ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING THE PROTECTION OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

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1. INTRODUCTION

The aim of this Report is to detect at an early stage any difficulties that may be encountered during the implementation of the laws governing the protection of the right to trial within a reasonable time in Bosnia and Herzegovina, based on an assessment of the situation in Bosnia and Herzegovina regarding the excessive length of court proceedings, including the existing remedy and its shortcomings, an overview of new remedies introduced/provided for in Bosnia and Herzegovina to address excessive length of proceedings and comparative evaluations of the effectiveness of similar remedies already introduced in other countries.

As one of the fundamental human rights guaranteed within the scope of the right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention), the right to trial within a reasonable time presupposes the fulfilment of certain obligations arising for Council of Europe member states from the case law of the European Court of Human Rights (hereinafter: the ECtHR). Hence, the starting point for the analysis of new legal remedies introduced/provided for in Bosnia and Herzegovina for judicial protection of the right to trial within a reasonable time are the criteria and standards established in the ECtHR case law.

A significant ECtHR judgment rendered in the case of *Scordino v. Italy*[1] notes the obligations of states regarding the protection of the right to trial within a reasonable time, which can be recognised through the following principles:

1. States should organise their judicial systems in such a way that their courts can meet each of the requirements under Article 6 of the European Convention, including the obligation to hear cases within a reasonable time (§ 183);

2. The remedy should be effective, adequate and accessible (§ 195);

3. States should provide effective remedies for the protection of human rights, including the protection of the right to trial within a reasonable time, with the best protection being a com-

1 Judgment of the Grand Chamber of the ECtHR of 29 March 2006, passed in the case of *Scordino v. Italy*, application no. 36813/97

bination of remedies - to prevent and stop further violations and to compensate damages when the violation has already occurred (§§ 186-189);

4. Appropriate and sufficient satisfaction, which includes the payment of compensation without undue delay after the decision on compensation has become final (§ 198);

5. The principle of fairness set out in Article 6 of the European Convention should also be respected in the procedure for deciding on just satisfaction (§ 200);

6. In cases where the domestic courts award minimal compensation or no compensation at all, they must give sufficient reasons to justify their decision (§ 204);

7. In determining the amount of compensation at the national level, as a measure to expedite proceedings, domestic courts may derogate from the amount normally awarded by the ECtHR, but these amounts cannot be unreasonable and must be consonant with the legal tradition and the standard of living in the country concerned (§ 206).

The effectiveness of legal remedies introduced/provided for will be assessed based on how much they contribute to the fulfilment of the aforementioned obligations and to overcoming the systemic problem of excessive length of court proceedings in Bosnia and Herzegovina.

2. RIGHT TO TRIAL WITHIN A REASONABLE TIME IN BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina, the legal basis that sets forth and protects the right to trial within a reasonable time is included in the Constitution of Bosnia and Herzegovina (hereinafter: BiH Constitution).[2]

According to Article II/2 of the BiH Constitution, "[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law." Article II/3 of the BiH Constitution contains the Enumeration of Rights and stipulates that "[a]ll persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: […] e) The right to a fair hearing in civil and criminal matters and other rights related to criminal proceedings."The afore-mentioned direct application of the European Convention includes Article 6(1) of the European Convention, which reads in its first sentence: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

This constitutional principle is also contained in some laws in Bosnia and Herzegovina. Thus, for example, the Civil Procedure Code of the Federation of Bosnia and Herzegovina and the Civil Procedure Code of Republika Srpska stipulate that a party has the right to have the court decide on its requests and proposals within a reasonable time. In addition, some laws prescribe the obligation to act expeditiously, e.g. the laws governing enforcement procedure in Bosnia and Herzegovina stipulate that the court must act expeditiously in the enforcement procedure, while the Law on Prohibition of Discrimination in Bosnia and Herzegovina prescribes "in accordance with the general rules of procedure, courts and other bodies shall be required to take necessary action

2 The BiH Constitution is Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in November in Dayton, and signed on 14 December 2005 in Paris.

to ensure that proceedings which concern examination of claims of discrimination are conducted as a matter of urgency and completed within the shortest time possible."

In order to address the problem of lengthy court proceedings in Council of Europe member states, the Committee of Ministers of the Council of Europe has issued a Recommendation[3] to member states on effective remedies for excessive length of proceedings. This Recommendation indicates, *inter alia*, that excessive delays in the administration of justice constitute a grave danger, in particular for respect for the rule of law and access to justice, and that excessive length of proceedings is often caused by systemic problems. Member States are recommended, *inter alia*: to take all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within a reasonable time; to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that: a) the proceedings are expedited, where possible, or b) redress is afforded to the victims for any disadvantage they have suffered; or, preferably, c) allowance is made for a combination of the two measures; to ensure that requests for expediting proceedings or affording redress will be dealt with rapidly by the competent authority and that they represent an effective, adequate and accessible remedy; to ensure that amounts of compensation that may be awarded are reasonable and compatible with the case law of the Court and, and recognise, in this context, a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage.

In addition to the already mentioned fact that the European Convention applies directly in Bosnia and Herzegovina, it should be noted that the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) is the final instance of subsidiary protection of human rights and freedoms because, according to Article VI/3.b) of the BiH Constitution, it has "appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina."

The Rules[4] of the Constitutional Court provide for the possibility that, exceptionally, the Constitutional Court may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution. Thus, the Constitutional Court may consider an appeal concerned only with the length of proceedings.

2.1. Constitutional Court case law

The Constitutional Court first dealt with the issue of excessive length of proceedings in a decision rendered in February 2001.[5] In this decision, the Constitutional Court, considering the issue of admissibility, stated that in the context of appellate jurisdiction, defined under Article VI.3.b) of the BiH Constitution, the term "judgment" must be interpreted broadly. In the opinion of the Constitutional Court, this term should not only include all types of decisions and rulings, but also the failure to render a decision when that failure is found to be unconstitutional. Ruling

3 Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings of 24 February 2010, https://vm.ee/sites/default/files/content-editors/Rec 2010 3% 20 2 eng.pdf

4 Rules of the Constitutional Court, Official Gazette of BiH, No. 94/14, Article 18(2).

5 Constitutional Court, decision U 23/00 of 2 February 2001.

on the same matter in a decision from September 2005,[6] the Constitutional Court found that in Bosnia and Herzegovina, specifically in the Federation of Bosnia and Herzegovina, there was no effective remedy to allow the parties to complain about the excessive length of proceedings, and that shortcomings in the organisation of the judicial system of the entity, or the state, must not affect the respect of individual rights and freedoms enshrined in the BiH Constitution, or the requirements and guarantees set out under Article 6(1) of the European Convention. The Constitutional Court further pointed out that an excessive burden must not be placed on an individual in discovering which is the most efficient way to exercise his rights.

In its further case law, the Constitutional Court continuously rendered decisions on appeals filed due to the excessive length of proceedings in cases concerning civil rights and obligations, as well as those concerning criminal charges, and which were on-going pending the ruling of the Constitutional Court. It has consistently followed the ECtHR case law with regard to case criteria such as the complexity of the case, relevance to the parties, conduct of the parties, conduct of the public authorities (courts and other bodies), period of inactivity, postponement of hearings, referral of cases to a higher court/authority, remanding cases for retrial, inadequate organisation of the judiciary, and legislative changes during the proceedings. In cases where a violation of the right to a fair trial was established due to the unreasonable length of proceedings, the Constitutional Court ordered ordinary courts of law and other bodies to take measures to bring the proceedings to an end without further delay and to inform the Constitutional Court of such measures within three months from the receipt of the decision on the appeal. Likewise, the Constitutional Court has ruled on respect for the right to trial within a reasonable time in appeals filed after the proceedings were brought to an end and the parties had received a final decision, as well as in regard to proceedings initiated for the enforcement of final and enforceable court judgments. The Constitutional Court has also awarded pecuniary compensation to victims of violations of this constitutional right, applying Article 74 of the Rules of the Constitutional Court which provides that: "In a decision granting an appeal, the Constitutional Court may award compensation for non-pecuniary damages. If the Constitutional Court considers that compensation for pecuniary damage is necessary, it shall award it on an equitable basis, taking into account the standards set forth in the case-law of the Constitutional Court".

Following ECtHR case law from the case of *Apicella v. Italy*, in its November 2005 decision, the Constitutional Court introduced for the first time a form for calculating compensation for non-pecuniary damage.[7] The Constitutional Court pointed out that when introducing the form for calculating compensation for non-pecuniary damage in cases concerning length of proceedings in Bosnia and Herzegovina, the standard of living and economic situation should be viewed through the parameter of gross national income (GDP-Gross Domestic Product or the value of all final goods and services produced in the country during the year divided by the average population for the same year). The mentioned ECtHR case referred to Italy, whose GDP in 2004 amounted to 29,014 US dollars, while for Bosnia and Herzegovina it amounted to 2,125 US dollars, or about 13 times less.[8] Having in mind the above, the Constitutional Court concluded that as compensation for non-pecuniary damage, appellants in Bosnia and Herzegovina should be paid the amount of BAM 150 for each year that the decision of domestic courts was delayed, or double that amount

6 Constitutional Court, decision U 992/04 of 13 September 2005.
7 Constitutional Court, decision AP 938/04 of 17 November 2005.
8 (source: http://en.wikipedia.org)

in cases requiring special urgency under domestic law.

In the case law that followed, the Constitutional Court also ordered the payment of statutory default interest on any unpaid amount or part of the amount of compensation fixed by a specific decision.[9]

With regard to monetary compensation for pecuniary damage, the Constitutional Court now takes into consideration the current ECtHR case law from its judgments against Bosnia and Herzegovina,[10] as well as the relevant circumstances of each specific case.[11]

According to the decisions of the Constitutional Court, monetary compensation is to be paid from the same public government level budget that funds the work of the ordinary court or administrative body before which the proceedings in question are being/had been conducted. The decision of the Constitutional Court on monetary compensation is an enforceable title in the enforcement procedure.[12]

In a decision rendered in 2010,[13] the Constitutional Court concluded that "the national legal system of Bosnia and Herzegovina does not ensure protection before the ordinary courts insofar as the unreasonable length of the proceedings is concerned", and that it will "deliver this Decision to all relevant authorities on the territory of Bosnia and Herzegovina in order to make it possible for them to undertake all necessary steps to protect and secure an effective legal remedy with regards to the unreasonable length of the proceedings before the ordinary courts within the national legal system of Bosnia and Herzegovina." This issue, however, remained unresolved.

