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Analysis of legislation introduced to deal with protracted domestic proceedings in Albania

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1. Introduction

The European Court for Human Rights (ECtHR) has highlighted the importance of administering justice without delays which might jeopardise its effectiveness and credibility and has pointed out, that "excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law". The right to a fair trial within a reasonable time is enshrined in Article 6, paragraph 1 of the European Convention for Human Rights (ECHR) and as such applies to both civil, criminal, administrative and enforcement proceedings in so far as those proceedings involve the determination of "civil rights and obligations" or a "criminal charge" within the meaning of the Convention. Protracted domestic proceedings can affect access to justice and legal certainty and diminish the citizens' trust in the justice system. Yet, a number of Member States of the Council of Europe have struggled with the issue of delayed proceedings at national level and have amended they legislation by introducing remedies designed to tackle the problem. States are obliged to have effective remedies in line with Article 13 of the Convention and after the change of the ECtHR case-law in *Kudla v. Poland,* when the Court departed from its previous precedent and held that given that the problem of lengthy proceedings was so widespread Article 6 was not sufficient and such cases had to be looked at through the lenses of Article 13 as well. In response, Member States have introduced remedies specifically dealing with the problem of delayed justice. This has been done with varying success, some States managed to solve the problem with a simple remedy, in respect of some States ECtHR has pronounced that they have an effective remedy, only to detect deficiencies in the remedy itself at a later stage. It should be highlighted that improvements in the length of proceedings must not be done at the expense of other guarantees contained in Article 6, as speed sometimes may affect quality of justice. States through their court systems have a complex "balancing exercise" in complying with all those guarantees. It is therefore highly important to approach the task at hand with great care and by building on the standards set by the Court and the lessons learnt from other States.

Based on Articles 6 and 13 of the Convention, the Council of Europe bodies have developed a wealth of standards, studies and guidelines pertaining to the right to a trial within a reasonable time and effective remedies in that context. ECtHR has rendered numerous judgments and decision detailing criteria and standards concerning lengthy proceedings and effective remedies in that respect. Analysing lengthy proceedings cannot be done without taking into account Recommendations by the Council of Europe, studies and guidelines by CEPEJ and the work of the Venice Commission. This assessment is largely based on the above-mentioned provisions, judgments and standards. Good practices from other Member States have been also taken into account and recommended as possible solutions in Albania.

As regards Albania, in the judgments *Marini v. Albania* (no. 3738/02, §§ 147-158, ECHR 2007-XIV (extracts)) and *Gjonbocari and Others v. Albania* (no. 10508/02, 23 October 2007), ECtHR, *inter alia*, established a violation of the right to a trial within a reasonable time and noted that there was no effective remedy in respect of the length of pending or terminated proceedings at the material time. In addition, in the pilot judgment *Luli and Others v. Albania* (nos. 64480/09, 64482/09, 12874/10, 56935/10, 3129/12 and 31355/09, 1 April 2014), it noted that the growing number of applications in this context was not only an aggravating factor as regards the State's responsibility under the Convention, but also

represent a threat to the future effectiveness of the system put in place by the Convention, given that the legal deficiency identified in the applicants' particular cases may subsequently give rise to other numerous well-founded applications (*paragraph 115*). It considered the issue of protracted domestic proceedings to be a systemic deficiency and under Article 46 of the Convention considered that general measures at the national level were necessary including, in particular, introducing a domestic remedy as regards undue length of proceedings. It reiterated its principles derived from the case-law as regards effectiveness of remedies for lengthy proceedings and drew attention to the Resolution (Res(2004)3) and Recommendation (Rec(2004)6) of the Committee of Ministers of the Council of Europe both adopted on 12 May 2004.

In response, Albania adopted Amendments of the Law on the organisation and functioning of Constitutional Court' on 'reasonable time' and length of proceedings - Law 99/2016 and Amendments of Civil Procedure Code addressing the issue of 'reasonable time' - Law 38/2017 'On the Amendments of Civil Procedures Code' which entered into force on 5 November 2017. The above-mentioned instruments are the subject of the assessment. It must be noted that given the fact that these instruments will start to be implemented from November 2017, part of the analysis will focus on hypothetical problems that could arise in practice in future. Such an exercise is difficult as the practice may show problems that cannot be envisaged at this stage. However, problems noted in other countries with similar remedies on lengthy proceedings have been used in the assessment as part of lessons learnt. Also, it should be reiterated that lengthy proceedings are multifaceted problem which can be effectively solved through dialogue, consultation, involvement of all stakeholders and sufficient resources.

Before engaging in the assessment itself, I would like to thank the representatives of the state institutions present at the Focus Group in Tirana on 10 October (please see below) for their invaluable input. The national expert, Ms Mirela Bogdani, provided a very good overview of the relevant Albanian legislation and was open to answer all questions that I had in the process of drafting. Her report on domestic laws and practice was very important in understanding the functioning of the Albanian justice system in general and in particular, the newly introduced remedies for lengthy proceedings. Last but not the least, I would like to sincerely thank the team of the Council of Europe Office in Tirana and particularly Ms Antuen Skenderi, Senior Project Officer, and Ms Ina Papa, Project Assistant, for all their help in carrying out all the activities related to the assessment I was tasked with.

As regards the methodology used in assessing the amendments designed to deal with the issue of protracted domestic proceedings, the main task was to compare the text with existing international human rights norms and to draft recommendations regarding possible improvements. Furthermore, special emphasis is placed on the judgments delivered by ECtHR in respect of Albania, the findings therein, especially as regards the issues at the source of protracted proceedings. In proposing, line of action, regard has been had to the good practices of others Member States as well. In addition, on 10 October 2017, the author attended a Focus Group in Tirana, in order to consult with the main beneficiaries including representatives of the Administrative Court, the High Court, the Constitutional Court, the State Attorney Office and the Agency for Treatment of Properties. It should be noted that the great majority of the preliminary suggestions and recommendations

provided by the author and the national expert were accepted by the Focus Group participants. All additional comments and ideas presented by the authorities are included in the text below and are noted as input from the Focus Group.

