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***Fighting ill-treatment and impunity and enhancing the application of the ECtHR case-law on national level 'FILL'***

# Analysis of the Legal Framework and Case-Law of Montenegrin Courts in the Implementation of Effective Remedies in Respect of a Trial within a Reasonable Time

*Mirjana Lazarova Trajkovska*

*Maja Velimirović*

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## Introductory remarks

This Analysis was made within the framework of the project "Fighting ill-treatment and impunity and enhancing the application of the ECtHR case-law on national level 'FILL'" funded by the European Union and the Council of Europe within their joint project *Horizontal Facility for the Western Balkans and Turkey*..

The analysis encompasses an overview of the legislative framework for the protection of the right to a trial within a reasonable time and its practical application, including the standards and principles of the European Court of Human Rights ("ECHR") and the existing case-law of the ECtHR concerning Montenegro.

The main objective of this Analysis is to contribute to further strengthening of the capacity of the judiciary in the application of the ECtHR case-law on national level and to offer recommendations for enhancing the implementation of the effective legal remedies in respect of the length of the proceedings.

The Analysis is based on the implementation to date of the legislative framework for the protection of the right to a trial within a reasonable time, on information, written materials, opinions and recommendations collected mainly in discussions and exchanges with the Deputy Prime Minister who is also the Minister of Justice, the judges of the Supreme Court of Montenegro, the Agent of Montenegro before the ECtHR, the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) and his associates, a representative of the non-governmental organization Human Rights Action and lawyers, and on the analysis of annual or periodical reports of these institutions or organizations, as well as on the analysis of numerous reports made by international and domestic organizations.[1]

The case-law of the European Court of Human Rights developed to date concerning Montenegro and the cases relating to the right to a trial within a reasonable time have been used. An analysis of domestic procedural laws and laws related to the work of courts and administrative bodies in Montenegro has been done. Furthermore, this Analysis also used and referred to the reports of the Council of Europe and other international organizations regarding the case-law of the ECtHR and its impact on the development of the work of the courts in Montenegro, as well as the reports of the European Commission and the European Commission for Democracy through Law (Venice Commission).[2]

The approach in this Analysis is based above all on good intention to help, with constructive conclusions and recommendations, all relevant entities strengthen the effective remedies for the protection of the right to a trial within a reasonable time developed to date, to propose new legal remedies in proceedings where necessary, as well as to indicate the areas where it is necessary to establish or further expand the case-law.

[1] For example, 2017 Work Report of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman), Implementation Analysis of the Right to a Trial within a Reasonable Time Act 2011–2015 (Human Rights Action, January 2017) etc.

[2] For example, The Report on the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in the case-law of the Supreme Court of Montenegro (January 2015 – July 2017).

**Summary**

In the last twelve years, Montenegro has incorporated the most important standards relating to the protection of the right to trial within a reasonable time into its legal system. In response to the systemic problem of lengthy judicial proceedings, following the model of Italy, back in 2007 Montenegro adopted the Law on the Protection of the Right to a Trial within a Reasonable Time[3], which provides for two legal remedies for the protection of this right: a request for review and an action for fair redress. In its *Vukelić v. Montenegro* judgment, the ECtHR acknowledged that the request for review could be considered an effective remedy as of 4 September 2013. In its *Vučeljić v. Montenegro* judgment, the ECtHR acknowledged that the action for fair redress had also been an effective remedy as of 17 November 2016.

The progress made by Montenegrin courts in improving the efficiency and solving the backlog of cases is undeniable. Thus, in the last three years, out of the total number of pending cases, the percentage of unresolved cases was about thirty or less percent (40 780 or 30.85% in 2017; 32 313 or 24.71% in 2016; 33 414 or 26.20% in 2015[4]). Special efforts are being made to reduce the number of old cases, so that at the end of 2017, there were 3 206 unresolved cases more than three years old (or 7.86% of the total number of unresolved cases at the end of 2017).

However, the number of cases registered by the ECtHR as well-established case-law related to the length of proceedings is still significantly higher compared to other violations of the Convention with respect to Montenegro.

Out of a total of 43 judgments adopted by the ECtHR with respect to Montenegro by 1 June 2018, violations of the right to a trial within a reasonable time were found in 17 judgments (39.5%). Only in the first six months of 2018, out of a total of six judgments against Montenegro, four have been related to the length of proceedings. These were mainly old applications submitted to the ECtHR in the period when the applicants estimated that the proceedings before the domestic courts were not effective.[5]

In 2017, the Office of the Agent of Montenegro before the European Court of Human Rights processed 66 cases (some cases contained more than one application), out of which 36 applications dealt with unreasonable length of judicial proceedings.[6]

In its Report for 2017, the Protector of Human Rights and Freedoms of Montenegro noted that, in 2017, 11.20% of the total number of complaints submitted to this institution were related to the work of the courts and that according to their content and structure they largely relate to a violation of the right to a fair trial within a reasonable time, then to the slow enforcement of judicial decisions or failure to enforce them, and more rarely to the abuse of procedural powers. The majority of the complaints related to civil contentious proceedings. In the mentioned report, the Protector pointed out long duration of court proceedings in respect of which urgent handling is prescribed, "…especially in disputes involving minors, disputes concerning family relationships, start or termination of employment, disputes concerning the exercise of the right to salary and

[3] Law on the Protection of the Right to a Trial within a Reasonable Time (Official Gazette of Montenegro 11/07 of 13.12.2007).

[4] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2015 (p. 27).

[5] See statistics for Montenegro on www.echr.coe.int/HUDOC (last accessed on 10 June 2018)

[6] 2017 Report of the Agent of Montenegro before the ECtHR.

other income."[7] The courts should pay more attention to the manner in which urgent cases are dealt with and should determine priority activities of the judges, as some of such cases last several years. There is no doubt that adequate court management directly affects the efficiency of court proceedings. Therefore, the Ombudsman rightly stated that "... Only the State in which the standards for the respect for the right to a fair trial within a reasonable time are ensured can be deemed to be 'responsible' with regard to the respect for this right."[8]

After a decade of implementation of the Law on the Protection of the Right to a Trial within a Reasonable Time, it is necessary to analyse this Law and other laws and case-law relating to the right to a trial within a reasonable time, so as to determine if there is a need for legislative amendments or for the improvement of application of the law with a view to improving the situation regarding the length of judicial and administrative proceedings.

[7] Ombudsman's Report ibid. p. 84.
[8] 2017 Work Report of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) (p. 83).

## 1. Legal remedies for the protection of the right to a trial within a reasonable time in Montenegro

The right to a trial within a reasonable time is guaranteed by numerous international instruments, binding on Montenegro, and by various recommendations which, although non-binding, and constituting the so-called *soft law* are aimed at improving the domestic legal framework and case-law. Thus, for example, the International Covenant on Civil and Political Rights states that everyone charged with a criminal offence shall have the right to be tried without undue delay.[9] The Convention for the Protection of Human Rights and Fundamental Freedoms extends the application of the right to a trial within a reasonable time to civil rights as well, and, in practice, also to administrative proceedings.[10] Furthermore, the Committee of Ministers of the Council of Europe, which is responsible for the execution of the judgments of the ECtHR, in a separate Recommendation, recommends that the member states "…take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights and obligations or of any criminal charge, are determined within a reasonable time…"[11]

Even before the aforementioned Recommendation was adopted, Montenegro adopted a separate Law on the Protection of the Right to a Trial within a Reasonable Time in 2007.[12] The constitutional justification for this Law is clearly determined by the fundamental guarantee of the Constitution of Montenegro that everyone shall have the right to a trial within a reasonable time before an independent and impartial court established by law.

According to this Law, legal remedies for the protection of the right to a trial within a reasonable time are the request to expedite the proceedings (request for review) and an action for fair redress, which the ECtHR assessed as effective remedies only several years after it entered into force in December, as follows:

- in its *Vukelić v. Montenegro* judgment of 4 June 2013 (application no. 58258/09,) the ECtHR held that a **request for review** (remedy submitted, as a rule, to the president of the relevant court with a view to expediting the proceedings) must be considered an effective domestic remedy as of 4 September 2013 (§ 85);

- in its *Vučeljić v. Montenegro* decision of 17 November 2016, the ECtHR took the view that the **action for fair redress** (a remedy submitted to the Supreme Court of Montenegro for the financial award for the damage caused and/or for the purpose of publication of the judgment that the right of the party to a trial within a reasonable time has been violated) is to be considered an effective domestic remedy as of 17 November 2016 (§ 30).[13]

[9] Article 14(3)(c) of the International Covenant on Civil and Political Rights.
[10] Article 6 of the Convention guarantees that, 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.
[11] Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings adopted on 24 February 2010.
[12] Law on the Protection of the Right to a Trial within a Reasonable Time (Official Gazette of Montenegro 11/07 of 13 December 2007).
[13] The EctHR took that view by reference to *Bulatović v. Montenegro* judgment of 22 July 2014 (application no. 67320/10), which demonstrated, *mutatis mutandis*, that the action for fair redress is capable of providing adequate compensation for a violation of the right to a trial within a reasonable time (§§ 17-22 and § 151).

### 1.1 Request to expedite proceedings/request for review for protecting the right to a trial within a reasonable time

*"The party may file a request for review if he or she considers that the court unreasonably delays the proceedings and decision in the case. The request for review shall be filed to the court handling the case, while the president of the court shall have the power to decide on the request for review."*[14]

Montenegro is one of the few member states of the Convention which have decided to introduce two remedies under the Law on the Protection of the Right to a Trial within a Reasonable Time. Namely, the request for review belongs to a group of preventive remedies or remedies enabling the speeding up of the court proceedings that are still pending while the action for fair redress is in a group of *a posteriori* remedies or remedies providing the opportunity to the applicants to claim compensation for damages caused by violations arising from unreasonable delays in the proceedings.

This Analysis will make an attempt to present the advantages and disadvantages of such a system.

### 1.2 To what extent is the request for review used as a remedy for speeding up judicial proceedings?

Despite the fact that the Law on the Protection of the Right to a Trial within a Reasonable Time has been used for many years and the ECtHR's position that this remedy is effective, the statistics indicate that this remedy is used to a limited extent.

It cannot be denied that the number of submitted requests for review has been constantly increasing since the commencement of application of the Law on the Protection of the Right to a Trial within a Reasonable Time, while a notable increase occurred in 2017 when 325 requests for review were submitted.