In a 2016 decision,[14] the Constitutional Court pointed out that "the determination of a violation of a constitutional right imposes on the public authority the obligation not only to pay the concerned persons the amounts awarded to them for just satisfaction, but also to select suitable general and/or, where appropriate, individual measures that will be introduced into the legal system in order to put an end to the violation as established by the Constitutional Court and to eliminate its consequences to the extent possible". The Constitutional Court recalled that for an entire decade it has been submitting its decisions establishing drastic violations of the right to a judgment within a reasonable time to the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (hereinafter: HJPC).[15] However, having in mind its powers and competences established by law, the Constitutional Court stated its opinion "that it is necessary for the HJPC to take further measures to address the shortcomings of the judicial system in Bosnia and Herzegovina with regard to compliance with the reasonable time limit requirement within the constitutional right to a fair trial. Therefore, the Constitutional Court has decided to submit this decision to the HJPC in order for the HJPC to take measures within its competence in accordance with this decision.

9 Constitutional Court, decision AP 3865/12 of 17 June 2015.

10 ECtHR, Dorić v. BiH, Application no. 68811/13, 7 November 2017, Škrbić and Vujičić v. BiH, Application no. 37444/17 and 75271/17 of 6 June 2019 and Hadžajlić and Others v. BiH, Application No. 10770/18 of 16 January 2020),

11 Constitutional Court, decisions, AP 483/18 of 19 February 2020, AP 2980/18 of 8 April 2020.

12 Constitutional Court, decision AP 1448/18 of 17 July 2018, item 37.

13 Constitutional Court, decision AP 575/07 of 30 January 2010.

14 Constitutional Court, decision AP 303/16 of 16 March 2016.

15 The HJPC is an independent body of Bosnia and Herzegovina. The HJPC, as an independent and autonomous body, has the task of ensuring an independent, impartial and professional judiciary - the Law on the High Judicial and Prosecutorial Council of BiH (Official Gazette of BiH, 25/04, 93/05, 48/07 and 15/08).

2.2. Systemic issue

In its decision from May 2017,[16] the Constitutional Court, deciding on a large number of appeals, determined that "such excessive duration of court proceedings is a consequence of systemic shortcomings in the organisation of the judiciary and in the effective exercise of competences of various levels of public authority in this area, which is why a systemic violation of this right before ordinary courts of law exists." The Constitutional Court pointed to the fact that, compared to other countries in the region, it receives by far the most appeals related to violations of the right to adjudication within a reasonable time, or the lack of an effective legal remedy regarding the right to adjudication within a reasonable time. The countries of the region, as a rule, have a separate law under which citizens may address ordinary courts of law or other bodies with complaints regarding the failure to deliver a decision within a reasonable time. The Constitutional Court further stated that "in such circumstances where a systematic violation of the right to trial within a reasonable time has been established, the actual effects of measures and activities will be visible and substantially effective only if all public authorities with competence over the good organisation of the judiciary, acting individually and jointly, take appropriate measures within their competence to ensure the effective enjoyment of the right to a fair trial within a reasonable time." In this decision, the Constitutional Court ordered the competent public authorities and the HJPC to take appropriate measures within their competence without delay, and within six months at the latest, in order to set forth one or more effective remedies in accordance with Article 13 of the European Convention and this decision, so as to effectively protect the right to trial within a reasonable time.

In view of earlier decisions, in November 2018, the Constitutional Court rendered a "pilot" decision dismissing appeals filed for non-compliance of ordinary courts with the standard of adjudication within a reasonable time in ongoing proceedings, because the it had already ruled on this matter.[17] The Constitutional Court emphasised that it was "still facing an extremely large number of applications to examine new concrete cases of the same kind", and that this "clearly indicated that the measures taken had not yet yielded fully effective results, especially as no effective remedy had been introduced in the way indicated by the Constitutional Court in its decisions, since the appellate jurisdiction of the Constitutional Court represents subsidiary protection of human rights in cases when all other possibilities provided by the relevant regulations are effectively exhausted." The Constitutional Court emphasised that this situation "makes it difficult for ordinary courts of law to effectively implement adopted plans and generates new cases before the Constitutional Court."

As the Constitutional Court pointed out, this weakens the system of human rights protection established by the appellate jurisdiction of the Constitutional Court, because the Court is burdened with an excessive number of appeals filed due to issues that should be effectively resolved by other appropriate remedies. The Constitutional Court concluded that it would not be expedient to continue deciding in new individual cases of this type, and that it was necessary to set an additional period of one year for all the mentioned bodies to fully and effectively implement systemic measures that are being taken and that still need to be taken.

16 Constitutional Court, decision AP 4101/15 of 10 May 2017.
17 Constitutional Court, decision AP 1356/17 of 6 November 2018.

2.3. Actions of the HJPC

On the other hand, recognising the importance of exercising the right to a fair trial within a reasonable time, the HJPC began to apply the Instruction for Drafting Backlog Reduction Plans already in 2011, i.e. before the Constitutional Court had ruled on this issue. As a result, the number of old cases has been greatly reduced, but this issue has not been fully resolved. Therefore, the HJPC continues to insist on the implementation of this activity. It is important to note that the application of this Instruction does not impose any additional obligation on judges. Instead, the HJPC Instruction only reinforces the existing legal obligation to resolve the backlog of cases, with a view to achieving more efficiency in practice.

During 2017 and in the period that followed, numerous parties complained to the Constitutional Court because their cases had not been resolved within a reasonable time. Deciding on the merits of these cases, the Constitutional Court upheld the appeals and ordered, *inter alia*, that the HJPC take appropriate measures within its competence to eliminate the systemic violation of the right to trial within a reasonable time and the shortcomings of the judicial system. The courts were ordered by the HJPC to immediately comply with the decisions of the Constitutional Court in order to meet the reasonable time requirement within the constitutional right to a fair trial.

In all decisions establishing a violation of the right to trial within a reasonable time, the Constitutional Court ordered the level of government funding the work of the ordinary court to pay a certain amount to the appellants as compensation for non-pecuniary damage, which placed a burden on their budgets. The seriousness of this issue is also confirmed by the fact that only during 2018, the total amount of funds paid to the appellants amounted to approx. 2.9 million convertible marks.

The HJPC also systematically approached the resolution of this issue by forming a working group in June 2017 to enforce the Constitutional Court's decisions regarding the violation of the right to trial within a reasonable time. In addition, an Action Plan for the implementation of the decisions of the Constitutional Court was discussed and adopted in October 2017, and the working group continuously monitors the implementation of the activities from the Action Plan. Immediately, in June 2017, the HJPC collected statistical data on the number of unresolved cases in first and second instance courts that were initiated in 2011 and earlier, and those covering the period from 2012 to 2015. An analysis was conducted and short-term and long-term measures were proposed in order to comply with the orders of the Constitutional Court. The established short-term measures included: that the courts resolve unresolved appealed cases within the time limit set in the decision of the Constitutional Court; that the current case resolution plan of courts with a large number of unresolved cases initiated in 2011 be repealed, and that the courts be given three, six, nine and twelve months, respectively, to resolve all unresolved cases initiated in or before 2011. The following have been established as long-term measures: the obligation of court presidents to take care of the uniform redistribution of cases between judges within the court, and to propose certain sanctions in case of non-compliance with this measure; that the Office of the Disciplinary Counsel analyse the work of judges who acted in the appealed cases.

According to the 2019 Annual Report of the HJPC,[18] the HJPC also undertook a number of activities in 2019 aimed at reducing the number of the oldest cases, increasing the productivity of judges and prosecutors, better organisation of the operations of judicial institutions, improving

18 Activity Report of the HJPC for 2019, available at www.vstv.pravosudje.ba

their capacities for strategic planning as well as ensuring better working conditions for judges, prosecutors and support staff. The effects of the plans and the norms are also visible from the fact that between 31 December 2010 and 31December 2019, we saw the number of pending cases in the courts drop by over 200,000. During 2019, the Office of the Disciplinary Counsel received 843 complaints. The most common reasons for complaints were the length of proceedings before courts and prosecutor's offices and dissatisfaction with adopted court and prosecutorial decisions. Specifically, 29% of complaints referred to the duration of proceedings before a court, and 13% referred to the length of proceedings before a prosecutor's office.

After the adoption of the Instruction for Drafting Backlog Reduction Plans (adopted on 6 December 2010, and amended on 13 and 14 December 2016), all courts were required to draft their backlog reduction plans. Thanks to this, every year courts complete over 100,000 of the oldest cases along with their regular activities. The largest number of all pending cases before the courts in BiH are enforcement cases. Systemic problems regarding the enforcement procedure have long been recognised by the HJPC, but also by the European Commission, which has addressed this issue in its reports on the situation in the judiciary. Following the recommendations of the European Commission, during 2019 the HJPC undertook significant activities aimed at improving the efficiency of courts within the existing legal framework, and finding modalities for complete reform of enforcement procedure.

All prosecutor's offices that have a backlog of cases made backlog reduction plans (for cases dating back two years or more) in 2019, as prescribed with the current Instruction for drafting backlog reduction plans in prosecutor's offices in BiH. At the end of 2019, the overall plan realisation rate of prosecutors' offices in BiH was 74%. Throughout 2019, prosecutors' offices in BiH completed 2,289 of their oldest cases. The total number of pending oldest cases in prosecutors' offices in BiH as of 31 December 2019 (4.858) was 71% less than the total number of pending old cases as recorded on 31 December 2014.

The total number of pending cases in 2019 was down by 10,791 cases or 3.6%, indicating the continuation of a declining trend in the number of pending cases in the courts in 2019. The average achieved collective quota for courts in 2019 was 112%. In 2019, prosecutors' offices, on average, achieved their collective quotas at 102%.

2.4. Actions taken to remedy the issues

There is a systemic issue in Bosnia and Herzegovina caused by the excessive length of court proceedings, as determined by the Constitutional Court's decisions.

The HJPC undertakes a series of activities aimed at reducing the number of the oldest cases, increasing the productivity of judges and prosecutors, better organisation of the operations of judicial institutions, improving their capacities for strategic planning as well as ensuring better working conditions for judges, prosecutors and support staff.

Despite the measures taken to address the excessive length of court proceedings, the excessive duration of court proceedings is a consequence of systemic shortcomings in the organisation of the judiciary and in the effective exercise of competences by public authorities at various levels in this area, which is why a systemic violation of this right before ordinary courts exists. The judiciary, often exposed to justified criticism, cannot do much on its own. The organisation of an efficient judiciary is the primary task of the legislative and executive branches, which must do

more than they have done in the past to provide the judiciary with the necessary working conditions.

