

European Council's member states' jurisdiction regarding the execution of court decisions and its issues

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Abstract

European Court of Human Rights states that the execution of final decisions is a compulsory provision for a fair hearing and a successful conclusion of a trial. The right to a court protected by Article 6 would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court, is considered to be an integral part of the "trial" for the purposes of Article 6.

Based on the Article 1 of European Convention for Human Rights member states of European Council are obligated to implement the the decisions of ECHR in their domestic legislation in the context of building an efficient legal system.

This paper aims to analyze the legal system of member states regarding the reinforcement of decisions looking forward to identify issues, commonalities and differences among states. What is the procedure followed in the process of execution? What do we understand with "Reasonable timeframe" and which are the legal requirements in which are based "Concrete deadlines" within a judicial decision should be executed? What is the significance of the enforcement agents in this process?

Keywords: jurisprudence; fair trial; domestic legislation; efficient legal system; reasonable timeframe; legal requirements; concrete deadlines

Execution of judicial decisions is a very important stage in the realization of the right guaranteed by law. In the absence of the guarantee for an efficient process of execution, the right of access to court and for a fair legal process would have no meaning.

Recognition and enforcement of judicial decisions is a sensitive issue, which constitutes a "de facto" phase of realization of the right. In antiquity the domestic law was applicable to foreigners (Aliens) and foreign judgments were refused to be applied in a territory where their sovereignty would be exercised. On the contrary, *ius commune* does not make a difference between domestic and non-domestic judgements, consequently these judgements would be recognized and executed.

Based on the issues addressed by the European Court for Human Rights we can state that the execution of court decisions is considered to be an integral part of a legal

process within the meaning of Article 6 of the ECHR, a standard that is set and stressed by the Strasbourg Court in cases: *Zappia v. Italy* and *Hornsby v. Greece*, which today are considered to be legal precedents for similar practices in the future.

This means that the process of execution enjoys the guarantees of Article 6(mentioned above), including the concept of “reasonable time”. The demand for the execution to take place within a reasonable time as well as many other aspects are reflected in the Report prepared by the Research Team on enforcement of court decisions¹ of the European Commission for the Efficiency of Justice. Taking into consideration the data obtained from this survey regarding the execution of court decisions the following analysis has been conducted in this paper:

There are differences between European countries based on the way how judicial decisions are reinforced. These changes are related mostly to the matter: whether the process of execution is carried out by a court or by a specialized authority such as the Agency of Reinforcement. This structure is defined respectively by the Member States and in cases where the process is carried out by a bailiff, a qualification is conducted into private, public or mixed bailiffs. (For more detailed information about this classification look at Table No.2). For example in Poland bailiffs are public officials who act on behalf of the Regional Court, while in Spain the competent authority for the execution process is the judge. Another issue, subject of analysis in this paper is whether the execution process is started automatically or does it need first an application by the creditor? Majority of the countries provide that the execution process is initiated on the request of the applicant.

The concept of compulsory execution

No study about the deadlines of mandatory enforcement can not be possible without firstly first specifying the meaning of the concept “Compulsory Execution”. When do we consider that execution procedures are successfully accomplished? The term “Compulsory Execution” is a key concept for setting the terms of deadlines, evaluation of performance and statistics. This process will be considered *procedurally completed* when the right for a fair trial is *de facto* implemented.

Defined terms or relative ones depending on the cases?

The standard set by the ECHR about the time within which a court decision must be executed is reflected in the domestic legislation of some Member States of Council of Europe. However, legislative approaches differ from country to country. We can identify two approaches:

¹ European Commission for the Efficiency of Justice

The first approach is applied very little compared to the second. It consists in setting through law or a regulatory provision a deadline within the execution of court decisions must take place. In these countries the legislation provides a well-defined term for the execution of the decisions of particular cases such those related to payments, regarding the protection of minority rights or remuneration for *pecuniary or non-pecuniary damage*. German legislation provides a practical example of this approach: it has set a deadline of one month for the execution of a decision of special importance.

The second approach consists in setting a reasonable deadline for the execution of court decisions, giving the competence to the judge to set the "reasonable timeframe". Legislation in Romania, which has been reformed recently offers an illustration of this approach: Rulings concerning commercial cases are executed immediately without any formal procedure and this decision can not be suspended if the debtor does not execute voluntarily the court decision and it will be the bailiff the one who will conduct the process. Usually in these cases the process of execution is carried out within 1, 5, 10 or 15 days. Romanian legislation aims to guarantee a flexible execution system.