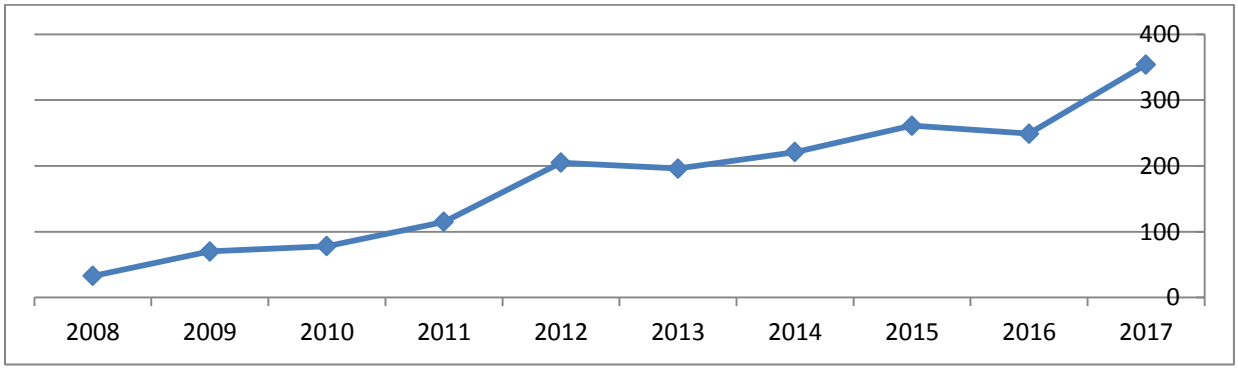


*Table 1: Overview of the number of submitted requests in the period from 1 January 2008 – 31 December 2017*

[14] Article 9 of the Law on the Protection of the Right to a Trial within a Reasonable Time.

A total of 814 requests for review were submitted in the last three years[15] (261 in 2015[16]; 228 in 2016[17]; 325 in 2017[18]), which amounted to around 270 requests on average per year.

However, when the number of filed requests for review is compared to the total number of the cases which are more than three years old (hereinafter "old cases"), which have been pending before Montenegrin courts in the period 2015–2017, that number is notably very low in percentage terms (up to 4%).

In the last three years, the Montenegrin courts had 8 600 pending old cases, on average, per year (9 940 in 2017[19]; 9 710 in 2016[20]; 6 303 in 2015[21]), while on average 270 requests for review were filed per year.

| | Total number of the cases older than three years pending before courts | Number of filed requests for review | Number of filed requests for review compared to the number of old cases pending before courts |
|---|---|---|---|
| 2017 | 9 940 | 354 | 3.56% |
| 2016 | 9 710 | 249 | 2.56% |
| 2015 | 6 303 | 261 | 4.14% |

*Table 2: Comparative overview of filed requests for review compared to the number of old cases pending before courts*

Even if the comparison is made in relation to the number of old cases which remained unresolved at the end of the year, the percentage of filed requests for review is still rather low (around 10%).

| | Number of unresolved old cases at the end of the year | Number of filed requests for review | Number of filed requests for review compared to the number of unresolved old cases at the end of the year |
|---|---|---|---|
| 2017 | 3 206 | 354 | 10.86% |
| 2016 | 3 214 | 249 | 7.75% |
| 2015 | 1 344 | 261 | 19.42% |

*Table 3: Comparative overview of filed requests for review compared to the number of old cases pending before courts and compared to the number of unresolved old cases at the end of the year*

It is important to stress here that since 2015 there has been a significant increase in the number of unresolved cases more than three years old.

### 1.3 Deciding on the request for review

[15] In the reports on the work of the courts, more specifically in the part relating to requests for review, the requests for review unresolved at the end of a reporting year are not shown as requests carried forward in the next annual report but as received requests, which creates certain confusion as to the actual number of received requests.
[16] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2015 (p. 28).
[17] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2016 (p. 38).
[18] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2017 (p. 36).
[19] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2017 (p. 38).
[20] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2016 (p. 38).
[21] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2015 (p. 35).

Out of a total of 814 requests for review filed in the period of three years (2015-2017) most requests were rejected as ill-founded (385, i.e. 47.30%), while the remaining requests were finalised as follows:

- 156 (19.16%) notifications to the party that an action will be taken in the case or a decision adopted within a period of 4 months (Article 17 of the Law);
- 120 (14.74%) was resolved otherwise;
- 54 (6.63%) were granted;
- 31 (3.81%) were rejected as manifestly ill-founded;
- 29 (3.56%) was dismissed on the grounds that the request for review was incomplete;
- 24 (2.95%) notifications to the party on setting the deadline for taking procedural actions due to unreasonable delay in the proceedings and decision in the case (Article 18 of the Law);
- 5 (0.61%) were dismissed as incomplete, although they were filed by a lawyer or a person who has passed a judicial exam;

At the end of 2017, a total of 10 requests for review remained unresolved.

In the procedures for deciding on legal remedies for the protection of the right to a trial within a reasonable time, the court is obliged to act urgently and, in doing so, in accordance with Article 4 of the Law, the following is in particular taken into account: - complexity of the case in terms of facts and law; - conduct of the applicant; - conduct of the court and of other state authorities, local self-government authorities, public services and other holders of public powers; - what is at stake for the applicant.

In the majority of rulings available on the courts' websites, it can be concluded that the presidents of the courts rarely base their reasoning on these criteria. The general impression is that the reasoning is insufficiently substantiated, the criteria set out in Article 4 of the Law on the Protection of the Right to a Trial within a Reasonable Time are not used. The exception is the Basic Court in Bar, where in almost every decision the president of the court reflects on the set criteria and, according to those criteria, assesses whether the request for review is well-founded.

### 1.4 Well-founded requests for review (Articles 17 and 18 of the Law on the Protection of the Right to a Trial within a Reasonable Time)

When the procedure upon the request for review is completed by notifying the party that the proceedings will be expedited under Article 17 of the Law on the Protection of the Right to a Trial within a Reasonable Time and by granting the request for review under Article 18 of the Law, it means that the request for review is well-founded and that actions have been taken to speed up the court proceedings.

The statistics show that 28.75% (i.e. 234 out of 814) requests for review were well-founded in the period 2015-2017.

### 1.5 Notifying the party under Article 17 of the Law

*"If the judge notifies the president of the court in a report or by means of any other written act that certain procedural actions will be taken and/or decision made no later than four months after receipt*

*of the request for review, the president of the court shall notify the party thereof and thereby finalise the procedure on the request for review."*

Out of a total of 814 requests for review for a period of three years (2015-2017), the presidents of the courts notified the parties in 156 cases (19.16%) that certain procedural actions would be taken and/or decision made within a period not longer than four months.

There has been a sharp increase in such decisions in 2017 (75 notifications under Article 17) compared to previous years (34 in 2016, 47 in 2015).

This manner of decision making on the requests for review has some weaknesses that need to be pointed out.

It is clear from the wording of Article 17 of the Law (read together with Article 15) that the role of a president of the court when deciding on a request for review is passive, i.e. that he is not obligated to consider and determine whether the applicant's allegations are correct and justified, but he or she will only require a statement from the trial judge on the length of the proceedings and the reasons for which the proceedings have not been terminated (Article 15). If the judge informs the president of the court that he or she will take certain procedural actions or make a decision within the set time-limit, the president of the court will notify the party thereof and, thus, finalise the procedure on the request for review. The fact that the submission of a notification to the party ends the procedure on the request for review implies that the president of the court has no further obligation to follow up on the proceedings in the case at hand. Moreover, Article 17 of the Law has not laid down an explicit obligation of the judges to provide feedback to the president of the court whether they took actions within the set time-limit. We are of the opinion that the role of the president of the court should be strengthened and that the mechanisms for following up on the actions taken in the case in which the request for review was submitted should be worked out further in order to establish a closer connection to Article 19 of the Law which provides that the president of the court may remove the judge from the assigned case if he or she "does not take actions set out in ... the notification referred to in Article 17 of this Law ...".

The wording of Article 17 "to take certain procedural actions" is too general and might not substantially lead to acceleration of the proceedings. Thus, for instance, a judge may schedule and hold a new hearing within the set time-limit, which will be considered as acceleration of the proceedings under Article 17 of the Law. However, if there is no mechanism and obligation of following up on the proceedings in that case, a new delay in the proceedings and further violation of the right to trial within a reasonable time may occur.

In its annual reports on the implementation of the Law on the Protection of the Right to a Trial within a Reasonable Time, the Ministry of Justice of Montenegro provides a detailed overview of the (non)compliance with the measures set out in the rulings adopted on the requests for review or the notifications referred to in Article 17 of the Law. This provides monitoring whether the judges take procedural actions within the time-limit provided for in Article 17 of the Law. For example, in the case IV-2-Su.134/2017, a notification under Article 17 was delivered on 10 August 2017. In this case, the main hearing was held on 19 September 2017[22]. However, the mere fact that the hearing was held does not mean that it effectively contributed to the acceleration of the proceedings, if the president of the court does not follow up on future activity of the judge in the case. This also

[22] Ministry of Justice of Montenegro, Report on the implementation of the Law on the Protection of the Right to a Trial within a Reasonable Time for the period 1 January – 31 December 2017.

involves setting up an appropriate mechanism available to the president of the court. Currently, the presidents of the court have the possibility to monitor the cases by means of the so-called control screens through the Judicial Information System (PRIS). Improving this tool in the way to address separately the cases in which a request for review is submitted could be an efficient response to this issue.

When the president of the court decides, by a final ruling, that the request for review is well-founded and notifies the party pursuant to Article 17 of the Law, the Supreme Court will, by a judgment, award just satisfaction. The fact that the Supreme Court is bound by the ruling of the president of the court in which it has been found that the request for review is founded indicates a very high degree of responsibility of the presidents of courts when deciding on the requests for review. On the other hand, the Supreme Court may award just satisfaction even if a request for review was rejected by a final ruling.

For the afore-mentioned reasons, we believe that it should be considered to leave as the responsibility of the presidents of the courts only taking of measures aimed at speeding up the court proceedings (acting on a request to speed up the court proceedings), and that the control role should be the sole responsibility of the Supreme Court which would determine whether there has been a violation of the right to a trial within a reasonable time and accordingly award just satisfaction. The presidents of the courts should only assess whether the proceedings are conducted within the time-limits that are very precisely set out in the procedural laws and whether the delay in or non-taking of certain actions occurs for the reasons provided for in the procedural laws as justified. On the other hand, the Supreme Court should assess whether there has been an unjustified delay in the proceedings as a whole, taking into account the criteria listed in Article 4 of the Law. We consider this solution to be meaningful also as, namely, the decision made by the president of the court on the request for review, when he or she finds that there has been a violation of the right to a trial within a reasonable time, affects the appraisal of the performance of the court and judges, which could make the president of the court to decide in rare situations to grant the request for review even if there has been a violation of a “reasonable time” requirement. This argument is supported by the judgments of the Supreme Court of Montenegro which had been in a position to find that there had been violations of the right to a trial within a reasonable time although the requests for review had previously been rejected by the presidents of the courts.

Another weakness of this approach is a four-month period within which the judges are to take certain procedural actions or adopt a decision. This period is indeed long in cases which are inherently urgent such as, for example, the cases relating to children's rights or parental rights or if the applicant is seriously ill. On the other hand, this time-limit may conflict with the time-limits prescribed by the procedural laws which very clearly specify timeframes for taking certain procedural actions.