According to the Constitutional Court's case law, being the only available legal remedy, an appeal to the Constitutional Court is an effective legal remedy, even though it is at the level of subsidiary protection of human rights. However, due to the limited ability of the Constitutional Court to determine specific acceleration measures in each specific case, but also due to the constant increase in the number of appeals related to the length of court proceedings, the effectiveness of the appeal has been seriously brought into question in terms of how effectively and efficiently it can bring court proceedings to a close in order to substantially meet the reasonable time requirement. The human rights protection system established by the appellate jurisdiction of the Constitutional Court is being weakened, because the court is burdened with an excessive number of appeals filed due to matters that should be effectively resolved by other appropriate remedies.[19]

The Constitutional Court considers that it would not be expedient to continue deciding in new individual cases of this type and to order ordinary courts to act urgently in these cases, as this would create an obligation for ordinary courts to act beyond their own plans on resolving cases, generate new proceedings before the Constitutional Court and other courts, and would generally not be conducive to the effective protection of human rights, or the elimination of the consequences of their violation.

The time limit set by the Constitutional Court for public authorities to take measures of a systemic nature, after concluding that it would not individually decide on appeals concerning the length of ongoing court proceedings in Bosnia and Herzegovina, has expired. However, within its appellate jurisdiction, the Constitutional Court still continuously ruled on the excessive length of enforcement proceedings before the courts, as well as on the right to a fair trial within a reasonable time in cases finalised before the ordinary courts of law.

The current situation regarding the lack of an appropriate remedy to address the issue of excessive length of proceedings is not sustainable in the long run.

One should always keep in mind the position of the ECtHR that a remedy for the protection of the right to trial within a reasonable time is considered effective in the sense of "preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred."[20] Moreover, the best solution for a state that already has an issue with violations of this right is to provide a means to prevent, i.e. stop further violations of the right, and to compensate the damage that has already occurred.[21] Preventive remedies do not provide compensation for an injury that has already occurred, and compensation does not prevent the injury from recurring within the same proceedings. The best solution is to establish an effective prevention system, which would prevent violations of this right in the future, and in the meantime to compensate all those who have already suffered a violation of this right. The aim is also to ensure that the institutions of subsidiary human rights protection, the Constitutional Court and the ECtHR, are not overwhelmed by cases of this kind, which significantly contributes to their lack of timeliness.

As stated in the 2019 Annual Report,[22] the Minister of Justice of BiH issued a decision es-

19 According to the Department of Constitutional Case Law, in the period from 2013 to 2018, the Constitutional Court received over 5,700 appeals raising the issue of "reasonable time", while at the end of November 2020 over 300 such appeals were pending.

20 ECtHR, Kudla v. Poland, 2000, para 158.

21 ECtHR, Scordino v. Italy, 2006; Grzinčič v. Slovenia, 2007,

22 The 2019 Annual Report of the BiH Ministry of Justice, p. 61, available at www.mpr.gov.bs

tablishing a Working Group for the development of Draft Laws on Trial within a Reasonable Time. There are plans to enact a similar law at the state level by the end of 2021, although the length of proceedings before the courts at this level has not been identified as an issue.

On 18 November 2020, the HJPC issued an opinion on the Draft Law of BiH on the Protection of the Right to a Fair Trial within a Reasonable Time. Given that the Draft Law provides a mechanism for the protection of the right to trial within a reasonable time, the HJPC in principle agrees with its adoption. Without prejudice to the need to protect the right to trial within a reasonable time in the investigation procedure as well, the HJPC recalled that the Criminal Procedure Code of Bosnia and Herzegovina prescribes clear rules on time limits for completing the investigation, the procedure to extend the prescribed time limits and competences of the Chief Prosecutor, and it also sets forth the possibility of filing a complaint with the Chief Prosecutor due to the duration of proceedings. Noting that the accompanying explanation did not clarify the relationship between the proposed provisions and the relevant provisions of the Code, the HJPC concluded that there was a conflict between the relevant part of the Draft Law and the prescribed rules of criminal procedure, and did not agree with the prepared norms where applications for the protection of the right to trial within a reasonable time would also be applicable to the duration of the investigation. The HJPC welcomed legislative activities to regulate the protection of the right to trial within a reasonable time at all levels in BiH, but also pointed to significant inconsistencies of proposed provisions in legislative initiatives in this area in the entities, which may result in the protection of the right to trial within a reasonable time not being adequately ensured in Bosnia and Herzegovina.

3. OVERVIEW OF NEW NATIONAL LEGAL REMEDIES INTRODUCED/PROVIDED FOR IN BOSNIA AND HERZEGOVINA FOR RESOLVING EXCESSIVE LENGTH OF PROCEEDINGS

Before the finalisation of this Report, after the Government of the Federation of BiH adopted the Draft Law on the Protection of the Right to Trial within a Reasonable Time and proposed its urgent adoption to the Parliament, the House of Representatives of the Federation of BiH adopted the draft law and submitted it for public discussion. At the same time, the Law on the Protection of the Right to Trial within a Reasonable Time was adopted in Republika Srpska (hereinafter: the RS Law),[23] as well as in the Brčko District of Bosnia and Herzegovina (hereinafter: the BD Law).[24]

3.1. Analysis of the Law on the Protection of the Right to Trial within a Reasonable Time of Republika Srpska

3.1.1. Basic provisions

The subject matter of the RS Law is the protection of the right to trial within a reasonable time, as well as of the right to just satisfaction for violations of the right to trial within a reasonable time in court proceedings. The purpose of judicial protection of the right to trial within a reasonable time should be preventive, by expediting the proceedings to prevent the violation of the right from occurring or to prevent further violation of the right. If the right to trial within a reasonable time has been violated, adequate satisfaction for the violation should be provided in court proceedings.

Anyone who considers that his civil rights and obligations or a criminal charge against him have not been decided within a reasonable time (Article 2(1)) has been designated as the **holder of rights** to judicial protection for violation of the right to trial within a reasonable time. This right

23 Official Gazette of Republika Srpska, No. 99/20 of 6 October 2020.
24 Official Gazette of the Brčko District of Bosnia and Herzegovina, No. 2/21 of 26 February 2021.

is recognised for both the injured party in the criminal proceedings and the injured party claiming damages as a subsidiary prosecutor (Article 2(2)). The Law emphasises that a violation of the right to trial within a reasonable time is determined in accordance with the ECtHR case law (Article 2(3)).

The statutory conceptualisation of who is entitled to judicial protection for violation of the right to trial within a reasonable time where capacity to sue is derived from adjudication on civil rights and obligations or criminal charges, and in accordance with ECtHR case law, and not from being parties in court proceedings may cause certain uncertainties in application.

In ECtHR case law, the notion of civil rights and obligations is an autonomous notion based on the character of a specific right, and not on the domestic law of the state, and it is primarily related to the question of whether the outcome of the procedure is decisive for resolving private law relations. These are rights and obligations that arise in the field of civil law, but the right to trial within a reasonable time also refers to administrative procedure, as well as to addressing any body that had to be addressed before addressing a civil court. Interpreting a criminal charge takes into account the criteria relating to the incrimination of the act in domestic law, the nature of the offence and the applicable sentence. However, criminal charges are also an autonomous concept in ECtHR case law, and the time limit taken into account in determining a violation of the right to trial within a reasonable time in appropriate situations may begin to run before the moment when a person is charged - from the moment of: deprivation of liberty in pre-trial proceedings,[25] submitting a request to conduct an investigation,[26] issuing a decision to conduct an investigation,[27] searching the suspect's office and dwelling,[28] etc.

Having systematically interpreted the RS Law, it can be concluded that the purpose of this Law is to provide protection of the right to trial within a reasonable time to parties in court proceedings, and to the injured party and the injured party as a subsidiary prosecutor in criminal proceedings. This means that the protection of this right does not apply to investigative proceedings, or to proceedings before other bodies that may precede court proceedings. Therefore, the moment when court proceedings are initiated should be decided in accordance with the provisions of the relevant domestic procedural law.

A special question is whether republican bodies, bodies of local self-government units, public services and other holders of public authority, when they act as parties in court proceedings, have the right to judicial protection due to a violation of the right to trial within a reasonable time. According to Article 20 of the RS Law, which stipulates that the right to just satisfaction under this law does not pertain to republican administrative bodies, bodies of local self-government units, public services and other holders of public authority when participating as parties in court proceedings, they have the standing for filing an application to expedite proceedings, but not for lodging an action to establish a violation of the right to trial within a reasonable time or to seek just satisfaction for a violation of the right to trial within a reasonable time. In ECtHR case law, state-controlled legal entities are not entitled to protection of the right to trial within a reasonable time before that court. In the case of *Zastava IT Tours v. Serbia*, the ECtHR has held that

25 Paragraph 5 of the ECtHR judgment of 27 June 1968 in the case of Wemhoff v. Germany, Application no. 2122/64

26 Paragraph 110 of the ECtHR judgment of 16 July 1971 in the case of Ringeisen v. Austria, Application no. 2614/65

27 Paras. 41-42 of the ECtHR judgment of 29 November 2007 in the case of Nankov v. FYROM, Application no. 26541/02

28 Paragraph 42 of the ECtHR judgment of 15 July 2002 in the case of Strategieset Communicationet Dumoulin v. Belgium, Application no. 37370/97

the applicant company (socially owned), despite the fact that it is a separate legal entity, does not enjoy sufficient institutional and operational independence from the State (...) and must, for the purposes of Article 34 of the Convention be classified as a governmental organisation.[29] The application was therefore rejected as incompatible *ratione personae* with the provisions of the European Convention.

3.1.2. Remedies and criteria for assessing the duration of a trial

Remedies to protect the right to trial within a reasonable time are: applications to expedite proceedings and actions to establish a violation of the right to trial within a reasonable time and to seek just satisfaction for a violation of the right to trial within a reasonable time (Article 4). Both remedies should be effective and they should provide the applicant with substantial protection of the right to trial within a reasonable time. Their effectiveness will primarily depend on the actions of judges and court presidents, who must be familiar with ECtHR case law and the standards of the right to trial within a reasonable time established in that case law, in order to correctly interpret and apply the provisions of the RS Law. The case law of the Constitutional Court, which has consistently implemented the standards and legal positions from ECtHR case law, can be of great help in this regard.

An application to expedite proceedings is a preventive remedy. Its upholding should prevent the infringement of the right to trial within a reasonable time when it is determined that there is a threat that the infringement may occur. The effectiveness of this legal remedy is manifest even when the right to trial within a reasonable time has already been violated in court proceedings, seeing that further violation of the right is prevented by upholding the application and taking measures to expedite the proceedings.

An action to establish a violation of the right to trial within a reasonable time and to obtain just satisfaction for a violation of the right to trial within a reasonable time is a compensatory remedy. It can be effective only if it provides the applicant with adequate and sufficient satisfaction for the committed violation.

