University of Nottingham
Human Rights Law Centre

Report on Research on the Execution of Judgments – The record of Ukraine in implementing judgments

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Svetlana Naumenko v Ukraine

(Application No 41984/98, judgment of 9 November 2004 – final on 30 March 2005)

Supervision track: enhanced
Last examination: 1179th meeting, 24-26 September 2013
Next examination: not known yet

Merit v Ukraine

(Application No 66561/01, judgment of 30 March 2004 – final on 30 June 2004)

Supervision track: enhanced
Last examination: 1179th meeting, 24-26 September 2013
Next examination: not known yet

(i) A brief description of the proceedings before the Court and the execution process

In the cases of *Svetlana Naumenko v Ukraine* and *Merit v Ukraine* the applicants complained about the excessive length of civil and criminal proceedings.

In *Svetlana Naumenko* it took the applicant around 10 years to prove in local courts her status as a relief worker at the Chernobyl nuclear power plant. This status, which entitled the applicant to a number of social benefits, was contested by the local authorities. Subsequently, in 2003 the local district court found that the applicant was a Chernobyl relief worker and in 2004 it awarded the applicant compensation for unpaid pension for the period of 1996-2003.

In *Merit* the criminal proceedings against the applicant regarding the alleged smuggling and fraud had lasted for more than four years and were still pending in local courts when the case was heard before the Court.

The Court found that the excessive length of civil and criminal proceedings and the lack of effective remedies in these cases amounted to violations by Ukraine of Article 6 (right to a fair trial) and Article 13 (right to an effective remedy). In *Svetlana Naumenko v Ukraine* the Court also awarded the applicant just satisfaction of EUR 20,000 in respect of non-pecuniary damage. In *Merit v Ukraine* the Court awarded EUR 2,500 in just satisfaction in respect of non-pecuniary damage.

Hence, the *Svetlana Naumenko* group of cases concerns the excessive length of civil proceedings, while the *Merit* group concerns the excessive length of criminal proceedings. However, the Committee of Ministers examines these groups of cases together.

(ii) The underlying problem and its root causes

Factors negatively affecting the length of judicial proceedings can be divided into two categories: objective factors and subjective factors.

The first objective factor is the overall significant caseload of the Ukrainian courts (criminal, civil and administrative) at all levels (local, appeal, the Supreme Court). This problem has been acknowledged by Ukrainian judges[1] and international experts.[2] The second (and related) objective factor is the shortage of judges in many courts. In particular, before the 2016 reform of the judiciary, judges were initially appointed for a 5-year period and, subsequently, for life. Under the 2016 reform, judges are since the beginning appointed for life. However, the reform did not clarify the status of judges who had been appointed for 5 years pre-2016, and whose term in office ended post-2016. As of 1 April 2019, around 1,000 judges (around 20% of all judges) were reportedly in this situation – namely, their 5-year term in office ended and they have not been formally reappointed, which means that they cannot hear cases.[3] This situation further proves that although the 2016 reform of the judiciary introduced many positive changes, it has

[1] T Antsupova, Judge of the Cassation Administrative Court of the Supreme Court of Ukraine, 'Queueing for court decisions, or how to hear tens of thousands of cases in reasonable time', *Yurydychna Gazeta*, 26 September 2018 (in Ukrainian). Available at: http://yur-gazeta.com/publications/practice/sudova-praktika/za-rishennyam--u-chergu-abo-yak-rozglyanuti-desyatki-tisyach-sprav-u-rozumni-stroki.html

[2] Working meeting between the experts of the Council of Europe Directorate General of Human Rights and Rule of Law and judges of the Supreme Court of Ukraine regarding the reasonable length of criminal proceedings, 23 May 2019 (in Ukrainian). Information available at: https://supreme.court.gov.ua/supreme/pres-centr/news/714278/

[3] Council of Judges of Ukraine, 'The Plenum of the Supreme Court of Ukraine should voice its concern over the shortage of judges and the problems regarding the qualification re-assessment of judges', Press Release, 27 May 2019 (in Ukrainian). Available at: http://rsu.gov.ua/ua/news/oleg-tkacuk-plenum-vs-mae-vislovitisa-sodo-nestaci-suddivskih-kadriv-u-sudah-ta-problem-so-povazani-iz-kvalifocinuvannam

a number of fundamental drawbacks (see also the report on the *Salov/Oleksandr Volkov* group of cases).

The subjective reasons for lengthy civil and criminal judicial proceedings include numerous rescheduling of court hearings due to non-appearance of parties, deliberate and abusive practices of parties aimed at delaying/extending court hearings, unjustified lengthy intervals between court hearings due to inadequate planning of caseload by judges, lengthy preparation of expert opinions, etc.[4] These factors are reportedly exacerbated by the fact that judges often do not properly discipline the parties of proceedings for, inter alia, their non-appearance to court hearings.[5] Moreover, the judges themselves are not always properly disciplined for unreasonable and excessive delays. Under the Law of Ukraine 'On the Judiciary and the Status of Judges' (Article 106, para 1.2), unreasonable length of court proceedings is one of the grounds for disciplinary liability of judges which can result in disciplinary sanctions being imposed (such as, for example, reprimand or even dismissal). There are some examples when the High Council of Justice initiated disciplinary proceedings against judges on this ground.[6] However, the High Council of Justice has been criticised for being inconsistent by not always reacting to such instances.[7]

(iii) General measures undertaken to address the problem

In July 2018 Ukraine submitted the most recent Action Plan regarding the general measures undertaken.[8] According to it, the Parliament adopted legislative changes which aim at, inter alia:

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[4] Mykolayiv Regional Appeal Court, Analysis of the length of civil proceedings in local courts in the Mykolayiv oblast in 2013 (in Ukrainian). Available at: https://mka.court.gov.ua/sud1490/uzagalnenj/uzagal_sud_praktik/strok/ Ruling of the Plenum of the High Specialised Court of Ukraine on civil and criminal matters No 11, 17 October 2014 (in Ukrainian). Available at: https://zakon3.rada.gov.ua/laws/show/v0011740-14/print1452721010619782

[5] Working meeting between the experts of the Council of Europe Directorate General of Human Rights and Rule of Law and judges of the Supreme Court of Ukraine regarding the reasonable length of criminal proceedings, 23 May 2019 (in Ukrainian). Information available at: https://supreme.court.gov.ua/supreme/pres-centr/news/714278/

[6] N Zozulia, 'Disciplinary Responsibility of Judges for Unreasonably Long Proceedings: Legality and Justice', *Ukrayinske Pravo*, 27 August 2018 (in Ukrainian). Available at: http://ukrainepravo.com/judicial_truth/divine_law/prytyagnennya-do-vidpovidalnosti-suddiv-za-propusk-strokiv-rozglyadu-spravy-zakonnist-i-spravedlyvis/

[7] P Guivan, 'The role of temporal aspects in the practice of the European Court of Human Rights: reasonable length of proceedings' (2017) 6 *Pidpryyemnytstvo, Hospodarstvo i Pravo* 24, 26 (in Ukrainian). Available at: http://pgp-journal.kiev.ua/archive/2017/6/6.pdf

[8] The most recent Action Plan regarding individual measures was submitted in April 2019. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2019)389E%22]}

- delineation of competences of administrative, commercial and general jurisdictions;
- putting mechanisms in place to counteract abuse of procedural rights;
- observation of the stages of the judicial proceedings;
- enhancing and strengthening the means of alternative dispute resolution;
- solving the issue of group (or "class") lawsuits;
- introduction of 'cassation filters';
- adjudication of certain groups of cases under simplified procedure (e.g. some minor cases arising from labour relations).[9]

The Committee of Ministers has not examined the 2018 Action Plan yet and it remains to be seen how it will assess the measures undertaken by Ukraine. Overall, it might be argued that the measures undertaken aim at addressing one of the objective factors (the workload of judges) and one of the subjective factors (the abuse of procedural rights). At the same time, the situation with the shortage of judges remains unaddressed.