### 1.6 Granted requests for review – Article 18 of the Law

*“When the president of the court finds that the proceedings and decision in the case is unreasonably delayed, he or she shall, by a ruling, specify a period for taking certain procedural actions, which may not exceed than four months, and a relevant period within which the judge must inform him or her of the action taken. The president of the court may order that the case be resolved as a priority if the circumstances of the case or the urgency of the case so require.”*

As already noted, when compared to a total number of submitted requests for review, few of those were granted pursuant to Article 18 of the Law. Out of a total of 814 requests for review submitted for a period of three years, only 54 were granted, while the notification to the party on setting the time-limit for taking procedural actions, due to the unjustified delay in the proceedings, and decision in cases pursuant to Article 18, was adopted in a total of 24 cases.

A decline is evident in the number of granted requests for review in 2017 (out of 354 pending requests for review, only 8 were granted[23]) when compared to previous years (22 out of 249 in 2016[24]; 24 out of 261 in 2015[25]).

The reports on the work of courts differentiate between granted requests for review and notifications to the party on setting the time-limit for taking certain procedural actions under Article 18, although such possibility is not explicitly provided for in the Law. In 2017, there was a sharp increase in the number of notifications under Article 18, (22) when compared to previous years (1 in 2015; 1 in 2016).

By analysing the rulings available on the websites of the courts, it can be concluded that the reasons for granting requests for review are most frequently the inactivity of the court over a long period of time.

In the Ruling ***Su. IV-2 br.1/2016*** of the Basic Court in Podgorica, the President of the Court provided detailed and correct reasoning for granting the request for review by stating as follows: "*When deciding on the request for review, the President of the Court took into account the criteria referred to in Article 4 of the Law on the Protection of the Right to a Trial within a Reasonable Time, so that based on previously determined facts, and considering that the complaint in this legal matter was filed on 4 August 2011, that the ruling adopted by the High Court in Podgorica on 18 February 2016 granted the plaintiffs' motion for* restitutio in integrum *and that in the period from 3 April 2013 until the date of the decision on the request for review (exactly two years, eleven months and seven days), no hearing was held with a view to determining the merits of the claim, thus pursuant to Article 18(2) of the Law on the Protection of the Right to a Trial within a Reasonable Time it has been ordered that the case be resolved as a priority."*

### 1.7 Rejected requests for review

*"If the president of court does not dismiss the request for review as incomplete or as manifestly ill-founded, he or she shall request the judge or the presiding judge of the chamber to whom the case has been assigned to deliver to him or her, promptly or within 15 days at the latest, a written report on the length of the proceedings and the reasons for which the proceedings have not been finalised. When the president of the court, upon completion of the procedure, finds that the court did not violate the right to a trial within a reasonable time, he or she shall, by a ruling, reject the request for review as ill-founded."*

Most requests for review (385 requests, i.e. 47.30%) were rejected as ill-founded in the last three years (2015–2017), while 31 requests for review (3.69%) was rejected as manifestly ill-founded.

[23] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2017 (p. 38).
[24] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2016 (p. 38).
[25] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2015 (p. 35).

The analysis of the rulings rejecting the requests for review as ill-founded which are available on the websites of the courts leads to the conclusion that the presidents of the courts rarely take into account the criteria set out in Article 4 of the Law in their reasoning. They also mention reasons for lengthy proceedings that are not recognised by the European Court of Human Rights as justification for failure to act in judicial proceedings, such as the judge's illness, justified absence of a judge, a large number of cases and taking annual leave.

The excuses relating to backlog of cases or general administrative difficulties are not acceptable to the ECtHR, as the States are obliged to organise their judicial systems in a way that their courts are able to meet the standards required by the Convention.

The reasons for adjournment of hearings must be acceptable from the perspective of protecting the right to a trial within a reasonable time. It is not sufficient to state that the hearings have been adjourned for objective reasons, such as the absence of a trial judge, being indisposed due to commitments not related to the performance of the current judicial office or professional training.

Example: By the Ruling *Su broj IV-2-3/15* of the Basic Court in Bar, the request for review was rejected as ill-founded on the grounds that the court acted promptly and that the main hearings were adjourned for objective reasons. Among other reasons "*four main hearings were adjourned due to justified absence of the trial judge*".

In its judgments on actions for fair redress the Supreme Court has clearly indicated that the adjournment of hearings "*because of judge's commitments not related to the performance of the current judicial office may not be considered justified",*[26] and that the "*adjournment due to business leave of the judge may not be justified from the perspective of the implementation of the right to a trial within a reasonable time.*[27]*"*

It is important to mention here that it is unquestionable that hearings can be adjourned for reasons such as illness of the trial judge, but that must in no way be the reason for the excessive length of the proceedings as a whole.

Example: By the Ruling Posl. br. IV-2 Su.1/2015 of the Basic Court in Herceg Novi the request for review was rejected as ill-founded and it was stated that "*somewhat longer length of these proceedings was due to reasons of objective nature, namely the trial judge was indisposed and could not act in the case as she was ill*."

Example: By the Ruling *Posl.br.IV- 2 Su 2/2015* of the Basic Court in Herceg Novi the request for review was rejected as ill-founded and it was stated that "*in the opinion of the president of the court, the trial judge could not have influenced the fact that the preliminary hearing which had been scheduled for 8 June 2015 was adjourned as he could not have known that he would be ill on that particular day i.e. that he would have problems with high blood pressure".*

According to its case-law, the Supreme Court is reserved when assessing these reasons as it considers that "*adjourning the hearing because of the judge's illness may constitute a justified reason."* [28]

[26] Judgment Tzp 30/2018 of the Supreme Court of Montenegro.
[27] Judgment Tzp 42/2017 of the Supreme Court of Montenegro.
[28] Judgment Tzp 42/2017 of the Supreme Court of Montenegro.

It seems that "collective annual leaves" are often cited as a reason for inactivity of the court although the procedural laws do not identify the category of collective annual leave in courts as a reason for not taking procedural actions. By a vacations schedule, the president of the court should ensure smooth proceedings in all cases and not only in cases defined by the law as urgent.

Example: By the Ruling Posl. br. IV-2 Su.1/2015 of the Basic Court in Herceg Novi the request for review was rejected as ill-founded and it was stated that "*as regards the allegations of the plaintiff's attorney that the court did not act within the statutory period of 30 days within which a hearing is to be scheduled following the repealing decision of the High Court, it should be pointed out that it was delivered to the court in July 2014 at the time of taking annual leave when the court reporters and judges were absent until the end of August. Given a large number of cases assigned at that time to the then trial judge, it was to be expected that the hearing could not have been scheduled so fast after the repealing decision*."

The right of the judge to take annual leave is indisputable, but that right should not significantly affect the duration of the court proceedings nor can it be a justification for inactivity of the court over a long period of time. According to the data submitted by the Judicial Council of Montenegro, the time interval between the hearings held in civil cases in June 2017 and the subsequent scheduled hearings before the Basic Court in Podgorica is 90 days or 100 days in the low-value cases (MAL cases). Before the Basic Court in Nikšić, the time interval between the hearings held in June and the next scheduled hearing is 65 days in civil cases or 57 days in MAL cases.

Further analysis of the rulings rejecting the requests for review showed that delays in the proceedings also occur because the hearings in those cases have not been scheduled within the time-limits prescribed by the law. The procedural laws provide for clear time-limits within which certain procedural actions must be taken. Failure to comply with these time-limits leads to delays in the proceedings which is not held to be a violation in the reasoning of the presidents of the courts.

However, the Supreme Court has very carefully analysed this issue as well in its judgments on actions for fair redress and has indicated that failure to comply with the procedural time-limits constitutes an unjustified prolongation of the court proceedings.

Example: In the Judgment TZP 36/2017 the Supreme Court pointed out that "*...the only hearing scheduled for 7 June 2016 was scheduled upon expiry of 2 months and 21 days after the previous hearing (16 March 2016), so the Court, according to Article 319(2) of the Civil Procedure Law unjustifiably delayed the court procedure by 1 month and 21 days. Moreover, the hearing scheduled for 9 November 2016 was scheduled upon expiry of 5 months and 2 days after the previous hearing (7 June 2016), so the first instance court did not have the justification for prolonging the court procedure by at least 3 months (1 month relates to the period of adjournment of the hearing within the statutory time-limit and 1 more month relates to the period of annual leaves).*" However, in this particular case, the Court found that the unjustifiable prolongation of the proceedings for a period of a couple of months is by itself not of such nature that it could cause a violation of the right to trial within a reasonable time.

Example: In the Judgment TZP 42/2017 it has been cited that "... *there has been a prolongation of the statutory time-limits for holding the preliminary hearing, main hearing and for the drafting and service of the judgment on the parties (Articles 284(3), 295(2), 319(2) and 340(2) of the Civil Procedure Law). The data provided show that there has been a delay in the proceedings for a period of around one year, which can be attributed to the court, and especially in view of the fact that it was a labour dispute which is of urgent nature, to the delay of which the plaintiff did not contribute*".

It should be emphasized once more that the disputes which are urgent by their nature require special attention, such as disputes related to employment, custody of children etc. The presidents of the courts should act with special diligence when dealing with the requests for review filed in such disputes and should carefully assess the criteria set out in Article 4 when deciding on these requests, especially if those requests are rejected. It is not enough to just state generally that the criteria set out in Article 4 have been taken into account, if the reasoning for rejecting the request does not include detailed reasons regarding each of those criteria.

Example: By the Ruling Su.IV-2 br. 69/2017 of the Basic Court in Podgorica, the request for review in a labour dispute concerning the termination of employment, which at the moment of filing of the request for review lasted more than three years before the first instance court, was rejected as ill-founded. The applicant pointed out that only five hearings were held in the period of three years and that the statutory time-limits for taking procedural actions were breached. In the reasoning of the Ruling, the president of the court stated that "*when deciding on the request for review, he took into account the criteria set out in Article 4 of the Law, so in view of previously established facts and bearing in mind the continuity in taking procedural actions by the court and the fact that all evidence proposed has already been presented in the proceedings conducted so far, while it can be expected with a high degree of certainty that the proceedings will be completed soon*, *thus, according to Article 16 of the Law on the Protection of the Right to a Trial within a Reasonable Time, the request to expedite the proceedings was rejected as ill-founded as it is not clear in respect of taking of which procedural actions the president of the court could set a time-limit within the meaning of Article 18 of the Law.*"

In *Novović v. Montenegro*, the ECtHR reiterated that the proceedings concerning reinstatement were of "key importance" to plaintiffs and that, as such, they had to be dealt with "expeditiously". This requirement is further reinforced when domestic law provides that such cases must be resolved with particular urgency.

