HELLENIC REPUBLIC

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The compliance of the Public Administration with domestic judicial decisions

I. Introduction

In the light of the recent convictions by the European Court of Human Rights (ECHR)[1], the National Commission for Human Rights (NCHR) elaborates on the issue of Public Administration's proper compliance with domestic judicial decisions. NCHR primarily dealt with this issue when it was requested by the Ministry of Justice to submit its observations on the draft law entitled "Obligation of the Administration to Apply the Judicial Decisions, Promotion of Judges of the Administrative Courts to the Council of State and Other Provisions". Estimating that a considerable length of time has passed since Law 3068/2002 entered into force, so that conclusions can be drawn regarding its effectiveness, NCHR decided to reiterate its opinion on this issue. To this end, NCHR requested the three state supreme courts -the Council of State, the Supreme Court (Areios Pagos) and the Court of Audit- to notify the special report drawn up at the end of each year by

[1] *Beka-Koulocheri v. Greece,* judgment of 6 October 2006, *Pantaleon v. Greece*, judgment of 10 May 2007, *Rompoti and Rompotis v. Greece*, judgment of 9 July 2007, *Georgoulis and Others v. Greece*, judgment of 21 September 2007, *Kanellopoulos v. Greece*, judgment of 21 May 2008, *Panagiotis Gikas and Georgios Gikas* v. Greece, judgment of 2 April 2009. The compliance of the Greek Public Administration with the domestic judicial decisions is a matter of high priority within the framework of the Parliamentary Assembly of the Council of Europe, see Parliamentary Assembly, Resolution 1516 (2006), para. 22.5 and Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights*, AS/Jur (2009) 36 (31.08.2009).

their three-member councils responsible for supervising Administration's compliance with domestic judgments.

II. Background

Administration's compliance with domestic judicial decisions constitutes the major aspect and expression of the principle of legality and the rule of law, as it is underlined by the relevant amendment of Article 95, paragraph 5 of the Constitution. However, the implementation of this self-evident obligation -notwithstanding the provision laid down in Article 20, paragraph 1 of the Constitution 1975/1986 on which the obligation of Administration's compliance is reasonably based providing effective judicial protection- appeared to be extremely defective, given that the Administration often enough failed or substantially delayed to comply with final domestic judgments, which, unfortunately, still persist today.

The problem of the Administration's non-compliance with the domestic judgments came to light with the *Hornsby* case, where ECHR held: "To construe Article 6 [of the European Convention on Human Rights] as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law [...]. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6". Furthermore, as the Court stated: "Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose".

Hornsby case was followed by a number of ECHR judgments convicting Greece for violating Article 6 and in certain cases for violating

Article 1 of the First Additional Protocol in the event of Administration's non-compliance with the relevant judicial decisions[2].

In consequence of ECHR judgments, the Greek State adopted two measures to remedy this structural problem. The first one was to review the relevant constitutional provisions. In accordance with Article 94, paragraph 4 of the revised 2001 Constitution: "*Any other competence of an administrative nature may be assigned to civil or administrative courts, as specified by law. These competences include the adoption of measures for compliance of the Public Administration with judicial decisions. Judicial decisions are subject to compulsory execution also against the Public Sector, local government agencies and legal entities of public law, as specified by law"*. Furthermore, under Article 95, paragraph 5 of the Constitution: *"The Public Administration shall be under obligation to comply with judicial decisions. The breach of this obligation shall render liable any competent agent, as specified by law. The measures necessary for ensuring the compliance of the Public Administration shall be specified by law*".

The second measure was to enact implementation Law 3068/2202 (Official Journal of the Hellenic Republic A' 274) regarding Administration's compliance with the judicial decisions establishing a specific judicial monitoring system assigned to the three-member councils of the state supreme courts in order to ensure Administration's compliance with the domestic judicial decisions.

In view of the foregoing, the Committee of Ministers of the Council of Europe noted that Greece has adopted a number of comprehensive constitutional, statutory and regulatory reforms to remedy the structural problem of the Administration's non-enforcement of domestic judicial decisions and consequently the Committee decided to close proceedings.

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[2] *Antonakopoulos, Vortsela and Antonakopoulou v. Greece*, judgment of 14 December 1999, *Dimitrios Georgiadis v. Greece*, judgment of 28 March 2000, *Logothetis v. Greece*, judgment of 12 April 2001, *Pialopoulos and Others v. Greece*, judgment of 15 February 2001, *Katsaros v. Greece*, judgment of 6 June 2002, *Adamogiannis v. Greece*, judgment of 14 June 2002.