Article 5 of the RS Law stipulates that when deciding on legal remedies that protect the right to trial within a reasonable time, the following **criteria** should be taken into account:

1) the complexity of the case in factual and legal terms,
   the conduct of the court and other republican administrative bodies, bodies of the local self-government unit, public services and other holders of public authority,
2) the conduct of the applicant, and
3) the significance of the case for the applicant.

The legislator opted for four basic criteria established in long-standing ECtHR case law, which are important for the assessment of the right to trial within a reasonable time. The ECtHR has never specified the length of court proceedings that will not lead to a violation of the right to trial within a reasonable time, which could be used to determine whether the proceedings were concluded within a reasonable time. A reasonable period is the period that is optimally necessary to eliminate legal uncertainty about the existence of a right or to remove doubts about the merits of an accusation against a person, because the principle of legal certainty requires trials not to last

29 Paras. 22-23 of the decision in the case of Zastava IT Tours v. Serbia, Application no. 24922/2012

longer than required by the rules of procedure. The four criteria set out in Article 5 of the RS Law should allow for a proper assessment of the duration of the trial with respect to the reasonable time requirement.

The length of proceedings undoubtedly depends on the complexity of the case, i.e. the case to be decided in court proceedings. The **complexity of the case** can be affected by both factual and legal issues - of a procedural or substantive nature - that are posed before the court. More complex the cases will objectively require more time to conclude, so this circumstance must be taken into account when assessing any violation of the right to trial within a reasonable time.

The factual complexity of the case depends on the number and nature of charges or claims to be decided, the number of defendants in criminal proceedings, or the number of parties in other court proceedings, the need to hear numerous witnesses, the need to conduct one or more different forms of expertise to establish legally relevant facts and the complexity of the expertise, the volume of evidence and any difficulties in evidence collection, how long ago the event from which the court proceedings arise occurred, etc. It follows from ECtHR case law that longer duration of proceedings is justified when it comes to complex criminal proceedings with an international element, criminal proceedings for the criminal offence of murder and offences against property. However, the ECtHR often stated that although a case was complex, the long duration of proceedings was not justified because other criteria relevant for determining a violation of the right to trial within a reasonable time were also assessed.

A court case can also be complex in terms of procedural law. Procedural complexity is usually caused by a large number of parties or defendants, numerous requests that are to be decided, the imposition of interim measures, the residence or stay of the parties abroad, the unavailability of individual defendants, the death of a party during the proceedings, locating and hearing witnesses who have changed residence, acting on letters rogatory in the country and abroad, simultaneously conducting several proceedings relating to the same person that are in a legal relationship with each other, using court interpreters, translating documents, etc.

The legal complexity of a case may arise due to changes in the applicable law, the application of unclear laws, the need to interpret international treaties, to delineate jurisdiction between courts and other bodies, as well as to make a decision in court proceedings that are related, from a legal point of view, to proceedings ongoing before another body.

Some cases are complex both factually and legally by their very nature, and these are, for instance, cases which concern construction projects by partners, acquisition in marital, common-law and family unions, distribution of property between heirs, divorce cases involving decisions on maintenance and custody of children, cases of organised crime, financial crimes with international elements, drug smuggling and crimes against sexual freedoms.

The **conduct of the court and other authorities** (republican administrative bodies, local self-government units, public services and other holders of public authority) is an important, perhaps the most important criterion for assessing the duration of trial within a reasonable time and fixing the amount of monetary compensation. This criterion is examined to determine whether the courts have taken all measures and actions mandated by law in order to end the proceedings within a reasonable time.

In ECtHR case law, the most common reasons for finding a violation of the right to trial within a reasonable time by applying the criterion of "conduct of public authorities" are as follows:

1) inactivity of the court characterised by the absence of any procedural action for a long

period of time, unless reasoned by the national court,

2) inadequate organisation of courts, poorly implemented reforms of the judicial system and insufficient number of judges,
3) frequent changes of judges in the same case leading to delays in the proceedings,
4) systemic shortcomings in national procedural legislation,
5) irregularities in summoning parties, witnesses or experts,
6) slow transmission of files to the appellate court,
7) legislative reform during the procedure,
8) delays by experts in drafting reports that are not sanctioned,
9) abuse of procedural powers by parties to the procedure that is not sanctioned,
10) judicial errors in the application of the law, and in particular in applying the rules of procedure,
11) judicial inertia in evidentiary proceedings.

The **conduct of the person who filed the remedy** for the protection of the right to trial within a reasonable time in the court proceedings in which s/he seeks such protection is one of the criteria for assessing the duration of a trial within a reasonable time and fixing the amount of monetary compensation. Every application by a party seeking to establish a breach of reasonable time need not necessarily be well founded. If the applicant is the only one who has contributed to the length of the proceedings and if he is the essential cause of the delay, there will be no breach of the reasonable time requirement. A standard has been established in ECtHR case law according to which the applicant is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings.[30]

A party in criminal proceedings is not required to actively cooperate with the judicial authorities, but an untimely execution of procedural actions that are required by law from the defendant is not tolerated. Applicants cannot be blamed for making full use of the remedies available to them under domestic law in court proceedings or for repeated failures to attend the proceedings due to poor health. The defendant is liable for the delay in the proceedings only when he has manifestly shown bad faith, an intention to delay or obstruct the proceedings. The period in which the defendant was evading justice and inaccessible to the authorities is always deducted from the total duration of the proceedings. A delay in the proceedings caused by the applicant failing to provide the required address of residence or stay to the court or other competent authority is also not tolerated.

What is required of a party in civil procedure is a "normal diligence". The applicant is liable for the length of court proceedings in cases where he submitted imprecise and unfounded requests, when he unjustifiably failed to appear at the hearings, when he made allegations contrary to his counsel's claims in order to delay the proceedings, or when he unjustifiably refused to undergo a medical examination that was deemed necessary. In civil proceedings, repeatedly making unjustifiable requests to postpone hearings or disqualify all judges, which is not permitted by law, is held against the applicant, but he cannot be blamed for making full use of the remedies available to him under domestic law, despite the fact that some of them were dismissed.

Delays caused by the conduct of parties for which the courts cannot be held responsible

30 Paragraph 35 of the ECtHR judgment of 7 July 1989 in the case Union Alimentaria Sanders S.A. v. Spain, Application no. 11681/85.

also include: initially addressing an incompetent court, applications for stay of proceedings and extension of time limits for court orders, late submission of petitions, evidence, names of witnesses to be examined, statements concerning petitions and proposals of the opposing party, as well as responses to the settlement offer, creation of a "procedural maze" by submitting numerous appeals, applications, requests for exemption, motions for delegation of another court or pleas alleging lack of jurisdiction, refusal to appoint a lawyer or proxy to receive letters, and the like.

When deciding on legal remedies for the protection of the right to trial within a reasonable time, the courts are obliged to assess **the significance of the case for the applicant** in each specific case. Cases which, given all the circumstances, have a special significance for the applicant or where a delay in the procedure poses a risk to the applicant, require taking action with particular or special diligence, or with exceptional diligence, because even the apparently shorter duration of the procedure can be considered unreasonable.

It is generally considered that criminal proceedings should be speedier than civil proceedings. The right to trial within a reasonable time in criminal proceedings is designed to avoid that a person charged should remain too long in a state of uncertainty about his or her fate, especially if he or she is in custody or threatened with a severe sentence.

Due to the significance of the case for the applicant in civil matters, many laws governing this subject matter prescribe time limits within which certain actions must be taken in the procedure and the procedure must be concluded, or the court is ordered to conduct the procedure without delay, urgently or with special urgency. However, there are also cases where urgent action is requested due to the significance of the case for the applicant, even though the court is not obliged by law to act urgently. Cases concerning applicants of advanced age, persons with disabilities, persons completely or partially deprived of legal capacity, persons suffering from an incurable disease, persons who have been exposed to police violence and torture or who are conducting civil proceedings for damages as accident victims may have to be addressed as a matter of priority.

If the court is overburdened with unresolved cases, standards established by the ECtHR require that cases are then resolved according to priority or special significance for the applicant, and not according to the order of receipt thereof by the court.

Reasonable length of proceedings is a relative category that depends on a number of factors, so prescribing four basic criteria for assessing the duration of court proceedings does not exhaust the list of criteria that can be applied when deciding on legal remedies to protect the right to trial within a reasonable time. The duration of the proceedings is the starting point for decision-making. The multi-year duration of court proceedings in one instance will, as a rule, be a sufficient reason to establish that a reasonable time has been exceeded. Statutory time limits for scheduling hearings, drafting decisions and bringing proceedings to an end, as well as other procedural rules that specify basic criteria must also be taken into account. In order to properly assess the merits of an appeal, the court proceedings must be examined as a whole, in the context of all the facts and circumstances of the case.

3.1.3. Jurisdiction and application to expedite the proceedings

An application to expedite the proceedings is lodged with the court seised of those proceedings (Article 6(1)). The court president decides on the application, and where it concerns

a case in which the court president is the acting judge, the deputy court president will decide on the application to expedite the proceedings (Article 6(2)). We see no obstacles that would prevent the deputy court president from acting and deciding on an application to expedite the proceedings also in the event of absence or indisposition of the president, given the short time limits prescribed for taking procedural actions and making decisions with respect to such applicaitons.

The procedure conducted on the application is unilateral and it is conducted without a hearing (Article 6(3)), while the facts and circumstances relevant to the decision are determined based on the report of the judge acting in the case on the length of the proceedings, the reasons why the proceedings were not concluded and the time limit within which they can be concluded, as well as by direct examination of the case files. This enables efficient decision-making on the application.

The provisions of the law governing non-litigation procedure, that is, the Law on Non-Contentious Proceedings (Official Gazette of Republika Srpska, 36/09 and 91/16), apply to matters related to decision-making on the application. Given the specific nature of the procedure for protection of the right to trial within a reasonable time, and that the procedure upon an application is mostly regulated by the RS Law, it is difficult to predict the procedural situations in which the provisions of the Law on Non-Contentious Proceedings would be properly applicable. Rather, some legal concepts not regulated by the RS Law could be pointed out, such as the costs of proceedings, when the relevant application of the rules of non-litigation procedure would not be appropriate to the legal nature and essence of the procedure to protect the right to trial within a reasonable time.

In the procedure for judicial protection of the right to trial within a reasonable time in the Republic of Serbia, it was noticed that Article 30 of the Law on Non-Contentious Proceedings of the Republic of Serbia, which is identical to Article 27 of the Law on Non-Contentious Proceedings of Republika Srpska, cannot be applied when deciding on an application for reimbursement of costs and expenses incurred, so the provisions of the Civil Procedure Code are applied accordingly. The relevant application of the provisions of the Civil Procedure Code is also enabled by Article 2(2) of the Law on Non-Contentious Proceedings of Republika Srpska. The possibility of relevant application of the provisions of the Civil Procedure Code should not be excluded in other cases when certain matters of procedure cannot be resolved by applying the rules of non-contentious proceedings.