A table of selected judgments and decisions concerning cases against Albania about length of proceedings is included in a separate annex to serve as a more practical tool in day-to-day implementation of the amendments that are the subject of this assessment. In the course of the discussions with all the counterparts it appeared that one of the main challenges in Albania in general including in the legislation under review, is not the legislative drafting, but rather absence of implementation of legal provisions and related problems, such as lack of staff, insufficient budget, high number of incoming cases, etc. As the abovementioned issues fall outwith the scope of an analysis from legal point of view and given the sincere wish to make this exercise meaningful, suggestions and proposals in this respect are attached in a separate Annex to this document (Annex II).

2. Starting point of the analysis

The starting point of this analysis are the judgments of the ECtHR delivered in cases concerning length of proceedings and/or effective remedies in respect of Albania. As noted already above, in *Luli and others (*cited above*),* the increasing number of repetitive applications on protracted domestic proceedings led to a delivery of a pilot judgment in which lengthy proceedings were recognized to be a structural problem and the State was required to introduce an effective domestic remedy for undue length of proceedings. There is a wealth of case-law on what constitutes an effective remedy for lengthy proceedings which will be elaborated in further detail below.

However, it is also very important to shed light on the issues which may lie at the core of the delays in administering justice in Albania. Thus, in a number of judgments against Albania the Court noted the problem of repeated referrals to lower courts. This has been the case in the judgments in *Topallaj v. Albania*, no.32913/03, 21 April 2016; *Mishgjoni v. Albania* (no. 18381/05, 7 December 2010 and *Marini v. Albania* (cited above).

In *Topallaj* specifically, the overall length of proceedings was not deemed to be unreasonable *per se*. The Court stressed the importance of domestic courts to be the ultimate guarantor of the rule of law. However, in the case at hand "they contributed to the delay by repeatedly referring the case back to lower courts for fresh examination. In this respect, the right to have one's claim examined within a reasonable time would be devoid of all sense if domestic courts examined a case numerous times, by shifting it from one court to another, even if at the end, the length of the proceedings at each instance did not appear particularly excessive". Under the case-law of the Strasbourg Court repeated remittals of a case to be re-examined are considered to disclose a deficiency in the judicial system frequently stemming from errors committed by lower courts.[1] Repeated quashing of judgments by lower courts has been noted as a deficiency in a number of other Member

[1] *Matica v. Romania*, no. 19567/02, § 24, 2 November 2006

States and there are solutions introduced in some of those countries which worked quite effectively and which could easily be applied in Albania, as well (more on this, below in the text).

In *Gjonbocari and Others v. Albania* (cited above) the Court noted the multiplication of domestic proceedings on the same issue which was assessed in the context of the authorities' management of the sets of related proceedings. This issue of management of proceedings as a factor in delay in justice does not appear to be as common a problem in Council of Europe Member States as the repeated remittal orders mentioned above. The Court was not oblivious to the fact that the initiation of separate proceedings was designed to circumvent previous courts' findings and that domestic courts were aware of the parallel proceedings in that they frequently cross-referred to them. According to ECtHR it was the domestic courts' task to identify related proceedings and, where necessary, join them, suspend them or reject the further institution of new proceedings on the same matter. It further held that the existence of prior proceedings raising the same legal issue must be taken into account in assessing the reasonableness of the length of the third set of proceedings.

Therefore, when implementing the judgments of the ECtHR apart from the findings and directions in the pilot judgment *Luli and others,* we must have due regard to the malfunctioning that has been identified in other judgments and analyse the applicable legislation from that aspect as well. Before we proceed to the actual analysis, in the text below, the author provides a brief overview of case-law on Articles 6 and 13 as regards length of proceedings and effective remedies. This overview is necessary for better comprehension of possible deficiencies and recommendations for improvement.

2.a. Length of proceedings in the jurisprudence of ECtHR

Article 6 § 1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to hear cases within a reasonable time. [2] The parties' attitude does not dispense the courts from ensuring the expeditious trial required by Article 6 § 1[3] and the same applies where the cooperation of an expert is necessary during the proceedings.[4]

When assessing whether the length of proceedings in reasonable the following criteria are considered: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the proceedings.[5] The period to be taken into consideration in civil and enforcement proceedings in principle starts at the moment of lodging a claim, while in criminal proceedings at the moment the person is charged, within the autonomous meaning of the notion "charge". Thus, in the jurisprudence such a moment has been considered to be the moment when search warrant was issued, the date of arrest or the date when confiscation was ordered or the moment of opening

[2] *Muti v. Italy*, 23 March 1994, § 15, Series A no. 281-C; *Caillot v. France*, no. 36932/97, § 27, 4 June 1999
[3] *Guincho v. Portugal*, 10 July 1984, § 32, Series A no. 81
[4] *Scopelliti v. Italy*, 23 November 1993, §§ 23 and 25, Series A no. 278
[5] *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII

preliminary investigation.[6] As regards administrative proceedings the period starts when the applicant lodges an appeal as this is the moment when a "dispute" within the meaning of Article 6 § 1 arises.

As to the conduct of the parties, using remedies regularly available to them is not considered to their detriment. However, even when proceedings appear to be unreasonably lengthy, if the party has contributed to their length this is taken into consideration. This will be the case, for example, when a party does not attend hearings and does not provide justification, also when the claimant's serious health conditions prevents him/her to attend and prolongs the hearing, although justified, it must be taken into consideration. In criminal proceedings the period during which the defendant was a fugitive is not taken into consideration. There is such example in an Albanian case (*Berhani v. Albania*, no. 847/05, 25 May 2010). As noted above, repeated remittal orders, delays due to expert witnesses, delays in summoning and other problems connected to management of the proceedings are negatively assessed. The complexity of the case will depend on the issues considered, whether there is new complex legislation recently introduced, complex factual or legal issues etc.

As to what is at stake for the applicant, in cases involving proceedings affecting the subsistence of the person, such as labour disputes, pension cases and proceedings concerning social contributions, damages for victims of crime as well as civil status and legal capacity, serious proceedings relating to a person's health or life require special diligence on part of the authorities and for such proceedings ECtHR uses a stricter scrutiny which in turn affects the amount of non-pecuniary damage ordered as just satisfaction.