Also, it is interesting to note that experts from the Council of Europe Directorate General of Human Rights and Rule of Law are currently preparing an expert opinion on the compliance of the 2012 Criminal Procedure Code of Ukraine with the requirements of Article 6 ECHR regarding the length of criminal proceedings. The opinion will be part of the Council of Europe project called 'Continued Support to the Criminal Justice Reform in Ukraine'. The draft of the opinion is not publicly available and it is not clear when the final version will be published.[10] However, in May 2019 the Directorate experts met with judges of the Supreme Court of Ukraine in order to discuss the draft and disclosed some of their recommendations. In particular, the experts recommend amending the Criminal Procedure Code and making written proceedings the default rule for the Supreme Court in order to make cassation proceedings less time-consuming.[11] The experts also suggest stricter sanctions for non-appearance to court, including the non-appearance of attorneys and prosecutors, – namely, imposition of fines and disciplinary proceedings.[12]

[9] Action Plan, enclosed to the Communication from Ukraine concerning the group of cases *Merit v Ukraine* and *Svetlana Naumenko v Ukraine*, 1324th meeting of the Committee of Ministers, 31 July 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)760E%22]}
[10] Other expert opinions under this Project are published at: https://www.coe.int/en/web/criminal-justice-reform/expert-opinions
[11] Working meeting between the experts of the Council of Europe Directorate General of Human Rights and Rule of Law and judges of the Supreme Court of Ukraine regarding the reasonable length of criminal proceedings, 23 May 2019 (in Ukrainian). Information available at: https://supreme.court.gov.ua/supreme/pres-centr/news/714278/
[12] Ibid.

Gongadze v Ukraine

(Application No 34056/02, judgment of 8 November 2005 – final on 8 February 2006)

Execution track: enhanced
Last examination: 1324th meeting, September 2018
Next examination: not known yet

(i) A brief description of the proceedings before the Court and the execution process

Georgiy Gongadze was the opposition journalist and the founder of the online news web-site *Ukrayinska Pravda* (*Ukrainian Truth*). On 16 September 2000 Mr Gongadze disappeared and on 2 November 2000 his decapitated body was found in a forest near the town of Tarashcha in Kyiv oblast. The case is especially notorious for the alleged involvement of the then President of Ukraine Leonid Kuchma. In particular, at the end of November 2000 the former bodyguard of President Kuchma announced that he had recorded numerous secret conversations at the office of the President (known as 'Melnychenko's tapes'). One of such recorded conversations implicated President Kuchma in the ordering of the kidnap and murder of Mr Gongadze. Other implicated high-level officials included Volodymyr Lytvyn, Yuriy Kravchenko and Leonid Derkach, who were at that time the Head of the Presidential Administration, the Minister of the Internal Affairs, and the Head of the Security Service, respectively. The scandal became known as the 'Kuchmagate' or the 'Cassette scandal'.[13]

The application was submitted by Myroslava Gongadze, the journalist's wife. At the time when the Court delivered its judgment the investigation into Mr Gongadze's disappearance and murder was still on-going and not a single person was charged or convicted.

The Court found two violations of Article 2 ECHR. First, Ukraine violated the positive obligation to protect the right to life. The Court took into account that two months before the disappearance Mr Gongadze had sent an open letter to the Prosecutor General, reporting his surveillance by unknown persons, and requesting an investigation of these acts and the implementation of measures of his protection. The Court also noted that the response of the prosecutors was 'blatantly negligent', although they ought to

[13] See A Karatnycky, 'Meltdown in Ukraine', *Foreign Affairs*, May/June 2001. Available at: https://www.foreignaffairs.com/articles/russia-fsu/2001-05-01/meltdown-ukraine

have been aware of the vulnerable position in which the journalist, who covered politically sensitive topics, placed himself. Secondly, Ukraine violated the procedural obligation to effectively investigate the circumstances of the disappearance and death of Mr Gongadze.

The Court also found that the attitude of the investigating authorities towards the applicant and her family caused her serious suffering which amounted to degrading treatment (violation of Article 3) and the applicant was denied an effective remedy in respect of the death of her husband (violation of Article 13). The Court awarded the applicant EUR 100,000 in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

The Committee of Ministers supervises the implementation of individual and general measures in this case. The individual measures concern the investigation into Mr Gongadze's death, which is still ongoing. Regarding the general measures, the key aspect that remains under the Committee's supervision is the protection of journalists' safety, notably through measures falling within the following two categories:

- measures taken to improve the independence and effectiveness of investigations into crimes against journalists; and

- any measures taken or envisaged to ensure that journalists have immediate access to protective measures in the light of the Recommendation to member States on the protection of journalism and safety of journalists and other media actors.[14]

More generally, general measures regarding effective investigation into loss of life (Article 2) and ill-treatment (Article 3) are examined by the Committee of Ministers under *Khaylo v Ukraine* and *Kaverzin v Ukraine*, respectively.

(ii) Individual measures undertaken

Prosecution of the perpetrators of the murder

Four persons were convicted and sentenced in relation to the kidnap and murder of Mr Gongadze. Namely, three police officers were sentenced to 12-13 years in prison in March 2008. The fourth convict, the Lieutenant-General Oleksiy Pukach, was sentenced

[14] Recommendation of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors, CM/Rec(2016)4, 13 April 2016. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806415d9

to life imprisonment in January 2013. His conviction was upheld by the Kyiv Court of Appeal in January 2016. However, Mr Pukach subsequently instituted cassation proceedings against his sentence, which are still pending before the Cassation Criminal Court of the Supreme Court of Ukraine. The last hearing in his cassation took place at the end of November 2018; the date of the next hearing is not known yet.[15] In its most recent Action Plan on the execution of the *Gongadze* judgment, submitted to the Committee of Ministers in June 2018, the Ukrainian Government clarified that the delay in the cassation proceedings regarding Mr Pukach is caused by the need to declassify audio recordings of all court hearings held by local and appeal courts in the criminal case against Mr Pukach. Such declassification is still pending.[16]

Prosecution of the organisers and instigators of the murder

There has been no progress on the prosecution of actual organisers and instigators of the murder of Mr Gongadze. In the *Gongadze* judgment the Court noted that 'the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than with discovering the truth about the circumstances of the disappearance and death of the applicant's husband' (para 179). The situation remained largely the same following the Orange Revolution when the authorities changed and Viktor Yushchenko became the President (2005-2009). Although three of the actual perpetrators of the murder were identified and sentenced during this period (see above), the evidence that implicated former President Kuchma was ignored.[17]

Subsequently, the General Prosecutor's Office initiated criminal proceedings against former President Kuchma in March 2011, i.e. during the presidency of Viktor Yanukovych (2010-2014). However, in December 2011 the Kyiv district court found that the 'Melnychenko's tapes' had been obtained illegally and could not be used as evidence in the criminal case. The court thus quashed the decision of the General Prosecutor's Office and the criminal proceedings against former President Kuchma were closed.[18] In

[15] 'Cassation hearing in the Gongadze case was rescheduled to 28 November', *Cenzor.Net*, 14 November 2018 (in Ukrainian). Available at: https://censor.net.ua/ua/news/3096850/rozglyad_kasatsiyi_na_vyrok_pukachu_u_spravi_gongadze_perenesly_na_28_lystopada

[16] Action Plan, enclosed to the Communication from Ukraine concerning the case of *Gongadze v Ukraine*, 1324th meeting, DH-DD(2018)662, 25 June 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)662E%22]}

[17] Freedom House, 'Freedom of the Press 2009: Ukraine'.