In general, it seems that flexibility is a key concept to calculate the terms of execution. Yet, the concept "deadline" seems to be always less applicable nowadays, as it is used only for specific procedures. Each case is unique and execution timeframe depends on a series of factors that do not depend on the will of bailiffs. These factors include firstly the willingness of the debtor to execute the decision; secondly the efficiency also depends on the solvency of the debtor. These two variables are not under the jurisdiction of the bailiff, therefore most of the member States of the Council of Europe prefer not to establish fixed deadlines. Formula "reasonable timeframe" gives to the bailiff some sort of autonomy related to the evaluation and enables the behavior of the parties to be the one which determines the timeframe. However it is required that the execution timeframe not only to be reasonable but also predictable. In order for this to be supported assessment period should be based on precise criteria.

From "reasonable timeframe" to "a well-defined timeframe"

What are the criterias to set a "well-defined timeframe" ?

There are no precise and universal criterias. It should be noted that the legislations of some european countries provide a general rule according to which the judicial proceedings should be conducted within a reasonable time. For example, in Moldova the legislation states that in civil and penal cases the deadline is determined by the evaluation and personal judgment of judges. Moldova is actually a reflecion of the european legal frame and today Moldova is a "legal precedent of the European Court for Human Rights": the complexity of the case, the attitude of the parties, judge's judgement. The effort of the legislator in Moldova to give judges the competence to

define the timeframe of reinforcement is valuable because the foundations of “case law” are built, bringing into life standards for other cases in the future to be set. This is a step toward defining the specific timeframes in reinforcement processes through the adoption of the criteria used by the judges, taking into account the circumstances of each case presented for consideration.

In order to ensure the reinforcement of court decisions within a well-defined timeframe, it must be taking into consideration that the efficiency of this process depends largely on two factors:

The will and solvency of the debtor, therefore the execution process in practice has required some measures to be taken. The prediction of deadlines is not limited to a single action of a bailiff. German legislator has taken into account these circumstances when the last reform was performed reflected in the Federal Execution Act. The new paragraph 25/3 of *Exekutionsordnung* has set a fixed term of one month within which a bailiff should carry out the first phase of execution process.

Based on the Report by the European Commission for the Efficiency of Justice results that unlike Germany well-defined timeframes are not widely used in European countries. Only 23 countries provide statistics about the terms of execution of court’s final decisions. Given the importance to the well-defined timeframes as a legal guarantee for the applicants, countries in Europe are encouraging the use of databases accessible to the citizens in order to provide data and case law precedents regarding legal deadlines within a final court decision must take place and as well to shape the terms based on which the timeframe will be set.

The obligation to inform applicants about the terms

Only a small number of countries have adopted provisions for informing the applicants about the length of proceedings: Finland, France, Georgia, Lithuania, Moldova and Greece out of 47 member states of Council of Europe.

Guarantee to enforce the terms

There are not many legal instruments to guarantee enforcement for deadlines. Effective remedy as the right to seek legal compensation for any delay in the execution process holds its actual position as the most efficient tool.

Bailiffs’ reliability

Legal terms for the implementation of a judicial decision is related to the quality of execution institutions in the Member States of Council of Europe. In some countries such as Finland, Germany, Norway and Sweden bailiffs are public employees and the

state itself is the authority which guarantees the effective execution of court decisions. In these countries, legislation has made provisions for certain types of complaints against extension of the terms of the execution process: disciplinary proceedings against bailiffs and appeal to the Ombudsman Institution.

At the Council of Europe's 3rd Summit (Warsaw, May 2005), the Heads of State and Government undertook to "make full use of the Council of Europe's standard-setting potential and promote implementation and further development of the Organisation's legal instruments and mechanisms of legal co-operation". At this summit, it was decided to "help member states

to deliver justice fairly and rapidly".

Such a policy is a key of great importance to the credibility and accountability of bailiffs and toward identifying their failures in enforcement of timeframes.

Complaints procedures and procedures to compensate users for failure to respect the enforcement timeframe

There is no doubt that the excessive length of enforcement procedures constitutes a failure of the judicial system. For this reason failure to respect a reasonable timeframe should open the possibility of filing a complaint against the enforcement agent in question. For example, German legislation provides that, in the event of failure by the enforcement agent to respect the timeframe imposed, the parties have the right to lodge a complaint for procedural error with the enforcement court (*Exekutionsgericht*)². The legislation of some member states makes provision in this situation for possible compensation, which follows the rules of procedure of the ordinary law (Finland and Sweden) or of a specific procedure (Germany and the United Kingdom). An example of such procedures is provided by the United

Kingdom legislation establishing a "dual" complaints mechanism for a system of compensation for users in the event of excessive length of enforcement. The Civil Procedure Rules 1998 (No. 3132), which are in force throughout the territory of the United Kingdom, make provision for appeal and, if necessary, compensation for each enforcement measure whose length is excessively long.

The procedures of compensation in cases of excessive length in the process of execution are provided in 22 countries of 45 members of Council of Europe. The only states that do not provide a national mechanism to exercise the right of appeal are Armenia and Hungary.

