

**UKRAINIAN HELSINKI HUMAN RIGHTS UNION'S SUBMISSION TO COUNCIL OF  
EUROPE COMMITTEE OF MINISTERS:  
YURIY NIKOLAYEVICH IVANOV V. UKRAINE  
BURMYCH AND OTHERS V. UKRAINE  
(Zhovner group)**

**The main observations to Government Action Plan for Solving Problematic Issues Arising from the Emergence of the State Debt under Judicial Decisions from 17 April 2018 (see DH-DD(2018)418).**

- A)** The main challenges regarding the problem of non-enforcement of domestic judicial decisions in Ukraine after the ECtHR judgement in case of Burmych and Others v. Ukraine.
- A large number of unenforced court decisions against the State and State-owned companies in Ukraine. Today, there are more than 12 thousand unenforced court decisions, which were included in the case of Burmych and Others v. Ukraine, and also those cases which were considered by the ECtHR after the adoption of this judgement and regarding which it has been decided to act in the same way as with court decisions in the Burmych case. At the same time, there are far more unenforced court decisions. In particular, according to official figures, at present there are 169,500 court decisions against the State, which remain unenforced. But this is also not a final figure, since far from all court decisions against the State are included into a special register. According to expert opinions, including the Government Agent before the ECtHR, this figure can be significantly more than 169,500. At the same time, it is extremely difficult to assess the exact number of unenforced court decisions against the State due to the lack of reliable monitoring of such court decisions and the lack of necessary information on such decisions in existing registries (description of Government efforts, para. 51-54 of the Government Action Plan).
  - The amount of the State debt for unenforced court decisions. The State has not yet established the amount of its indebtedness for the applicants in the case of Burmych and Others v. Ukraine. As of today, one knows only the amount of the State's indebtedness due to court decisions which were entered into a special register, which is 4,612 billion

UAH. However, as indicated above, the real amount of debt is much higher. According to the preliminary assessment conducted by the Government Agent before ECtHR, the amount of the State's indebtedness under such court decisions is approximately 31 billion USD. (1 billion EUR) <sup>1</sup>. And it shows the enormous scale of this debt. This figure may also be uncertain and increases with each passing month, as more and more court decisions are added against the State and State-owned companies.

- Insufficient funding of budget programmes aimed at enforcing court decisions against the State. For a long time, in the budget programmes, there have been allocated about 150 thousand UAH for implementation of such decisions. Starting from 2018, 500 thousand UAH were allocated for this budget program. At the same time, this funding is extremely insufficient in order to solve the problem, since even with this financing the current indebtedness for court decisions would not be conclusively settled any earlier than within 9 years, which is unacceptable. The Government Agent also notes the inadmissibility of such a long period of execution of court decisions. <sup>2</sup>
- The existence of moratoria that make it impossible to enforce court decisions against the State and State-owned companies in various sectors. As of today, there already exist 7 such moratoria, and the introduction of the eighth is planned.
- The legislation of Ukraine does not solve the core problem of a large number of decisions against the State in Ukraine, namely the large number of social obligations of the State, which are not covered by state funding. Decisions against the State continue to emerge despite the efforts of the Government of Ukraine to limit the social obligations of the State through legislative mechanisms. At the same time, there are new social obligations that the State assumes. Also, in Ukraine there are no mechanisms for monitoring the possible problems that arise from shortcomings or lack of legislation and which may lead to the emergence of the next wave of court decisions.
- A significant number of court decisions against the State which provide for the enforcement of these decisions is not in material form, but in the form of certain obligations. The legislation of Ukraine significantly impedes the enforcement of such decisions and often makes it impossible to enforce it.
- Weak performance in enforcement of court decisions. Today, according to the information received by the deputy of the Verkhovna Rada of Ukraine R. Sidorovych, only 3-4% of court decisions are being executed. (percentage of enforced court decisions).
- The absence of an Ad hoc mechanism for the execution of the judgment in the case of *Burmych and Other v. Ukraine* with regard to the applicants in that judgment. Ukrainian

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<sup>1</sup> Para.55 of the Government Action Plan

<sup>2</sup> Para. 47 of the Government Action Plan

legislation does not foresee the execution of such a type of the ECtHR judgements concerning the applicants who are mentioned there. In fact, it is not possible to execute such a judgement. The Government Agent in response to the petition of the applicants in the Burmych case states that absence of necessary legislation is the ground for non-execution of judgements in their respect.

- The complexity of enforcement of court decisions concerning applicants in the occupied territory of Ukraine, as well as concerning property located in this territory.
- Very weak level of confidence in the State in carrying out reforms in the field of ensuring the enforcement of decisions. The Government's long-standing inability to solve this systemic problem and, moreover, the constant creation of obstacles to the enforcement of court decisions against the State led to a significant reduction of trust in the State. This level of trust was not increased by the judgement in the Burmich case. Moreover, this judgement deepened mistrust in the Government's actions.

