

SHADOW REPORT

Implementation by the Ukrainian Government of the European Court of Human Rights Judgement in the Case of *Burmych and Others v. Ukraine*

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1. Summary

The problem of non-enforcement of the national court decisions was first stated by the European Court in the cases of Zhovner v. Ukraine (Application No. 56848/00, Judgement of 29.06.2004) Voytenko v. Ukraine (Application No. 18966/02, Judgement of 29.06.2004).

Unfortunately, the Government of Ukraine took no efficient measures in the subsequent 5 years to solve this problem, which generated a much bigger number of complaints submitted to the European Court, so, as a result, the Court decided to apply a pilot-judgement procedure in the case of Yuriy Mykolayovych Ivanov v. Ukraine (Judgement No. 40450/04 of 15.10.2009) [10].

In particular, the Court noted the following:

90. The structural problems with which the Court is dealing in the present case are large-scale and complex in nature. They prima facie require the implementation of comprehensive and complex measures, possibly of a legislative and administrative character, involving various domestic authorities. Indeed, the Committee of Ministers is better placed and equipped to monitor the measures to be adopted by Ukraine in this respect.

91. The Court notes with satisfaction that the adoption of measures in response to the structural problems of prolonged non-enforcement and the lack of domestic remedies have been thoroughly considered by the Committee of Ministers in cooperation with the Ukrainian authorities (see paragraphs 38-39 above). However, as is evident from the Court's own findings in the present case and similar cases against Ukraine, viewed in conjunction with other relevant material in its possession, the respondent State has demonstrated an almost complete reluctance to resolve the problems at hand.

92. The Court stresses that specific reforms in Ukraine's legislation and administrative practice should be implemented without delay in order to bring it into line with the Court's conclusions in the present judgment and to comply with the requirements of Article 46 of the Convention. [2]. The Court leaves it to the Committee of Ministers to determine what would be the most appropriate way to tackle the problems and to indicate any general measure to be taken by the respondent State.

94. In any event, the respondent State must introduce without delay, and at the latest within one year from the date on which the judgment becomes final a remedy or a combination of remedies in the national legal system and ensure that the remedy or remedies comply, both in theory and in practice, with the key criteria set by the Court and reiterated in the present judgment (see paragraphs 63-65 above). In so doing, the Ukrainian authorities should

also have due regard to the Committee of Ministers' recommendations to the member States on the improvement of domestic remedies (see paragraphs 35-36 above).

In view of this, the Court:

[...] 4. Holds that the above violations originated in a practice incompatible with the Convention [2] which consists in the respondent State's recurrent failure to comply in due time with domestic decisions for the enforcement of which it is responsible and in respect of which aggrieved parties have no effective domestic remedy;

5. Holds that the respondent State must set up without delay, and at the latest within one year from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, an effective domestic remedy or combination of such remedies capable of securing adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions, in line with the Convention principles as established in the Court's case-law.

6. Holds that the respondent State must grant such redress, within one year from the date on which the judgment becomes final, to all applicants whose applications pending before the Court were communicated to the Government under Rule 54 § 2 (b) of the Rules of Court [6] before the delivery of the present judgment or will be communicated further to this judgment and concern arguable complaints relating solely to the prolonged non-enforcement of domestic decisions for which the State was responsible, including where complaints alleging a lack of effective remedies in respect of such non-enforcement are also raised;

7. Holds that pending the adoption of the above measures, the Court will adjourn, for one year from the date on which the judgment becomes final, the proceedings in all cases in which the applicants raise arguable complaints relating solely to the prolonged non-enforcement of domestic decisions for which the State is responsible, including cases in which complaints alleging a lack of effective remedies in respect of such non-enforcement are also raised, without prejudice to the Court's power at any moment to declare any such case inadmissible or to strike it out of its list following a friendly settlement between the parties or the resolution of the matter by other means in accordance with Articles 37 or 39 of the Convention [2]. [...]

Consideration of similar cases was suspended for the same period.

At the request of the Government, the Court postponed enforcement of this judgement by six months, but the necessary measures were still not taken, so the Court resumed consideration of this category of cases.