### 1.8 Time-limits for taking action upon a request for review

Article 5 of the Law on the Protection of the Right to a Trial within a Reasonable Time provides that the court shall act urgently in the procedure for deciding on a remedy for the protection of the right to a trial within a reasonable time.

If the maximum time-limits provided for in this Law are taken into account, the procedure on the request for review may last around 4.5 months, including the appeal procedure, or 6 months if the procedure is completed by a notification or a ruling pursuant to Articles 17 and 18.

Namely, the president of the court shall be obliged to make a decision on the request for review no later than **60 days after the date** of receipt of the request (Article 20 of the Law).

Certain procedural actions must be taken and/or a decision made no later than **four months** after the receipt of the request for review, in accordance with Article 17 and Article 18 of the Law.

If, upon the request for review, the president of the court does not submit a ruling or notification in accordance with Article 17 to the party within 60 days, the party may file an appeal within **8 days**

from the expiry of the deadline for submitting a ruling or notification. Furthermore, if the president of the court dismisses or rejects a request for review, the party may file an appeal within eight days from the date of submission of the ruling.

The appeal is to be filed to the immediately superior court through the court at which the case is pending. The court at which the case is pending is obliged to deliver the case files to the immediately superior court within **8 days** from the date of receipt of the appeal.

The president of the immediately superior court is obliged to adopt the ruling within **60 days** from the date of delivery of the case files.

A party may not file a new request for review in the same case before the expiry of the deadline set in the notification or ruling of the president of the court. If the president of the court has adopted the ruling, the party may submit a new request for review only after the expiry of six months from the receipt of the ruling.

The time-limits for taking action on the requests for review set in this way are long, especially with respect to proceedings that are urgent by their nature.

By analysing the rulings available on the courts' websites, it can also be concluded that the presidents of the courts decide on the requests for review in a timely manner, much before the expiry of the time-limit prescribed by the law, which is certainly commendable. For that reason, one of the proposals is to reduce the statutory time-limits for taking decision on the requests for review.

### 1.9 Additional mechanisms available to the president of the court for speeding up the proceedings

The judges and the presidents of the courts have legal obligation to act in the manner and within the time-limits prescribed by the law to protect the right to a trial within a reasonable time.

In this context, the Law on Courts entrusts a special role to the president of the court who, pursuant to Article 30 of this Law, within his power and obligation to manage the work of the court "shall organise work in the court, allocate tasks and take measures aimed at orderly and timely performance of tasks in the court".

Article 108 of the Law on Judicial Council and Judges lay down as grounds for severe disciplinary offence of a judge, *inter alia*, if he or she fails, without justified reason, to schedule trials or hearings in cases assigned to him or her for work or delays the proceedings otherwise or if he or she delays the proceedings or does not assume the case for work without justified reason, where, due to statute of limitations, such action results in barred criminal prosecution or barred enforcement of criminal sanctions for the criminal offence for which a prison sentence of at least one year is prescribed or if he or she exceeds, without justified reason, the triple statutory deadline for making decisions in at least three cases. According to the data provided by the Judicial Council of Montenegro[29] for the period of three years 2015–2017 only one disciplinary proceeding was initiated for the committed offence referred to in Article 108 of the Law on Judicial Council and Judges.

[29] Data were submitted as a reply to a letter of the Council of Europe Programme Office dated 29 June 2018.

Under Article 19 of the Law on the Protection of the Right to a Trial within a Reasonable Time, the president of the court may remove the judge from the assigned case pursuant to a separate law if he or she fails to take actions as stipulated by the ruling on the request for review or by the notification referred to in Article 17 of this Law.

According to Article 22 of the Law on the Protection of the Right to a Trial within a Reasonable Time, if the president of the court finds that the proceedings and adoption of decision in the case have been unreasonably delayed due to failure of other public authorities, local self-government authorities, public service and holders of public offices to submit documents or other evidence, he or she shall order such authority to take action upon the request within a specified timeframe. Nevertheless, the president of the court may submit to the competent authority an initiative for initiating disciplinary proceedings or dismissal procedure against the person who has failed to act as ordered. We have not received information from the Judicial Council whether, to date, any president of the court submitted an initiative to the competent authority for initiating disciplinary proceedings or dismissal.

It is indisputable that the timely performance of tasks in the court involves principally the completion of court proceedings within a reasonable time and, with that in mind, it would be necessary to consider elaborating in more detail the powers and duties of the president of the court by stipulating concrete actions for the management of work of the court that would contribute to a more efficient resolution of the cases.

## 2. Just satisfaction for a violation of the right to a trial within a reasonable time

*Just satisfaction for a violation of the right to a trial within a reasonable time may be realised by payment of pecuniary compensation for the damage caused by a violation of the right to a trial within a reasonable time and/or by publication of the judgment that the party's right to a trial within a reasonable time has been violated.*

The Supreme Court handles the claims for compensation for non-pecuniary damages for a violation of the right to a trial within a reasonable time and it refers to the relevant ECtHR case-law in its decisions when deciding on the merits of those claims. It is a general conclusion that the Supreme Court properly uses and analyses the criteria referred to in Article 4 of the Law on the Protection of the Right to a Trial within a Reasonable Time and that it provides reasoning for its judgments in line with the standards of the ECtHR.

### 2.1. Decisions on claims for just satisfaction

In the period between 2015 and 2017, the Supreme Court received a total of 143 claims for just satisfaction and found a violation in 69 cases (29 in 2017; 23 in 2016; 17 in 2015).

| | Total number of claims for just satisfaction | Claims for just satisfaction adopted and compensation awarded | Rejected | Dismissed | Other |
|---|---|---|---|---|---|
| 2017 | 54 | 29 | 9 | 11 | 1 |
| 2016 | 54 | 23 | 8 | 16 | 1 |
| 2015 | 35 | 17 | 6 | 7 | 2 |

| | | | | | |
|---|---|---|---|---|---|
| **TOTAL** | **143** | **69 (48.25%)** | **23 (16.08%)** | **35 (37.06)** | **4 (2.80%)** |

*Table 4: Overview of decisions made by the Supreme Court on claims for just satisfaction (actions for fair redress)*

The Protector of Human Rights and Freedoms of Montenegro (Ombudsman) noted that in 2017 around half of the parties that resorted to a claim for just satisfaction was successful (56.8%) but that success rate was significantly higher than in requests for review**.**

It is important to point out that the total number of submitted claims for just satisfaction is lower than the total number of well-founded requests for review. In the period of three years (2015-2017), a total of 234 requests for review were well-founded pursuant to Article 17 and Article 18 of the Law, while 143 claims for just satisfaction were submitted to the Supreme Court (61.11%). Considering that Article 37(3) of the Law on the Protection of the Right to a Trial within a Reasonable Time prescribes that the Supreme Court shall, by a judgment, order just satisfaction when the request for review was found to be well-founded by a final and enforceable ruling or when the party was notified under Article 17 of the Law, it is evident that nearly half of the applicants who were successful in the requests for review did not exercise their right to just satisfaction.

## 2.2 Granted claims for just satisfaction

The Supreme Court adopts most of the claims for just satisfaction and awards pecuniary compensation (48.25% in the last three years, 2015–2017).

It should be kept in mind that when deciding on a claim for just satisfaction, the Supreme Court is bound by the ruling of the president of the court adopted on the request for review when the request for review was found to be well-founded by a final and enforceable ruling or when the court notified the party within the meaning of Article 17 of this Law (Article 37(3) of the Law). In such situations, the Supreme Court will, by a judgment, order just satisfaction. Such legal provision calls for a high level of responsibility when deciding on a request for review.

Example: By the Judgment Tpz 30/2018 the Supreme Court noted that "[*d*]*eciding on the request for review submitted by the plaintiff, the President of the Basic Court in Podgorica ordered, by the Ruling Su IV-2.br.39/2015 of 29 December 2017, that the case Rs.br. 231/17 be resolved as a priority. With this in view, the only thing the Supreme Court could do, according to Article 37(3) of the Law on the Protection of the Right to a Trial within a Reasonable Time, was to award to the plaintiff, by a judgment, just satisfaction i.e. to assess whether the claim was reasonable with respect to amount."*

On the other hand, the Supreme Court can award just satisfaction by a judgment even when the request for review was rejected by a final and enforceable ruling.

Example: By the Judgment Tpz 28/2018 the Supreme Court found a violation of the right to a trial within a reasonable time, noting that "... *there has been a violation of the plaintiff's right to a trial within a reasonable time because the Basic Court in Podgorica has had no justification for keeping the case files for an unreasonably long period after it declined jurisdiction, just as it cannot justify long duration of the process of renewal of the files after the fire because the files in question consisted essentially of two documents, the bill of indictment and the ruling by which the court declined subject-matter jurisdiction...".* Although in that case the plaintiff had previously submitted to the president of the court a request for review on which the decision had not been made, while, upon appeal, the

President of the High Court rejected the request as manifestly ill-founded, the Supreme Court of Montenegro awarded just satisfaction.

It is precisely these legal provisions that support the suggestion to consider clear separation of the jurisdiction of the presidents of the courts and the Supreme Court as regards determining of the violation of the right to a trial within a reasonable time, in such a way that the Supreme Court is entrusted with a control role to determine whether there has been an unreasonable delay in the proceedings and that the presidents of the courts have only the powers to take the measures to accelerate the trial. In this way, the Supreme Court, *inter alia*, would not be bound by the rulings of the presidents of the courts regarding (non-)existence of a violation of the right to a trial within a reasonable time.

### 2.3 Rejected claims for just satisfaction

*"... the Supreme Court may reject the claim, should it find that the right to a trial within a reasonable time has been violated."*

A total of 23 (i.e. 16.08%) claims for just satisfaction were rejected by the Supreme Court in the period 2015–2018.

In its judgments, the Supreme Court has analysed very carefully on a case-by-case basis, taking into account the criteria set out in Article 4 of the Law, while referring to the ECtHR case-law, whether the delay in the proceedings constitutes a violation of the right to a trial within a reasonable time.

Thus, the Supreme Court assessed that the fact that "*three hearings (hearings of 9 March 2017, 11 April 2017 and 24 May 2017) were adjourned, as it was required to obtain "position or opinion of the Civil Division of the Supreme Court of Montenegro", does not constitute exceeding the reasonable time, in view of the fact that only two and a half months are in question"*[30].

Furthermore, "… *the Supreme Court made an assessment that the period of a couple of months of unjustified delays in court proceedings is not by itself of such a nature to be able to cause violation of these plaintiffs' right to a trial within a reasonable time*".[31]

### 2.4 Dismissed claims for just satisfaction

*"Late claims, claims filed by an unauthorised person and claims filed contrary to Article 33 (1) and (2) of this Law shall be dismissed by the Supreme Court by a ruling."*

A total of 35 (i.e. 37.06%) claims for just satisfaction were dismissed in the period 2015–2017.