**B) Observations that are important to consider when introducing general measures on the group of cases YURIY NIKOLAYEVICH IVANOV V. UKRAINE, BURMYCH AND OTHERS V. UKRAINE.**

- The need to remove or recognize unconstitutional the existing moratoria that do not allow for enforcement of decisions against the State. It is important that when introducing a long-term mechanism for resolving the problem, these significant obstacles, creating a considerable amount of court decisions against the State, were removed. Although the Action Plan proposed by the Government indicates the need to lift the moratorium, this need refers to additional measures. The description of the main mechanism indicates that cases concerning non-enforcement of decisions due to the existence of moratoria are for consideration by the administrative commission<sup>3</sup>. However, the transfer of such cases to administrative commissions can not lead to their enforcement, but only leads to a delay in time. Only abolishing the moratoria or recognizing them as unconstitutional may change the situation.
- Addressing the issues, which constitute core aspects of the problem causing a large number of unenforced decisions where the State is a debtor. In particular, taking certain measures, ensuring that the size of the state statutory social obligations is corresponding to the financial capabilities of the state budget. Establishing a mechanism preventing such problems in the future. In the context of the issue of the state social obligations to implement a clear division of legislative norms to those that guarantee social and

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<sup>3</sup> Para.50 of the Government Action Plan

economic rights and those granting certain privileges in connection with a particular position or particular services. The measures proposed in the Action Plan, in particular regarding the monitoring of legislation and case law to check possible threats<sup>4</sup>, are important but not sufficient to prevent new similar cases to emerge. The measures envisaged in the Action Plan are aimed at obtaining information, rather than creating a real effective mechanism for solving the problem.

- The need to establish an adequate amount of compensation in the event of a long-term failure to enforce court decisions. The compensation mechanism offered by the Government Agent neither makes it possible to determine it as sufficient, nor takes into account various specific circumstances. The mechanism of compensation provided for in the existing law “On the State Guarantees regarding the Enforcement of Judicial Decisions” has not been brought into force in Ukraine. In particular, the State has not paid 3% for non-enforcement of court decisions against the State. Therefore, performance of this mechanism in a more complex scheme proposed by the Government (10% but not more than 110 EUR) is questionable. Moreover, the size of the State's responsibility for non-fulfillment of its obligations is insufficient also taking into account economic factors, including the level of inflation and the number of years that the State may not fulfill its obligation. All this can lead to situations where the State will benefit from non-fulfillment of its obligations. Also, the situation will be adversely affected by a significant reduction in the responsibility of the State, comparing State responsibility upon the judgements of the ECtHR and under national law (the maximum amount for redress will be only 110 EUR, which is 4% of the amount established by the ECtHR, and in most cases it will be even less). It is not justified to set a maximum redress in the amount of EUR 110. Here it is necessary to take into account that many court decisions that relate to compensation for damage caused to health, compensation to the victims of Chernobyl, etc. exceed the amount from which such a restriction is established, and accordingly these people can receive compensation not in the amount of 10% , but in the amount of 5, 4, 3, 2%. Such an approach seems to be unjustified, since it is hard to actually call obtaining of for example an amount of EUR 120 in compensation for the long-term non-fulfillment by the State of its obligations “an unjust enrichment”. It should be noted that the establishment of such a restriction will, on the contrary, stimulate the State not to execute court decisions, the amount of redress on which will exceed the threshold of 110 EUR. Such an approach does not take into account the possibility of many specific cases in which it would be fair to pay higher compensations.
- The proposed procedure for enforcement of court decisions where the debtor is the State,

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<sup>4</sup> Para.43 of the Government Action Plan

described in the Action Plan, leaves unnecessary obstacles in enforcement for the applicant and does not provide for the automatic execution of such court decisions. This is especially true for court decisions, which need special performance rather than payment of funds.

- Welcoming the plans of the Government to increase funding for the Programme on the enforcement of the judicial decision, it should be noted that the amount of financing provided in the Government Action Plan in the amount of 1 billion UAH will not be enough to repay existing debts in adequate terms. Here it should be taken into account that in Ukraine there remain the dynamics of increase in the number of unenforced court decisions. As well as the fact that if this mechanism is widely deployed, the number of those who will apply with their judicial decision will be considerably larger than 169500 decisions recorded currently in the register. Accordingly, the existing amount of debt will not be 4.61 billion, but may be close to 30 billion UAH.
- Establishing a time limit for applicants to take advantage of the mechanism proposed by the Government<sup>5</sup> is highly questionable since it can actually leave a significant part of the court decisions against the State "out of the picture". Taking into account the fact that the missing deadlines may be of objective nature and often arise from the specific circumstances, the establishing of such a time limit is not justified. The fact that the Government leaves the opportunity for those who missed the 6-month limit to use the ordinary procedure of enforcement is a dead-end road, because the usual procedure will not give any opportunity to get such court decisions against the State enforced.
- Essential is to establish an integrated system of determination of the amount of debt arising from unenforced decisions in Ukraine, which would use clear criteria and be based on real and objective data.

After the judgement in the case of Burmych was adopted, Ukraine is once again at a crossroads, where it is important to choose the right vector that will help many people in solving the problem of non-enforcement of court decisions. In this context, it is very important to take into account all the features and risks, including those referred to in this document. Without taking into account these observations, the solution of this problem will be virtually impossible, especially in the absence of public confidence in the reforms in this area.

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<sup>5</sup> Para.57 of the Government Action Plan