III. The problem today

A) The operation of three-member councils

The aforementioned reforms constitute a very important development for ensuring Public Administration's proper compliance with judicial decisions, yet they have not managed to resolve the problem, as it is also apparent from the special report drawn up by the three-member councils. For instance, despite the considerable number of judgments by which the Three-Member Council of the Council of State has ascertained the Administration's non-compliance with Administrative Courts' judgments, it has imposed monetary sanctions only to 11 of these cases. Furthermore, the Three-Member Council upholding having exerted a policy to exhaust time-limits provided to the Administration by Law 3068/2002 complemented by Presidential Degree 61/2004, given that by this specific set of arrangements which implement the constitutional guarantee of Article 94, paragraph 4 and Article 95, paragraph 5 of the Constitution, the purpose of which is to encourage Administration to comply with the judicial decisions mainly as providing effective judicial protection and not as merely imposing monetary sanctions. Albeit lawful, this practice does not necessarily comply with the letter and spirit of Article 6 of the European Convention on Human Rights ("the Convention"), as it is apparent from the conviction by ECHR in the case of *Georgoulis and Others* v. *Greece*.

In addition to the foregoing, the Three-Member Council of the Court of Audit assessing its work as a new institutional instrument, finds it has already produced significant results owing to the fact that despite a seeming increase in the number of applications, the Greek General Accounting Office has met the requirement to comply with the judgments of the Three-Member Council, even after the second stage of the aforementioned procedure is being applied. This arises from the fact that the Council did not hitherto have to impose a financial penalty. Nevertheless, the Council has been concerned whether the enforcement of the monitoring system established by Article 2 of Law 3068/2002 for

ensuring Administration's compliance -even reluctant in exceptional cases- is possible to be considered over time as a prerequisite without which the Administration would not finally comply with the judgments.

B) ECHR convictions since the entry into force of Law 3068/2002

ECHR has convicted Greece six times for violation of Article 6 of the Convention or/and Article 13 on the grounds of Administration's non-compliance with the judicial decisions in cases where facts occur at a later date than the adoption of Law 3068/2002. Thus, two important issues arise from these decisions of the European Court of Human Rights: a) the obligation of the Administration to **promptly** comply and b) the effectiveness of the procedure itself provided for in Law 3068/2002, so as to ensure the Administration's compliance with the judicial decisions.

i) Administration's prompt compliance

The first issue arises from *Georgoulis and Others v. Greece* case. In the present case, although the applicant had submitted application to the Three-Member Council of the Council of State for the Administration's non-compliance with the judgment of the Administrative Court of Appeal of Thessalonici, which was ultimately rejected because in the meantime the Administration has met the requirement to comply, the Court finally convicted Greece for non-compliance within a reasonable deadline. As a consequence, this decision highlights the need for amending Law 3068/2002, not only to accelerate the procedure of monitoring Administration's compliance by the Three-Member Councils, but also to exert greater pressure to the Administration so as to comply.

The necessity to accelerate the conformity checking procedure also arises from the operation of the Three-Member Council of the

Council of State as it is being illustrated in the report drawn up showing that it is indeed a very time-consuming procedure.

ii) The effectiveness of the procedure of Law 3068/2002

As regards the second issue, it arises from the judgments of the European Court of Human Rights and it is much more complex, as the Court calls in question the effectiveness of the procedure itself. In the cases of *Georgoulis* and *Rompoti*, Greece has raised the objection of non-exhaustion of domestic remedies, since the applicants have not made use of the possibility to submit application to the Three-Member Council of the Council of State when they brought proceedings before the Court, where the latter held:

"The mechanism set up by the Government is not likely to lead to a certain execution of a judgment since the Administration refused to comply. In fact, after the applicant had appealed before the competent committee of the highest jurisdiction, this committee could only note the administration's refusal to comply with a judgment and impose the payment of compensation to the applicant, if necessary. However, the execution of the judgment would not derive from the implementation of the mechanism set up by the Government, but it would be at the Administration's discretion with a view to avoiding paying compensation".

On the basis of those considerations, the Court rejected the objections raised by Greece of non-exhaustion of domestic remedies in the aforementioned cases.

Therefore, having regard to the above-mentioned judgments, the Court raises questions about the effectiveness of the procedure, since even imposing a financial penalty to the Administration may exert some pressure, but it does not guarantee its compliance with the judicial judgments, as envisaged.