ECtHR has thus far refused to expressly state what overall duration of proceedings and what duration at separate levels of jurisdiction is reasonable and how to calculate just satisfaction. Therefore, analysis of its judgments, decisions and the amounts ordered may be helpful when domestic courts apply domestic remedy for length of proceedings. In fact, the Macedonian Government asked the Court to provide guidelines as regards the fixing of the amount of just satisfaction at a comparable level to the amount awarded by the Court in similar cases. In response, ECtHR referred to the Court judgments against the respondent State in which it has found a violation and decisions in over 130 length cases that have been struck out of the list of cases on the basis of a friendly settlement reached by the parties or a unilateral declaration by the Government, noting that these decisions could also be of relevance for setting the amount of just satisfaction to be awarded to successful claimants.[7]

2.b. Effectiveness of domestic remedies for length of proceedings

In respect of effective domestic remedies in general, ECtHR has held that for a domestic remedy to be considered as effective one, it has to be available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in

[6] The length of civil and criminal proceedings in the case-law of the European Court of Human Rights, Human Rights Files No. 16

[7] Adzi- *Spirkoska and others v. the former Yugoslav Republic of Macedonia* (dec.), nos. 38914/05 and 17879/05, 3 November 2011

respect of the applicant's complaints and offered reasonable prospects of success (*Scoppola v. Italy (no. 2)* [GC], no.10249/03, § 71, 17 September 2009). States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their Convention obligation under that provision. When it comes to length of proceedings, the Court has given guidelines as to effectiveness of domestic remedies, which may be expeditory, compensatory or a combination of two remedies.

In *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 183, ECHR 2006, as regards a remedy designed to expedite the proceedings, ECtHR held that such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*. On the other hand, it added this type of remedy may not be adequate to redress a situation in which the proceedings have clearly already been excessively long.

2.b.1 Acceleratory/preventive remedy

Preventive or acceleratory remedies are designed to expedite the proceedings in order to prevent them from becoming excessively lengthy.[8] The possibility to apply to a higher authority for speeding-up proceedings (imposing an appropriate time-limit for the taking of necessary procedural steps or putting forward a hearing) will not be considered effective in the absence of a specific procedure, when the result of such application depends on the discretion of the authority concerned and where the applicant is not given the right to compel the State to exercise its supervisory powers.[9]

In *Kormacheva v. Russia* (no. 53084/99, 29 January 2004) the Court held that, the disciplinary action concerned the personal position of the responsible judges, but did not result in any direct and immediate consequence for the proceedings and that therefore applying to a higher judicial and other authorities could not be regarded as effective remedy since it could neither expedite the determination of the case nor provide the applicant for the adequate redress for delays already occurred.

2.b.2 Effective compensatory remedy

In *Luli and others,* ECtHR in terms of effectiveness of domestic remedies referred to, *inter alia*, its findings in *Dimitrov and Hamanov v. Bulgaria* (nos. 48059/06 and 2708/09, §§ 125-29, 10 May 2011. In that case, the ECtHR explained key features of an effective compensatory remedy:

"– the procedural rules governing the examination of such a claim must conform to the principle of fairness enshrined in Article 6 of the Convention;

– the rules governing costs must not place an excessive burden on litigants where their claim is justified;

– a claim for compensation must be heard within a reasonable time. In that connection, consideration may be given to subjecting the examination of such claims to special rules

[8] Venice Commission report on the effectiveness of national remedies in respect of excessive length of proceedings, available at http://www.venice.coe.int/webforms/documents/CDL-AD(2006)036rev.aspx

[9] Idem

that differ from those governing ordinary claims for damages, to avert the risk that, if examined under the general rules of civil procedure, the remedy may not be sufficiently swift (see *Scordino (no. 1)*, cited above, § 200;*Vidas v. Croatia*, no. 40383/04, §§ 36-37, 3 July 2008; and *McFarlane*, cited above, § 123);

– the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases (on this point, see also *Magura v. Slovakia*, no. 44068/02, § 34, 13 June 2006;*Rišková v. Slovakia*, no. 58174/00, § 89, 22 August 2006; *Šidlová v. Slovakia*, no. 50224/99, § 58, 26 September 2006; and *Simaldone*, cited above, § 30). In relation to this criterion, it should be noted that the domestic authorities or courts are clearly in a better position than the Court to determine the existence and quantum of pecuniary damage. In relation to non-pecuniary damage, there exists a strong but rebuttable presumption that excessively lengthy proceedings will cause such damage. Although in some cases the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all, the domestic authority or court dealing with the matter will have to justify its decision to award lower or no compensation by giving sufficient reasons, in line with the criteria set out in this Court's case-law;

– the compensation must be paid promptly and generally no later than six months from the date on which the decision that awards it becomes enforceable (on that point, see, as a recent authority, *Gaglione and Others v. Italy*, no. 45867/07, §§ 34-44, 21 December 2010)."

In *Dimitrov and Hamanov,* ECtHR further emphasised that, to be truly effective and compliant with the principle of subsidiarity, a compensatory remedy needs to operate retrospectively and provide redress in respect of delays which predate its introduction, both in proceedings which are still pending and in proceedings which have been concluded but in which the persons charged with a criminal offence have already applied to the Court or may do so (*Korenjak v. Slovenia* (dec.), no. 463/03, § 39 and 63-71, 15 May 2007). Such remedies were introduced in Poland, the Czech Republic, Slovenia and Croatia.

As regards criminal proceedings, in the same decision against Bulgaria, ECtHR noted that in certain situations, past delays could be remedied through the possibility to obtain a reduction in the penalty imposed on a convicted defendant. It highlighted that the effectiveness of such a measure did not depend on whether it is the product of legislative changes or of well-established case-law of the domestic courts, but it must meet three conditions.