The analysis of the rulings available on the websites of the courts leads to the conclusion that the most common reasons for dismissing the claims are tardiness and non-compliance with the requirements of Article 33(1) of the Law which stipulates that the claim may be filed by the party who has previously submitted the request for review to the competent court.

[30] Judgment Tzp 44/2017 of the Supreme Court of Montenegro.
[31] Judgment Tzp 36/2017 of the Supreme Court of Montenegro.

Example: By the Judgment 15/2018 the Supreme Court dismissed the claim for just satisfaction on the grounds that *"[a]according to the allegations in the claim, drawn up by an attorney, the plaintiffs have not previously submitted the request to expedite the proceedings (the request for review), nor did the claim contain data and circumstances related to the case from which it would follow that the proceedings have been unjustifiably delayed which data must be contained in the claim for just satisfaction in accordance with Article 35(1) read together with Article 9(3) of the Law on the Protection of the Right to a Trial within a Reasonable Time."*

Example: By the Judgment 5/2018 the Supreme Court dismissed the claim stating that "*[a]s regards the part of the claim seeking non-pecuniary damages due to the length of the civil contentious proceedings that have been terminated by a final and enforceable decision, the Supreme Court hereby points out to the plaintiff that a claim for just satisfaction due to the length of court procedure that has not met the reasonable time requirement may be filed not later than 6 months after the receipt of a final court decision, as prescribed in Article 33(3) of the Law on the Protection of the Right to a Trial within a Reasonable Time."*

In its case-law the Supreme Court *"has taken a view that judicial protection for a violation of the right to a trial within a reasonable time cannot be applied in the process of making a decision on a motion for retrial in a civil court proceedings completed by a final judgment. Therefore, the claim in this legal matter is inadmissible and as such it had to be dismissed*"[32]. This ruling is an exceptional example of the application of the Convention for the Protection of Human Rights and Fundamental Freedoms and of reference to the ECtHR case-law, where the Supreme Court has found that *"according to the established case-law of the European Court of Human Rights, Article 6 of the Convention does not apply to the proceedings concerning the request for reopening of the proceedings (decision Rudan v. Croatia no. 45943/99, Ptičar v. Croatia no. 24088/07, X v. Austria no. 7761/77 and Jose Maria Ruiz Mateos and Others v. Spain no. 24469/94)."*

A relatively high percentage of dismissed claims for just satisfaction indicate that the parties and their legal representatives are still not sufficiently informed of the conditions for the application of this legal remedy.

### 2.5 Financial award

*"Pecuniary compensation shall be paid for non-pecuniary damage caused by the violation of the right to a trial within a reasonable time. The amount of pecuniary compensation shall be determined in the range from €300 to €5 000."*

In the period between 2015 and 2017, the Supreme Court of Montenegro made financial award for non-pecuniary damages in the total amount of €111 400.00 (€42 700.00 in 2017[33]; €24 000.00 in 2016[34]; €44 700.00 in 2015[35]).

The problem of high expectations when compared to the just satisfaction awarded is present in most countries at the beginning of the application of a new legal remedy. Although, in the

[32] Ruling Tpz br. 35/2017.
[33] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2017, p. 34.
[34] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2016, p. 32.
[35] Annual report on the work of the Judicial Council and overall situation in the judiciary in 2015, p. 32.

meantime, the case-law has changed for the better, it can be concluded that the statutory maximum amount of 5 000 euros that can be awarded by the Supreme Court as just satisfaction is not present in the legislation of other member states. Setting the highest or the lowest limit was not accepted by the ECtHR in its case-law either, as in each case it is guided by individual characteristics of that particular case.

**Part II**

## 3. Standards of the European Court of Human Rights relating to the right to a reasonable length of the proceedings

The ECtHR case-law shows that a violation of the right to a fair trial and a trial within a reasonable time (Article 6 as a whole) has been found in more than 55% of the total number of the judgments rendered by the ECtHR. The fact that 62% of the violations found by the ECtHR concerning the length of the proceedings (Article 6 paragraph 1) relate to the procedures for the protection of the right to property (Article 1 of Protocol No. 1) is even more striking.[36]

In a number of its judgments, the ECtHR has stressed that "[d]elayed justice is denied justice". The Court bases its jurisdiction to decide with regard to a trial within a reasonable time on four words from Article 6 § 1 of the Convention: the trial "... within a reasonable time". Notwithstanding the fact that the term trial "... within a reasonable time" is used in Article 6 § 1, in the application to specific cases, when examining whether there has been a violation of the Convention, the Court shall assess what is unreasonable in judicial and administrative proceedings. The objective of the right to a trial within a reasonable time is to guarantee that within a reasonable time, through a court decision, a situation of legal uncertainty of a person in respect of her civil status or in respect of the situation he or she is in as a result of the criminal proceedings brought against him or her is terminated.

Over many years, four important elements have been established in the ECtHR case-law for the trial within a reasonable time: the complexity of the case; the conduct of the applicant during the proceedings; the conduct of the authorities in the particular case and what was at stake for the applicant in the particular litigation. The ECtHR assesses each of these elements individually and inevitably as a whole together with other elements. Such holistic approach is particularly applicable to issues of what was at stake for the applicant in the litigation. The Court does not assess that individually but as a matter present in all other aspects. That is why we are not discussing this segment separately here but in the context of the other three elements.

*The complexity of the particular case*: In each individual case, the Court assesses and weighs the complexity of the case according to the specificities inherent to it. The complexity of the case depends primarily on the number of persons involved in the proceedings, the number of witnesses, the amount of the evidence, the complexity of the proceedings for determining the facts, the existence of international elements.[37]

*The applicant's conduct*: The applicant intentionally seeking not to respond to the summons by the police, prosecution service, investigating judge, etc. cannot complain about a violation of the right to a trial within a reasonable time, even in the proceedings that have remained open for a long time.

[36] As a comparison, 9% of violations found by the Court relate to the right to life, prohibition of torture, inhuman or degrading treatment (Articles 2 and 3 of the Convention). The European Court of Human Rights – Facts and Figures (http://www.echr.coe.int).

[37] *Trickovic v. Slovenia,* application no. 39914/98, judgment of 12.6.2001 (http:www.echr.coe.int).

The applicants have the right to make use of all remedies available to them to secure or improve their defense, but they have no right to interfere with the work of the competent courts.[38]

*Conduct of the authorities (administrative authorities and courts)*: "...[I]t is for the Contracting States to organise their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations." The Court advocates the application of the principle of the proper administration of justice, namely, that the domestic courts have an essential obligation to treat properly the cases they deal with. Decisions of the courts on obtaining the evidence, on joinder of cases and on adjournment of the hearing for certain reasons can be accepted to a certain extent if they do not affect the adjournment of the case and conducting trial within a reasonable time. However, on the other hand, the errors of the courts with respect to jurisdiction may pose a serious threat to the length of the proceedings. An important duty of the courts is to ensure that all those who have a particular role in the process make full use of all possible legal mechanisms and human resources to guarantee, secure and enforce justice. If the time-limits are prescribed by law, then the State should proceed with amendments to the law. If there is a small number of judges and court administration, then more judges or administration must be hired.

*The right to just satisfaction*: The applicants in the proceedings for determining the violation of the right to a trial within a reasonable time, most frequently request that they are determined just satisfaction in the form of non-pecuniary damages because they consider that due to long proceedings they have suffered consequences that have significant impact on their mental health or pecuniary damages because long duration of the proceedings resulted in the loss of profits or the reduction in the value of the item that was the subject of the dispute. The compensatory aspect is an important element of the remedies with regard to the right to a trial within a reasonable time. For these reasons, the courts in the Contracting Parties to the Convention when applying legal remedies in respect of a trial within a reasonable time must take into account the amount of determined financial award. According to the Court, "... the amount of compensation depends on the character and effectiveness of the domestic remedy. However, the amount of compensation for unreasonable delays determined by the courts must not be less than the amount set by the Court in the cases having regard to the complexity and length of proceedings in the specific case in which the domestic court decides."[39] Retaining the status of the victim depends largely on the amount of the compensation determined at the domestic level.

For the ECtHR, it is important not only to award the compensation, but to pay it on time. In *Musci v. Italy*,[40] the ECtHR found that it is inappropriate to require an individual who won dispute against the State in the proceedings upon legal remedy for a trial within a reasonable time to then bring enforcement proceedings to obtain satisfaction that has been awarded. It is acceptable to the Court that the State needs time to make the payment, but it is not acceptable to delay payment of the compensation determined by the courts in respect of long duration of the proceedings.[41] In this regard, the period of payment of compensation should generally not be longer than six months

[38] *Monnet v. France*, application no. 13675/88 (http:www.echr.coe.int).
[39] *Normann v. Denmark*, application no. 44704/98, http://www.echr.coe.int.
[40] See *Musci v. Italy*, application no. 64699/01, http://www.echr.coe.int.
[41] See *Simaldone v. Italy*, application no. 22644/03, judgment of 31.03.2009, http://www.echr.coe.int.

from the date of finality of the decision for the awarded compensation, and it is not acceptable that the State authorities use the lack of funds in the budget as justification.[42]

Regarding the effectiveness of the domestic remedy for a trial within a reasonable time, the ECtHR acknowledges that the rules regarding the allocation of compensation for expenses can be regulated differently and, therefore, leaves it to the States to regulate this issue as well. But "...It might appear paradoxical that, by imposing various taxes – payable prior to the lodging of an application or after the decision – the State takes away with one hand what it has awarded with the other to repair a breach of the Convention. Nor should the costs be excessive and constitute an unreasonable restriction on the right to lodge such an application and thus an infringement of the right of access to a tribunal."[43] Many times in its judgments, the ECtHR reminds the member states that "practical exercise of rights and freedoms and not just theoretical is necessary". This means that it is not enough only to enact laws which will comply with the Convention because the ideal of application of the Convention is to achieve the level of effective protection of human rights and freedoms before State authorities of a member state, which also implies the establishment of an effective remedy before authorities and courts in a member state of the Convention.

### 3.1. The ECtHR case-law relating to the length of the proceedings in respect of Montenegro

The cases that have been completed to date with a judgment or decision before the ECtHR show the structural specifics of the Montenegrin legal system. As in most countries, majority of the cases related to long duration of judicial and administrative proceedings concern civil proceedings. Some of these cases, although they have been completed with a final judgment, before they were brought before the Court, went through lengthy administrative proceedings (such as in the expropriation cases, the cases related to urban planning, etc.). In addition, the case-law of the Strasbourg Court in respect of Montenegro reveals that a large number of the cases in the Court were related to lengthy enforcement proceedings. In order to present as accurately as possible the jurisprudence related to Montenegro, we have divided the cases completed so far by different types of proceedings.