According to Article 7 of the RS Law, the application to expedite proceedings must contain information on the applicant, his legal representative and attorney, the case number of the case to which the application relates, as well as information and circumstances related to the case to which the application relates. Such **contents of the application** allow parties to file an application without the professional assistance of a lawyer (without incurring unnecessary costs).

The question this raises is whether a special power of attorney attached to the application is required to submit an application through an authorised legal representative. We are of the opinion that the lawyer who represents the party based on a general power of attorney in the court proceedings for which expediting is requested does not need a new power of attorney to file an application to expedite the proceedings. If, conversely, the lawyer was required to submit a special power of attorney, this would be an excessive formalism that is inappropriate for the protection of the right to trial within a reasonable time and should therefore be avoided, as it may jeopardise the effectiveness and availability of remedies established for judicial protection of that right.

The court president decides on the application to expedite proceedings within 60 days from the date of receipt of that application by the court (Article 10). The RS Law does not stipulate that a party has the right to appeal if the court president does not decide on the application within the prescribed time limit, probably because the court president can reasonably be expected to meet that time limit.[31]

The application to expedite proceedings is dismissed if it is disorderly or if it does not contain the obligatory elements referred to in Article 7 of this Law or has been submitted by an unauthorised person (Article 11(1)). The assessment of the orderliness and content of the application should not be formalistic, especially when the application was drafted by the applicant him or herself, because the Law does not provide for the possibility of giving the applicant an appropriate time limit within which to eliminate deficiencies. Consequently, the application should be dismissed if it is unclear or if the absence of any mandatory element of the application makes it impossible to act on it. In fact, when submitting an application, parties may be guided by the fact that the information on their place of domicile, residence or seat is already in the records of the court case that they are requesting to be expedited and that it is, therefore, not necessary to state this information in the application. In that situation, there would be no objective obstacles to acting upon such an application. The fact that Article 18 of the RS Law does not provide for the right to file a new application to expedite proceedings in the event that an earlier application is dismissed should not be neglected either.[32]

The RS Law does not explicitly prescribe the moment until which an application to expedite proceedings can be filed, but there is no doubt that this can be done up to the end of the proceedings. As the application is filed to the court hearing the proceedings, the question arises as to how to proceed if the application is filed after the end of the proceedings before that court or if the court case to which the application to expedite proceedings refers has in the meantime been referred to a higher court for review. When the proceedings have been brought to an end before the application is submitted, it is obvious that expediting the proceedings is neither necessary nor possible, and in that case the application should be dismissed. If the proceedings before the court to which the application was addressed were concluded before the application was filed but have continued before a court of higher instance, the procedural situation could be resolved in two ways - by dismissing the application to expedite proceedings before the lower instance court or by surrendering it to the higher instance court for a decision. The choice of one of the possible solutions will largely depend on the circumstances related to the case and the contents of the application.

The application could also be dismissed as premature in the case of a new application to expedite proceedings submitted before the expiry of the time limits provided for in Article 18 of the RS Law.

The application to expedite proceedings is rejected by a decision of the court president when the application to expedite proceedings is judged to be manifestly unfounded (Article 11(2)). The application may be considered manifestly unfounded if, for example, it can be concluded from the allegations of the applicant that the procedure is short-lived, that it is not designated

31 Article 14(1) of the Law on Protection of the Right to Trial within a Reasonable Time (Official Gazette of the Republic of Serbia, No. 40/15) stipulates that a party has the right to appeal if its complaint is rejected or if the court president does not decide on the complaint within two months of the date of receiving it.

32 Article 13(4) of the same law stipulates that the party whose complaint or appeal has been dismissed may immediately file a new complaint.

as an urgent procedure by law, or that the subject-matter of the dispute has not been given priority due to its special importance for the applicant.

Where the court president, having obtained a report on the duration of the procedure from the judge acting in the case and, if necessary, examined the case file, determines that there was no unjustified delay of the proceedings and decision-making in the case, he shall reject the application to expedite proceedings as unfounded (Article 11(3)).

If the court president finds that the proceedings and decision-making in the case have been unjustifiably delayed, he shall issue a decision and set a time limit, which may not exceed three months, for taking certain procedural actions and an appropriate time limit within which the acting judge must inform him of the actions taken (Article 12(1)). Determining the procedural actions to be taken primarily depends on the phase of the proceedings and their previous duration. The judge should be ordered to take actions that will effectively expedite or end the proceedings, while making sure that it is objectively possible to take the ordered actions within the set time limit. Otherwise, bringing the proceedings to a close under an application to expedite proceedings, within the set time limit, may be called into question. Namely, the procedure on the application ends only when the judge informs the court president within the set time limit about the procedural actions taken, and the court president informs the applicant about the procedural actions taken (Article 14).

The RS Law does not provide for the possibility for a court president to order a case to be revoked from a judge and assigned to another judge if a party's right to trial within a reasonable time is compromised or violated due to the judge's prolonged absence. Notwithstanding the above, the court president should assign the case to another judge, if this is necessary in order to take the ordered measures within the set time limit.

If the application to expedite proceedings refers to proceedings ongoing before the Supreme Court of Republika Srpska (hereinafter: the Supreme Court), the application to expedite proceedings shall be decided by a panel of three judges of that court, which may uphold the application or reject it as unfounded (Article 17(1) and (2)). The panel of the Supreme Court decides on the application to expedite proceedings within 90 days from the date of receipt of the application (Article 17(3)). The decision to uphold the application sets a time limit, which may not exceed three months, for taking certain procedural actions, and an appropriate time limit within which the judge must inform the panel about the actions taken (Article 17(4)).

3.1.4. Right to appeal and decisions on appeal

The applicant **may lodge an appeal** against the decision made on the application to expedite proceedings to the president of the immediately higher court within 15 days from the date of receipt of the decision (Article 15). The RS Law does not stipulate whether an appeal is lodged to the court that decided on the application to expedite proceedings or to the appellate court. Since this matter is not regulated by the Law on Non-Contentious Proceedings, Article 212 of the Civil Procedure Code, according to which the appeal is lodged with the first instance court, should be applied accordingly in this situation.[33] Article 16(3) of the RS Law also indicates that the appeal is lodged with the first instance court. According to this provision, the president of the first instance

33 Law on Civil Procedure (Official Gazette of Republika Srpska, nos. 58/2003, 85/2008, 74/2005, 63/2007, 105/2008 - CC decision, 45/2009 - CC decision, 49/2009 and 61/2013)

court may dismiss an appeal as inadmissible, untimely or when it is filed by an unauthorised person.

The president of the immediately higher court renders the **decision on appeal** within 30 days from the date of receipt of the case file obtained from the court that rendered the appealed decision (Article 16(2)). The president of the immediately higher court can render a decision to dismiss an appeal as inadmissible, untimely or unauthorised, if it has not been dismissed by the court president in charge of the case (Article 16(3)). The president of the immediately higher court may reject the appeal as unfounded and confirm the first-instance decision or uphold the appeal and reverse the decision (Article 16(4)). It is extremely important that the protection of the right to trial within a reasonable time is ensured by the appellate court if it was not ensured in the procedure upon an application to expedite proceedings, and this can be done by reversing the first-instance decision. The decision upholding the appeal and reversing the first-instance decision may order the judge charged with the case to take certain procedural actions in order to expedite proceedings and it may set a time limit for taking them.

The RS Law explicitly excludes the possibility of lodging an appeal and seeking a review against the decision of the Supreme Court panel (Article 17(5)), which is fully justified given that it concerns a decision of the highest-instance court. However, the question remains whether decisions of presidents of second-instance courts on appeals against decisions on applications to expedite proceedings are subject to review. The Supreme Court may have an opportunity to rule on this matter. For now, it can be stated that resorting to extraordinary legal remedies and judicial review would not be appropriate to the procedure for the protection of the right to a fair trial, which should be concluded as soon as possible in order to expedite and bring to an end the court proceedings in relation to which protection of the right was requested.

3.1.5. Right to a new application to expedite proceedings

An applicant whose application to expedite proceedings has been rejected, but who has not lodged an appeal, as well as an applicant whose application to expedite proceedings has been rejected and who has lodged an appeal which has been rejected, may submit a new application to expedite proceedings after six months have elapsed from the date of receipt of the decision rejecting the appeal (Article 18).

The RS Law does not provide for the possibility for a new application to expedite proceedings to be filed by a party whose application was dismissed or a party whose application was upheld, but despite the measures ordered by the original decision, the proceedings were further delayed before the same court or a higher-instance court in the legal remedy procedure. However, Article 11(1) of the Law on Protection does not prescribe the dismissal of such applications as inadmissible. Therefore, there is a possibility that the targeted interpretation of law, which starts from the purpose for which the application to expedite proceedings was introduced as a legal remedy, results in a conclusion that new applications filed in these situations would not be inadmissible, although this is not explicitly provided for under the law. Such an interpretation would provide broader protection of the right to trial within a reasonable time in the event that it is violated in court proceedings.

3.1.6. Action to establish a violation of the right to trial within a reasonable time and just satisfaction

In the procedure of judicial protection of the right to trial within a reasonable time, the party whose right has been violated must be provided with adequate, sufficient and just satisfaction.

In accordance with Article 19 of the RS Law, **just satisfaction** for a violation of the right to trial within a reasonable time may be achieved by:

1) establishing a violation of the right to trial within a reasonable time,
2) establishing a violation of the right to trial within a reasonable time and awarding monetary compensation,
3) establishing a violation of the right to trial within a reasonable time and awarding monetary compensation and publishing the judgment stating that the party's right to trial within a reasonable time has been violated in court proceedings,
4) establishing a violation of the right to trial within a reasonable time and publishing a judgment stating that the party's right to trial within a reasonable time has been violated in court proceedings.

An action to establish a violation of the right to trial within a reasonable time and just satisfaction for the violation of the right to trial within a reasonable time (hereinafter: the action) may be filed by the applicant who has previously submitted an application to the competent court to expedite the proceedings (Article 21(1)). The action is submitted to the Supreme Court, no later than six months from the date of receipt of the final decision made under an application of the party to expedite proceedings (Article 21(2)).

In practice, the issue of the right to bring an action for a violation of the right to trial within a reasonable time will most likely be raised as contentious. The matter refers to whether the right to file an action belongs to each party whose application to expedite proceedings has resulted in a final decision, including those whose applications have been rejected or dismissed, or only to the party whose application to expedite proceedings has been upheld by a final decision. This matter gains additional importance because the mere fact that the application to expedite proceedings was dismissed or rejected does not necessarily mean that a violation of the right to trial within a reasonable time did not occur at the time when the application was dismissed due to formal deficiencies, or after the application was rejected, at a later stage in the court proceedings and up until their conclusion. Resolving this legal question should take into account the need to provide effective protection of the right to trial within a reasonable time, which precludes excessive formalism.