- First, the courts must acknowledge the failure to observe the reasonable-time requirement of Article 6 § 1 in a sufficiently clear way.
- Secondly, they must afford redress by reducing the sentence in an express and measurable manner.
- Lastly, the opportunity to request such a reduction, whether based on express statutory language or clearly established case-law, must be available to the convicted defendant as of right. It highlighted that this does not mean that the courts must as a rule accede to such requests; in situations where a reduction of sentence would not be an appropriate measure, they may refuse to do so, and it will then be for the defendant to seek other forms of redress, such as pecuniary compensation. It further noted that in cases of extreme delay or delay which has been exceptionally prejudicial to the accused, consideration may even be given to discontinuing the proceedings altogether (see *Sprotte v. Germany* (dec.), no. 72438/01, 17 November 2005), provided that the

public interest is not adversely affected by such a discontinuance and that similar measures may also be envisaged in the context of plea bargaining between the accused and the prosecution.

This decision builds on the Court's previous case-law which I provide here below in order to provide a comprehensive and precise overview of characteristics of effective remedies. Thus, in *Scordino v. Italy* (no. 1) [GC], no. 36813/97, ECHR 2006 it said that:

- There should be an acknowledgment, at least in substance, by the authorities of a violation of a right protected by the Convention and the redress ordered should be considered as appropriate and sufficient (*paragraph 193*);
- There is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage. In some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all. **The domestic courts will then have to justify their decision by giving sufficient reasons** (*paragraph 204*);
- a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, will award amounts which – while being lower than those awarded by the Court – are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly (*paragraph 206*);
- According to ECtHR it is even conceivable that the court determining the amount of compensation will acknowledge its own delay and that accordingly, and in order not to penalise the applicant later, it will award a particularly high amount of compensation in order to make good the further delay (*paragraph 207*)

3. Assessment of the Amendments of the Law on the organisation and functioning of Constitutional Court on 'reasonable time' and length of proceedings - Law 99/2016

In *Gjyli v. Albania* (no.32907/07, § 58, 29 September 2009) ECtHR analysed the role of the Constitutional Court (CC) as regards remedying lengthy proceedings before the adoption of the amendments subject to this assessment. It held that its decisions were declaratory and did not offer any redress. In particular, it did not make any awards of pecuniary and/or non-pecuniary damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation. Similarly, in *Luli and others* it held that the Constitutional Court did not make any awards of non-pecuniary damage for the delay experienced by the appellant, nor could it offer a clear prospect of expediting the impending proceedings.

While it is difficult to assess legislation which has not been put into practice, the author will refer to the text of the legislation itself and recommend how to avoid potential pitfalls once it starts to be implemented. The amendments will be analysed in light of the findings above and in light with the jurisprudence on effective remedies in general. While the general

deadline for complaining to the CC is four-months, according to the amendments regardless of the consequences, the applicant cannot apply to CC before **at least one year** from commencement of the trial before CC. This provision may possibly be worded in this manner in order to prevent an influx of unfounded applications to the CC that would place a burden on its work. CC decides on the amount of **compensation** by reference to consequences suffered by the applicant because of the undue prolongation of the process before this court. While nothing prevents CC to explicitly refer to criteria set forth in the jurisprudence of ECtHR, **it would be advisable to either add a provision to this effect or for the CC to develop consistent practice of explicit reference to such criteria and usage of the steps used by ECtHR when assessing length of impugned proceedings**. As to the amount of compensation that could be ordered, If CC concludes that the trial has been extended beyond the deadline without reasonable cause, then, it shall compensate the applicant up to **100,000 ALL (7500 EUR)**, **for each year** of delay. This appears to be a rather generous amount but it only contains the upper limit, so CC will have discretion to assess the amount according to the circumstances of the case. It will be important, in its practice though to deliver well-reasoned judgments (hence the recommendation to explicitly use criteria used by ECtHR) in which the amount ordered will be related to the circumstances on the case and in which cases which require special diligence (please see above what type of cases require such approach) are adequately dealt with. Lastly, the provision is silent on pecuniary damages, unlike the corresponding provision for proceedings before ordinary courts where the law talks of both pecuniary and non-pecuniary damages (please see below).

The Law does not seem to have a provision on the duration of the proceedings before CC when an applicant complains about the length of proceedings before CC itself nor a deadline in case a violation is established by which the amount of compensation ordered should be paid. For ECtHR the speediness of the remedial action is very important for it to be effective. Generally, it should not surpass 2 years for two levels (when the domestic law provides a remedy in two instances). In *Vidas v. Croatia*, (no. 40383/04, § 37, 3 July 2008), where proceedings before the Constitutional Court about a length complaint lasted over three years at one level of jurisdiction, ECtHR concluded that the effectiveness of the constitutional complaint already recognised as an effective remedy for the length of the pending civil proceedings was undermined by its excessive duration. Comparatively speaking in many countries, such as Italy and the former Yugoslav Republic of Macedonia there are statutory deadlines for the length of the proceedings of the length remedy. This is all the more important in case when the applicant had proceedings before ordinary courts about the same issue which had already lasted unreasonably long. **It would be advisable that to either add a provision to this effect or for the CC to develop consistent practice of dealing with such cases within a reasonable time.**

As regards the deadline payment of compensation this could be even more problematic in practice and require adequate preparation given that so far CC was not faced with cases in which it would order compensation. According to the ECtHR jurisprudence cited above, **the compensation must be paid promptly and generally no later than six months from the date on which the decision that awards it becomes enforceable.** Being fully aware the frequent changes of the legislation are not encouraged by ECtHR in view of legal certainty, **the author would recommend that a statutory provision is added in which the deadline**

for payment of compensation is defined and which should not be longer than six months from the CC decision.

The amendment does not provide for a retroactive application and does not provide redress in respect of delays which predate its introduction, both in proceedings which are still pending and in proceedings which have been concluded. **It would be advisable to provide such an opportunity following the examples of Croatia or Slovenia, to name a few. This could be done as above, by intervention in the text of the law or through the case-law of CC**.