In November 2011, the Government submitted to the Parliament the draft Law on State Guarantees for Enforcement of Court Decisions [5], which envisaged:

1. an enforcement mechanism for the national court decisions subject to the responsibility of the state;
2. the compensation payments for the protracted enforcement;
3. amendment of the laws governing the payment of social assistance and special pensions;
4. restriction of the number of companies subject to the moratoria preventing the coercive enforcement of the judgements issued by the national courts.

The bill also prescribed taking stock, over the course of one year after it comes into force, of the arrears under the court decisions where the enforcement is guaranteed by the state and which were issued based on the legal relations existing before the enactment of the law. In addition, the bill announced development of a timeline and the procedure to pay the above arrears from the state budget of Ukraine in accordance with the stock-taking data and analysis of the existing financial resources by 2013.

The provisions restricting social payments and moratoria were included into the draft law as it is these two categories that were the main reason for the accumulation of arrears under the court decisions.

In addition, the calculations provided by public authorities evidence that should the social payments and the moratoria on the coercive enforcement of decision be restricted, the annual assignments to ensure the efficient functioning of the law would have made not less than 3 500 000 000 UAH.

The law was passed on 05.06.2012 to be enacted in January 2013.

The Verkhovna Rada, however, excluded the provisions on the restriction of social payments and moratoria to the enforcement of the decisions issued by the national courts.

This rendered the law inefficient since the moment of its adoption, as its implementation without removing the reasons generating the arrears required considerable annual funding, by far exceeding the possibilities of the state budget.

The European court resumed the consideration of the cases similar to the Ivanov v. Ukraine.

Five applications were combined into the case of Burmych and Others v. Ukraine [7] and sent to the Government for consideration in the period between December 2013 and January 2015.

On 08.12.2015, Section V Chamber that used to be trying the case ceded its jurisdiction to the Grand Chamber, and already on 12.10.2017, the Grand Chamber issued its judgement in the case of Burmych and Others v. Ukraine (Application No. 46852/13 and others).

The reasons behind such judgement are well explained by its text (Paras 148-155) [7]:

148. The continuing failure over many years by Ukraine to execute the Ivanov judgment has left unresolved the systemic problem of non-enforcement of domestic judicial decisions, thereby generating large numbers of follow-up applications which raise issues that are identical in substance to those in the instant case.

149. The Ukrainian Government have conceded that they have failed to implement the general remedial measures of the kind indicated in the pilot judgment and have also acknowledged that the systemic problem identified in that judgment is in principle capable of affecting each and every holder of an unenforced domestic judgment in Ukraine (see paragraphs 130-134 above). According to data presented by the Government to the Committee of Ministers, the number of persons with unenforced judicial decisions stands at some 120,000 (see paragraph 126 above).

150. The above situation, with such a massive influx of applications, is liable to affect the Court's ability to fulfil its mission under Article 19 in relation to other meritorious applications warranting examination. In that context, the Court finds it important to recall that on the date of delivery of this judgment, 72,100 cases earmarked as meritorious are awaiting examination, of which over 27,000 concern non-repetitive Convention issues, including allegations of serious human rights violations.

*151. The respondent State's continued failure to take appropriate general measures, thus leaving the systemic problem unresolved, led the Court to adopt a practice of dealing with the Ivanov follow-up cases in an accelerated, simplified summary procedure for grouped judgments and strike-out decisions, essentially limited to a statement of a violation and award of just satisfaction. This allowed the applicants to obtain swiftly a decision affording them financial redress (see, for example, *Rozhenko and Others v. Ukraine* [Committee], no. [2644/04](#) and 23 other applications, 11 April 2013 and paragraphs 28-29 above).*

152. However, that judicial policy of wholesale delivery of rulings has not had any meaningful impact on the overall systemic problem identified in Ivanov. Nor has it resulted in any apparent progress in the execution process (see paragraphs 43-44, 124-128 and 131 above). Furthermore, every year growing numbers of applicants, instead of receiving appropriate redress at domestic level, have applied to the Court in order to obtain financial relief under Article 41 of the Convention. As noted above (see paragraph 146 above), some new applications concern non-enforcement of domestic decisions which have already been the subject of the Court's judgments finding a violation of the Convention.