[18] 'The case against Kuchma was closed because Melnychenko's records were "illegal"', *Radio Liberty*, 14 December 2011 (in Ukrainian). Available at: https://www.radiosvoboda.org/a/24421760.html

2012 the decision of the district court was upheld by the appeal court[19] and by the High Specialised Court on Civil and Criminal Matters.[20]

The situation remained largely the same more recently, during the presidency of Petro Poroshenko (2014-2019). In the June 2018 Action Plan, the Ukrainian Government informed the Committee of Ministers that the Main Investigation Department of the Prosecutor General's Office continues the investigation in the criminal proceedings against organisers and instigators of the murder and that 'the involvement of a significant scope of the Ukrainian high state officials [in the murder] is being verified'.[21] However, the Prosecutor General's Office refuses to provide more detailed information, referring to the impossibility of disclosing information of pre-trial investigation.[22] It is known that the criminal case against former President Kuchma has not been reopened.

Overall, it is not clear to what extent the recent investigation conducted by the Prosecutor General's Office has been independent and genuine. It shall be noted that in 2014 President Poroshenko appointed former President Kuchma to serve as Ukraine's permanent representative at the Trilateral Contact Group (TCG) in Minsk. The latter is the forum for dialogue between Ukraine, Russia and the OSCE, which aims to facilitate the diplomatic resolution of the conflict in the East of Ukraine. The appointment of Kuchma to the TCG suggested that Poroshenko and Kuchma were in a relatively good relationship. It is also well-known that the current Prosecutor General, Yuriy Lutsenko, has been a close ally of President Poroshenko. This situation raises serious doubts regarding the genuineness of the Prosecutor General's investigation. On the other hand, it is possible that even if the organisers are identified, they may not be subject to criminal punishment due to the statute of limitations for bringing to criminal liability.[23]

The latest examination by the Committee of Ministers

At its examination of the *Gongadze* case in September 2018, the Committee of Ministers deplored the fact that the investigation into the murder had lasted for 18 years. It also urged Ukraine to provide information regarding the outcome of the cassation proceedings against Mr Pukach and to ensure swift completion of the overall

[19] 'The appeal court upheld the closure of the criminal case against Kuchma', *Radio Liberty*, 20 January 2012 (in Ukrainian). Available at: https://www.radiosvoboda.org/a/24457818.html
[20] 'The High Specialised Court confirmed the closure of the criminal case against Kuchma', *Tyzhden*, 26 June 2012 (in Ukrainian). Available at: https://tyzhden.ua/News/53834
[21] Action Plan, enclosed to the Communication from Ukraine concerning the case of *Gongadze v Ukraine*, 1324th meeting, DH-DD(2018)662, 25 June 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)662E%22]}
[22] Ibid.
[23] Communication from NGO in the case of *Gongadze v Ukraine*, 1324th meeting, DH-DD(2018)878, 18 September 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)878E%22]}

investigation in the case.[24] Interestingly, the Committee also noted that with the adoption of the new Code of Criminal Procedure in 2012, Ukrainian law now provides, with retroactive effect, for the possibility to balance the right of not having illegally obtained evidence used at trial, obtained in breach of privacy, against the right to an effective investigation (balancing rights under Article 8 ECHR against those under Articles 2 and 3 ECHR). The Committee invited the authorities to clarify whether any evidentiary obstacles still exist in respect of the investigation – namely regarding using the 'Melnychenko tapes'.[25]

It is not clear yet how the investigation will develop under the new Ukrainian authorities. It is noteworthy that although former President Kuchma left the TCG in October 2018, the recently elected President Volodymyr Zelenskyi has reinstated him in June 2019[26] – the move which also suggests a good relationship between the current and the former Presidents. However, more will become clear after the early parliamentary elections which took place on 21 July 2019. Following the elections the Parliament and the President will appoint the new Prosecutor General, who will be tasked with continuing the investigation in the *Gongadze* case.

(iii) General measures undertaken

In the June 2018 Action Plan the Ukrainian Government noted that in May 2015 the Criminal Code had been amended, so that criminal liability had been introduced for criminal offences against journalists' life, physical integrity, freedom and property, and more severe punishments in comparison to ordinary circumstances had been envisaged. Moreover, in February 2016 the definition of the obstruction of journalists' lawful activities had been broadened.[27] The Government also provided some general statistical information on the investigation of crimes against journalists, and the relevant judicial practice.[28]

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[24] Committee of Ministers, 1324th meeting (DH), Decision CM/Del/Dec(2018)1324/25, 18-20 September 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2018)1324/H46-25E%22]}

[25] Committee of Ministers, 1324th meeting (DH), Notes CM/Notes/1324/H46-25, 18-20 September 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Notes/1324/H46-25E%22]}

[26] 'Zelenskyi reinstated Kuchma in the Minsk TCG', *Ukrayinska Pravda*, 3 June 2019 (in Ukrainian). Available at: https://www.pravda.com.ua/news/2019/06/3/7216967/

[27] Action Plan, enclosed to the Communication from Ukraine concerning the case of *Gongadze v Ukraine*, 1324th meeting, DH-DD(2018)662, 25 June 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)662E%22]}

[28] Ibid.

At its latest examination, in September 2018, the Committee of Ministers asked the Ukrainian Government to provide more specific information regarding the effectiveness and independence of investigations into crimes against journalists.[29] It also noted with concern that the definition of 'journalist' in the Criminal Code of Ukraine is 'restrictive and might lend itself to a formalistic interpretation'.[30] The same concern was voiced by the Ukrainian Helsinki Human Rights Union.[31] Moreover, the Committee of Ministers called on Ukraine to provide more information regarding measures taken or envisaged to ensure within the legal and institutional framework a system of effective protection for the safety of journalists.[32] As noted by the Ukrainian Helsinki Human Rights Union, the Ukrainian legislation on security measures regarding journalists does not envisage rapid response measures, and the overall process is lengthy and bureaucratic.[33]

[29] Committee of Ministers, 1324th meeting (DH), Decision CM/Del/Dec(2018)1324/25, 18-20 September 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2018)1324/H46-25E%22]}
[30] Ibid.
[31] Communication from NGO in the case of *Gongadze v Ukraine*, 1324th meeting, DH-DD(2018)878, 18 September 2018, para 7. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)878E%22]}
[32] Committee of Ministers, 1324th meeting (DH), Decision CM/Del/Dec(2018)1324/25, 18-20 September 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2018)1324/H46-25E%22]}
[33] Communication from NGO in the case of *Gongadze v Ukraine*, 1324th meeting, DH-DD(2018)878, 18 September 2018, para 24. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)878E%22]}