4. Assessment of the Amendments of the Civil Procedure Code addressing the issue of 'reasonable time' - part of legislative measures - Law 38/2017 'On the Amendments of Civil Procedure Code'

The amendments envisage measures to shorten the length of proceedings - during the course of the trial, such as right of the court to impose fines (at any instance) when parties deliberately delay the proceedings; requirement from the plaintiff deliver the 'defense declaration', a document representing a summary of pre-trial information aiming to prepare judge and parties for the trail and shorten pre-trial time. Further, the judge can issue court orders without carrying out preparatory hearings and a summary proceedings is envisaged for small claims up to 150 000 ALL (1115 EUR), arising from contractual relations. In addition, after the scheduling of the first hearing, parties cannot ask the judge to collect/admit new evidences or facts, unless the party proves that (without its fault) could not present these new evidence before, or was unaware of the evidence, when there is a public interest for admitting new evidence. Furthermore, experts appointed are obliged to notify the court when they are not accepting the assignment before the hearing. Another measure is that testimonies are taken in writing for small claims and that court decisions in such cases should contain (as a general procedure) only the introduction and disposition part, the court decision should be reasoned by the court **only** in the cases when the parties notify the court in witting within 3 days from oral pronouncement of the decision that they will appeal that decision.

These amendments are a welcome change and if implemented by the letter of the law, they provide opportunities for the judge to steer the proceedings in a way that would shorten and avoid unnecessary delays and shorten the length of the proceedings at separate levels of jurisdiction and decrease the overall duration of the proceedings. However, they concern the active management of the proceedings by the courts. They provide for an opportunity for the judges to utilise their discretion and do not give applicants a personal right to compel the State to exercise its supervisory powers (*Dimitrov v. Bulgaria*, judgment of 23 September 2006, § 80) and as such are not a remedy for the parties to proceedings within the meaning of Article 13 of the Convention. Lastly, as noted by CEPEJ while summary proceedings at first instance is an effective mean to process quickly a given type of cases while reducing the courts' workload, must always go hand in hand with safeguards to protect, if appropriate in subsequent proceedings, the adversarial principle and equality of

arms.[10] CEPEJ also warns about the reduction of the obligation to provide reasons and the elimination of public proceedings which must be considered with extra caution, especially at first instance.[11] This is logical given the obligation of lower courts to provide reasons for their decisions and the guarantee of public hearings, under Article 6 of the Convention.

It was noted by participants at the Focus Group that implementation of laws in general is a serious problem. So this equally applies to the amendments above. In addition, participants at the Focus Group stated that in some respect indicative timeframes for proceedings existed thus far but were seldom used by judges. Participants also pointed out the problem of summoning parties through the post office, problem of high number of unproductive hearings and that not all delays in the proceedings can be tackled with provisions dealing with abuse of the procedure. It was stressed that application of the new amendments will highly depend on judges on the way how they will apply the legislative provisions, both existing and recently introduced.

As to the new remedies, Albanian courts, of all instance have the competence to adjudicate claims with regards to "just satisfaction" of the individuals who have sustained pecuniary or non-pecuniary damages, due to unreasonable delay of their trial, pursuant to the definition of Article 6, paragraph 1 of ECHR (Article 399, paragraph 1). Similarly to the provisions concerning CC, these amendments do not provide for retrospective application which has been criticised by ECtHR. **It would be advisable to amend the law or develop a case-law to the effect, but a new provision might be a better solution in this case.** Parties to proceedings are able to lodge a complaint about length of proceedings and the remedy is not entirely in the discretion of the authorities.

Article 399, paragraph 2 prescribes the meaning of **'reasonable time'**, by providing what would be considered as reasonable:

> a) with regards to administrative proceedings at first instance and the appeal, the termination of trial within **1 year** from its commencement (beginning) at each instance (maximum 2 years - 1 year at first instance +1 year at the appeal)
>
> b) with regards to civil proceedings, termination of trial within **2 years** for first instance court, **2 years** for appeal instance and also **2 years** for High Court instance.
>
> c) for the execution/enforcement procedure of a civil or administrative court decision, the **1 year** term begins from the day that petition for execution/enforcement is lodged.
>
> ç) for the investigation of criminal offences, the maximum duration will be as provided by Criminal Procedures Code.

The provision regulates in detail the deadlines for the courts to decide a case at different levels in different type of proceedings. In essence, the deadlines indicated for the courts do not appear to be unreasonable. However, similarly to the corresponding provisions

[10] CEPEJ, Structural measures adopted by some Council of Europe member states to improve the functioning of civil and administrative justice, Good practice guide, as adopted at the 28th plenary meeting of the CEPEJ on 7 December 2016, available at https://rm.coe.int/16806eb602

[11] Idem

concerning the remedial action before CC it is evident that they do not take into consideration the type of cases where special diligence is required. **It would be advisable to amend this in the text of the law or the courts to create case-law that would stipulate that in certain cases it would shorter or longer duration may be justified. However, given that this is new legislation and given that participants at the Focus Group noted that courts are already overburdened it may be a better solution to have a provision in the law, but** this is not for the author to decide. In addition, representative of stakeholders present at the Focus Group in Tirana noted with concern that the deadlines in the law may not be attainable given the current average length of proceedings at different levels of jurisdiction. It was also repeatedly pointed out that there is insufficient number of judges and court staff, which could be problematic with the possible influx of cases initiated with the new length remedy, especially for the administrative cases; where there are cases pending before the Administrative Appeal Court already for more than 2 years.

"Just satisfaction" for violation of the "reasonable time" standard (Article 399, paragraph 3) is **every measure** taken to accelerate investigation, trial or execution/enforcement proceedings, and/or compensation for damages. The wording 'and/or' used at this paragraph does not give a clear indication when parties or individuals suffered from trial delays could request from the court compensation for damages and could be interpreted that it is up to the court's discretion to decide if parties that had claimed 'fair compensation' are entitled to have it along (use of wording **'and'**) with the other measures taken for acceleration of trial proceedings, or are entitled only to 'fair compensation' for damages without issuing other measures. **In practice, it would be important for the courts to apply this provision with flexibility and verify whether measures taken to accelerate proceedings, actually had a real effect of shortening the proceedings.**

An applicant wishing to use the remedy, will first have to apply to have the courts decide whether his right to a trial within a reasonable time has been violated and only if this is established s/he should initiate separate proceedings for compensation. This solution while not very common and on first glance burdensome for applicant, exists in Poland and Germany, where in principle the remedies are considered to be effective. However, as proven by the case of Poland the "devil is in the details" and this solution may create problems depending how it is applied in practice. This will be further elaborated below.

