EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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The Registrar – Le Greffier
#6546690

Mr Ivan LISHCHYNA
Agent of the Government of Ukraine
before the European Court of Human Rights
Ministry of Justice
13 Gorodetsky Str
01001 KYIV
Ukraine

25 October 2019
By e-transmission only

Dear Mr Lishchyna,

Your letter of 6 September 2019 addressed to Ms Claudia Westerdiek, Registrar of the Fifth Section, has been forwarded to me as Registrar of the Court. In so far as your letter does not fall within the scope any pending proceedings before the Court, you will appreciate that it would not be appropriate for the Section Registrar for the case which you cite in your letter to respond. Indeed any response from the Court must be regarded as being outside any formal procedure. Moreover and accordingly any information provided can only be of a general character.

That being said, as I understand it your letter raises two questions:

1. Is the State's responsibility engaged in respect of non-enforcement or lengthy non-enforcement of judgments where the debtor is a separate legal entity?

2. Is an applicant required to exhaust domestic remedies in respect of enforcement where the State is in effect the debtor?

As regards question 1. the relevant case-law is as follows:

In the case of *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, §§ 114-115, ECHR 2014, the Court summarised its case-law on situations in which the State could be found responsible not only for organising proper enforcement of domestic decisions, but also for debts of separate legal entities:

> "114. ...the Court reiterates that a State may be responsible for debts of a State-owned company, even if the company is a separate legal entity, provided that it does not enjoy sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention (see, among many other authorities, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, §§ 43-46, ECHR 2004-XII; *Cooperativa Agricola Slobozia-Hanesei v. Moldova*, no. 39745/02, §§ 17-19, 3 April 2007; *Yershova v. Russia*, no. 1387/04, §§ 54-63, 8 April 2010; and *Kotov*, cited above, §§ 92-107). The key criteria used in the above-mentioned cases to determine whether the State was indeed responsible for such debts were as follows: the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control).

In addition to *Mykhaylenky and Others v. Ukraine* (cited above), in which the debtor was a construction company operating in the Chernobyl alienation zone, the Court found the State responsible for debts of companies:

- in which the State was an owner or a majority shareholder - *Romashov v. Ukraine*, no. 67534/01, § 41, 27 July 2004:

> "the mine at issue is a State-owned enterprise and that the State is responsible for the debts of the legal entities controlled by it financially or administratively";

or

- in which the enforcement proceedings against a company were seriously limited due to the existence of a statutory ban on execution of judgments.

In Ukrainian cases situations arose, inter alia, due to the Law of 29 November 2001 introducing a moratorium on the forced sale of property (Закон України "Про введення мораторію на примусову реалізацію майна") which was intended to protect State interests on the sale of assets belonging to undertakings in which the State held at least 25% of the share capital (see *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al, § 98, 12 October 2017). Thus, as one example among many, in a case where the State owned 26.1% of the debtor-company's share capital the Court held the State responsible for the impugned non-enforcement because as a result of the above-mentioned law the company's property could not be sold (see *Rotar v. Ukraine*, no. 34126/05, § 12, 15 October 2009).

In respect of question 2., the Court's current case-law is set out the judgment in the case of *Voytenko v. Ukraine* (no. 18966/02, §§ 27-31, 29 June 2004):

> "30. The Government invoked the possibility for the applicant to challenge any inactivity or omissions on the part of the Bailiffs' Service and the Treasury, and to seek compensation for pecuniary and non-pecuniary damage caused by them. In the present case, however, the debtor is a State body and the enforcement of judgments against it, as it appears from the case file, can only be carried out if the State foresees and makes provision for the appropriate expenditures in the State Budget of Ukraine by taking the appropriate legislative measures. The facts of the case show that, throughout the period under consideration, the enforcement of the judgment in question was prevented precisely because of the lack of legislative measures, rather than by a bailiff's misconduct. The applicant cannot therefore be reproached for not having taken proceedings against the bailiff (see *Shestakov v. Russia*, decision, no. 48757/99, 18 June 2002). Moreover, the Court notes that the Government maintained that there were no irregularities in the way the Bailiffs' Service and the Treasury had conducted the enforcement proceedings.
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> 31. In these circumstances, the Court concludes that the applicant was absolved from pursuing the remedy invoked by the Government and has therefore complied with the requirements of Article 35 § 1. Accordingly, the Court dismisses the Government's preliminary objection."

This position was reiterated in a number of cases, including the pilot judgment in the case of *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, §§ 46-47, 15 October 2009):

> "46. As regards the question of the admissibility of the complaints concerning the non-enforcement of the judgment of 29 July 2003, the Court reiterates that a person who has obtained a final judgment against the State cannot be expected to bring separate enforcement proceedings (see *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004, and *Lizanets v. Ukraine*, no. 6725/03, § 43, 31 May 2007). In such cases, the defendant State authority which was duly notified of the judgment must take all necessary measures to comply with it or to transmit it to another competent authority for execution (see *Burdov (no. 2)*, cited above, § 68)."

Therefore, as the Court has found in a number of cases, a plea of non-exhaustion of domestic remedies concerning a failure to challenge the bailiffs' actions or omissions in cases where 25% or more of the debtor-companies' share capital belonged to the State cannot succeed (see, among others, *Rotar* cited above, § 11 with further references).

I hope this information clarifies the matters which you raise. I would finally note that these questions apparently arose in the context of a striking-out following a friendly settlement. I would reiterate the Court's interest in encouraging Contracting States to conclude friendly settlements or, absent the agreement of the applicant, to make unilateral declarations in cases that raise issues of well-established case-law. It was to that end that the Court introduced the dedicated non-contentious phase in its procedure. I would therefore take this opportunity to express the hope that your Government might reconsider its position with regard to the possibility of concluding friendly settlements with a view to reducing the backlog of cases concerning Ukraine.

Yours sincerely,

Roderick Liddell