### 3.2. Length of civil proceedings

The case *Bujković v. Montenegro* is only one of the cases related to the long duration of civil proceedings initiated before the European Court of Human Rights. This case is significant as it shows a typical situation of long duration of proceedings in civil cases when higher courts repeatedly remit the case to a lower court, thereby unreasonably delaying the court proceedings. The Court noted that the first instance decision was quashed three times, and it was only after three remittals that the case, which was not complex by its nature, was finally adjudicated. It further noted that the applicant himself had not contributed to the unreasonable length of the proceedings and that there had been a breach of reasonable length of the proceedings. In this case, the European Court of Human Rights observed that the claim for just satisfaction lodged by the applicant to the Supreme Court of Montenegro was dismissed for his failure to previously make use of a request for review, a remedy that was not considered to be effective at the relevant time. The applicant could

[42] For example, *Burdov v. Russia* (§ 35)
[43] See *Charzynski v. Poland*, application no. 15212/03.

not be required to avail himself of this remedy at this stage, as its use had long become time-barred in his case and, therefore, he was not obliged to exhaust this particular avenue of redress.[44]

In the case *Đuković v. Montenegro* it can be observed that the higher courts have repeatedly remanded the case to the lower courts for a retrial. Additionally, this case also points out to numerous problems related to long duration of the administrative proceedings as a procedure preceding the civil proceedings. Namely, this case relates to the proceedings concerning a compensation claim brought by the applicant for damages he suffered as a consequence of an expropriation of his property because of which he instituted two sets of civil proceedings before domestic courts. As regards the second set of civil proceedings, the Court found that the application in respect of this set of proceedings was introduced outside the six-month time-limit set out in the Convention. However, as regards the first set of proceedings, the Court found that the length of the proceedings of more than twelve years was excessive and failed to meet the "reasonable time" requirement.[45] At the same time as this judgment, the Court rendered one more judgment in which it pointed out that although the impugned proceedings in the civil case *Tomašević v. Montenegro* were not particularly complex, no justification was provided for the period of more than twelve years and the other periods of inactivity before domestic courts so it concluded that they failed to meet the "reasonable time" requirement.[46]

In *Svorcan v. Montenegro* the Court also found that that the civil case which lasted more than four years for two levels of jurisdiction, the unreasonable delay before the Supreme Court, in particular, which amounted to almost three years and seven months, as well as the lack of any explanation justifying such a delay, demonstrate that the domestic authorities failed to act with the required diligence under Article 6 § 1 of the Convention. [47]

In *Vučinić v. Montenegro*, the ECtHR considered that neither the complexity of the case nor the conduct of the applicant explained the length of the civil proceedings and that, in the absence of any justification the length of the proceedings of more than seven years for three levels of jurisdiction was excessive and failed to meet the "reasonable time" requirement.[48] In *Dimitrijević* case the ECtHR also considered that, in the absence of any justification, the length of proceedings of more than seven years at three levels of jurisdiction was excessive and failed to meet the "reasonable time" requirement.[49]

Despite the fact that all these cases were initiated before the Court before the acceptance of effective legal remedies in Montenegro with respect to long duration of court proceedings, they reflect the situation which is realistically present both in Montenegro and in other member states. Namely, it must be pointed out that the number of cases related to long duration of court proceedings in civil cases is greater than in other cases. Additionally, the analysis of the above-mentioned cases indicates that very often civil proceedings are preceded by administrative proceedings (as in cases of expropriation, denationalisation or similar measures, or in relation to urban planning, etc.) that last very long and burden the entire process before the court.

[44] *Bujković v. Montenegro*, application no. 40080/08, judgment of 10.3.2015.
[45] *Đuković v. Montenegro*, application no. 38919/08, judgment of 13.6.2017.
[46] *Tomašević v. Montenegro*, application no. 7096/08, judgment of 13.6.2017.
[47] *Svorcan v. Montenegro*, application no. 1258/08, judgment of 13.6.2017.
[48] *Vučinić v. Montenegro*, application no. 44533/10, judgment of 5.9.2017.
[49] *Dimitrijević v. Montenegro*, application no. 17016/10, judgment of 12.12.2017.

### 3.3. Length of administrative proceedings

In *Živaljević v. Montenegro*, the applicants complained that the length of the proceedings had been incompatible with the "reasonable time" requirement. The Court was of the opinion that the length of the proceedings complained of by the applicants had failed to satisfy the reasonable time requirement.[50] The judgments in *Stanka Mirković v. Montenegro* and in *Sinex DOO v. Montenegro*, point out to the problem of repeated remittals of the cases by higher authorities to lower authorities and vice versa, i.e. the so-called *ping-pong* proceedings which lead to the Court's conclusion that the length of the proceedings was excessive and that it did not meet the "reasonable time" requirement. In both cases, the applicants complained of the lack of an effective domestic remedy, as guaranteed by Article 13 of the Convention. The Court analysed the remedy against the "silence of administration" and the initiative to initiate the inspection supervision procedure and found that these remedies were not effective and that in administrative proceedings there was a lack of effective remedy.[51]

The judgment in *Nedić v. Montenegro* emphasized that the period to be taken into consideration, according to the ECtHR case-law, in administrative proceedings begins only when an applicant appeals against the decision of the administrative body, since it is only then that a "dispute" within the meaning of Article 6 § 1 of the Convention arises. The particular case was not one of such complexity as to justify the length of the proceedings of more than five years and four months at one level of jurisdiction.[52]

It seems that administrative proceedings and, especially, the length of administrative disputes are not so much a problem from the perspective of legal solutions as the poor implementation of the law in practice. Namely, from the proceedings that have been brought so far before the ECtHR, it can be concluded that there is a problem not only because of the overall length of the administrative proceedings, but also because of the silence of administration, the failure to make decisions within statutory time-limits or the failure to make decisions within statutory time-limit on appeal. Likewise, it is evident that legal option of the second instance body to decide on the merits is not used and the cases are often remanded to the first instance body for a re-trial and decision-making.

### 3.4. Length of enforcement proceedings

The right to a fair trial under Article 6 § 1 of the Convention protects the execution of final and binding judicial decisions which, in the countries which accept the rule of law, cannot remain unexecuted to the detriment of one party. Consequently, the execution of judicial decisions cannot be prevented, annulled or excessively delayed because unreasonably long delay in the execution of binding judgments can lead to breach of the Convention. Additionally, enforcement procedures by their very nature should be implemented expeditiously and the State is obliged to organise a system of execution of judgments that is effective both in the laws and in practice.[53]

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[50] *Živaljević v. Montenegro*, application no. 17229-04, judgment of 8.3.2011.
[51] *Stanka Mirković and Others v. Montenegro*, cited above, § 63, see also *Stakić v. Montenegro*, application no. 49320/07, §§ 59-60, judgment of 2 October 2012.
[52] *Nedić v. Montenegro*, application no. 15612/10, judgment of 10.10.2017.
[53] *Comingersoll S.A. v. Portugal* [GC], application no. 35382/97, § 23, ECHR 2000-IV and *Burdov v. Russia*, application no. 59498/00, ECHR 2002-III.

In *Milić v. Montenegro and Serbia*, the applicant complained against Montenegro and against Serbia for failing to execute the judgment rendered by the Basic Court in Podgorica, requiring his reinstatement, as well as the lack of an effective domestic remedy therefor. The Court in Strasbourg considered that these complaints should be examined in respect of the right to a trial within a reasonable time and the right to an effective remedy before the national authorities. At the time when the applicant filed an application to the ECtHR, there was no available legal remedy which would allow him to obtain satisfaction for the past delays, while the effectiveness of the remedy would be assessed against the date on which the application was filed. Taking into account the case-law, the importance of the legal matter for the applicant and the fact that the authorities of the respondent State did not show due diligence, the Court considered that the non-enforcement in question constituted a violation of the right to a fair trial and that there had been an infringement for the lack of an effective remedy in domestic law for the applicant's complaint concerning the length of the non-enforcement.

The case *Jovović v. Montenegro* is related to the non-enforcement of a final judgment against two private individuals. Regardless of whether the execution should be conducted in relation to a private entity or in relation to the State, the State has the duty to take all necessary steps within its power to enforce a final judgment. The execution of final judgments is a part of procedural obligations that guarantee a fair trial and the State must ensure the effective participation of the entire State apparatus, and if it does not, it is deemed that it does not meet the requirements defined in Article 6 § 1. In this particular case, the Court found that there is no failure of the State in connection with the enforcement proceedings with respect to the first debtor, while with regard to the second debtor, it considered that such length of the enforcement proceedings could not be justified by the insolvency of the second debtor and that it led to a violation of Article 6 § 1 of the Convention.[54]

The above-mentioned cases show that Montenegro has a problem with non-enforcement of final judgments which threaten a fair trial. This is because even if the entire court proceedings were completed within a reasonable time and if all guarantees in respect of a fair trial were fulfilled, if a final judgment is not enforced within a reasonable time, the State violates the right to a fair trial within a reasonable time. Even the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) notes that in 2017 the number of complaints related to the work of public enforcement officers increased. The complaints most often concerned the delay in the enforcement proceedings, not taking required actions and measures to carry out enforcement and adopting unlawful rulings, therefore, he assessed that it was necessary to pay more attention to strengthening the accountability of public enforcement officers.[55]

## 4. The ECtHR and the effectiveness of the remedy for the length of the proceedings in Montenegro

The Court often recalls that a fundamental feature of the machinery of protection established by the Convention is that it is subsidiary to the national systems safeguarding human rights. States do not have to answer before international bodies for their acts before they have had an opportunity to resolve matters through their own legal system, and those who wish to invoke the jurisdiction of

[54] *Jovović v. Montenegro*, application no. 46689/12, judgment of 18.7.2017.
[55] 2017 Work Report of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman), p. 89.

the Court as concerns complaints against a State are obliged to use first the remedies provided by the respective national legal system. The complaints intended to be brought before the Strasbourg Court should have first been filed with the appropriate domestic bodies, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, moreover, any procedural means that might prevent a breach of the Convention should have been used.

In *Vukelić v. Montenegro*, the European Court of Human Rights analysed the relevant domestic case-law in relation to the practical application of the remedy for the protection of the right to a trial within a reasonable time. The applicant complained about the non-enforcement of a final judgment rendered in his favour that has become final in 1997. The Court observed that the case-law in respect of Montenegro on the basis of the request for review has considerably evolved in the meantime. In this judgment, the ECtHR concluded that in nearly all the cases in which the relevant domestic courts specified a time-limit for undertaking certain procedural activities these activities were indeed undertaken and in most cases in a timely manner and that most of the requests for review that were dismissed as ill-founded were correctly dismissed as such.