Zhovner v Ukraine

Application No 56848/00

29 June 2004 – final 29 September 2004

Yuriy Nikolayevich Ivanov v Ukraine

Application No 40450/04

Pilot judgment, 15 October 2009 – final 15 January 2010

Burmych and Others v Ukraine

Applications Nos 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14

Grand Chamber, 12 October 2017

Supervision track: enhanced

(iv) A brief description of proceedings before the Court

Zhovner (2004) was one of the first cases where the Court found that the non-enforcement by Ukraine of final domestic judicial decisions constituted a violation of the ECHR. In *Ivanov* (2009) and *Burmych* (2017) the Court found that the practice of systemic non-enforcement or delayed enforcement of final domestic judicial decisions *mostly delivered against the state, state-owned and state-controlled entities*, and the lack of an effective remedy under the national legislation in this respect amounted to violations of Article 6 (right to a fair trial), Article 13 (right to an effective remedy) and Article 1 of Protocol 1 ECHR (right to peaceful enjoyment of possessions).

Ivanov was the pilot judgment in which the Court decided to adjourn the consideration of similar cases against Ukraine and stressed the need for Ukraine to adopt the necessary general measures in order to address this structural problem. The Court set a deadline of 15 July 2011. Insofar as Ukraine failed to adopt the necessary general measures within the deadline, in February 2012 the Court resumed the examination of the *Ivanov*-type cases.

In *Burmych* the Grand Chamber decided to strike out of its list of cases and to transmit to the Committee of Ministers a total of 12,148 *Ivanov*-type cases that were pending before the Court and reiterated the need to adopt the requisite general measures. 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. The

transmission of 12,148 applications to the Committee of Ministers was the Court's novel approach to dealing with a large number of repetitive cases.[34] Notably, seven judges of the Court, including the Ukrainian judge, in their dissenting opinion criticised this solution, arguing that it favoured 'momentary judicial convenience' at the expense of the right to individual application under the ECHR.[35] Similar criticism was also voiced by scholars.[36]

(v) The underlying problem: the non-enforcement of domestic judicial decisions

The Ukrainian authorities have recently identified three thematic groups of cases related to non-enforcement of domestic judicial decisions: i) cases regarding social benefits; ii) cases regarding the debts of state-owned enterprises; and iii) cases regarding in-kind obligations.[37] As of January 2018, there were more than 169,000 such unenforced domestic judicial decisions, although the exact number is not known.[38]

Thus, there is a problem of 'double' non-enforcement: first, Ukraine fails to enforce final domestic judicial decisions; second, it fails to implement the *Ivanov* and *Burmych* judgments.

(vi) The root causes of the problem

Financial problems

In December 2017 Ivan Lishchyna, Ukraine's Deputy Minister of Justice / the Government Agent before the European Court of Human Rights, claimed that the key

[34] For a critical analysis of the Court's novel approach in *Burmych* see: G Ulfstein and A Zimmermann, 'Certiorari through the Backdoor? The Judgment of the European Court of Human Rights in *Burmych and Others v Ukraine* in Perspective', KFG Working Paper Series No 13, April 2018. Available at: https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/42205/file/kfg_wps13.pdf
[35] Joint dissenting opinion of judges Yudkivska, Sajo, Bianku, Karakas, De Gaetano, Laffranque and Motoc.
[36] E Kindt, 'Giving Up on Individual Justice? The Effect of State Non-execution of a Pilot Judgment on Victims' (2018) 36:3 *Netherlands Quarterly of Human Rights* 173.
[37] Draft 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', 29 May 2019 enclosed to Committee of Ministers, 1348th meeting (June 2019) (DH), Communication from the authorities in the case of *Yuriy Nikolayevich Ivanov v Ukraine* (DH-DD(2019)632) (hereinafter 'Ukraine Draft National Strategy May 2019'), 12. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2019)632E%22]}
[38] Committee of Ministers, 1348th meeting (June 2019) (DH), Action Plan, 9 May 2019, Communication from Ukraine concerning the cases of *Yuriy Nikolayevich Ivanov*, *Burmych and Others* and *Zhovner v Ukraine* (DH-DD(2019)508), 18-19 (hereinafter 'Ukraine Action Plan May 2019'). Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2019)508E%22]}

factor behind the non-enforcement of national judicial decisions was that there were no sufficient budgetary funds allocated.[39] He further argued that this situation was the result of the populist social policies pursued by the previous Ukrainian authorities (especially during the presidency of Viktor Yanukovych, 2010-2013), which adopted laws granting special social benefits to various vulnerable groups but did not provide the necessary budgetary allocations due to the lack of money.[40] The populist social policies were similarly condemned by civil organisations.[41] Concerns over the insufficient financial capabilities of the state were also voiced by the international and domestic experts who attended the first annual forum 'Enforcement of domestic judicial decisions in Ukraine', which took place in November 2018 and was organized under the Council of Europe Human Rights Trust Fund.[42]

According to Ganna Yudkivska, the Ukrainian Judge at the European Court of Human Rights, the exact total sum of the internal state debt in relation to all unenforced domestic judicial decisions remains unknown and is hard to calculate.[43] According to Ivan Lishchyna, as of April 2018, the total debt was at least 4.6 billion of the Ukrainian hryvnias (UAH), which amounted to approximately 154 million of euros (EUR).[44] However, according to the estimates of the Ukrainian Helsinki Human Rights Union, the state debt is much higher and can be close to UAH 30 billion (approximately EUR 1 billion).[45]

Other problems

According to the most recent Action Plan, submitted by the Ukrainian Government to the Committee of Ministers in May 2019, the comprehensive root causes behind the non-enforcement of final domestic judicial decisions include:

[39] I Lishchyna, 'The judgment of the European Court of Human Rights cannot be ignored', *Ukrayinska Pravda*, 19 December 2017 (in Ukrainian). Available at: https://www.pravda.com.ua/columns/2017/12/19/7166045/
[40] Ibid.
[41] Agency for Legislative Initiatives, 'Shadow Report on the Implementation by the Ukrainian Government of the Judgment of the European Court of Human Rights in the Case of *Burmych and Others v Ukraine*', Kyiv, November 2018, 13-14 (in Ukrainian). Available at: http://parlament.org.ua/wp-content/uploads/2018/03/Tinovyj-zvit_YESPL.pdf
[42] Materials of the first annual forum 'Enforcement of domestic judicial decisions in Ukraine', November 2018 (in Ukrainian). Available at: https://zib.com.ua/ua/135527-eksperti_pidrahuvali_za_yakiy_chas_ukraina_rozrahuetsya_iz_z.html
[43] Interview with G Yudkivska: S Sydorenko, 'The ECtHR judge: imagine that 7 million of Ukrainians will go to Strasbourg because of the land moratorium', *Yevropeyska Pravda*, 20 November 2018 (in Ukrainian). Available at: https://www.eurointegration.com.ua/interview/2018/11/20/7089551/
[44] I Lishchyna, as quoted on the official web-site of the Ministry of Justice, 18 April 2018 (in Ukrainian). Available at: https://minjust.gov.ua/news/ministry/ivan-lischina-ukraina-gotue-shostiy-pozov-do-espl-proti-rosii
[45] Communication from the Ukrainian Helsinki Human Rights Union, submitted to the Committee of Ministers (DH-DD(2018)1095), 26 October 2018, 7. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)1095E%22]}