153. On adoption of the Ivanov judgment at the end of September 2009 1,400 follow-up cases were pending before the Court (see Ivanov, cited above, § 86). At present, notwithstanding that the Court has already dealt with 14,430 such cases, 12,143 are pending (see Ivanov, cited above, § 86, and paragraphs 43-44 above).

154. The only conclusion that can be drawn from the present state of affairs is that if the Court examines the present cases and all the other follow up cases in the same or a similar manner, it will face the inevitable prospect that growing numbers of applicants in Ukraine will turn to it for redress in the future (see also paragraph 148 above). In reaching that conclusion, the Court also relies on the Committee of Ministers' assessment of the situation at its meeting on 20 and 21 September 2016, to the effect that the measures for settling all already pending cases through friendly settlements or unilateral declarations would not provide a lasting solution to the problem because the Court will still be at risk of receiving new applications as long as the root cause of the problem is not addressed (see paragraph 127 above).

155. The Court observes that it runs the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities in directing "appropriate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions", as required under the fifth operative provision of the Ivanov judgment. That task is not compatible with the subsidiary role which the Court is supposed to play in relation to the High Contracting Parties under Article 1 (obligation to respect human rights) and Article 19 of the Convention, and runs directly counter to the logic of the pilot-judgment procedure developed by the Court.

Therefore, the Court has concluded that the Ivanov-type cases should be treated as follows:

- 1. As observed above, the resolution of the present applications and the 12,143 pending applications – whether or not those applications have been communicated to the respondent State – is more properly part of the process*

of execution of the Ivanov pilot judgment and redress for the systemic problem found in the Ivanov judgment should be afforded to all victims, including all those who have already lodged applications with the Court, within the framework of the execution procedure, under the supervision of the Committee of Ministers (see also the fifth operative provision of the Ivanov judgment and paragraphs 195-196 and 203-204 above). [...]

(i) As regards pending applications

219. Having regard to the fact that all those applications originated in the same systemic problem as found in Ivanov and that they concern essentially the same issues of fact and law as the present case and to its conclusions above (see paragraphs 211-212 above), the Court considers that they should be joined to the present case, in accordance with Rule 42 § 1 of the Rules of Court read together with Rule 71 § 1.

220. Furthermore, for the reasons set out above (see paragraphs 200-208 and 211-212 above), the Court finds that the 7,641 communicated applications listed in Appendix I and 4,502 new applications listed in Appendix II to this judgment should be struck out of its list of cases under Article 37 § 1 (c) of the Convention also.

(ii) As regards future similar applications

221. Considering that the same reasoning applies to any future well-founded Ivanov-type applications that may be lodged after the delivery of this judgment, the Court may strike them out of the list of its cases and transmit them directly to the Committee of Ministers, save those applications which are found to be inadmissible under Article 35 of the Convention.

222. Furthermore, bearing in mind the Committee of Ministers Resolution on judgments revealing an underlying systemic problem of 12 May 2004 (Res (2004)3; see paragraph 112 above), the Court will ensure that the Committee of Ministers and the Council of Europe's institutions referred to in the Resolution are properly notified of any future similar cases and relevant developments concerning the Ivanov follow-up cases (see Greens and M.T., cited above, § 122). The Committee of Ministers and the respondent State will be provided with the Court's judgments/decisions listing such applications, which should then be dealt with in the framework of the general measures of execution of the pilot judgment at national level, in such a way as to ensure appropriate relief for all applicants in those applications (see also the fifth operative provision of the Ivanov judgment).

(iii) Final consideration

223. As stated above (see paragraph 207 above), the decision to strike Ivanov follow-up applications out of the Court's list of cases is without any

prejudice to its power to restore to the list of cases, pursuant to Article 37 § 2, the applications listed in the appendices to the judgment, or any other similar future applications, if the circumstances justify such a course. The Court envisages that it may be appropriate to reassess the situation within two years of the delivery of the present judgment with a view to considering whether in the meantime there have occurred circumstances such as to justify its exercising this power.

Thus, the Court removed from its list of cases 12 143 applications related to the lengthy non-enforcement of the decisions of the national courts. Such applications were removed on the basis of Para 1 (c) of Art. 37 of the Convention [2] since their further consideration was unjustified.

