*Ministero della Giustizia*

SUBJECT: Report of the Commissioner for Human Rights of the Council of Europe. Requests for information on legislative initiatives designed to address the problem of excessive length of judicial proceedings in Italy.

REMARKS

The Report of the CoE Commissioner for Human Rights, drawn up following his visit to Italy from 3 to 6 July 2012, shows the following critical observations with reference to the problem of excessive length of court proceedings in Italy.

1) **Malfunctioning of domestic remedies for excessively lengthy proceedings**, due to insufficient compensation, unjustified delays in payments, the complexity of the judicial procedure for the payment of compensation and the lack of remedies to expedite proceedings (paragraphs 14 et seq. of the Report).

Article 55 of Decree-Law no. 83 of June 22, 2012, converted into Law no. 134 of August 7, 2012, significantly changed Law no. 89 of March 24, 2001, (the so-called *Pinto* Law), affecting the procedure for the settlement of compensation payments providing for objective criteria for the quantification of their amount.

These changes are aimed at streamlining the caseload of appellate courts, preventing the length of such proceedings from giving rise to State liability for violation of Article 6 of the European Convention on Human Rights (which is one of the causes of the malfunctioning of the domestic remedy, as pointed out by the Commissioner for Human Rights).

In particular, according to the new provisions of the so-called Pinto Law:

- the threshold below which the length of proceedings must be deemed reasonable is established (the length of proceedings cannot be declared unreasonable if it does not exceed three years before first instance courts, two years before appellate courts, and one year before the Supreme Court; in any case, the reasonable length is to be considered complied with if the case is finally settled in a period of time not exceeding six years);

- The fact that the reasonable length of proceedings is set by law is important not only to establish the right of the party to compensation (compensatory function), but it also has the function of not exceeding the established length of proceedings, being a clear directive the judge has to comply with in carrying out the trial (expediting function);

- the amount of compensation payable for each year (or fraction of a year) exceeding the period of reasonable length is established by law (compensation is determined in a range between 500 and 1,500 euros). The practical quantification of compensation is affected by several factors such as the conduct of the parties and of the judge, the outcome of the trial, the nature of the interests involved, the value and importance of the case (also assessed in relation to the personal conditions of the party);

- cases are listed where compensation is denied because of the procedural behavior of the party alleging an unreasonable length of proceedings (when the unsuccessful party in the civil trial is convicted of abuse of process [*responsabilità processuale aggravata*] pursuant to Article 96 of the Code of Civil Procedure, and when the party, although successful, started the civil action or contributed to prolonging its duration for refusing to accept the proposal of the other party for an amicable settlement of the dispute, if this proposal is fully equivalent to the content of the final decision of the judge; if the offence is statute-barred due to procedurally dilatory conduct of the party);

- as to the procedural aspect – apart from the jurisdiction of the Court of Appeal as court of first and final instance on the merits, the claim is submitted and decided upon according to a mechanism similar to that of an order for payment (the party alleging a violation of the reasonable length of proceedings brings the case before the Court's Chief Justice who appoints a judge of the court for the handling of the case; the case is decided on the basis of the documents filed by the claimant; the case is settled by a decree by which the court accepts the claim, in whole or in part, or rejects it);

- in order to avoid an appeal instrumental to the procedure for the payment of compensation under the Pinto Law, procedural sanctions were finally introduced, which may be imposed on the claimant when the claim for fair compensation is declared inadmissible or manifestly unfounded.

As to the non-payment of compensations, the control of public expenditure, due to the well-known international economic situation, makes it very difficult to pay - in the short term – the whole debt deriving from the sentences imposed on the Administration of Justice in "Pinto proceedings". However, as shown by the Report of the Commissioner, the Ministry of Justice adopted an action plan to pay off less recent debts, with procedures ensuring greater effectiveness of administrative action.

**2) <u>Excessive number of proceedings</u>** (paragraphs 19 et seq. of the Report).

As pointed out by the Commissioner for Human Rights, the high number of pending civil proceedings is caused by the increase in the demands for justice which add to the workload of Italian courts, resulting in an increasing number of pending cases which have for a long time exceeded the number of 5 million cases.

The reduction of the judicial backlog implies:

a) the introduction of alternative dispute resolution mechanisms in civil matters (in order to reduce the demand for judicial action);
b) the adoption of organizational measures for the progressive elimination of the backlog (in order to ensure that the number of settled civil cases be at least equal to the number of incoming cases per year).

<u>In order to progressively eliminate the existing backlog</u>, Article 37 of Decree-Law no. 98, dated July 6, 2011, converted into Law no. 111 of July 15, 2011, provides that Presidents of courts shall adopt an annual program for the management of pending civil, administrative and tax proceedings.

The aim of the program is to reduce the average length of pending proceedings, setting a priority in dealing with cases in relation to their previous length, their nature and value. The achievement of the goals set in the annual program is relevant for the confirmation of the Head of the Office in his management post and it is enhanced by economic incentives given to judges and administrative staff working at the efficient court office.

Moreover, legislative proposals are being examined by the Office for Legislative Matters of the Ministry of Justice aimed at introducing extraordinary measures for the settlement of civil litigation, even with possible contribution of professionals not belonging to the ordinary judiciary - in order to reduce the total number of pending cases in appellate courts and the Supreme Court.

As to the high number of pending criminal proceedings, the Commissioner for Human Rights identifies the main cause in the large number of offenses defined in the Italian system where there is a constitutional obligation to prosecute (Article 112 of the Constitution).

In this regard, it must be noted that a Government Bill is being examined by the Justice Committee of the Chamber of Deputies (AC 5019), which provides for the delegation of legislative powers to the Government as to decriminalization, stay of criminal proceedings with probation, stay of proceedings due to the fact that the defendant cannot be traced.