- 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.[46]

(vii) Post-*Burmych* (2017) general measures taken to address the root causes of the problem

Financial measures

The budgetary allocations for the enforcement of domestic judicial decisions are gradually being increased. For example, while in 2016 the state budget allocated UAH 145 million (approximately EUR 4.8 million) for this purpose, in 2017 and 2018 the annual allocations increased to UAH 500 million (approximately EUR 16.5 million). In 2019 the allocation increased further, to UAH 600 million (approximately EUR 20

[46] Ukraine Action Plan May 2019, 18-19.

million).[47] Nevertheless, following this level of annual allocations, Ukraine will need at least nine years to fully cover the abovementioned debt of UAH 4.6 billion.[48]

Additionally, the new procedure was introduced whereby some parts of debts under unenforced judicial decisions can be paid in treasury bonds.[49]

Other measures

Draft bill #8533, which amends a number of laws regarding enforcement procedures, was submitted to the Parliament in June 2018 and is still pending for adoption. The bill received a generally positive assessment of the Ukrainian human rights organisations, as it, inter alia, improves a compensation mechanism for a delayed enforcement.[50] On the other hand, the 10% maximum level of compensation as proposed under the bill was subject to criticism for being too low and unjustified.[51] The delay in the adoption of the bill is explained by, inter alia, the influx of other bills / workload of the Parliament.[52] At the same time, the fact that the bill has been pending for more than a year suggests that the Parliament does not accord a first priority to it, does not fully comprehend the urgency and scale of the problem identified by the Court in *Ivanov* and *Burmych* and does not take seriously the deadline of 12 October 2019 as set by the Court.

On the other hand, a recent positive development is that on 29 May 2019 the Ministry of Justice presented to the Committee of Ministers the draft national strategy on the implementation of the *Ivanov* and *Burmych* judgments. The strategy lists very specific financial, legislative, institutional and other measures. It is planned that it will soon be approved in a form of an action plan with timetable, which will be binding for the Government.[53]

[47] Laws on state budget of 2016, 2017, 2018 and 2019, state budgetary programme #3504040.
[48] Materials of the first annual forum 'Enforcement of domestic judicial decisions in Ukraine', November 2018 (in Ukrainian). Available at: https://zib.com.ua/ua/135527-eksperti_pidrahuvali_za_yakiy_chas_ukraina_rozrahuetsya_iz_z.html
[49] Ukraine Action Plan May 2019, 23-25.
[50] The Kharkiv Human Rights Protection Group, Commentary on draft bill #8533, 28 July 2018 (in Ukrainian). Available at: http://khpg.org/index.php?id=1532803061
[51] Communication from the Ukrainian Helsinki Human Rights Union, submitted to the Committee of Ministers (DH-DD(2018)1095), 26 October 2018, 6-7. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)1095E%22]}
[52] Ukraine Action Plan May 2019, 23.
[53] Ukraine Draft National Strategy May 2019.

At the same time, Ivan Lishchyna in a recent interview expressed hopes that the Court will give Ukraine one additional year by postponing the assessment of the execution of *Ivanov* and *Burmych* until October 2020.[54]

[54] Interview with I Lishchyna, Youtube, 6 May 2019 (in Ukrainian). Available at: https://www.youtube.com/watch?v=LiDD1btV5zg

Salov v Ukraine

(*Application No 65518/01*, 6 September 2005 – final 6 December 2005)

Supervision closed in June 2018.[55] The legislative, institutional and practical measures related to the reform of the system of judicial discipline and careers of judges are examined within the *Oleksandr Volkov* group.

Oleksandr Volkov v Ukraine

(*Application No 21722/11*, 9 January 2013 – final 27 May 2013)

Supervision track: enhanced
Last examination: June 2018
Next examination: September 2019

Agrokompleks v Ukraine

(*Application No 23465/03*, 6 October 2011 – final 8 March 2012)

Supervision track: enhanced
Last examination: December 2016
Next examination: unknown yet

(i) A brief description of the proceedings before the Court and the execution process

Salov (2005), *Oleksandr Volkov* (2013) and *Agrokompleks* (2012) are a group of cases in which the Court found a violation of Article 6 ECHR (right to a fair trial) on several accounts – most prominently, regarding the lack of independence and impartiality of judges.

In *Salov* the Court noted that 'domestic legislation did not lay down clear criteria and procedures for the promotion, disciplinary liability, appraisal and career development of judges, or limits to the discretionary powers vested in the presidents of the higher

[55] Committee of Ministers, Resolution CM/ResDH(2018)232, adopted on 7 June 2018 at the 1318th meeting of the Ministers' Deputies. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-184052%22]}

courts and the qualifications commissions in that regard' (paras 38-40). It further found that there were insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in respect of possible pressure from the president of the regional court.

The *Oleksandr Volkov* case was especially notorious. It concerned the dismissal of the applicant from the post of the judge of the Supreme Court of Ukraine by the Parliament of Ukraine, for the alleged breach of oath. The case disclosed serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the system of judicial discipline did not ensure the sufficient separation of the judiciary from the other branches of state power – the executive and the legislative. Moreover, it did not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence. Ukraine was therefore required to take a number of general measures aimed at reforming the system of judicial discipline.

The *Agrokompleks* case similarly disclosed the lack of sufficient guarantees ensuring the independence of judges from external pressure and from pressure within the judiciary – in particular, vis-à-vis their judicial superiors.

The Committee of Ministers focuses on these issues separately. Namely, the aspects related to external independence of judges are examined under the *Oleksandr Volkov* case, while internal independence of judges is the focus of the *Agrokompleks* case.

(ii) The underlying problem and its root causes

The lack of internal and external independence of the judiciary has been a long-standing problem in Ukraine. Right after independence and at different periods afterwards, the main root cause of this problem has been the authorities' unwillingness to have independent and impartial judiciary.[56]

For example, under the 1996 Constitution of Ukraine, the power of appointment/dismissal of judges belonged to the President (for the initial appointment for 5 years) and to the Parliament (for a subsequent appointment for life). Proposals on the appointment/dismissal of judges were made by the High Council of Justice (HCJ). In

[56] P Kubicek, 'Delegative Democracy in Russia and Ukraine' (1994) 27:4 *Communist and Post-Communist Studies* 423, 430-435; Freedom House, 'Freedom in the World 2001: Ukraine', 'Nations in Transit 2004: Ukraine', 'Nations in Transit 2009: Ukraine'.

addition, the HCJ also dealt with disciplinary proceedings against judges. The HCJ consisted of 20 members: 3 members were appointed by the President, 3 by the Parliament, 3 by the congress of judges, 3 by the congress of advocates, 3 by academic institutions, and 2 by the congress of prosecutors. The President of the Supreme Court, the Minister of Justice and the Prosecutor General were members of the HCJ *ex officio*. The problem was that the non-judicial members appointed directly by the executive and the legislative authorities comprised the vast majority of the HCJ's members. Hence, the principle of division of power into legislative, executive and judiciary was undermined.