The main principle is that it is the immediately higher court which decides on the length remedy, in the case of the High Court the remedy will be examined by a different college and for enforcement proceedings the court of first instance which is competent for the enforcement. This is a common solution in many Council of Europe Member States which have similar mechanisms. A potential issue in this respect is a problem that occurred in practice in Poland of a remedy that was originally assessed as an effective one. Poland, namely, was found to be non-compliance with the Court's case-law on the assessment of the reasonableness of the length of proceedings, in particular the Court's judgments holding that the period to be taken into consideration comprises the entirety of the proceedings. What was problematic for ECtHR was that the Polish courts dealing with length complaints

applied practice called "**fragmentation of proceedings**", making a "fragmentary" assessment of the length of proceedings, limited to their current stage. [12]

In addition, during the examination of the claim for establishing a violation of the right to a trial within reasonable time, the immediately higher court can issue instruction for acceleration of proceedings which are binding to the court that examines the grounds of case or to the institution that is executing/enforcing the final decision (Article 399, paragraph 11). While this provision is rather vague, it gives a discretion to the higher courts to impose measures to accelerate the proceedings. If implemented properly, this could significantly speed up lengthy proceedings. This could be done by ordering the lower court to render a judgement within a given deadline. However, it will be important that this practice is consistent.

According to the law, if the institution/court undertakes the steps/measures that are claimed by the party/plaintiff during the time-span of trial, within 30 days from the day the petition had been filed, the court shall terminate the trial. From the wording of the provision, it appears that the parties themselves may request such a measure. This gives the applicant a personal right to ask the court to use its powers, as noted in a number of ECtHR precedents. However, given that compensation can be claimed only when a violation of the right to a trial in reasonable time is established, in this case the applicant will not be able to claim such compensation. This limitation may be problematic, except in cases when the measure taken actually rendered the length of the proceedings in compliance with ECtHR standards. However, as noted in *Scordino v. Italy* (cited above), an acceleratory remedy may not be adequate to redress a situation in which the proceedings have clearly already been excessively long. For example, in proceedings which have already been pending for a long time at the moment of entry into force of the amendments, if the court deciding on the length remedy instructs the lower court to perform some action and that instruction is complied with, the case will be closed without finding a violation of reasonable time and the applicant will not be able to claim compensation. **It may be advisable to amend the text and add that even in cases where the instruction is complied with, the immediately higher court has the power to find a violation of the reasonable time standard if the circumstances of the case so indicate.**

The decision is not subject to appeal and is final. In case the petition is being rejected by the court (the law does not specify when or reasons for which the court can reject the case), it could not be filed again for the same facts. The procedures for violation of 'reasonable time' standard is to be conducted at within 45 days from the date the claim was lodged.

The timeline for filling the petition for compensation for damages is 6 months from the day the violation had been found/determined by the final court decision. Trial for compensation of damages (for violation of 'reasonable time' standard) is envisioned to be conducted as per the same regular/usual trial procedures, within 3 months from the day the lawsuit has been filled. Thus, ideally the two separate procedures should last around 5 months which us in line with ECtHR standards. However, this remains to be seen in practice, especially given repeated concerns raised by the authorities at the Focus Group as to knowledge of ECtHR standards, insufficient numbers of judges and court staff and already overburdened courts.

[12] R*utkowski and Others v. Poland and 591 other applications*, nos. 72287/10 and 2 others, §§ 223-228 and the ninth operative provision, 7 July 2015

The court decides on the violation based on the complexity of the case, object of the lawsuit (what is at stake), conduct of parties, conduct of court, conduct of bailiff officer and conduct of every other person related to the case (Article 399, paragraph 9). This provision takes into account some of the criteria used by ECtHR. It does not include the complexity of the case and adds the conduct of the bailiff and "every other person related to the case". While others persons, such as experts may contribute to length of proceedings, the responsibility is on the court to effectively manage the proceedings. It will be important the court to apply these criteria in that spirit and not to use to the detriment of the parties using the remedy by claiming that it is neither the court nor the party which contributed to the length of the proceedings, but rather the responsibility of an expert, for example.

In any case, the amount of the compensation could not exceed the value of the object of the trial/lawsuit or of the execution. After the examination of case, the court can decide on the compensation of damages from 50 000 ALL (370 Eur) to 100 000 ALL (750 Eur) for each year of delay, or months proportionate with year compensation, that exceeds the 'reasonable time' standard (Article 399, paragraph 10). The amounts are visibly smaller than the maximum amount that can be ordered by CC and have both a lower and upper limit, as opposed to CC which only has the latter limit. In view of the amounts ordered by ECtHR in cases against Albania (please see the table of cases in Annex I), the amounts are not problematic *per se*. The provision that the amount of just satisfaction cannot exceed the value of the claim appears to be restrictive, however. In addition, in cases requiring special diligence or cases where there have been very serious delays, amounts of compensation could be higher. **This could be solved by adding a provision according to which if the amount prescribed in the law is not equitable due to the circumstances of the case, the court may allow for a higher or lower sum.** This kind of provision was assessed positively by ECtHR in a case against Germany in which the domestic remedy was considered to be *prima facie* effective. In addition, it was noted at the Focus Group Lack that there is lack of legal criteria for calculating compensation for damages when courts establish violation of reasonable time standard. An indicative table of cases decided by ECtHR against Albania, containing amounts ordered, type of cases and when information was available, length of the impugned proceedings is attached as Annex I designed to assist the authorities in the practical implementation of the laws.

As regards **criminal proceedings**, the practice will show given the wording of the provisions whether the remedy is applicable in preliminary investigations. According to the Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings states should ascertain that such remedies exist **in respect of all stages of proceedings** (emphasis added) in which there may be determination of civil rights and obligations or of any criminal charge. **Also**, given the fact that indicative timelines may be extended, this allows for some flexibility depending on the circumstances of the case, but could also potentially leave the door wide open for the exception to become rule even when it is not justified**. It would therefore be advisable to consider additional measures for criminal proceedings, such as the possibility to remedy past delays through the possibility to obtain a reduction in the penalty imposed on a convicted defendant**, under the conditions set forth in *Dimitrov and Hamanov,* cited above.