IV. The need to ensure Administration's obligation to comply with judicial decisions

A) Ensuring prompt compliance

In order to accelerate the whole procedure and consequently ensure Administration's prompt compliance with the judicial decisions, a number of improvements of the existing legislative framework shall be made.

First of all, under the provisions of Article 2, paragraph 3 of Law 3068/2002 "[...] With the exception of judgments delivered by the Supreme Special Court and by the Plenary of the relevant Supreme Court, judges who delivered the decision for which the Administration's compliance procedure is initiated do not participate in the three-member council unless its formation by other judges is impossible". The participation of the judges who dealt with the case in the three-member council will accelerate the procedure, given that they will be able to inform their colleagues about a case saving them from spending too much time to study the dossier.

The need for the judge to participate in the three-member council is made clearly evident having regard to the provisions of Article 3, paragraph 2 of Law 3068/2002 according to which: "The three-member council may appoint and authorise a judge [...], to submit, even ex officio, an opinion and to provide the authority under obligation of compliance with the necessary assistance regarding the most appropriate manner of compliance with the decision". The judge dealing with the case is the most competent to fulfil this role, since he is aware of the details as well as the potential complexity of the case in question.

Moreover, in order to accelerate the conformity checking procedure, it is essential to decentralise it, as supported by the Plenary of the Council of State. The decisions on the compliance may de issued by courts of all degrees. Thus, three-member councils could just as well be established at level of courts of appeal -civil and administrative- which would be competent to ensure Administration's compliance with their regional Court judgments. In so doing, the three-member councils of the supreme courts will not be overburdened and at the same time this will render possible the participation of the judge dealing with the case in the council in most cases.

B) Ensuring Administration's compliance itself

In principle, it has to be noted that the Law in question refers to compliance and not to execution, which is a crucial distinction, as the concept of compliance is wider that this of execution.

The obligation to comply with -and not only to execute- the judgment raises questions to what extent Administration is obliged to comply with refusals by administrative courts. The Three-Member Council of the Council of State has held that the obligation of compliance does not derive from any refusal, "because with the request to comply with such a decision, what is really intended is not the Administration's compliance with the judicial decision, but the execution of its own actions". NCHR considers that this approach is not in line with pursuing enforcement of the principle of legality.

Furthermore, ECHR does not share either the above-mentioned opinion of the Three-Member Council, as in the case of *Prophet Elias Monastery in Thera*, it held that "Article 6, paragraph 1 makes no distinction between decisions allowing or refusing the action brought before national courts. In fact, regardless of the result, a judicial decision must always be respected and implemented. The acts or omissions of the Administration following a judicial decision can not therefore either prevent or even less challenge the merits of the case".

Moreover, in line with the dissenting opinion in the Three-Member Council "the obligation to comply may result from any refusal, within the meaning of the obligation to execute the administrative act against which was lodged the rejected appeal, since the legality of the contested administrative act is confirmed by the refusal, and in so doing the obligation to comply with the act is renewed after lis pendens and litigation of validity are lifted". NCHR stands in favour of the above decision and dissenting opinion holding that it responds better to the principle of legality and thus it ensures effective compliance of the Administration. Therefore, three-member councils shall also have

jurisdiction to deal with compliance requests on refusals where appropriate.

Beyond this specific issue, the Administration's obligation to comply is to adopt all necessary administrative acts. In case of Administration's refusal to comply, various judges and scholars propose that a solution could be its "substitution" of the three-member judicial councils, at least for those cases where the relevant court decisions leave no discretion, but provide for the exercise of circumscribed powers to the Administration. As, moreover, it has been noted "as provided for in the Constitution the possibility for taking administrative measures can be assigned to judicial bodies so as to ensure Administration's compliance with judicial decisions and it constitutes a deliberate by the constitutional legislator extension of the strict separation of powers".

On those grounds and given that in the exercise of circumscribed competence Administration does not essentially have to opt between one alternative and another, a judicial body can adopt the necessary for the compliance with the judicial decision administrative act ensuring the required efficiency of the monitoring procedure. It is proposed, therefore, to make a provision regarding the possibility to issue the Act which is the subject of compliance by the Appointed Judge under Article 3, paragraph 2 of Law 3068/2002, as a case of circumscribed competence. This regulation is in line with the assignment of administrative competences to the judicial power under Article 94, paragraph 4 of the Constitution.