Although it found there were some cases in which the outcome of the request for review is rather unclear, the ECtHR considered that, in view of the considerable development of the relevant domestic case-law on this issue, a request for review must, in principle and whenever available in accordance with the relevant legislation, be considered an effective remedy in respect of all applications introduced against Montenegro after the date when this judgment became final. As to this particular case, the ECtHR noted that while the applicant had indeed never lodged a request for review as such, he had urged at least twice the relevant domestic courts to expedite the enforcement proceedings, substantially complying with the requirements provided by a request for review but to no avail. The Court considers that requiring the applicant to use this remedy formally in such circumstances would amount to excessive formalism and that therefore he did not have to exhaust this particular avenue of redress. Having regard to its case-law on the subject and the failure of the domestic authorities to display adequate diligence, the Court found that the non-enforcement amounted to a violation of the right to a trial within a reasonable time.

In *Novović v. Montenegro*, the applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement. The Government stated that the applicant had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act and he had also failed to make use of a constitutional appeal. The Court has held that it would be unreasonable to require an applicant to try a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic proceedings had been pending for a number of years before the introduction of this piece of legislation and where no conclusions could be drawn from the Government's submissions about its effectiveness. The Court, however, reserved its right to reconsider its view if the Government demonstrated, with reference to specific cases, the efficacy of this remedy. As regards the action for fair redress, the Court noted that the applicant had lodged his application more than 2 years and 8 months before an action for fair redress was introduced by the Right to a Trial within a Reasonable Time Act. At the time when the applicant lodged his application with this Court, there was no available domestic remedy which would have enabled him to obtain redress for the delay in the proceedings, the effectiveness of a particular remedy being assessed with reference to the date on which the application was lodged. The Court noted that the relevant law in Montenegro had not been passed in response to numerous applications pending before the Court, nor does it contain any transitional provision whatsoever

with regard to applications already pending before the Court. Therefore, it was unclear to the Court whether the domestic courts would have ruled at all on the merits of the applicant's action for fair redress had he lodged one. The Court also noted that the applicant could not be required to avail himself of this avenue of redress at this stage, as its use had long become time-barred in his case. Having regard to the particular circumstances of the case at issue, the Court considered that the applicant had not been obliged to exhaust this particular avenue of redress and that it arised from the circumstances of the case that the overall length of the impugned proceedings had failed to satisfy the reasonable time requirement.[56]

In *Mojsije Vučeljić v. Montenegro*, the applicant complained about the outcome and length of the civil proceedings, the length of the enforcement proceedings, and the resulting violation of his right to respect for private and family life. The applicant failed to avail himself of either a request for review or an action for fair redress. The Court considered that he had not been obliged to make use of a request for review in order to expedite the civil proceedings, given that the said remedy was effective as of 4 September 2013, and the civil proceedings had already been concluded by that time,[57] and that, as regards an action for fair redress, the Court had previously held that as long as the proceedings had still been ongoing and the request for review had not been yet considered an effective remedy, the action for fair redress could not be considered capable of expediting proceedings.[58] The practice, however, proved that this legal remedy is capable of providing adequate compensation for a violation of the right to a trial within a reasonable time.[59]

The ECtHR has accepted this remedy as an effective domestic remedy. Additionally, the Court previously stated that the new legislation on constitutional appeal explicitly provided for a possibility of lodging a constitutional appeal in respect of not only a decision but also an action or an omission and that a constitutional appeal in Montenegro can in principle be considered an effective domestic remedy as of 20 March 2015, this being the date when the new legislation entered into force.[60] The relevant rule also explicitly provides for the possibility to file a constitutional appeal relating to the length of the proceedings after a legal remedy under the Law on the Protection of the Right to a Trial within a Reasonable Time has been exhausted or if for some reason those legal remedies are not effective. Therefore, a constitutional appeal must be regarded as an effective domestic remedy for appeals relating to the length of the proceedings. In the particular case, the Constitutional Court dismissed the appeal on the grounds that it was incomplete, it was not subsequently amended at the request of the court and did not contain the reasons for which the applicant considered that his human rights and fundamental freedoms were violated. On this basis, the applicant did not fulfil the formalities prescribed by domestic law and the ECtHR concluded that he had not exhausted all effective domestic remedies and that his application had to be dismissed.

### 4.1. The ECtHR judgments regarding the length of proceedings rendered in 2018

[56] *Novović v. Montenegro*, application no. 13210/05, judgment of 23.10.2012.
[57] *Vukelić v. Montenegro*, application no. 58258/09, § 85, 4 June 2013.
[58] *Mijušković v. Montenegro*, application no. 49337/07, § 72, 21 September 2010, and *Boucke v. Montenegro*, application no. 26945/06, § 72, 21 February 2012.
[59] *Mutatis mutandis Bulatović v. Montenegro*, application no. 67320/10, §§ 17-22 and § 151, 22 July 2014.
[60] *Siništaj and Others v. Montenegro*, cited above, § 123.

The ECtHR acknowledged that Montenegro has effective remedies in respect of long duration of the proceedings. More specifically, the request for review became effective on 4 September 2013,[61] the claim for just satisfaction became effective on 18 October 2016,[62] while the constitutional appeal became effective on 20 March 2015.[63] Despite the fact that the ECtHR has acknowledged that the request for review and the claim for just satisfaction, including the constitutional appeal, are effective remedies in case of Montenegro, during this (2018) year the ECtHR continued to decide on the length of the proceedings in the cases against Montenegro. These cases were brought before the ECtHR prior to the acceptance of the effective remedies and as the cases for which there is well-established case-law (WECL cases) the judgments in these cases are rendered by a Committee composed of three judges. Thus, for instance, in *Rajak v. Montenegro*,[64] the ECtHR, sitting as a three judge Committee, made a decision on the length of the civil proceedings and found that the complaint had introduced in the application of 17 October 2011 and that at the time there had been no effective remedies in Montenegro as regards the length of proceedings. In view of that, the Court could not but conclude that, since before the lodging of the application the applicant had had no effective remedy at his disposal, his application must be declared admissible. In *Novaković and Others v. Montenegro,* having examined all the material submitted to it, the Court considered that in the instant case the length of seven years at three levels of jurisdiction was excessive and failed to meet the "reasonable time" requirement. [65]

In *Montemlin Šajo v. Montenegro*, the ECtHR notes that the case was not particularly complex to justify the length of five years and four months at two instances. Besides, it points out that the first instance judgment was served on the applicant company some three years and three months later following its adoption, for which delay the Government did not supply any justification.[66] In case *Arčon and Others v. Montenegro*, the ECtHR considers that the length of the proceedings of five and a half years at two levels of jurisdiction was excessive and failed to meet the "reasonable time" requirement.[67]

It is indisputable that in such cases, the long duration of court proceedings is the basis for finding a violation before the ECtHR, but in the circumstances when the ECtHR acknowledged that the remedies that Montenegro practically implemented in a satisfactory manner, it would be best for Montenegro to make an effort to resolve all these cases by friendly settlement or unilateral declarations. This is because these cases do not bring anything new in respect of the ECtHR case-law for Montenegro, and by resolving them, the ECtHR will focus on much more significant and more complex cases related to other rights and freedoms, including the cases that have been brought before the ECtHR after determining that the remedy for the length of the proceedings is an effective remedy, which may offer a basis for reviewing or confirming the efficacy of the control mechanism or just satisfaction as legal remedies.

[61] *Vukelić v. Montenegro*, application no. 58258/09, § 85, 4 June 2013.
[62] *Vučeljić v. Montenegro* (dec.), application no. 59129/15, § 30, 18 October 2016.
[63] *Siništaj and Others v. Montenegro*, application no. 1451/10 and 2 other, § 123, 24 November 2015, and *Vučeljić*, cited above, § 31.
[64] Application no. 71998/11, judgment of 27.2.2018.
[65] *Novaković and Others v. Montenegro*, application no. 44143/11, judgment of 20.3.2018.
[66] *Montemlin Šajo v. Montenegro*, application no. 61976/10, judgment of 20.3.2018.
[67] *Arčon and Others v. Montenegro*, application no. 15495/10, judgment of 3.4.2018.

**Conclusions**

The progress made by the Montenegrin courts with a view to strengthening their efficiency and solving the backlog of cases is undeniable. Thus, in the last three years, out of the overall number of the pending cases, the percentage of unresolved cases was about thirty or less percent. Particular efforts are being made to reduce the number of old cases. Consequently, at the end of 2017, the number of unresolved cases which were more than three years old was only 3 206 cases.

The ECtHR has accepted that in the last twelve years, by setting up the legal framework and its application, Montenegro has succeeded in elaborating three effective remedies: a request for review, a claim for just satisfaction related to a trial within a reasonable time and a constitutional appeal.

After a decade of implementation of the Law on the Protection of the Right to a Trial within a Reasonable Time, submission of requests for review with a view to accelerating the court proceedings is constantly increasing, however this number is still low when compared to the number of unresolved cases. Thus, in 2017, the number of filed requests for review amounted to 10.86% compared to the number of unresolved old cases.

In the last three years, 28% of the submitted requests for review were successful (pursuant to Articles 17 and 18 of the Law). Out of 814 requests filed, in 234 cases a president of the court granted a request for review or certain procedural actions were undertaken under Atrticle 17 of the Law.

On the other hand, a significant number of the requests for review which were dismissed and rejected as manifestly ill-founded indicate that neither the parties nor the lawyers are still sufficiently aware of the remedies that can contribute to accelerating the court proceedings.

It is evident that in 2017 the number of requests for review tended to increase but at the same time the number of granted requests for review was decreasing. These statistics show that the presidents of the courts have more often finalised the procedure on the requests for review (which they granted as well-founded in the previous years) by making use of the notification that they will act within 4 months or otherwise, while they granted the request in a small number of cases. This approach can significantly affect the statistics concerning the effectiveness of the request for review, which can lead to a review of the efficacy of this remedy before the ECtHR.

The notification of the party under Article 17 is a manner of speeding up judicial proceedings, but it should be borne in mind that taking certain procedural action does not mean that the process has been essentially accelerated as a whole and, therefore, it is important to develop a system that will enable a president of the court to follow up on the proceedings in the case concerned and to have insight into the final outcome of the dispute.

The statutory period for taking procedural actions and adopting decision under Article 17 of the Law is 4 months at most. In the proceedings that are defined by law as urgent this time-limit for taking action is long and for those reasons much shorter time-limit needs to be set for such cases.

The rulings on the requests for control mainly contain a detailed chronological overview of the procedural actions that have been taken in certain cases, but it has been noticed that the presidents of the courts in a small number of rulings refer to the criteria set out in Article 4 of the Law relating to assessment whether a reasonable time-limit has been exceeded.