The lack of political will to reform the judiciary was especially obvious during the presidency of Viktor Yanukovych (2010-2014). The 2010 reform of the judiciary (Law 'On the Judiciary and the Status of Judges' of 7 July 2010) led to the increased external pressure on judges. The role of the Supreme Court was diminished due to, inter alia, the establishment of the high specialised courts as cassation courts.[57] The President's powers were formally curtailed but in practice his influence over presidents of the high specialised courts was substantial.[58] Moreover, despite the fact that the number of judges among the members of the HCJ increased, they remained largely under control of the executive, namely the President.[59] The 2010 reform was adopted in great haste, without waiting for the opinion of the Venice Commission.[60] The latter subsequently criticised the reform, in particular, regarding the decreased powers of the Supreme Court.[61] The fact that courts were largely under control of the President was best illustrated by the imprisonment of Yuliya Tymoshenko, former Prime Minister, and Yuriy Lutsenko, former Minister of Internal Affairs[62] – these cases were seen by many as politically motivated, selective justice.[63]

(iii) General measures taken to ensure external independence of judges: *Salov* and *Oleksandr Volkov*

[57] Razumkov Centre, 'Reform of the judiciary in Ukraine: results and perspectives', Report, Kyiv, April 2013, 28-30 (in Ukrainian). Available at: http://razumkov.org.ua/upload/Sudova_reforma_2013.pdf
[58] Ibid, 33-35.
[59] Ibid, 31-33.
[60] Parliamentary Assembly of the Council of Europe, Resolution 1755 (2010) 'The functioning of democratic institutions in Ukraine', 5 October 2010, para 7.3.2. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17899&lang=en
[61] Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, Draft Joint Opinion No 588/2010 'On the Law on the judicial system and the status of judges of Ukraine', 15-16 October 2010. Available at: https://www.venice.coe.int/webforms/documents/?opinion=588&year=all
[62] These cases were also considered by the Court: *Tymoshenko v Ukraine*, Application No 49872/11, 30 April 2013; *Lutsenko v Ukraine*, Application No 6492/11, 3 July 2012.
[63] Freedom House, 'Nations in Transit 2012: Ukraine'; Amnesty International, 'Annual Report 2012', 350, 'Annual Report 2013', 282.

More effective steps to reform the judiciary were taken during the presidency of Petro Poroshenko (2014-2019).

Initially, in the course of 2014-2015, the Parliament adopted three laws which, in different ways, aimed to reform the judiciary. However, these laws failed to have visible affects because they offered only partial changes, without the necessary constitutional amendments.[64]

Ultimately, on 2 June 2016 the Parliament adopted the necessary constitutional amendments and the new Law 'On the Judiciary and the Status of Judges'. The 2016 judiciary reform significantly improved the institutional independence of the judiciary. Its positive effects were comprehensively summarised by the Ukrainian Government in the Action Plan submitted to the Committee of Ministers in March 2018, in particular:

- The Parliament is now excluded from appointment/dismissal of judges. Judges are appointed for life by the President, after receiving a proposal from the High Council of Justice (HCJ). The latter also decides on judges' dismissal.

- The composition of the HCJ changed. It now consists of 21 members, 10 of whom are judges appointed by the congress of judges, while the President of the Supreme Court is a member of the HCJ *ex officio*. Thus, the representation of judges in the HCJ increased significantly. The other 10 members are appointed as follows: 2 – by the President, 2 – by the Parliament, 2 – by the congress of advocates, 2 – by the congress of prosecutors, and 2 – by academic institutions.

- A three-tier court system was established (local courts, appeal courts, the Supreme Court). Thus, the role of the Supreme Court in the system of courts was reinstated and the negative effects of the 2010 reform were rectified.

- The Supreme Court started functioning in a completely new composition on 15 December 2017. The new judges of the Supreme Court were selected on a competitive basis. The selection was conducted by the High Qualification Commission of Judges (HQCJ), which was assisted by civil society through the Public Council of Integrity. The HQCJ proposed the candidates to the HCJ, which then made the relevant proposal on appointment to the President. Notably, for the first time academics and practicing lawyers were allowed to become judges of the Supreme Court.

[64] R Kuybida, 'The current state of the judiciary reform', Centre of Policy and Legal Reform, Kyiv, 2015, 6-14 (in Ukrainian). Available at: http://pravo.org.ua/files/Curent_situation.pdf

- The two-tier review of disciplinary proceedings against a judge was established. Namely, decisions of the disciplinary chambers of the HCJ can be appealed first to the HCJ, and then to the Grand Chamber of the Supreme Court.

- The prosecutors' influence in the area of discipline and careers of judges is now limited by legislation. In particular, the Prosecutor General is not an *ex officio* member of the HCJ anymore.

- The three-year limitation period for instituting disciplinary proceedings against a judge was established and is observed in practice.

- An explicit scale of sanctions in disciplinary cases and other types of judges' liability was established.[65]

In its latest examination, in June 2018, the Committee of Ministers positively assessed these measures and asked the Ukrainian authorities to provide more information on: the appeal procedure against decisions on the careers/promotions of judges and how it functions in practice; and the dismissals by the Parliament of judges before October 2016 (i.e. during the transition period, before the 2016 reform entered into force).[66]

Nevertheless, despite these positive effects, the 2016 reform also had major shortcomings which, unfortunately, were not taken into account by the Committee of Ministers.

- First, concerns were raised over professionalism and integrity of some of the new Supreme Court judges. In particular, some questionable candidates (e.g. those whose assets do not correspond to the declared official income) were appointed despite open opposition of the Public Council of Integrity.[67]

- Secondly, unlike the Supreme Court, local and appeal courts, were not established from scratch. Instead, judges of these courts were simply asked to

[65] Action Plan, Communication from Ukraine concerning the cases of *Oleksandr Volkov* and *Salov v Ukraine*, submitted before the 1318th meeting of the Committee of Ministers, 19 March 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)275E%22]}
[66] Decision of the Committee of Ministers, 1318th meeting, 5-7 June 2018. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2018)1318/H46-28E%22]}
[67] R Kuybida, 'Analytical overview of the implementation of the general measures in the cases of *Oleksandr Volkov v Ukraine* and *Salov v Ukraine*', Kyiv, February 2018, 7-10 (in Ukrainian). Available at: https://rm.coe.int/doc-3/168078f22d

undertake a re-examination by the HQCJ. As a result of such re-examination, reportedly only 16 out of 2,700 judges were dismissed.[68]

- Thirdly, Ukrainian experts on the judiciary reform complain that the HQCJ and the HCJ still remain under informal control of the executive, predominantly the President.[69] They claim that these institutions consist of judges who themselves are loyal to the executive and, hence, cannot be entrusted with the task of selecting independent judges.[70] Ukrainian experts further argue that the majority of the HQCJ and the HCJ should consist of independent civil society activists and international experts.[71] In this regard it shall be noted that Ukraine already has a successful experience of selecting judges by international experts. Namely, the judges of the newly-established High Anti-Corruption Court (HACC) were selected by the HQCJ, together with the Public Council of International Experts. The latter consisted of six experts from the UK, Canada, Lithuania, Denmark and North Macedonia. In January 2019, the Public Council of International Experts disqualified around 40% of candidates due to concerns about their integrity and professionalism,[72] thus raising chances that the HACC will be independent and professional.

