the National Strategy

It is recommended that a working group of competent persons to monitor the implementation of the National Strategy is created. The efforts of all branches of the state power should be directed at solving the issue of the non-execution of national judgments.

It also seems appropriate to amend the legislation to strengthen the institutional capacity of the Verkhovna Rada of Ukraine's Subcommittee on the Implementation of ECtHR Judgments and Alternative Dispute Resolution, as well as to assign to the relevant Deputy Prime Minister of Ukraine the co-ordination function with regard to the central executive authorities in the process of the execution of ECtHR judgments.

There is also a need to ensure the involvement of representatives from all branches of the state power and expert institutions in work to conduct constant monitoring of the current state of affairs in this area and provide appropriate recommendations, mandatory for the implementation of instructions on the comprehensive resolution of problems of non-compliance with judgments in which the state is the debtor and to ensure the co-operation of interested parties.

The National Strategy and the Action Plan are very important national documents, but a number of effective measures are yet required, which the state must undertake in order to reach the required level of execution, as set out in the respective ECtHR judgments.