The Court also defined that, if necessary, it may resume consideration both of the applications added to the case of *Burmych and Others v. Ukraine*, and of other similar cases. In addition, the Court stressed that it would reassess the delivery of the judgement within two years.

Thus, if no efficient mechanisms are introduced for the execution of the enforcement of the national court decisions, the European Court may resume consideration of the removed application.

The *Burmych and Others v. Ukraine* case was considered at the 1302nd meeting of the Committee of Ministers of the Council of Europe (CMCE) on 5-7 December 2017 where the following was noted:

*It should be recalled that the problem of non-enforcement or delayed enforcement of domestic judicial decisions has persisted in Ukraine for a long period and that this group of cases has been pending before the Committee since 2004, that six interim resolutions and numerous decisions have been adopted by the Deputies calling upon the authorities to take resolute action without further delay, that a significant lapse of time has passed since the *Ivanov* pilot judgment of 2010 and in particular that no effective system of redress has been introduced in response to it.*

It appears that no further progress has been achieved in this group of cases since its last examination by the Committee.

In its last interim resolution ([CM/ResDH\(2017\)184](#)) of June 2017) the Committee once again underlined that rapid resolute action was absolutely necessary.

*This state of affairs led the Grand Chamber of the Court, in the recent *Burmych* judgment of 12 October 2017, to decide to transmit all pending and future similar cases to the Committee of Ministers to be dealt with in the framework of the general measures of execution of the *Ivanov* pilot judgment,*

including the provision of redress for the non-enforcement or delayed enforcement of domestic decisions and payment of the judgment debt.

The authorities therefore should be urged to introduce a targeted mechanism at domestic level to provide redress to all actual and potential applicants with valid complaints under the Convention.

As a reaction to the Burmych judgment a high level meeting was held on 17 November 2017 in Strasbourg, with the participation of the Ministry of Justice, the Presidential Administration and the Parliament, to discuss the creation of an ad hoc targeted redress mechanism for all applicants concerned by this judgment, which should go hand in hand with efforts to secure a long-lasting solution addressing the root cause of the problems.

Considering that the government have started to work on the setting up of an ad hoc mechanism, it should be stressed that such a mechanism should provide, in line with the Convention requirements as developed in the Court's case law, adequate and sufficient redress to all applicants with valid complaints.

It should take into account the following:

- the requirement to secure enforcement of domestic court decisions that still remain enforceable;*
- the obligation to ensure payment of default interest to safeguard the monetary value of the domestic awards, and,*
- the need to ensure adequate and sufficient compensation for non-pecuniary damage and costs and expenses.*

The ad hoc mechanism should also provide a procedure for verification of claims and speedy administration of payments.

Such a mechanism must be provided with the resources necessary to carry out its functions. Thus the authorities should ensure that sufficient staff and administrative resources are provided and that necessary budgetary allocations are made.

It is also urgent to find in parallel a long-lasting solution to the root cause of the problems, which the Court found to be of a fundamentally financial and political nature. One of the obligations under the general measures is to set up an effective domestic remedy or combination of such remedies that can provide an adequate response to the present situation to ensure the observance by the respondent State of the Convention at domestic level. The authorities should draw inspiration from the guidance given by the Committee in its numerous decisions and its six interim resolutions and the Court's case law over the years. In particular, they should identify, on the basis of available statistical data

relating to judgments delivered against the State and judgments pending execution, the types of cases awaiting enforcement, the types of obligations arising from these judgments (i.e. monetary obligations or obligations in kind) and the major legal impediments, including moratoriums on non-execution, procedural deadlocks or lack of allocated funds, which are the root causes of the problems. The Committee is invited to call the authorities to reinforce their contacts with the Secretariat in this respect.

The authorities should also be invited regularly to inform the Committee of the progress achieved in setting up the ad hoc mechanism and in their work to establish the long-lasting solution. In particular, they should be invited to provide a roadmap, with a precise time-table, by 15 February 2018, bearing in mind the strict timeframe imposed by the Court for reassessing the situation (namely by 12 October 2019) with regard to the measures to be taken to resolve this problem.