Having regard to the cases where Administration has discretion, "judicial substitution" of the latter can also be recommended. This proposal, in fact, is consistent with the opinion expressed by the Council of State on the revision of the constitutional provisions in 2001. With regard to the relevant constitutional provisions on the Administration's compliance with the judicial decisions, the Council of State held that:

> "In other legal orders courts themselves take administrative measures to ensure Administration's compliance with judicial decisions, such as the substitution of administrative acts by

court decisions etc. Taking such measures should be assigned by law in Greek courts."[3]

Hence, the Council of State proposed the solution of "judicial substitution" without making a distinction between circumscribed competence and discretion. According to a provision laid down in a previous draft law drawn up by a working group to study and propose legislation for the compliance of the Administration with judicial decisions:

> "If the Administration has discretion to formulate the content of action of compliance, the Appointed Judge shall cooperate with the competent authority in order to find an appropriate solution. If this partnership leads to a concrete solution which seems to be the most appropriate, the previous paragraph is applied. If more than one solutions arise, the judge shall outline all possible solutions and set a reasonable time-limit for the administration to adopt one of those solutions. When the time-limit, which can only once be extended, has expired, then the Appointed Judge shall select the most viable option in his opinion and the remainder of the previous paragraph is applied.[4]

On those grounds, it is proposed to adopt the above-mentioned draft legal provision.

Lastly, it is recommended to the three-member councils to systematically impose the financial penalty for which provision is made when the conditions laid down in Law 3068/2002 are met.

V. The problematic addition to Article 1 of Law 3068/2002

Under subparagraph laid down in Article 1 of Law 3068/2002 as amended by Article 20 of Law 3301/2004 (OJHR A' 263): "Enforcement orders referred to cases c-g of paragraph 2, Article 904 of the Civil Procedure Code are not considered to be judicial decisions

[3] Record No. 6/2000 of the Meeting Plenary of the Council of State, page 19.
[4] E. Spiliotopoulos, "Η συμμόρφωση της Διοίκησης προς τις δικαστικές αποφάσεις", vol. *Τόμος Τιμητικός του Συμβουλίου της Επικρατείας: 75 χρόνια* (Sakkoulas Editions, Athens-Thessalonici, 2004), page 875, 879.

within the meaning of the present Law and shall not be implemented except those declared as enforceable foreign judicial decisions".

The greatest change made by this addition is that it essentially excludes enforcement of paying orders against the State. This issue is of great practical importance given the extensive search for judicial protection through payment order.

A first issue is whether the payment order is a judicial decision. Combining Article 904, paragraph 2 (e) and Article 631 of the Civil Procedure Code, it can be accepted that a payment order is an enforcement order and not a judicial decision since it is delivered by a judge, however, yet without the constitutional guarantees of the right to be heard as well as the principle of publicity and orality. In 2008, the Plenary of the Court of Audit held by a majority that "payment orders or interim orders do not fulfill the terms of the judicial decision and consequently do not urge public bodies to execute them".

Nevertheless, according with the minority "when the time-limit has expired for the part of the defendant debtor's to oppose the payment order, then it acquires the force of res judicata and shall be treated as a judicial decision. In addition, the decision issued after the opposition under Articles 632 and 633 of the Code of Civil Procedure meets the constitutional guarantees of the right to be heard as well as the principle of publicity and orality and therefore constitutes a judicial decision within the meaning of Article 93, paragraph 3 of the Constitution".

Mr. Rantos and Mr. Kalavros, Members of the Supreme Special Court, expressed their opinion in the judgment 18/2005, according to which the amendment of Article 20 of Law 3301/2004 "as unacceptably restricts the concept of judicial decision within the meaning of the last subparagraph of Article 94, paragraph 4 of the Constitution is incompatible with the constitutional provision in question, since judicial decisions are considered to be not only decisions delivered by courts in the strict sense, but also the ones functionally similar to these, because on the one hand, they resolve differences, on the other hand they

produce the characteristic effects of judgments, which meet the basic functional features of judicial protection as provided for in Article 20, paragraph 1 of the Constitution. A payment order is a judicial decision of this kind, since it is delivered by a judge and may under certain conditions acquire the force of res judicata".