In particular, the Bill is designed to streamline the system of sanctions through the transformation of most offences currently punishable with fines, and certain misdemeanors punishable by a fine or arrest, into administrative offenses.

**3) Malfunctioning of the procedural system** (paragraphs 25 et seq. of the Report)

The Commissioner for Human Rights, while pointing out that the Italian codes of criminal and civil procedure contain important safeguards to protect the rights of defendants or parties, identifies some malfunctioning of the procedures, which in some cases appears to be rigid and unable to adapt to the nature and seriousness of the case in question.

In this regard, it must be noted that the 2009 Reform (Law no. 69 of June 18, 2009,) introduced summary proceedings for a declaratory judgment [*procedimento sommario di cognizione*] into our system, an alternative instrument to the ordinary proceedings for a declaratory judgment the parties may have recourse to for a speedy resolution of less complex disputes or where it is not necessary to carry out complex preliminary activities.

A certain elasticity of procedural instruments available to the parties was thus introduced for the first time in Italy (a party can decide to opt for ordinary proceedings or for summary proceedings according to the level of complexity of the dispute), giving the judge significant powers of case management for the first time (as to the suitability of the procedure in relation to the complexity of the case).

The possibility of making the use of this procedural instrument more flexible is being examined, allowing the judge to transform the type of procedure any time a case, although filed according to the ordinary procedure, has the necessary elements to be dealt with according to the summary procedure.

As to the rules governing the service of documents and summonses, legislative interventions starting from 2008 onwards have gradually extended the use of e-mails for communications and services which must be made by the clerk's office during the proceedings (Article 51 of Decree-Law no. 112 of June 25, 2008, converted into Law no. 133 of August 6, 2008; Article 4 of the Decree-Law no. 193 of Dec. 29, 200, converted into Law no. 24 of Feb. 22, 201; Article 25 of Law no. 183 of Nov. 12, 2011).

A regulatory intervention is currently being prepared by the Office for Legislative Matters of the Ministry of Justice aimed at extending the use of telematic communications and service of documents, providing that it shall be mandatory any time the communication or service of documents is addressed to a person/entity obliged by law to have a certified e-mail address (defense counsels, court experts, businesses, public administrations), or having nevertheless voluntary communicated their certified e-mail address upon their entering of appearance.

As to the system of civil appeals, it was significantly modified by Article 54 of Decree-Law no. 83 of June 22, 2012, converted into Law no. 134 of August 7, 2012.
As to appeals, a filter mechanism concerning their inadmissibility (modeled on the lines of the German law) was introduced to ensure that only appeals having a reasonable chance of being admitted are filed and decided upon on the merits.

Moreover, it is provided that an appeal shall be declared inadmissible if it does not contain the specific grounds for the appeal and the specific parts of the 1st instance judgment the party wants to challenge.

The aim of this reform is to facilitate the work of appellate courts (through a reduction in the number of appeals to be decided upon with a judgment on the merits), preventing the appeal from being just a request for review of the merits of the decision of the earlier court, generally considered to be wrong.

The system of appeals to the Court of Cassation was amended in order to exclude the possibility that, through a request for the verification of the grounds of the challenged decision, the parties may indirectly request the Court of Cassation to verify the factual findings of the trial court.

The aim of this reform is to strengthen the typical function of the Supreme Court, which is to ensure the uniform interpretation of the law.

**4) Other factors of the malfunctioning of the judicial system.**

Other important factors of the malfunctioning of the Italian judicial system identified by the Commissioner for Human Rights are: the high number of lawyers, the system of payment of professional fees to lawyers, a deficient

geographical organization of judicial districts and a lack of adequate organization of court work (paragraphs 30 et seq. of the Report).

The system of payment of lawyers' fees based on mandatory legal fees was finally abolished by Article 9 of the Decree-Law no. 1 of January 24, 2012, converted into Law no. 27 of March 24, 2012, and by the Decree of the Minister of Justice no. 140 of July 20, 2012. The payment of fees is now left to the free negotiation between the lawyer and the client (the minimum and maximum fees were abolished, as well as the fees themselves). If no agreement is reached, the fee is determined by the court on the basis of parameters which no longer take into account the activities carried out by the lawyer, but the nature, value and complexity of the case and the overall quality of the activity provided by the defense counsel and the benefits obtained by the client.

The aim of this reform is – *inter alia* - to prevent a lawyer from having an interest contrary to the speedy settlement of the case, since his/her fee will not be proportional to the number of hearings and acts carried out during the trial.

As to the excessive number of lawyers in Italy, it must be noted that a Bill (AC 3900) is currently being examined by the Chamber of Deputies (it was already approved by the Senate at first reading); it contains some important changes of the rules on the examination to be called to the Bar, aimed at introducing stricter mechanisms for assessing candidates.

The geographical organization of the judicial districts was recently reformed through the following instruments:

a) Legislative Decree no. 155 dated 7 September 2012, (on the new organization of courts and public prosecutor's offices), which abolished 31 courts and 31 prosecutor's offices, as well as all the 220 previously existing "branch offices" of the courts;
b) Legislative Decree no. 156 dated 7 September 2012, (concerning the overhaul of the judicial offices of the Justices of the peace), which abolished 667 offices of the Justices of the peace, equal to about 80% of the previously existing offices.

As to the need for an adequate organization of the work of the courts, please see what stated above in relation to the provisions contained in Article 37 of Decree-Law no. 98 dated July 6, 2011, converted into Law no. 111, dated July 15, 2011, (yearly programmes on court management drawn up by Courts' Presidents).