According to Article 22 of the RS Law, the action must contain basic information about the applicant, his legal representative and attorney, information about the case to which the action relates and the signature of the applicant, his legal representative or attorney, and it must be accompanied by a copy of the final decision on the application to expedite proceedings.

Article 22 the RS Law does not explicitly stipulate that an action must also contain the form of order sought by the applicant, but it follows from Article 26(1) and Article 29(1) that the manner of just satisfaction is decided in accordance with the applicant's request. Absence of the form of order sought by the applicant is not prescribed as a reason for dismissing the action, so if the applicant did not make a clear and precise request as to the manner of just satisfaction he seeks, the court could restrict itself to finding a violation of the right to trial within a reasonable time, if

it does not follow from the allegations of the action that the applicant also seeks to eliminate the harmful consequences of the violation.

If it finds a violation of the right to trial within a reasonable time, the Supreme Court may, at the request of the applicant, render a judgment awarding monetary compensation in the amount of BAM 300 to 3,000 (Article 27(2)) in addition to establishing a violation. Where several persons are injured in court proceedings in which a violation of the right to trial within a reasonable time has been established, the compensation may amount to BAM 30,000 per case (Article 27(3)). The amount of monetary compensation is determined in accordance with the criteria prescribed in Article 5 of the RS Law (Article 27(4)).

Notwithstanding the fact that the law prescribes the amount of monetary compensation aligned with the amount of compensation for non-pecuniary damage awarded to appellants in Bosnia and Herzegovina in the case law of the Constitutional Court for violations of the right to trial within a reasonable time, the ECtHR case law must also be taken into account. The amounts awarded may be less than the usual amounts awarded by the ECtHR, but they must not be unreasonable, otherwise the applicants will not have lost their "victim" status.

The ECtHR established the form for calculating the amount of compensation for non-pecuniary damage in the already mentioned judgment in the case of *Apicella v. Italy.*[34] It was determined in that judgment that the basic amount to be received by the applicants who proved that their right to trial within a reasonable time had been violated was EUR 1,000-1,500 for each year of postponement of the lower instance courts' decision, and double the amount in cases requiring special urgency or if the stakes involved in the dispute are considerable for the applicant. The basic amount may be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant, where what is at stake in the dispute is of little importance for the applicant, and on the basis of the standard of living in the country concerned and the compensation already paid before the domestic authorities. Section 2.1. of this report explains how the Constitutional Court determined in its case law the amount of monetary compensation to be awarded to appellants for established violations of the right to trial within a reasonable time, taking into account the level of GDP in Bosnia and Herzegovina.

The manner in which the ECtHR considers the possibility of reducing the compensation for non-pecuniary damage due to the violation of the right to trial within a reasonable time can be seen from the decisions rendered in the cases of *Vokurka v. the Czech Republic*[35] and *Surbanoska and Others v. the Former Yugoslav Republic of Macedonia*.[36]

In the case of *Vokurka v. the Czech Republic* the monetary compensation awarded amounted to 66.7% of that awarded by the ECtHR in similar cases against the Czech Republic. The ECtHR assessed that amounts equivalent to 45% of those which it would itself have awarded in similar cases, and which was paid at the national level, to be acceptable.

In the case *Surbanoska and Others v. the Former Yugoslav Republic of Macedonia*, with regard to the amount of compensation, the ECtHR noted "... that so far the awards made by the Supreme Court in 'length-of-proceedings' cases has varied between EUR 80 and EUR 4,000. The total amount

34 Judgment of the Grand Chamber of the ECtHR of 29 March 2006 in the case of Apicella v. Italy, Application no. 64890/01

35 Paragraph 30 of ECtHR's decision on admissibility in the case Vokurka v. the Czech Republic of 16 October 2007, Application no. 40552/02

36 Paras. 38-39 of ECtHR's decision on admissibility of 31 August 2010 in the case Surbanoska and Others v. the Former Yugoslav Republic of Macedonia, Application no. 36665/03

of compensation awarded in 46 cases was EUR 40,610, which is 15-20% of the overall amount that the Court would have awarded in comparable cases." However, the ECtHR took the view that it could not assess in the abstract whether these amounts were appropriate, although it was clear that in most cases the amount was below or far below the ECtHR's standards. However, considering the circumstances of the specific case, and taking into consideration the awarded amount of EUR 4,000 for a delay of over seventeen years, as well as the fact that the Supreme Court set the three-month time-limit for the Court of Appeal to decide the applicants' claim in the substantive proceedings, and the latter court complied, the ECtHR is satisfied that the amount awarded to the applicants is "not manifestly unreasonable" having regard to what the ECtHR generally awards in similar cases against FYROM.

If the awarded amount of monetary compensation does not constitute adequate satisfaction for the established violation of the right to trial within a reasonable time, the applicant will continue to be considered a "victim" of the violation. In the case of *Savić and Others v. Serbia*[37] the matter considered was whether the applicants had lost their "victim" status because the national court had awarded them monetary compensation for an established violation of the right to trial within a reasonable time. The Court noted that "the applicants' victim status then depends on whether the redress afforded was adequate and sufficient having regard to just satisfaction as provided for under Article 41 of the European convention." In this connection, the Court recalled that "in length-of-proceedings cases one of the characteristics of sufficient redress which may remove a litigant's victim status relates to the amount awarded. This amount depends, in particular, on the characteristics and effectiveness of the remedy. Thus, States which, like Serbia, have opted for a remedy designed both to expedite proceedings and afford compensation are free to award amounts which – while being lower than those awarded by the Court – are not unreasonable." The ECtHR pointed out that "whether the amount awarded may be regarded as reasonable, however, falls to be assessed in the light of all the circumstances of the case. These include not merely the duration of the proceedings in the specific case but the value of the award judged in the light of the standard of living in the State concerned, and the fact that under the national system compensation will in general be awarded and paid more promptly than would be the case if the matter fell to be decided by the Court under Article 41 of the European convention." Having regard to the particular circumstances of the cases, the ECtHR considers that "the sums awarded to the applicants cannot be considered sufficient and therefore amount to appropriate redress for the violations suffered". The Court therefore concluded that the applicants did not lose their status as victims. It therefore found that there has accordingly been a violation of Article 6(1) of the Convention and awarded them certain amounts in respect of non-pecuniary damage and costs and expenses incurred before the ECtHR.

Considering that the amount of monetary compensation prescribed by Article 27(2) and (3) of the RS Law is obviously lower than the compensation for non-pecuniary damage awarded by the ECtHR for violations of the right to trial within a reasonable time, the Supreme Court must convincingly justify the lower amount of compensation so that it would not be considered unreasonable. This justification must, in particular, also be contained in the judgment that only establishes a violation of the right to trial within a reasonable time without awarding monetary compensation. It is of the utmost importance that the awarded amount of monetary compensa-

37 ECtHR judgment of 5 April 2016 in the case *Savić and Others v. Serbia,* Applications nos: 22080/09, 56465/13, 73656/14, 75791/14, 626/15, 629/15, 634/15 and 1906/15

tion be paid within three months from the date of submission of the request for payment, which is prescribed by Article 28 of the RS Law. In order to achieve that, the amount of funds in the budget of Republika Srpska necessary for the payment of monetary compensation and compensation for property damage must be well planned. Namely, appropriate and sufficient satisfaction as a standard developed in ECtHR case law also implies the payment of compensation without unnecessary delay after the decision on compensation becomes final.

Regarding the payment of compensation, a question that can be raised is whether it would be more expedient for the RS Law to provide for the payment of compensation from the budget item used for funding the court that heard the procedure in which the violation of the right to trial within a reasonable time was established. There are reasons that speak in favour of the statutory provision according to which the payment should be made from the budget of Republika Srpska. First, it can and often does happen in reality that the blame for the long duration of the proceedings is not predominantly borne by the higher instance court that heard the procedure resulting in establishing a violation of the right, but by the lower instance court.[38] Moreover, it is safer to ensure the payment of compensation without undue delay after the decision on compensation becomes final with funds in the state budget, rather than with funds allocated for the work of individual courts.

Article 29 of the RS Law provides for the possibility to **publish the judgment**, as one of the ways of just satisfaction when the court finds a violation of the right to trial within a reasonable time. The judgment can be published at the request of the applicant, and must be available to the public on the website for a period of 60 days, after which it is removed *ex officio*. The right to publish a judgment establishing that a party's right to trial within a reasonable time has been violated also exists in the Republic of Serbia as a form of just satisfaction,[39] but in five years no party has sought this kind of just satisfaction. It is more than obvious that the parties in court proceedings exclusively demand monetary compensation and compensation for material damages caused by the established violation of their right to trial within a reasonable time.

The RS Law also provides for the **right to compensation for material damages** due to the violation of the right to trial within a reasonable time, which is exercised by lodging a civil action before the competent court and relies on the general rules on compensation of damages (Article 32). According to the RS Law, lodging an action for compensation for material damages does not require the existence of a judgment of the Supreme Court that established that the plaintiff's right to trial within a reasonable time was violated in a certain court procedure. The existence of such a judgment should be a condition for bringing an action for compensation of material damages for violation of the right to trial within a reasonable time. In the absence of such a judgment, the court would have to render a preliminary ruling in the civil procedure for compensation as to whether the plaintiff's right to trial within a reasonable time has been violated. Such conduct would be contrary to the established jurisdiction of the Supreme Court and the Constitutional

38 It has been noticed in the case law of the Republic of Serbia's courts that the most common culprits for unreasonably long proceedings are first-instance courts, and that, as a rule, parties seek protection of the right to trial within a reasonable time before an appellate or review court, only when the violation of the right becomes manifest due to the duration of the proceedings in their entirety. The numerous claims for damages submitted to the higher instance courts, only because a violation of the right to trial within a reasonable time was established in the procedure conducted by them, caused a financial blow to certain courts and resulted in the freezing of their accounts (e.g. Commercial Court of Appeals due to the long duration of bankruptcy proceedings), and thus made payment of monetary compensation more difficult.

39 See: Article 23(1) (3)) of the Law on Protection of the Right to Trial within a Reasonable Time.

Court to decide on the violation of the right to trial within a reasonable time. Therefore, the plaintiff would have to enclose the judgment of the Supreme Court establishing a violation of his right to trial within a reasonable time to his action for compensation for material damages, as well as to provide evidence that the damage suffered by him is causally related to the established violation.