On 22.02.2018, the Governmental Agent before the ECHR notified the Committee of Ministers that the action plan was being developed and would not be provided to the CMCE before 15.02.2018 [11].

2. Analysis of the Measures Proposed by the Government of Ukraine

Since as of now the action plan has not yet been officially presented, this report will be based on the 2017 annual report of Governmental Agent before the ECHR, Mr Lishchyna's reply to the inquiry made by MP R. Sydorovych, the information provided by the Ministry of Justice to the Ombudsman (see Annex 1), the Ombudsman's 2017 Annual Report on the Respect and Protection of Human and Civil Rights in Ukraine [9], and the information received from the Burmych case applicants.

The analysis presented herein will be divided into two parts:

1. Measures taken to fulfil the decisions of the national courts issued for the benefit of the Burmych case applicants and compensation payments; and
2. Measures taken to introduce an efficient enforcement system for the national court decisions.

a. Measures taken to fulfil the decisions of the national courts issued for the benefit of the Burmych case applicants and compensation payments

According to the Court judgement and the CMCE position, the Government should establish an ad hoc targeted redress mechanism for all applicants defined in the judgement.

When the judgement was issued, however, the Government was aware of 7 741 applications communicated thereto in 2013-2015, while 4 502 applications found in Annex II had never been communicated to the Government, and therefore, first, there is a need to collect information on the pending decisions and their current status.

As of today, however, the Ministry of Justice has taken no steps to collect such information.

For example, the Good Advice Llc (the company listed in the Burmych case Annex II) sent a request to the Governmental Agent before the ECHR (the Agent) asking to provide information on the procedure and deadline for the enforcement of the national court decision which led to a complaint filed with the Court. The request was accompanied by the Court letter on the removal of the application from the Burmych case list, the copy of the judgement to be executed, and the document confirming that the judgment delivery was still pending.

In reply, the applicant's representative was informed that since the application concerned was included into Annex II, *"there was no information on which particular decision of the national court became the grounds for the application to the European Court."*

Thus, the Agent has taken no actions to collect information on the pending court decisions, and therefore the Government has no information on the amount to be paid to the applicants for the execution of such court decisions.

The Agent also informed the applicant that, under the Law of Ukraine on the Enforcement of ECHR Judgements and Application of Its Practice [8], the decision in the Burmych case is not subject to enforcement:

"Art. 1 of the Law defines the ECHR judgements as follows: a) the ECHR final judgement in a case against Ukraine recognising the violation of the Convention on Protection of Human Rights and Fundamental Freedoms; b) the ECHR final judgement on the just satisfaction in a case against Ukraine; and c) the ECHR final judgement on the amicable settlement in a case against Ukraine.

In such a way, taking into account the provisions of the Law of Ukraine, the ECHR Grand Chamber judgement in the case of Burmych and Others v. Ukraine on the removal of cases from the European Court's list is the decision that is not subject to the enforcement procedure established by the legislation.

In view of the above, in cooperation with CMCE, Ukraine takes active efforts to develop a strategy to settle this problem and to introduce a

mechanism for provision of the relevant and sufficient indemnification for the violation of the rights guaranteed by the Convention."

To this regard, it is rather worthwhile to look into the Ukrainian Ombudsman's position presented in the 2017 Annual Report:

"First of all, it should be noted that enforcement of the national court decisions, which led to the applicants' complaints to the European Court and which were united into the case of Burmych and Others v. Ukraine, are the general nature measures aiming to fulfil the pilot judgement in the case of Yuriy Mykolayovych Ivanov v. Ukraine. This conclusion is based on the provisions of Art. 13 of the Law of Ukraine on the Enforcement of ECHR Judgements and Application of Its Practice".

The judgements issued by the national court can be enforced under the Programme "Payments for the Enforcement of the Decisions of the Foreign Jurisdiction Bodies Adopted Upon Consideration of Cases Against Ukraine."

Thus, according to the Procedure for the Use of the State Budget Funds to Make Payments Related to the Enforcement of the Decisions of the Foreign Jurisdiction Bodies Adopted Upon Consideration of Cases Against Ukraine approved by CMU Resolution No. 408 of 07.03.2007, the budget funds are used, in particular, for the expenses related to the individual additional events to enforce the ECHR judgements, including the execution of the decisions issued by the national courts, non-enforcement of which has become the basis for addressing the ECHR, as well as the expenses needed for the implementation of the general measures to deliver the ECHR judgements.

