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## **TRIAL WITHIN REASONABLE TIME IN EU ACQUIS AND SERBIAN LAW**

### **ABSTRACT**

*Since the adoption of the Charter of Fundamental Rights of the EU, it has become clear that the EU prioritizes the protection of human rights as an EU policy. One of the key standards set out in the Charter is the right to a fair trial and, within it, the right to trial within reasonable time.*

*The extensive jurisprudence of the European Court of Human Rights provides key guidance in the interpretation of this standard both within the Council of Europe and within the EU. However, the Court of Justice of the European Union also started to build its particular case law related to trial within a reasonable time.*

*In this paper, the authors will present the developments related to the interpretation of the standard of trial within a reasonable time as a part of the EU acquis. Furthermore, the authors will explore the binding nature of the Charter of Fundamental Rights on the EU candidate countries. Lastly, the authors will analyze the steps that Serbia has taken in order to improve its practices in this field, particularly through the adoption of the Law on the Protection of the Right to Trial within a Reasonable Time. Using the comparative and exegetic method, the authors will assess the effectiveness of the normative approach utilized by the Serbian government aimed at ensuring improved compliance with the trial within reasonable time standards and its impact on the EU accession process.*

**Key words:** *Charter of Fundamental Rights of the EU; The Right to a Fair Trial; The Right to Trial within Reasonable Time; Law on the Protection of the Right to Trial within a Reasonable Time.*

## 1. INTRODUCTION

The right to trial within a reasonable time became a component of the standard of independent and fair trial in the 20<sup>th</sup> century.<sup>1</sup> The right to judicial protection, or the right of access to justice, is a human right that implies the right to trial within a reasonable time by an independent and impartial court, established by law. It is beyond doubt that the legal foundation of this approach lies in the interpretation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) by the European Court of Human Rights (hereafter: ECtHR).<sup>2</sup>

Historically speaking, the standard of trial within a reasonable time can be traced back to the Magna Carta Libertatum.<sup>3</sup> In the comments on Magna Carta that were printed in 1642 as a part of his *“Institutes of the Laws of England”*, Sir Edward Coke described “delay” as a kind of “denial”.<sup>4</sup> Indeed, justice delayed is justice denied, or even injustice, as William Gladstone pointed out. This quote became a globally popular maxim.

The XX century brought the adoption of supranational legal instruments that are now the cornerstones of this standard. The United Nations’ Universal Declaration of Human Rights<sup>5</sup> represents a milestone in the development of human rights. Its Article 10 states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 14 of the International Covenant on Civil and Political Rights underlines: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... Everyone charged with a criminal offence shall have the right to be...tried without undue delay...” Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) prescribes 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

<sup>1</sup> Poznić, B., Rakić-Vodinelić, V., *Civil Procedure Law*, Law Faculty, Union University in Belgrade and Public Enterprise Official Gazette, Belgrade, 2015, p. 175.

<sup>2</sup> *Ibid.* p. 69.

<sup>3</sup> Magna Carta Libertatum, The Great Charter of Freedoms, an English constitutional document passed in 1215.

<sup>4</sup> Martin, W, *Because delay is a kind of denial, Timeliness in the Justice System*, Ideas and Innovations, Monash University Law Chambers, Melbourne, 2014, pg. 3.

<sup>5</sup> Passed and proclaimed a Resolution by the UN General Assembly 217 (III) on Dec. 10, 1948.

by law.” The EU Charter of Fundamental Rights represents a unique document on fundamental rights protected in the EU. It involves all the rights contained in the European Court of Justice’s case law, the rights and freedoms contained in the ECHR, as well as other rights that arise from common constitutional traditions of the EU countries and other international documents.<sup>6</sup>In addition to equality before the law<sup>7</sup>, Article 47 of this Charter prescribes that „everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law...”