Article 34 of the RS Law stipulates that a person who has lodged an appeal with the Constitutional Court may not submit an application to expedite proceedings under this Law.

3.2. Analysis of the Law on Protection of the Right to Trial within a Reasonable Time of the Brčko District

The BD Law contains mostly identical or similar basic principles as the RS Law and therefore these will not be repeated in this analysis. However, there are several important differences that will be pointed out here.

According to Article 2, the purpose of the BD Law is to have a preventive character and prevent violations of the right to trial within a reasonable time from occurring, but also to provide compensation through judicial review in cases of violation of this right.

Pursuant to Article 4, holders of the right to trial within a reasonable time are all parties to court proceedings, who have the right to protection and use of legal remedies pursuant to this Law. However, paragraph 3 of this Article prescribes an exception, because administrative bodies and other holders of public authority do not enjoy the rights from this law. It is indisputable that this category of parties could not initiate proceedings before the ECtHR either, because they do not enjoy the protection of human rights and freedoms under the European Convention. However, the Constitutional Court ruled in a 2004 decision that "state bodies and public authorities as participants in judicial proceedings do not enjoy the rights safeguarded by the European Convention, but they do enjoy the guarantees of the right to a fair trial and the right to property under Article II/3. e) and k) of the Constitution of Bosnia and Herzegovina."[40] In this context, the Constitutional Court rendered several decisions on respect for the right to trial within a reasonable time in proceedings in which the party was a "public authority".[41]

Article 6 of the BD Law emphasises that the guiding criteria for assessing the duration of a trial within a reasonable time will be those determined by the Constitutional Court and the ECtHR. Such precise determination, along with an exhaustive list of the criteria that are taken into account, avoids ambiguities in practice. In doing so, the BD Law further recognised the need to take into account other statutory provisions regarding the urgency of proceedings (prescribed for civil, criminal and misdemeanour proceedings, administrative disputes, etc.).

The BD Law also provides for two remedies, but these are two applications: an application for protection of the right to trial within a reasonable time and an application for monetary compensation for a violation of the right to trial within a reasonable time. Unlike the RS Law, according to the BD Law, both of these applications are submitted to the court which is hearing the procedure and they are decided by the court president.

When deciding on an application for protection of the right to trial within a reasonable time, there is an important difference in the BD Law, because Article 11(2) stipulates that the ap-

40 Constitutional Court, Decision on Admissibility and Merits of 27 February 2004
41 Constitutional Court, decisions nos. AP 1774/15, AP 98/18, AP 1926/18.

plication is rejected if, given the duration of the proceedings, the right to trial within a reasonable time is manifestly not violated, while Article 11(3) sets forth that the application is dismissed by a decision against which no appeal is allowed. Article 16 of the BD Law stipulates the right to a new application, where a new application may be submitted by a party whose application was dismissed as deficient, and not because, given the duration of the proceedings, no *prima facie* violation of the right was found. The new application may be submitted after the expiration of a period of six months. It follows that a party whose claim was dismissed because there was no *prima facie* violation of the right may also submit a new application only after the expiration of the six-month time limit.

The BD Law, as well as the RS Law, prescribe the obligation of the court president to whom the application was filed, to decide on it within 60 days. However, according to Article 14(2) of the BD Law, if the court president does not decide on the application within the prescribed time limit, the party has the opportunity to appeal.

The amount of monetary compensation for the violation of the right to trial within a reasonable time is fixed in Article 18 of the BD Law and it is recognised in the amount of BAM 300 to 3,000 , or where several persons submit an application in one case, it cannot amount to more than BAM 10,000. It is noticeable that the amounts of compensation are set forth differently in the RS Law and in this law, although the criteria applied by the court in assessing the reasonable duration of a trial are the same. This can have negative consequences in relation to the principle of alignment of regulations.

Funds for the payment of monetary compensation are provided in the budget of the Brčko District. Unlike the RS Law, the BD Law does not specify the time limit within which these amounts must be paid, but Article 19(3) stipulates that the payment decision is an enforceable document. This means that where the compensation has not been paid from the budget, the party awarded monetary compensation by a court decision can initiate enforcement proceedings for enforced collection. However, the absence of a provision defining the time limit within which the payment under the decision must be effected can create problems in practice and lead to unnecessary enforcement procedures.

3.3. Analysis of the Draft Law on Protection of the Right to Trial within a Reasonable Time of the Federation of Bosnia and Herzegovina

The starting point for the analysis of the Draft Law on Protection of the Right to Trial within a Reasonable Time of the Federation of Bosnia and Herzegovina (hereinafter: the FBiH Draft Law) includes the basic positions on effective judicial protection of the right to trial within a reasonable time arising from ECtHR case law. These have been presented in the Introduction and therefore they will not be repeated. The analysis of the FBiH Draft Law will point out the good aspects of the proposed provisions, but also refer to possible amendments and upgrades of certain provisions in order to avoid issues in their future application and ensure their effectiveness. The comments and interpretations set out in Section 3.1 apply to the proposed statutory provisions that are identical to the provisions of the RS Law.

3.3.1. Basic provisions

The FBiH Draft Law prescribes the manner, conditions and procedure for protection of the right to trial within a reasonable time in court proceedings before a competent court in the Federation of Bosnia and Herzegovina (Article 1).

The **holder of the right to trial within a reasonable time** is a party in court proceedings who considers that the competent court has not decided within a reasonable time on its right or obligation or accusation of a criminal offence (Article 4). This precise determination of the right holder avoids the ambiguities arising from Article 2 of the RS Law. However, although not explicitly stated in the FBiH Draft Law, the position of the ECtHR where the injured party and the subsidiary prosecutor may invoke a violation of the right to trial within a reasonable time from the moment they filed a claim for damages should be applied in practice, or Article 4 of the FBiH Draft Law should be amended accordingly.

Remedies protecting the right to trial within a reasonable time include: an application for protection of the right to trial within a reasonable time (hereinafter: the application) and an application for adequate compensation for the violation of the right to trial within a reasonable time (Article 5(1)). The legislator opted for two legal remedies to protect the right to trial within a reasonable time, one of which has exclusively preventive and the other exclusively compensatory effect. Submitting an application for adequate compensation for a violation of the right to trial within a reasonable time is conditioned by prior submission of an application for protection of the right to trial within a reasonable time.

3.3.2. Application for protection of the right to trial within a reasonable time

The procedure under this application is largely similar to the procedure under an application to expedite proceedings in the RS Law. Let us point out that there are certain differences between them, which are primarily related to more precise regulation of the procedure.

More precise regulation of the procedure under an application in the FBiH Draft Law refers to:

1) designating the moment when the proceedings are concluded as the time limit for submitting the application (Article 8(2));
2) supplementing the contents of the application (Article 9);
3) the possibility for the court president to appoint one or more judges in the annual work schedule to conduct the procedure in addition to him and to decide on the application (Article 10(2)), which may lead to a speedier rulings on applications;
4) dismissal of the application only if the absence of an element of the application referred to in Article 9 makes it impossible to act upon it (Article 11(1));
5) the possibility to lodge an appeal if the president does not decide on the application within 60 days from the date of receipt thereof (Article 14(2));
6) the possibility for the party whose application was dismissed as deficient to file a new application (Article 16 (1));
7) a clear stipulation that an appeal against the decision rejecting the application shall be submitted to the president of the court that decided on the application, which shall immediately submit it to the president of the immediately higher court along with the relevant information from the case file (Article 15(1) and (2)).

Article 13(2) of the FBiH Draft Law regulates the measures to be taken by a judge when he determines that the application is founded. This matter is regulated differently than in the RS Law, both in terms of time limits for taking measures and in terms of the formulation of measures that can be ordered. The RS Law sets a time limit of no more than three months for certain procedural actions, while the FBiH Draft Law provides for a maximum of six months, unless the circumstances of the case require a longer time limit, within which the judge must take action to resolve the case. Procedural actions for expediting the proceedings may include scheduling a hearing, conducting evidentiary proceedings, deciding on an interim measure, drafting a written copy of the decision or submitting the case to the higher instance court to decide on a legal remedy. All these measures can contribute to a speedier resolution of the case, and as such can be considered measures for resolving the case. However, when Article 13(2) of the FBiH Draft Law is brought into relation with Article 17(1), it becomes clear that "measures for resolving the case" should imply "resolving the case", i.e. bringing the proceedings to a close. The purpose of the proposed statutory provision is to provide more effective protection of the right to trial within a reasonable time, but there is a danger that the six-month period will be too short to bring the proceedings to a close. It is therefore important that the time limit for taking measures to resolve the case provides the judge with an objective opportunity to comply with it, which will depend on the stage of the proceedings at the time the measure is imposed and the number and type of procedural actions that have to be taken to bring the proceedings to a close.

The party has the right of appeal against the decision of the court president rejecting its application within eight days from the date of receiving the decision, as well as when the court president does not take a decision on the application within 60 days from the date of receiving it (Article 14). The decision to dismiss the application (Article 11(1)) and the decision to uphold the application (Article 13(4)) are not subject to appeal. The president of the immediately higher court decides on the appeal, and if the president of the Supreme Court of the Federation of Bosnia and Herzegovina has decided on the application, the appeal procedure is conducted and decided by the panel of the Administrative Division of the Supreme Court of the Federation of Bosnia and Herzegovina (Article 15(2) and (3)). The decision on the appeal must be made within 30 days from the date of receipt of the appeal (Article 15(5)). The president of the immediately higher court, or the panel, may reject the appeal as unfounded and confirm the first-instance decision or overturn the decision (Article 15(6)).

A new application may be filed by the party whose application was dismissed, the party whose application was rejected and who did not file an appeal after the expiration of six months from the date of receipt of the decision rejecting the application, as well as the party whose appeal was rejected, upon expiration of six months from the date of receipt of the decision rejecting the appeal (Article 16).

3.3.3. Application for adequate compensation for a violation of the right to trial within a reasonable time

Article 17 of the FBiH Draft Law stipulates, *inter alia*, that if the court does not resolve the case within the time limit specified in the decision referred to in Article 13 of the Law, the party may file an application for adequate compensation for a violation of the right to trial within a reasonable time (para. 1); that the request referred to in paragraph (1) of this Article is submitted

to the president of court referred to in Article 10 of this Law within a further period of six months (para. 2); that the decision is made within 30 days from the date of submitting the application referred to in paragraph (1) of this Article (para. 3); that a party may file an appeal against the decision referred to in paragraph (3) of this Article to the president of the immediately higher court within eight days from the date of receipt of the decision (para. 4); that if the decision was rendered by the president of the Supreme Court of the Federation of Bosnia and Herzegovina, the decision on appeal shall be rendered by a panel of the Administrative Department of the Supreme Court of the Federation of Bosnia and Herzegovina composed of three judges (para. 5); that the decision is delivered to the party, the president of court which violated the right to trial within a reasonable time and the competent authority referred to in Article 19 of this Law (para. 6).