In addition, the general measures were already implemented at the expense of this programme funds in 2008. Thus, based on the amendments introduced to the above Procedure, the Ministry of Justice paid the salary arrears to the laid off staff of the Atomspetsbud DBPK as a general measure to execute the relevant ECHR judgements."

The Court has clearly expressed its position stating that the settlement of the issue related to the five initial applications in the *Burmych* case and 12 143 enrolled applications and other applications concerning the protracted enforcement of the national court decisions is a component of the general measures under the case of Yuriy Mykolayovych Ivanov v. Ukraine.

In this case, Law on the Enforcement of ECHR Judgements and Application of Its Practice explicitly envisages the necessity of general measures for the complete delivery of the Court judgements.

In our opinion, currently it is impossible to enforce the decisions of the national courts and to pay compensation to the *Burmych* case applicants based

on CMU Resolution No. 408 [4], since its current version envisages only additional individual measures.

We believe that amendment of this resolution to enable the possibility of using the funds of the above programme will provide for quick settlement of the applicants' cases.

It should be taken into account that apart from the enforcement of the national court decisions, there is also a need to indemnify the damage caused to the applicants, including the indexation of the payment amounts, as well as compensation of the intangible damage and judicial fees.

The procedure for the calculation of such compensation should also be written down in CMU Resolution No. 408.

Thus, to ensure enforcement of the national court decisions issued for the benefit of the applicants in the Burmuch case and to pay compensations, there is a need to:

- 1) collect information on the decisions subject to execution and their current status;***
- 2) amend CMU Resolution No. 480 to enable payments for the general measures;***
- 3) calculate the indexation amounts and the compensation for the lengthy non-execution; and***
- 4) ensure sufficient funding for the above payments.***

b. Measures taken to introduce an efficient enforcement system for the national court decisions

In our opinion, the settlement of this problem should be divided into two parts:

- 1) Introduction of an efficient mechanism to enforce new decisions; and
- 2) Repayment of the arrears.

I. Introduction of an efficient mechanism to enforce new decisions

According to the Ombudsman's reply to the MP R. Sydorovych's inquiry, the public authorities take measures to summarise the information on the decisions of the court subject to the responsibility of the state.

The information given by the Ministry of Justice to the Ombudsman, however, indicates that as of 19.01.2018, there are 169 500 pending enforcement documents for the total amount of 4 612 000 UAH.

The Ombudsman's annual report states that the State Treasury Service information evidences that:

- 1) as of 19.12.2017, the first queue arrears made up 992.32 mln UAH (158 851 court decisions);
- 2) as of 19.12.2017, the second queue arrears made up 20.34 mln UAH (1 006 court decisions); the third queue – 3 727.37 mln UAH (7 988 court decisions).

The Law on State Guarantees to the Enforcement of Judgements [5] sets that the court decisions under the state responsibility should be delivered either by the State Treasury Service (the Treasury) or the State Enforcement Service.

Thus, the Ministry of Justice and the Treasury have all necessary information on the pending decisions subject which makes it possible to analyse the reasons of the arrears and the measures that need to be taken to deal with them.

Therefore, the reference to the need to collect information from public authorities on the pending decisions is an attempt to protract the time.

The information provided by the Ministry of Justice to the Ombudsman testifies that the following remain to be the main reasons behind the court decisions under the responsibility of the state (see Annex 1):

- social payments;
- the moratoria preventing the coercive sale of the debtors' property.

Social Payments

To solve this problem, the Ministry of Justice suggests the following:

- to establish a register for those who are entitled to the benefit payments and to use the register information when planning the budget expenses;
- to introduce a system for monitoring draft and valid legislation on establishment of additional benefits and their reconciliation with the budget possibilities, as well as on introduction of any moratoria;
- to establish the governmental budget committee (a responsible CMU body) and to strengthen the efficiency of the parliamentary budget committee;
- to study the possibility of introducing a mechanism to fund the existing benefits and/or to establish new benefits within the quote set by the budget;
- to prohibit adoption of any legislation blocking the decisions enforcement/moratoria and establishing any guarantees not supported by the state budget, as well as to cancel the already existing legislation containing any similar norms.