The law envisages disciplinary action for judges, but as noted above in the text, according to ECtHR the disciplinary action in itself concerns the personal position of the responsible

judges, but does not result in any direct and immediate consequence for the proceedings since it cannot neither expedite the determination of the case nor provide the applicant for the adequate redress for delays already occurred. If used carefully and not as a means of control of judges by other branches of Government, however, it may contribute to more active management of proceedings by judges.

Last but the least, in accordance with ECtHR criteria on effective remedies for lengthy domestic proceedings, the law could be amended so as to provide that the proceedings for compensation are subject to **court fees** which can be reimbursed according to the quota of success in court, following the example of Poland and Germany which have similar system of remedies for length.

5. General assessment

The amendments appear to provide a combination of acceleratory and compensatory remedies for ordinary court proceedings. They give applicants a personal right to compel the State to take action. If correctly applied in practice the aggregate of these remedies may be considered effective. Thus, in *Michalak v. Poland* and *Charzynski v. Poland*, the Court held that the domestic provisions according to which if the superior court finds a violation of Article 6 of the Convention, it instructs the lower court to take measures to accelerate the proceedings and/or awards the complainant compensation, capable of preventing alleged violations of the right to a hearing within a reasonable time and of providing adequate redress for any violation that had already occurred. This is rather similar to the solution envisaged for proceedings before ordinary courts in Albania. **Fragmentation** in examining length cases must be avoided (please see above) as this was found to be at odds with ECtHR jurisprudence in Polish cases. As regards CC, the remedy appears to be compensatory which in itself is acceptable from ECtHR standpoint. Limitations for claiming compensation when proceedings had already lasted too long and when acceleration of the proceedings is finally achieved should be removed, as explained above.

A potential problem is the fact that in accordance with ECtHR a compensatory remedy needs to operate **retrospectively** and provide redress in respect of delays which predate its introduction, both in proceedings which are still pending and in proceedings which have been concluded but in which the persons charged with a criminal offence have already applied to the Court or may do so. In their present form, neither of the laws, which were assessed can be applied retroactively. **It would be therefore advisable to either add provisions in the law or to allow such a possibility through consistent case-law of domestic courts.**

In its framework programme (CEPEJ (2004) 19 Rev 2 § 6), the CEPEJ observed that "mechanisms which are limited to compensation are too weak and do not adequately incite the States to modify their operational procedures, and provide compensation only *a posteriori* in the event of a proven violation instead of trying to find a solution to the problem of delays." This holds true for Albania even more so, **in view of the fact that the amendments do not deal with the sources of the systemic deficiency.** In Recommendation CM/Rec(2010)3 it is recommended that the states recognize that when an underlying systemic problem is causing excessive length of proceedings, **measures are required to address this problem, as well as its effects in individual cases.** Simply indicating

deadlines for courts to conduct their proceedings will not be sufficient given the realities on the ground. Part of the problems leading to excessively lengthy proceedings are beyond the scope of this assessment and are dealt with in Annex II. The issue of **repeated referrals** which was noted as a root cause for the delay of justice in several cases against Albania has not been dealt with at all. It would be advisable to amend the laws governing procedure to the effect that after the case has been remitted to a lower court once, the higher court is obliged to decide on the merits if appeal is lodged, as opposed to remitting it again from fresh consideration. Such a provision was adopted in the former Yugoslav Republic of Macedonia and it proved to be a meaningful tool in tackling the particular malfunctioning of justice.

Furthermore, as to the issue of **multiplication of domestic proceedings concerning the same legal and factual issues**, ECtHR has noted that the domestic courts were aware that different set of proceedings were pending, which means that this kind of cases can generally be easily detected. According to the CEPEJ Guide on good practices,[13] in Romania, the Council for the Judiciary has amended the regulations governing the operation of the courts in order to make it easier to identify cases that are on the list of cases of the same court and involve the same subject-matter, the same cause and the same parties, a measure they have made the courts' work more efficient with respect to possible abusive practices by specifying a single body to examine them and could also reduce the total duration of the proceedings, a by-product of multiplication observed in *Gjonbocari.* It will be very important for domestic courts to use the tools available to detect such cases use the legal possibility to *join them, suspend them or reject the further institution of new proceedings on the same matter*.

Provisions that would allow spaces for flexibility in determining compensation and better compliance with the criteria of ECtHR should be added. The **amounts of compensation** will have to be in compliance with the Court's standards for "appropriate and sufficient redress", but this will only become apparent once the domestic case-law starts to be developed. It also remains to be seen whether the proceedings on the new remedy will be conducted within the deadlines specified and whether compensation will be paid speedily in line with ECtHR standards. Having in mind the concerns raised by the authorities at the Focus Group in Tirana, as to problems in implementation, insufficient number of judges and court staff, high number of incoming cases, backlog of cases, coupled with the fact that they will have to implement new provisions and deal with possible influx additional type of cases, there may be problems especially for second and third instance courts and CC. The recommendations contained in Annex II may be of help in this respect.

[13] See supra at 10

ANNEX I

Indicative table of selected length of proceedings cases against Albania (already decided)

Focus group participants stressed the lack of legal criteria for calculating compensation for lengthy proceedings. In order to assist the beneficiaries, a selection of most cases against Albania concerning length of proceedings is provided in the table below.

The judgments/decisions are listed in chronological order, from newest to oldest. It was not possible to establish the number of instances, the overall length of proceedings and/or what was at stake for the applicant in some of the cases and hence no information is included in the relevant column. This mostly applies to strike-put decisions which are very succinct and without the information usually included on judgments or ordinary decisions. Thus, it cannot be precisely determined what led ECtHR to awarding certain amount of compensation and which would be helpful for domestic authorities. However, in the efforts to render the new remedies effective such information could possibly be obtained from the State Advocate's Office.

In some cases there were also violations of both Article 6 and 13 or other Articles, which have been taken into consideration in the just satisfaction (JS) as regards non-pecuniary damage.

The blue numbers in the column "Case" are hyperlinked application numbers and by clicking on them the relevant judgment/decision on HUDOC will open.