According to Article 18, the maximum **monetary compensation** granted can be in the amount of up to BAM 2,000. When fixing the amount, the court applies the criteria for assessing the duration of the trial within a reasonable time referred to in Article 6 of this Law, by indicatively fixing the amount of BAM 100 per year of court proceedings. Monetary compensation is paid from the budget which is used for funding the court which heard the procedure establishing a violation of the right to trial within a reasonable time (Article 19(1)).

The following objections can be made in respect of the proposed statutory provisions:

1) in addition to adequate compensation for a violation of the right to trial within a reasonable time, there is no possibility to impose measures to bring the proceedings to a close, which leads to a further violation of the right to trial within a reasonable time where the party is not entitled to file a new application for protection of the right to trial within a reasonable time (because the previous application was upheld);
2) the envisaged amounts of compensation of BAM 100 per year of court proceedings, up to a maximum of BAM 2,000, are significantly lower than those awarded by the Constitutional Court and the ECtHR, and as such could be considered insufficient and unfair;
3) there is no time limit for payment of the awarded compensation;
4) the payment of monetary compensation from the budget which funds the work of the court which heard the procedure establishing a violation of the right to trial within a reasonable time may be more complicated and time-consuming compared to payment from the aggregate budget;
5) the matter of the procedure for compensation for material damages that may be caused to the party due to the violation of the right to trial within a reasonable time has not been regulated.

All these shortcomings should be remedied, as they could be considered non-compliant with the principles established in the ECtHR case law and defined in the *Scordino v. Italy* judgment, and they could potentially lead to proposed remedies not being considered effective in terms of protecting the right to trial within a reasonable time.

In any case, it is undisputed that the use of legal remedies provided by the RS Law, the BD Law and the FBiH Draft Law, as well as the decisions rendered in these proceedings, do not preclude an appeal to the Constitutional Court as a remedy. Naturally, according to the Rules of the Constitutional Court and its case law, it is necessary to exhaust all effective remedies available before lodging an appeal, which certainly includes the remedies provided by the RS Law, the BD Law and the FBiH Draft Law.

In this regard, the relevant ECtHR case law should be borne in mind. For example, in 2020, the ECtHR rendered three judgments against Croatia.[42] In these judgments, the ECtHR considered the effectiveness of remedies for a trial within a reasonable time, prescribed by the 2013 Courts Act. The ECtHR ruled that the applicants were not obliged to exhaust the application for protection of the right to trial within a reasonable time, as this remedy only serves to expedite the proceedings and the domestic court upholds it only if the proceedings had already lasted too long, not to prevent a future violation of the right to trial within a reasonable time. This remedy can only be considered effective if it is accompanied by a possibility to file an application for adequate compensation. However, such an application may be filed only where the judge hearing the case did not comply with the time-limit for deciding the case specified by the court president when upholding the application for protection of the right to trial within a reasonable time. The ECtHR concluded that this legal remedy has neither a preventive nor a compensatory effect. However, if the application for protection of the right to trial within a reasonable time is successful, thus affording the applicant the possibility to submit an application for compensation, then he is obliged to exhaust the latter legal remedy. Conversely, if the remedy from the Courts Act has not been successful, a constitutional complaint is an effective remedy.

Moreover, it should be borne in mind that in March 2021 the Constitutional Court rendered its first decision[43] on an appeal lodged due to the excessive length of court proceedings before a court in the Republika Srpska, after the RS Law entered into force. The Constitutional Court dismissed this appeal as inadmissible due to the non-exhaustion of legal remedies provided by law, because the appellant had not previously addressed the court hearing the proceedings or used the legal remedies available under the RS Law. The Constitutional Court concluded that the RS Law was an effective remedy that should be used by appellants, in accordance with the principle of subsidiarity, before lodging an appeal with the Constitutional Court.

42 Mirjana Marić v. Croatia, Kirinčić and Others v. Croatia and Glavinić and Marković v. Croatia, judgments of 30 July 2020

43 Constitutional Court, decision AP 148/21 of 16 March 2021.

4. JUDICIAL REVIEW OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME IN THE REPUBLIC OF SERBIA

In the period from 2007 to 2014, a constitutional complaint before the Constitutional Court of the Republic of Serbia was the only remedy in the Republic of Serbia to protect the right to trial within a reasonable time guaranteed under Article 32(1) of the Constitution of the Republic of Serbia.

Art. 8a, 8b and 8c of the Law on Amendments to the Law on Organisation of Courts[44] started to apply on 22 May 2014. These provisions introduced new instruments to protect the right to trial within a reasonable time in ongoing court proceedings: an application for protection of the right to trial within a reasonable time filed with the immediately higher court and an appeal against the decision on the application for protection of the right to trial within a reasonable time lodged with the Supreme Court of Cassation. The provisions on new remedies, referred to in only three articles of the law, did not regulate the rules of procedure in more detail. The rule that referred to the relevant application of the provisions of the law governing non-litigation procedure was not sufficient to regulate the specific procedure of judicial protection of the right to trial within a reasonable time, so a number of controversial legal issues of a procedural nature arose in practice. In order to ensure the uniform application of the law in proceedings for the protection of the right to trial within a reasonable time, the Supreme Court of Cassation issued dozens of legal positions and had them published for the benefit of informing lower-instance courts about them.

The protection of the right to trial within a reasonable time of parties in court proceedings was regulated comprehensively for the first time by the Law on the Protection of the Right to Trial within a Reasonable Time,[45] which has been applicable as of 1 January 2016. Judicial protection of the right to trial within a reasonable time also covers investigations conducted by the public prosecutor in criminal proceedings (Article 1(3)). The holder of the right to trial within a reasonable

44 Official Gazette of RS, No. 101/2013
45 Official Gazette of RS, No. 40/2015

time is any party to court proceedings, including enforcement and non-litigation proceedings, as well as a private plaintiff and subsidiary prosecutor if they have filed a claim for damages (Article 2(1)).

The law provides for three legal remedies to protect this right: a complaint to expedite the proceedings, an appeal, and an application for just satisfaction. The complaint and the appeal are means to expedite the proceedings and may be filed until the end of the procedure. The complaint is filed with the court conducting the procedure or hearing the (investigative) proceedings, and is decided on by the court president or a judge determined in the Annual Work Schedule. The party has the right to appeal to the president of the immediately higher court in the cases and within the time limits prescribed by Article 14 of the Law. Where a violation of the right to trial within a reasonable time has been found, the party whose right was violated acquires the right to just satisfaction which is exercised before the court in civil proceedings by filing an action for monetary compensation (compensation for non-pecuniary damage in the amount of EUR 300 to 3,000 or the dinar equivalent on the day of payment) or an action for compensation for property damage (compensation for material damages, the amount of which is not limited). The party may also address the State Attorney's Office in order to conclude a settlement on the payment of monetary compensation or to issue and publish a written statement of the Attorney General's Office establishing that the party's right to trial within a reasonable time has been violated.

The Law on Protection of the Right to Trial within a Reasonable Time has been in force in the Republic of Serbia for five years and has so far had positive effects in terms of expediting court proceedings. In numerous cases, the complaints filed led not only to the court proceedings being expedited, but also to their finalisation even before a decision on the complaint had been taken. The case law of the Supreme Court of Cassation includes a number of decisions rejecting the complaint because the trial ended immediately after its filing. This effect of the complaint can be explained by its character as a legitimate means of "pressuring" the court to expedite and end the trial.

However, there are also numerous examples of abuse of the right to petition in practice. Some lawyers file complaints to expedite proceedings on behalf of their clients without requesting measures to expedite or bring the court proceedings to an end, but only seeking the reimbursement of costs and expenses for drawing up the complaint and that a violation of the right to trial within a reasonable time be determined so that they would have grounds for filing an action for damages in civil proceedings. By doing so, the complaint is submitted with a lucrative goal and its main purpose, which is to expedite the court proceedings, is evaded. When the courts are overburdened with a large number of unresolved cases and when the proceedings undoubtedly take a long time, it is very difficult, if not impossible, to prevent the protection of the right to trial within a reasonable time from becoming the easiest way to secure lawyers' perquisites.

In order for the Law on the Protection of the Right to Trial within a Reasonable Time to fully meet its purpose, the parties whose right has been found to be violated must receive just satisfaction. The case law in the Republic of Serbia shows that the parties very rarely turn to the State Attorney's Office for the conclusion of a settlement and that they exercise their right to just satisfaction through actions for monetary compensation or compensation for material damage. Thousands of court cases conducted to protect the right to trial within a reasonable time and monetary compensation due to an established violation of the right further deplete the limited human resources of courts, since a certain number of judges must be designated to resolve these

cases. This reduces the number of judges acting in cases from the core competences of the courts, which also brings into question their objective ability to expedite court proceedings.

A particular issue regarding monetary compensation is that courts in civil proceedings conducted due to an established violation of the right to trial within a reasonable time usually award monetary amounts that either match or are slightly above the statutory minimum of EUR 300, which is not sufficient or adequate as just satisfaction. It is a practice that changes very slowly, despite the work of the courts of appeal and the Supreme Court of Cassation on alignment with the case law of the Constitutional Court of the Republic of Serbia and the ECtHR. On 29 January 2021, the Constitutional Court of the Republic of Serbia rendered its Decision Už-7309/2018[46] determining that the constitutional complainants' right to a fair trial had been violated because the final award they received in civil proceedings as compensation for non-pecuniary damage caused by a violation of the right to trial within a reasonable time was in the amount of EUR 300, which did not relieve the applicants of their "victim" status. Therefore, each applicant was awarded an additional amount of EUR 500.

Based on all of the above, it can be concluded that the use of combined remedies for judicial protection of the right to trial within a reasonable time, along the lines of those adopted/proposed in Republika Srpska and the Brčko District and the Federation of Bosnia and Herzegovina, has achieved the basic goal of expediting court proceedings. However, in order for full protection of this right to be achieved, uniform practice in terms of just satisfaction must be ensured in accordance with the standards established by the ECtHR.

46 The decision has been published in the Official Gazette of RS, No. 6/2021

The aim of this Report is to detect at an early stage any difficulties that may be encountered during the implementation of the laws governing the protection of the right to trial within a reasonable time in Bosnia and Herzegovina. The Report is based on an assessment of the situation in Bosnia and Herzegovina regarding the excessive length of court proceedings, including the existing remedy and its shortcomings, an overview of new remedies introduced/provided for in Bosnia and Herzegovina to address excessive length of proceedings, and comparative evaluations of the effectiveness of similar remedies already introduced in other countries.

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