The best method to solve this problem is, undoubtedly, by bringing the social payment legislation into the compliance with the real possibilities of the state.

Unfortunately, for decades already, the Parliament passes the laws containing promises on the increase of the level of life for various social groups without taking into account the budget capability.

In particular, as it has already been mentioned above, when the Law on the State Guarantees to the Enforcement of Judgements [5] was passed, the Parliament cut down the provisions which were supposed to bring the social payments into compliance with the possibilities of the state budget.

For this reason, adoption of the expected law at the current stage seems to be rather improbable.

In any case, this problem can be solved through introduction of a mechanism which was already used by in 2011 and in 2012.

Thus, in June 2011, the 2011 State Budget Law was amended to set that in 2011 the norms and provisions of certain social laws (such as the Laws on the Status and Social Protection of the Citizens Who Have Suffered from Chernobyl Disaster, on the Social Protection of the Children of War, on the Pension Support to the Individuals Exempt from the Military Service and Certain Other Individuals) had to be applied in accordance with the procedure and within the limits established by the CMU based on the existing Pension Fund financial resource for 2011.

Similar provisions were included into the 2012 Budget Law.

On 6 July 2011, the CMU passed Resolution No. 745 to establish the indicated amounts. This Resolution was valid in the period from 23 July 2011 to 1 January 2012. On 23 November 2011, the CMU issued another resolution, No. 1210, on the same issue.

Moreover, by its Judgment No. 1-42/2011 of 26.12.2011, the Constitutional Court recognised these provisions of the 2011 budget to be constitutional.

On 03.06.2014, the European Court issued its ruling in the case of Valentyna Nikanorivna Velykoda v. Ukraine (Application No. 43331/12) where it also concluded that the above restriction did not violate the Ukrainian constitution [8].

After this, for the same reasons, the Court ruled unacceptable about 5 600 Ivanov-type applications (see Paras 33-35 *Burmych*).

Thus, application of this mechanism may bring the social payments into compliance with the real financial possibilities of the state.

Another issue defined by the Ministry of Justice as problematic in the area of social payments is enforcement of the binding national court decisions on the transfer of social payments and on denial of the change of the decision enforcement method and procedure.

In our opinion, refusal by the social care bodies to fulfil the court decisions to transfer social payments is an artificial problem, as it is not the court that is supposed to calculate such social payment amounts, while such applications increase the burden on the judicial system, which is already overburdened. The problem exists only because the Ministry of Social Policy officials are not diligent enough in fulfilling their duties.

In such a way, application to the court with a petition to change the enforcement method and procedure for the judicial decision to transfer of social payments is an attempt to put the responsibility for the settlement of this issue on the court.

Coercive Sale of Property Moratoria

Like with the social payments, the ideal solution for the problem would be cancellation of the legal norms that introduced such moratoria. Just like with the social payments, however, the Parliament lacks the political will for this decision.

In our opinion, such legal provisions are discriminatory in relation to the companies which are not subject to the moratoria. In view of this, it is rather advisable to consider the possibility of sending a request to the Constitutional Court to recognise such provisions unconstitutional.

If the Parliament refuses to cancel the moratoria, and the Constitutional Court recognises such provisions constitutional, the only way out is to ensure sufficient funding for the delivery of the court decisions involving the debtor companies enjoying the moratorium.

Solution of the systemic problems will make it possible to allocate the necessary state budget funds for the enforcement of such decisions.

II. Payment of the Arrears

In our opinion, the enforcement of the decisions issued about the legal relations that appeared before the settlement of the systemic problems and after should be separated.

As of now, the public authorities have no information on the number of decisions subject to the state responsibility.

Even though many of them were not submitted for execution to the State Enforcement Service or the Treasury, or they were returned without execution, the state is still supposed to enforce such decisions.

Since the development of an efficient mechanism to pay off the arrears requires information on the number of such decisions and the amount to be paid, the Ministry of Justice position to limit the terms for the submission of the relevant documents seems to be quite justified.