(iv) General measures taken to ensure internal independence of judges: *Agrokompleks*

In its latest Action Plan on the execution of the *Agrokompleks* judgment, as submitted to the Committee of Ministers in October 2016, the Ukrainian Government stressed that the 2010 Law 'On the Judiciary and the Status of Judges' improved the independence of

[68] R Kuybida, 'How to stop the corrosion of the judiciary', Centre of Policy and Legal Reform, Kyiv, 25 June 2019 (in Ukrainian). Available at: http://www.pravo.org.ua/ua/news/20873759-yak-zupiniti-koroziyu-pravosuddya
[69] M Zhernakov and I Shyba, 'How Poroshenko failed the reform of the judiciary, and what the new president should do', *Ukrayinska Pravda*, Kyiv, 14 March 2019 (in Ukrainian). Available at: https://www.pravda.com.ua/articles/2019/03/14/7209169/
[70] M Zhernakov, 'Reform of the judiciary became a curse for Poroshenko', Bureau of Judicial Information, Kyiv, 2 May 2019 (in Ukrainian). Available at: https://court.investigator.org.ua/uk/2019/05/sudova-reforma-stala-proklyattyam-poroshenka-interv-yu-z-myhajlom-zhernakovym/
[71] R Kuybida, 'How to stop the corrosion of the judiciary', Centre of Policy and Legal Reform, Kyiv, 25 June 2019 (in Ukrainian). Available at: http://www.pravo.org.ua/ua/news/20873759-yak-zupiniti-koroziyu-pravosuddya
[72] Anti-Corruption Action Centre, '71 candidates continue to participate in the competitions to the Anti-Corruption Court. International experts have completed their work', Kyiv, 28.01.2019. Available at: https://antac.org.ua/en/publications/infographics-71-candidates-continue-to-participate-in-the-competition-to-the-anti-corruption-court-international-experts-have-completed-their-work/

judges from their superiors, including from presidents of courts.[73] Similarly, Ukrainian think tanks welcomed the fact that the 2010 Law narrowed the competences of presidents of courts.[74]

In December 2016, during its latest examination of the *Agrokompleks* case, the Committee of Ministers generally positively assessed the 2010 Law regarding the internal independence of judges.[75] At the same time, it is not clear why the Ukrainian Government referred to the 2010 Law and did not include specific information on the effects of the 2016 judiciary reform on the internal independence of judges. Indeed, the Committee of Ministers subsequently asked the Ukrainian authorities to provide additional information on the internal independence of judges in light of the 2016 reform and on measures other than legislative aimed at eradicating the practice of undue influence on judges, in particular as to the exclusion of the influence of hierarchically superior judges over their peers.[76]

Unfortunately, recent reports of the Ukrainian civil society organisations suggest that despite the improved legislative framework, the instances of pressure of presidents of courts on ordinary judges still happen in practice after the 2016 reform.[77] What is especially worrying is that the HCJ, which can initiate disciplinary proceedings against presidents of courts for undue pressure on ordinary judges, in practice has not paid proper attention to such instances.[78]

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[73] Updated Action Plan, Communication from Ukraine concerning the case of *Agrokompleks v Ukraine*, submitted before the 1273rd meeting of the Committee of Ministers, 19 October 2016. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806b1934

[74] Razumkov Centre, 'Reform of the judiciary in Ukraine: results and perspectives', Report, Kyiv, April 2013, 58 (in Ukrainian). Available at: http://razumkov.org.ua/upload/Sudova_reforma_2013.pdf

[75] Decision of the Committee of Ministers, 1273rd meeting, 6-8 December 2016. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22CM/Del/Dec(2016)1273/H46-34%22]}

[76] Ibid.

[77] Centre of Policy and Legal Reform, 'Alternative report on the state of independence of the judiciary in Ukraine in 2017', Kyiv, 2018, 7-14 (in Ukrainian). Available at: http://www.pravo.org.ua/img/zstored/files/AltReport%202017%20Final.pdf

[78] Ibid.

Zelenchuk and Tsytsyura v Ukraine

Applications Nos 846/16 and 1075/16
Judgment of 22 May 2018 – final on 22 August 2018

Execution track: enhanced
Not examined by the Committee of Ministers yet

(viii) A brief description of the proceedings before the Court and the execution process

In this case the Court decided to join two separate, but very similar, applications. Both applicants had inherited plots of agricultural land. However, they resided in urban areas, far from their respective land plots. Due to the distances involved and the applicants' age, farming was not a viable option for them. Instead, the applicants rented their land out.

The problem was that the applicants could not sell their land. The Transitional Provisions of the Land Code of Ukraine prohibited alienation in any form of most agricultural land, including of the categories owned by the applicants, except in cases of inheritance, swap transactions and expropriation for public use. They also prohibited any change in the designated use of such land, except where it has been allocated to an investor under a production-sharing agreement. The applicants alleged that the legislative restrictions imposed on them as owners of agricultural land had breached their rights under Article 1 of Protocol No 1 ECHR.

The Court found that the ban on the sale of agricultural land imposed excessive burden on the applicants and was disproportionate. More specifically, Ukraine failed to strike a fair balance between the general interest of the community and the property rights of the applicants and hence violated Article 1 of Protocol No 1 ECHR.

Notably, the Court referred to Article 46 ECHR and noted that:

> 'the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislative situation itself and that its findings extend beyond the sole interests of the applicants in the instant case. The Court considers that the respondent State should take appropriate legislative and/or other general measures to ensure a fair balance between the interests of agricultural land owners on the one hand, and

> the general interests of the community, on the other hand, in accordance with the principles of protection of property rights under the Convention. It is not for the Court to specify how those interests should be balanced. Under Article 46 the State remains free to choose the means by which it will discharge its obligations arising from the execution of the Court's judgment… The Court's judgment should not be understood to mean that an unrestricted market in agricultural land has to be introduced in Ukraine immediately.' (para 150 of the judgment)

The applicants claimed EUR 30,000 each in respect of non-pecuniary damage. However, the Court found that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants (paras 155-156 of the judgment). At the same time, it is noteworthy that the Court stressed that:

> 'should the respondent State unreasonably delay adoption of the requisite general execution measures, this may, with the passage of time, lead to a situation where awards under Article 41 may eventually become warranted, at least for some categories of agricultural land owners' (para 157 of the judgment).

The Court awarded EUR 3,000 to each applicant for legal costs and expenses (para 160 of the judgment). These sums were paid by the Government in October 2018.[79]

(ix) The underlying problem and its root causes

First of all, a brief historical background is necessary. In the Soviet times land belonged to the state. In the early 1990s, shortly after Ukraine gained independence, the former Soviet collective and State-owned farms were renamed 'collective agricultural enterprises' ('CAEs'). In the late 1990s, under the land reform, the CAEs were dissolved and the shares of land and other assets were distributed among its members. Subsequently, a large-scale process of converting the shares into physical plots of land (defined on the ground) was organised. As a result of this process, millions of new owners were issued with ownership certificates relating to specific plots of land. The land owned by the applicants underwent this process.