Furthermore, it should be noted that the European Commission for Human Rights in the case of *Beis v. Greece* found that "if no objections are raised, the payment order acquires the force of res judicata" as well as that "the procedure for issuing a payment order concerned the determination of civil rights of the applicant". Therefore, the payment order having acquired the force of res judicata shall be essentially treated as a judicial decision, shall be enforced against the State. Consequently, the addition to Article 1 of Law 3068/2002 raises a question of constitutionality.

The issue in question does not concern only the legal nature of the payment order, but also the actual content of the right to judicial protection, as enshrined in Article 20, paragraph 1 of the Constitution and Article 6, paragraph 1 of the European Convention on Human Rights. As it has been already noted, compulsory execution is also included in the right to legal protection. Typical of this is the decision 21/2001 of Areios Pagos which in reliance of Article 2 and Article 14 of the International Covenant on Civil and Political Rights, Article 6, paragraph 1 of the Convention (ECHR) and Article 20, paragraph 1 of the Constitution held that the right of compulsory execution is included in that of effective judicial protection and therefore the execution of judgments awarded by financial debts and generally any enforcement application relating to such debts as well as the delivery of the cheque to pay those debts is permitted not only against the State, but also against local authorities.

Moreover, much interesting on this point is the opinion expressed by the Plenary of the Court of Audit which indeed runs counter to the aforementioned decision. Having regard to the Record of the 7th General Meeting of the Plenary of the Court of Audit dated 19.03.2003

"... it is immaterial whether compulsory execution is conducted on the basis of enforcement court order or under other enforcement orders referred to in Articles 904, 905 of the Code of Civil Procedure, because the legal order is not to simply recognize rights, but should also provide how they are being compulsorily satisfied, for the existence and the content of which, interested parties, if challenged, may use the diagnosis court, either before or after the executive procedure starts. [...] Note that although such orders are not referred to in Article 1 of Law 3068/2002, this does not alter things. The obligation of the Administration to comply with the above-mentioned enforcement orders, since it is possible to implement such enforcement by compulsory execution, is under the guaranteeing of Articles 20, paragraph 1 of the Constitution and Article 6, paragraph 1 of the Convention (ECHR) provided by enforcing the legal system of rights". This view was also adopted in their entirety by the Athens Court of Appeal in a recent ruling.

In accordance with the foregoing, Article 20 of Law 3301/2004 is a constitutional problem and therefore it should be abolished in respect of payment orders which have become final and in general regarding interim legal protection afforded by law as enforceable.

NCHR, based on its prior proposals in 2002 and all these newer data for the implementation of Law 3068/2002, concludes with the following proposals aimed at rendering the procedure of monitoring compliance with the judicial decisions faster and more effective:

VI. Proposals

1) It is proposed that provision should be made for the participation of one of the judges having dealt with the case to the composition of the three-member council, where possible.

2) It is proposed to set up three-member councils at level of courts of appeal -civil and administrative- competent to supervise

Administration's compliance with the judgments delivered by courts of their region.

3) Provision should be made for the Administration to comply with the judicial decision within a reasonable deadline, which will initiate from the moment of notification of the decision to the authority to be complied with.

4) The three-member councils should also undertake the application of compliance on refusals, where appropriate.

5) The financial penalty as provided for the non-compliance should be systematically imposed by the three-member councils when terms and conditions laid down in Law 3068/2002 are met.

6) Provision should be made for issuing an act of compliance with the judicial decision by an appointed judge by prior arrangement with the Administration in cases where the administrative authority exerts circumscribed competence.

7) Provision should be made for issuing the relevant act by an appointed judge by arrangement with the competent authority during the procedure of the aforementioned draft legal provision in case the Administration has the discretion to formulate the content of the action to compliance.[5]

8) Payment orders having acquired the force of res judicata and remedies of interim legal protection recognized by law as enforceable should be reintegrated into the scope of Law 3068/2002.

9) To disseminate the conformity checking procedure of the Administration with the judicial decisions and the parties make use of this option more frequently, as well as to remind the Administration of its obligations, it is proposed to systematically send a reminder of this procedure as long as relevant decisions are being communicated to the parties by administrative courts.

NCHR considers that in case the Greek State adopts its proposals and amends Law 3068/2002 as it proposes, the compliance of the

[5] Regarding relevant text, see page 17 and footnote 39.

Administration with the judicial decisions will improve. Furthermore, the conformity checking procedure itself will fulfill the requirements provided for in Article 13 of the European Convention on Human Rights, as they have been interpreted and developed by ECHR case-law, so as to become an effective legal remedy.

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