Case	Type	Length	Priority	Finding	Amount
Rushiti (23136/13)	Civil	Around 12 yrs	No info	Strike out/Unilateral declaration	1,800 EUR
Hatja (53103/15)	Civil	No info	No info	Strike out/ Unilateral declaration	1,000 EUR
Çela (15373/15) And	Civil	No info	No info	Strike out/friendly settlement	4,400 EUR
Petrela (3604/16)	Administrative				4,700 EUR
Shehu (33704/09)	Enforcement	13 yrs, 6 months		Judgment/violation	3,300 EUR
Sinani & 6 other apps. (21634/15, et all)	Civil	No info	No info	Strike out/friendly settlement	For 6 applicants – 1,100, only for one applicant 1,700 EUR
Topallaj (*32913/03*)	Civil	9 yrs, 4 months & 8 days	No	Judgment/violation	
Theodhosi (75175/13)	Administrative	No info	No info	Strike out/friendly settlement	5,900 EUR
Bici (5250/07)	Administrative	11 yrs, 9 months & 18 days,	Inherited property rights	Judgment/violation	7,000 EUR

		one level			
Lako & 2 others (48693/08 et all)	Criminal/Civil	No info	No info	Strike out/friendly settlement	48693/08 – 1,200 EUR
					72462/11 – 900 EUR
					30946/12,- 1,400 EUR
Luli & others (64480/09 et all)	Civil/Administrative	6 yrs before 2 levels, pending	No	Judgment/violation	1,500 EUR
		6 yrs, 1 level, pending	No		1,500 EUR
		4 yrs, 8 months & 25 days, 3 levels*	No		No award as no JS was claimed
		6 yrs, 2 levels, pending	No		No award as no JS was claimed
Kaçiu & Kotorri (33192/07 & 33194/07)	Criminal	6 yrs, 11 months		Judgment/violation	Overall amount covering other violations, so not indicative of length only
Mishgjoni (18381/05)	Civil (dismissal)	More than 8 yrs, 3 levels	Yes (dismissal)	Judgment/violation	2,000 EUR
Marini (3738/02)		One set lasted 7 yrs, the second 9**	No	Judgment/violation	Overall amount covering other violations+ pecuniary damage so not indicative of length only
Gjonbocari & others (10508/02)	Civil	7 years & five months***	No		7,000 EUR for all violations found

*While the overall length did not seem unreasonable, the Court was concerned with the period, when the applicant lodged an appeal with the Supreme Court until the moment when that court dismissed the appeal. That period totalled 2 years, 4 months and 21 day.

**The applicant complained about 5 sets of proceedings. ECtHR established a violation in only two, the remaining three proceedings were not deemed unreasonably lengthy.

*** The applicants complained about the length of three sets of proceedings. While only the length of one of the proceedings was assessed as problematic, ECtHR took into account the other two sets as an indication of the authorities' management of different sets of proceedings, in the context of multiplication of proceedings on the same issue.

ANNEX II

In the main text of the current analysis, it is observed that the legislation under review as it stands, is in general compliant with European standards on trial in reasonable time with room for improvement in some aspects. At the same time, it has to be acknowledged that currently the analysis is mainly theoretical as the provisions are yet to be applied in practice. Participants at the Focus Group noted that in Albania implementation of laws in general is serious problem and it can assumed that this might be the case with the legislation under review. Furthermore, many participants raised their concern about insufficient number of judges and court staff. This challenge is related to a lack of funding and as such outside the scope of this review. However, beneficiaries may request for increase of budget and new posts in view of the possible influx of new type of cases. The judicial system needs to have sufficient resources to cope with its regular workload in due time, the resources have to be distributed according to the needs and must be used efficiently.[14]

The legislation provides changes that will affect significantly the work of judges and court staff. As mentioned above, Focus Group participants were concerned that this will place additional burden to the already overburdened courts. It was also highlighted that the deadlines noted in the legislation will hardly be attainable given the average length of proceedings currently. However, the problems noted cannot be overcome by budget increase and new posts alone. It will be equally important for the courts to effectively manage their dockets and use practices noted as efficient in overcoming unproductive hearings or problems of summoning. Problems of summoning can be tackled by using electronic means of notification or by providing a rule or practice that after failed attempts to deliver the summons, it can be announced on the bulletin of the respective court. While the intention of these proposals is not to amend the legislation completely, it can be a starting point. The OSCE presence in Albania together with USAID is conducting a project Justice without delays with pilot courts showing significant improvement in management of proceedings and decreasing number of unproductive hearings[15]. Following such good practices could be of relevance as well.

Mindful and effective use of the Automatic Court Management System in line with the revised Guidelines of the SATURN Centre for judicial time management, the Time management checklist and the work of analysing and evaluating judicial systems carried out by CEPEJ is therefore strongly advised. In this context, the automatic court management system should be used for early detection of delays so as judges can react accordingly and steer the proceedings.

Judges can be subject to disciplinary proceedings for ineffective management of proceedings, however, according to the author providing rewards for success in eliminating backlog can also be solution. [16] However, just in the case of disciplinary proceedings it carries the risk of affecting the independence of judges and it should be done by structured procedures and objective criteria, which must not be reduced to quantitative indicators, as noted by CEPEJ. The former Yugoslav Republic of Macedonia was criticised by GRECO for relying exclusively on elements of productivity, even among the so-called "qualitative" criteria of the evaluation of judges in its system of appraisal.[17] Therefore, this kind of measures must be introduced and applied with due regard of judges' independence.

[14] Revised Guidelines of the Saturn Centre for judicial time management, available at https://rm.coe.int/16807482cf

[15] More information available at http://www.osce.org/albania/120023

[16] See supra at 10

[17] Corruption prevention in respect of members of parliament, judges and prosecutors, Fourth evaluation round, available at https://rm.coe.int/16806c9ab5

Finally, it cannot be assumed that the new laws can be effectively implemented without adequate training. This was also noted by participants at the Focus Group and it would be advisable to provide more in-depth and systematic training on the application of the amendments to judges, court staff and lawyers particularly those who are or will be in charge of dealing with length of proceedings cases. Apart from continuous training provided by relevant institutions in Albania, Council of Europe's HELP programme is an excellent tool for gaining knowledge on ECtHR jurisprudence.