On 25 October 2001 a new Land Code was enacted. It entered into force on 1 January 2002. Para 15 of the Transitional Provisions of the new Land Code provided that

[79] Action Plan, enclosed to the Communication from Ukraine concerning the case of *Zelenchuk and Tsytsyura v Ukraine*, 1340th meeting (DH), 1 March 2019. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2019)254E%22]}

until **1 January 2005** individuals and non-State entities could not sell or otherwise transfer title to agricultural land. Swap transactions, inheritance cases and expropriation for public needs were exempt from the ban. The ban (commonly referred to in Ukraine as 'the land moratorium') has been subsequently extended and modified multiple times. Para 15 of the Transitional Provisions of the Land Code currently extends the moratorium until the adoption of the law on the sale of agricultural land, but in any case not earlier than until **1 January 2020.** Accordingly, the land moratorium has been in place in Ukraine for more than 17 years.

The Court observed that although some members of the Council of Europe have certain restrictions regarding the sale of agricultural land, Ukraine is the only member which has a general ban on the sale of agricultural land (paras 45-54, 127 of the judgment). Except for Ukraine, such blanket ban operates only in the Democratic Republic of the Congo, Venezuela, Tajikistan, Cuba and North Korea.[80]

As noted by the Court, Ukraine has consistently declared the creation of a sales market in agricultural land and eventual discontinuation of the moratorium as its goal. However, the Ukrainian Government has been inconsistent in explaining the rationale behind the moratorium. Initially the Government argued that the absolute ban was introduced in view of the need for additional time to form a land market and enact the necessary legislation for such a market. However, the relevant legislation – most notably, the law on the sale of agricultural land – is still lacking. Subsequently, the Government advanced such explanations for the moratorium as the danger of impoverishment of the rural population, the danger of concentration of land in the hands of a few wealthy individuals/companies or hostile powers, and the risk of the withdrawal of land from cultivation (paras 21 and 112 of the judgment). Notably, EasyBusiness, a Ukrainian non-governmental organisation which intervened as a third party, argued that these explanations are not convincing and are not substantiated by the relevant experience of other countries (paras 93-96 of the judgment).

Independent observers note that an important factor behind the authorities' failure to adopt legislation on a land market is the lobby of large agricultural companies which benefit from low rent prices on agricultural land.[81] According to some estimates, rent profits of owners of agricultural land are currently approximately 12 times lower

[80] 'Moratorium, impoverishment, populism: five myths about the land market', *24 Kanal*, 6 February 2019 (in Ukrainian). Available at: https://24tv.ua/moratoriy_na_zemlyu_v_ukrayini_2018_5_mifiv_pro_rinok_zemli_n1084374
[81] O Kramar, 'Farmers vs agro-holdings', *Tyzhden.UA*, 23 June 2017 (in Ukrainian). Available at: https://tyzhden.ua/Economics/195072

than what they could be had the agricultural land market been open.[82] In this regard EasyBusiness noted that agricultural holding companies rent numerous small land plots from individuals, hence they concentrate land and have disproportionate power over small land owners who have no choice but to accept low rents (paras 93-96 of the judgment). Indeed, it is illustrative that the applicants complained that they had no choice but to rent out the land at 'knockdown prices'. More specifically, unable to find offers for monetary rent at an acceptable level, the first applicant had had to accept rent in kind (grain or sunflower oil) and the second applicant was receiving very low rent payments (para 82 of the judgment).

(x) General measures taken to address the problem

The Ukrainian Government submitted the first (and the only so far) Action Plan to the Committee of Ministers in March 2019. The Government noted, inter alia, that an interdepartmental working group for implementation of the *Zelenchuk and Tsytsyura* case was established and held its meeting in September 2018.[83] According to the Government, the working group is tasked with facilitating the drafting of a law on the sale of agricultural land. Moreover, the Government expressed the view that the actual adoption of a law on the sale of agricultural land would constitute 'the full execution of the general measures, required under the judgment'.[84] However, this law has not been adopted yet. Two draft bills on the sale of agricultural land had been submitted to the Parliament in 2016 but were never considered.[85] More recently, the law extending the moratorium until 2020 required that the Cabinet of Ministers submit the draft law on the sale of agricultural land by 1 March 2019. The Cabinet of Ministers failed to do this.

Possible future developments

Ukraine has held the early parliamentary elections on 21 July 2019. Notably, President Volodymyr Zelenskyi's party 'Sluha Narodu'/'Servant of the People' won 254 out of 450 seats in the Parliament. Such single-party majority suggests that the President and his

[82] 'Moratorium, impoverishment, populism: five myths about the land market', *24 Kanal*, 6 February 2019 (in Ukrainian). Available at: https://24tv.ua/moratoriy_na_zemlyu_v_ukrayini_2018_5_mifiv_pro_rinok_zemli_n1084374
[83] Action Plan, enclosed to the Communication from Ukraine concerning the case of *Zelenchuk and Tsytsyura v Ukraine*, 1340th meeting (DH), 1 March 2019. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2019)254E%22]}
[84] Action Plan, enclosed to the Communication from Ukraine concerning the case of *Zelenchuk and Tsytsyura v Ukraine*, 1340th meeting (DH), 1 March 2019. Available at: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2019)254E%22]}
[85] Draft bill #5535, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=60724 Draft bill #5535-1, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=60829

allies will determine the reform agenda of the country in the coming years. The official programme of 'Sluha Narodu'/'Servant of the People' does not mention the land reform and the moratorium.[86] However, according to President Zelenskyi[87] and representatives of his administration,[88] they support the abolishment of the moratorium and adoption of the law on the sale of agricultural land by the end of 2019. Discussions with the World Bank regarding the preferred model of the Ukrainian agricultural land market are currently underway.[89]

Moreover, it shall be noted that four out of the five parties that have been elected to the Parliament support the abolishment of the moratorium, but stress the need to introduce relevant restrictions, e.g. regarding the maximum amount of agricultural land that can be owned by an individual/legal entity, or regarding foreigners' rights.[90] The only party that opposes the abolishment is the 'Batkivshchyna'/'Homeland' party led by former Prime Minister Yuliya Tymoshenko.[91] This overall cross-party support for the reform increases the chances that the problem will be resolved in due course.

[86] Official programme of political party 'Servant of the People' (in Ukrainian), available at: https://sluga-narodu.com/program
[87] V Yermolayeva, 'The 2019 parliamentary elections: approaches of Ukrainian political parties regarding the agricultural land market', *Hromadske Radio*, 9 July 2019 (in Ukrainian). Available at: https://hromadske.radio/publications/vybory-v-radu-pozyciyi-ukrayinskyh-politychnyh-syl-shchodo-rynku-zemli
[88] M Winfrey, V Verbyany and D Krasnolutska, 'Ukraine turns to blueprint that transformed ex-Communist Europe', *Bloomberg*, 30 July 2019. Available at: https://www.bloomberg.com/news/articles/2019-07-30/ukraine-turns-to-blueprint-that-transformed-ex-communist-europe
[89] Ibid.
[90] Y Korniyenko, 'Elections-2019: what political parties want to do with land, taxes, tariffs and social standards', *Ekonomichna Pravda*, 19 July 2019 (in Ukrainian). Available at: https://www.epravda.com.ua/publications/2019/07/19/649815/
[91] Ibid.