There is a certain inconsistency in the actions taken by the presidents of the courts upon the requests for review. In certain cases, the president examines the proceedings of the court in the case as a whole and not only those of lately, for example, with regard to the work of the judge who is at the moment dealing with the case and accordingly concludes that there has been no violation of the right to a trial within a reasonable time. The president refers to the ECtHR case-law and notes that "*when it comes to the case-law of the European Court of Human Rights, one cannot speak of exact time-limits. According to the analysis of the European Commission for the Efficiency of Justice (CEPEJ) on the court deadlines in member states of the Council of Europe based on the case-law of the European Court of Human Rights as at 31 July 2011, it has been assessed that in a simple criminal case, the length of the proceedings of 6 years and 3 months and four years and 3 months does not constitute a violation of Article 6 of the European Convention on Human Rights. As the proceedings before the court in the case K broj 191/12 were initiated by a bill of indictment on 12 April 2012, having in view the complexity of the proceedings, the length of the proceedings until now, the prompt handling by the court, that the main hearings were adjourned for objective reasons, according to the president's assessment, the court has not violated the right to a trial within a reasonable time, for which reason the request to expedite the proceedings has been rejected as ill-founded."*[68]

On the other hand, in the cases of urgent nature that last for several years, the presidents do not find that the proceedings have been delayed but merely assess the current status of the case and note, for instance, that *"it can be expected with a high degree of certainty that the proceedings will be completed in the near future"*[69] and reject the request for review as ill-founded, without considering the length of the proceedings as a whole.

The reasons for long duration of the proceedings stated in the rulings rejecting the requests for review often include overburdening of the judge; business leave of the judge; illness of the judge[70]; collective annual leaves. It should be kept in mind that these are not the reasons recognised by the European Court of Human Rights as a justification for failure to act in court proceedings.

It is particularly indicative that collective annual leaves are cited as a justifiable reason for the inactivity of the court, although the procedural laws do not recognise a summer or winter break in the work of the courts as a reason for adjournment which is longer than 30 days. On the contrary, Article 41 of the Court Rules of Procedure provides that "*[j]udges, officers and employees shall, as a rule, have their vacation in the months of July and August. The vacations schedule shall be made by the president of the court in such a way as to secure that a sufficient number of judges, officers and employees remains in court to ensure unhindered handling of cases defined by law as urgent cases."* Such practice in a case, such as labour dispute, which is urgent by nature and which, under the provision of Article 434(3) of the Civil Procedure Law, must be completed in the first instance within 6 months from the date of filing the lawsuit, can result in a materially significant delay. It is necessary to pay more attention to the organization of work in the courts in order to allow judges to use uninterrupted annual leaves and that such entitlement of the judge does not significantly affect the rights of the parties to complete the court proceedings within a reasonable time.

[68] Ruling Su broj IV-2-3/15 of the Basic Court in Bar.
[69] Ruling Su.IV-2br69/2017 of the Basic Court in Podgorica.
[70] Ruling Posl.br.IV- 2 Su 2/2015 of the Basic Court in Herceg Novi.

The statistics indicate that the interval between the hearings held in June and the next scheduled hearings exceeds two months[71], which is contrary to the provisions of the procedural laws on scheduling the hearings. These data point out the need to pay more attention to the organisation of work in the courts and to the case management, to ensure that the right to a trial within a reasonable time is respected also in situations when there is a sudden increase in the number of cases in courts or a judge is overburdened.

It seems that the time-limits stipulated in the Law on the Protection of the Right to a Trial within a Reasonable Time for the president of the court to act on the request for review (Article 20), or the president of the immediately superior court to act on appeal (Article 26) are unreasonably long. Namely, the president of the court is obliged to decide on the request for review no later than 60 days after the date of receipt of the request, while the president of the immediately superior court is obliged to issue a ruling within 60 days after the appeal has been filed. A 120-day period for handling a request for review is unreasonably long, especially as regards the disputes that are urgent in nature.

As regards administrative proceedings, in several judgments that have been analysed in detail in this analysis the ECtHR found that there is no effective remedy in administrative proceedings and that Montenegro has a problem with repeated remittals of the cases by second instance bodies or administrative courts to lower bodies. The new Law on Administrative Procedure has so far failed to provide enough elements to make a finding that the participants in the proceedings have an effective remedy to resolve their claims within a reasonable time.

The judgments and rulings of the Supreme Court Division for deciding on the claims for just satisfaction are an excellent example of applying the ECtHR case-law on national level. The structure of the decisions and the manner of referring to the ECtHR case-law should be used as a guideline and a fine example to judges of all courts in Montenegro.

The problem of high expectations with regard to the awarded just satisfaction is present in most countries at the beginning of the application of a new remedy. Although, in the meantime, the case-law has changed for the better, it can be concluded that the statutory maximum amount of 5 000 euros that may be awarded by the Supreme Court as just satisfaction is not present in the legislation of the other member states. Setting upper or lower limit was not accepted by the ECtHR either in its case-law, since it is guided in each case by the individual characteristics of that case.

**Recommendations**

**I. Amendments to the Law on the Protection of the Right to a Trial within a Reasonable Time**

The applicable legal provision provides for a request for review, i.e. a request to expedite the proceedings, as a legal remedy for speeding up the court proceedings. It is recommended to consider separating this remedy in a way that only the request to expedite the court proceedings is submitted to the president of the court and that he or she assess on a case-by-case basis whether and to what extent activities may be taken to complete the proceedings as soon as possible. On the other hand, it would be more expedient to entrust the control role, namely, that of assessing

[71] According to the data provided by the Judicial Council of Montenegro, the time interval between the hearings held in civil contentious cases in June 2017 and the next scheduled hearings before the Basic Court in Podgorica was 90 days or 100 days in MAL cases; at the Basic Court in Nikšić, the time interval between the hearings held in June and the next scheduled hearing was 65 days in civil contentious cases or 57 days in MAL cases.

whether there has been a violation of the right to a trial within a reasonable time solely to the Supreme Court of Montenegro. Thus, the Supreme Court would also have a closer look at the efficiency of lower courts. Through the process following submission of a claim for just satisfaction, the Supreme Court would assess the duration of the proceedings as a whole and determine whether there has been a violation of the right to a trial within a reasonable time against the criteria set out in Article 4 of the Law on the Protection of the Right to a Trial within a Reasonable Time. Therefore, we are of the opinion that the presidents of the courts should assess only whether the proceedings are taking place within time-limits that are very precisely stipulated in the procedural laws and whether adjournment/not taking of certain actions occurs for reasons that are defined as justified in the procedural laws. On the other hand, the Supreme Court should assess whether there has been an unjustified delay in the proceedings as a whole, taking into account the criteria laid down in Article 4 of the Law and the ECtHR case-law.

Furthermore, it is recommended to consider the amendment that the decisions made by the president of the court on the request for speeding up the court proceedings as such do not affect the appraisal of performance of a judge, which would eliminate the suspicion that the presidents of the courts avoid granting requests for review as that affects the evaluation of performance of the courts and the judges.

It is important to elaborate in more detail the mechanisms set out in Article 17 of the Law and make possible for the president of the court to follow up on the case until it is completed. We are of the opinion that the role of the president of the court should be strengthened and that the mechanisms for following up on the proceedings in the case in which a request for review was filed should be developed further so as to establish a stronger connection to Article 19 of the Law which provides that the president of the court can remove the judge from the assigned case if the judge "does not take measures determined by … notification under Article 17 of this Law…".

Hence, it is also necessary to amend Article 38 of the Law which provides that the decision of the president of the court granting the request for review obliges the Supreme Court to award just satisfaction. Namely, the Supreme Court should assess all circumstances of the case entirely independently and determine whether a reasonable time requirement has been violated under Article 4 of the Law.

It is recommended to amend Article 20 and Article 26 of the Law on the Protection of the Right to a Trial within a Reasonable Time and shorten the time-limit of 60 days for the decision of the president of the court on the request for review or of the president of the immediately superior court on appeal in those cases. These time-limits seem long, especially in respect to proceedings that need to be dealt with urgently.

It is necessary to initiate amendments to the Law on the Protection of the Right to a Trial within a Reasonable Time regarding the amount of just satisfaction. It is not usual for minimum or maximum amounts to be determined by law as each case depending on specific elements inherent to it requires a different approach.

Instead of by a provision of the law, it is important to elaborate the criteria related to just satisfaction in more detail by an implementing act.

## II. Request from the ECtHR that the remaining cases relating to a trial within a reasonable time are resolved by a friendly settlement or unilateral declaration

The case-law of the Strasbourg Court developed to date has shown that once the ECtHR establishes that the domestic remedy for a trial within a reasonable time is effective, the best and the most effective approach of the State is to end the cases that remain before the ECtHR by either a friendly settlement or unilateral declaration. Thus, the State would help the ECtHR to free itself from the cases for which there is well-established case-law and to assist the applicants who have been waiting for years for the proceedings before the ECtHR to end.

## III. To improve the application of procedural laws by the courts

The majority of the cases completed with respect to a trial within a reasonable time is related to civil proceedings resulting from long-lasting civil contentious proceedings. Despite short deadlines, civil courts have problems to adhere in practice to statutory time-limits. The Civil Procedure Law allows proactive approach of the judges and the presidents of the courts and they must show tangible results. The judges must undergo continuous training to understand the importance of the practical application of the principle of cost-effectiveness in the proceedings. The training should help motivate judges to be guided, in the application of law for contentious proceedings, by a notion that long-lasting proceedings provide basis for unjust and unfair trial and also that their work, among other things, includes creative application of the law in the way not to threaten the rule of law by unnecessarily long proceedings.

## IV. To organise adequate training on the standards of trial within a reasonable time

Furthermore, multi-annual reports of various actors in the judicial system of Montenegro point out that it is necessary to continue training of the presidents of the courts, judges and lawyers and that it is important and essential to promote remedies relating to the trial within a reasonable time by raising the awareness of the citizens of how to speed up court proceedings and obtain compensation for just satisfaction if there has been a violation of the right to a trial within a reasonable time. This leads to the conclusion that there is still a need for training of the presidents of the courts so as to avoid erroneous application of the law in the future.

The judges of the Administrative Court must undergo training on the right to a trial within a reasonable time. Despite the fact that the new Law on Administrative Procedure sets really short periods for taking action in administrative proceedings, the actual results of their application in practice are lacking. Namely, the new Law on Administrative Procedure has been applied as from 1 July 2017 and it is still too early to say whether the application of the new provisions of this Law (Articles 117, 125 and 129) gives results with respect to the long duration of administrative proceedings due to repeated remittals of the cases by the courts to the administration and vice versa. For these reasons, at this stage of implementation of the law, training of judges regarding the standards for a trial within a reasonable time is of exceptional importance.

Additionally, Montenegro must step up its efforts to ensure the efficiency of the enforcement officers in the enforcement proceedings, as well as to strengthen the responsibilities of public enforcement officers in order to curtail time-limits in the enforcement proceedings.

It is necessary to deliver continuous training on the implementation of the right to a trial within a reasonable time for the enforcement officers and, in particular, for the employees in the administrative bodies performing the tasks in respect of administrative proceedings relating to civil rights.

### V. To enhance the transparency of the work of the courts

The transparency of the work of the courts on the requests for review must be increased. A negligible number of rulings on the requests for review are available on the courts' website. The Supreme Court is an exception as it promptly publishes the rulings adopted on the claims for just satisfaction.

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