Also, it seems to be the right thing to do to restrict the limitation period for the legal relations that existed before the systemic problems have been settled.

Upon expiry of the period set for the submission of the court decisions subject to execution, the amount of arrears on the court decisions will become known, which will also make it possible to define the indexation amount and the intangible damage.

There is no denial the fact that the amount will be big, and its payment will be impossible over a year or two, therefore there is a need to approve the timeline to pay off such arrears.

In addition, the Government of Ukraine proposed an alternative option to the CMCE to pay off the arrears through their restructuring as of 01.01.2015 and payment by promissory notes with the possibility of repayment in a 7-year time. Such mechanism also envisaged a possibility of paying the just satisfaction amounts by promissory notes (CMU Resolution No. 703 of 16.09.2015) [3].

The CMCE was negative the possibility to pay just satisfaction amounts by promissory notes, while more detailed information was requested about this mechanism in relation to the rest (Para 125 *Burmych*).

In 2017, CMU Resolution No. 703 was amended, and the following mechanism was proposed:

- restructuring of the arrears on the decisions of the court subject to the responsibility of the state and on the ECHR judgements as of 01.01.2017 for the amount of 7 544 562 370 UAH;
- issuance of promissory notes equalling the judgement amount;
- the arrears should be paid over 7 years by equal instalments with the first payment made in one year;
- the amount of such promissory note includes 9.3 5 of the annual interest rate;
- the receipt of the promissory note should mean the actual complete delivery of the judgement.

We see the following main drawbacks of such mechanism:

- the arrears are paid off on the consent of the claimer, but no repayment alternatives are offered;
- no indexation for the period between the moment when the decision is issued and until the moment when the promissory notes are issued, as well as indemnification of the intangible damage;
- the repayment period is too long, which has also been noted by the Ukrainian Helsinki Group for Human Rights, (Para 125 *Burmych*), and, besides, the Government may decide to extend it any time or to change the interest rate;
- the court decision is considered to be delivered not when the promissory note is fully paid, but when it only issued.

We believe that if the above drawbacks are removed, and the Government also strictly observes the restructuring conditions, the proposed mechanism can become quite an efficient tool for the repayment of the existing arrears.

3. References

1. Law of Ukraine on the Enforcement of ECHR Judgements and Application of Its Practice No. 3477-15 of 23.02.2006.
2. Convention on the Protection of Human Rights and Fundamental Freedoms (ratified by Law No. 475/97-BP of 17.07.1997).
3. CMU Resolution on Certain Issues Related to the Enforcement of the Court Decisions Guaranteed by the State and the ECHR Judgements No. 703 of 16.09.2015.
4. CMU Resolution on Approval of Procedure for the Use of the State Budget Funds to Make Payments Related to the Execution of the Decisions of the Foreign Jurisdiction Bodies Passed Upon Consideration of Cases Against Ukraine No. 408 of 07.03.2007.
5. Draft Law on the State Guarantees to the Enforcement of Judgements No. 9127 of 08.09.2011; Law of Ukraine on the State Guarantees to the Enforcement of Judgements No. 4901-17 of 05.06.2012.
6. ECHR Rules of Procedure, Strasbourg, 01.11.2003.
7. Case of *Burmych and Others Against Ukraine*, Applications No. 46852/13 and others, ECHR (Grand Chamber), 12 October 2017.
8. Judgement in the Case of *Valentyna Nikonorivna Velykoda v. Ukraine*, Application No. 43331/12, ECHR (Fifth Section), 3 June 2014.
9. Ombudsman's Annual Report on the Status of Human and Civil Rights and Freedoms in Ukraine/ Ombudsman's Secretariat. – Kyiv, 2018. – 661 c.
10. Case of Yuriy Mykolayovych Ivanov v. UKRAINE, No. 40450/04, ECHR (Fifth Section), Judgment (Merits and Just Satisfaction) of 15.10.2009.
11. Communication from the authorities (23/02/2018) concerning the case of *Burmych and Others v. Ukraine* (Application No. 46852/13). – External link: <https://rm.coe.int/1310th-meeting-march-2018-dh-communication-from-the-authorities-23-02-/168078fa91>