² Report by European Commission for the Efficiency of Justice

22 states are able to calculate the foreseeable enforcement timeframe for administrative cases	Albania, Armenia, Azerbaijan, Bulgaria, Cyprus, Czech Republic, Finland, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Moldova, Netherlands, Poland, Romania, Slovakia, Spain, Sweden, UK-England/Wales, UK-Scotland, Ukraine
Of those 22, 21 states guarantee users the possibility of complaining if the foreseeable enforcement timeframe is exceeded	Albania, Austria, Azerbaijan, Bulgaria, Cyprus, Czech Republic, Finland, Germany, Iceland, Moldova, Netherlands, Poland, Romania, San Marino, Slovakia, Spain, Sweden, UK-England/Wales, UK-Northern Ireland, UK-Scotland, Ukraine
Of those 21, 10 states give users the possibility of obtaining compensation for excessive length of proceedings	Azerbaijan, Bulgaria, Iceland, Luxembourg, Poland, Slovakia, Spain, Sweden, UK-England/Wales, UK-Scotland

Table 1: Procedures of compensation in cases of excessive length in the process of execution

The data provided in the above table indicate that 21 states foresee the appeal procedures against the length of execution deadlines. Taking as a premise the fact which indicates that the extension in time of the process of execution is considered to be a failure of the judicial system, the compensation constitutes a guarantee for the respect of these terms. But however the possibility of a domestic remedy is foreseen only by 11 countries from 21 which foresee the right to appeal.

In both civil and administrative the total number of countries which provide legal guarantees for the observance of deadlines, only a small number of states provide the right to a domestic remedy. The remedy, itself constitutes a guarantee for the observance of "reasonable timeframe" in which the execution of court decisions has to take place. Providing a system of compensation for citizens to whom the right to a fair trial is violated through delays in the enforcement process comprises several advantages: Such a policy framework will promote respect for the law by the competent authorities which carry out the execution, therefore it will establish legal standards and increase public confidence in the legal system.

The scale of autonomy given to the enforcement agents

The autonomy of enforcement agents varies on the basis of how their activity is controlled: the role of authorities on behalf of whom the office is run is essential. Does this authority exercise an *a priori* authority (initial function) or *posteriori*

(disciplinary function) ? Usually the autonomy of bailiffs is proportional to the degree of involvement of judges in the procedure of execution: In systems where legislation requires that the bailiff must take permission from the court to take certain measures (a priori) the procedure of execution seems to demand an extra time, contrary to the systems which accords to the bailiffs more autonomy.

Enforcement agents per 100,000	0-5	5-10	10-15	15-20	20+	
States and legal entities with enforcement agents with a public status	Albania Austria Azerbaijan Bulgaria Georgia Malta Montenegro Turkey UK-Nothern Ireland	Andorra Germany Iceland Italy Liechtenstein Moldova Norway	Finland Russian Federation Sweden Ukraine		Cypros	21
States and legal entities with enforcement agents with a private status	Albania Estonia Hungary Latvia Lithuania Luxembourg Netherlands Romania Slovakia Slovenia	Monaco	UK-Wales			11
States and legal entities with enforcement agents with mixed status	Ireland, Portugal UK-Scotland	Belgium Chech Republic, France				6
	22	11	5	0	1	38

Table 2: Number of enforcement agents in relation to population

Conclusions

The diversity of issues addressed by the legal systems of Council of Europe's member states regarding non-execution of court decisions, has established a binding legal practice on the signatory States under Article 1 of the ECHR, regulating the domestic gap regarding execution of judgments that contain an obligation, mainly, monetary.

The enforcement of courts' final decisions, is not only a guarantee but also as the conclusion of legal proceedings in view of the jurisprudence of ECHR.

Article 6 of ECHR underlines the fact that every citizen, who is addressed to the court for the implementation of a right, can not wait indefinitely for that to happen. The execution, within a reasonable time, of a court final decision is an integral part of the right to a fair hearing within the meaning of the European Convention of Human Rights.

The non-enforcement of the courts' final decisions within a reasonable time emphasizes the necessity of an effective execution system, which should ensure correct implementation of judicial decisions as the conclusion of a legal process.

Excessive length of enforcement is probably the most widespread complaint of users in Europe. In order to reduce it, it may be useful to put in place quality standards for enforcement agents; such standards should be based on a system of regular follow-up of court activity concerning the length of proceedings. To ensure equal accessibility to enforcement services, measures should be taken to ensure that there are effective enforcement systems.

The role of the bailiff in the process of reinforcement has a crucial importance as many states foresee the bailiff as the authority to comply with the execution of court's final decisions. Recently, like in Moldova, the judges have taken more responsibility in the process of execution as well-defined timeframes are to be set by the personal judgements of them.

As there have recently been a shift from "reasonable timeframe" to "well-defined one" such as in Germany case law precedent will be a strong criteria in setting the time needed for a decision to be enforced.

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