As justice delayed is justice denied, everyone is entitled to have their rights decided on within a reasonable time, without unnecessary delay. Adjudication within a reasonable time is a standard set in the judiciary in terms of its efficiency. Not abiding by this standard, or, in other words, delaying proceedings and decisions, is one of the key problems in most national judicial systems; it is therefore not surprising that, in the past few years, at least a third of applications submitted to the ECtHR are related to the breach of the right to trial within a reasonable time.

Trial within a reasonable time is the most frequently analyzed area of the fair trial standard, and it seems that this trend will not change soon. The reasons for this are twofold: first, the parameters that define a reasonable time are developed at a rather slow pace; and second, in order to observe this standard, national judicial system needs to reform, and these reforms are complex and slow processes, which often include numerous cases of trial-and-error solutions. This is particularly the case given that efficiency of the judicial systems is undoubtedly one of the major challenges that national judicial systems face nowadays.<sup>8</sup>On the other hand, the need for efficiency is sometimes juxtaposed with the need to respect human rights and ensure equal justice - courts all over the world are expected to perform their duties expeditiously, but never at the expense of a legitimate trial.<sup>9</sup>So how do supranational and national legal and judicial systems try to ensure that the standard of the trial within reasonable time is observed?

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<sup>6</sup> URL=<http://www.ec.europa.eu>. Accessed 28 October 2016.

<sup>7</sup> Article 20.

<sup>8</sup> URL=<http://www.humanrights.is>. Accessed 8 November 2016.

<sup>9</sup> Gyampo, R.E.V, *Justice Delayed is Justice Denied: A Call for Timeous Court Rulings in Ghana*, Journal of Law, Policy and Globalization, Vol. 21, 2014, p. 36.

## 2. NATIONAL REMEDIES FOR BREACH OF RIGHT TO TRIAL WITHIN REASONABLE TIME IN THE CONTEXT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The success of the European Convention depends on the interaction between the domestic systems of human rights protection and the European umbrella held by the ECtHR.<sup>10</sup> Over the history, ECtHR has found more violations of Article 6 of the ECHR than of any other Convention Article.<sup>11</sup> However, the issue of introduction of special effective domestic remedies, in terms of Article 13 of the ECHR, regarding violations of the right to trial within reasonable time was not raised until the adoption of the seminal *Kudla v. Poland* judgment.<sup>12</sup> Until that judgment, the ECtHR's position was that Article 6, paragraph 1 constituted a *lex specialis* in relation to Article 13 of the Convention<sup>13</sup> and was not considered even when Article 6(1) was found to be violated.<sup>14</sup> However, in *Kudla v. Poland* judgment the court acknowledged that the Article 13 claim is not absorbed by the claim under Article 6(1) and clearly pointed out that complaints related to excessive length of proceedings should in the first place be addressed within the national legal system.<sup>15</sup> After the adoption of this decision, the adoption of the conclusions of the European Ministerial Conference on Human Rights<sup>16</sup> and of the Recommendation (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies,<sup>17</sup> several national systems started developing domestic remedies that could address the specific issue of breach of right to trial within reasonable time.<sup>18</sup>

<sup>10</sup> Rotfeld D., *Welcome Speeches*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, Workshop held at the initiative of the Polish Chairmanship of the Council of Europe's Committee of Ministers, Directorate General of Human Rights, Council of Europe, 2006, p. 5, URL=[http://echr.coe.int/Documents/Pub\\_coe\\_Domestics\\_remedies\\_2006\\_ENG.pdf](http://echr.coe.int/Documents/Pub_coe_Domestics_remedies_2006_ENG.pdf). Accessed January 29, 2017.

<sup>11</sup> According to HUDOC data, 22328 violations of Article 6.

<sup>12</sup> *Kudla v. Poland* App No 30210/96, ECHR 2000-XI, [2000] ECHR 512, (2002) 35 EHRR 198, (2002) 35 EHRR 11, [2000] Prison LR 380, (2000) 10 BHRC 269, IHRL 2853 (ECHR 2000), 26th October 2000

<sup>13</sup> Article 13 envisages the right to an effective remedy

<sup>14</sup> Harris D. J., O'Boyle M., Bates E., Buckley C., *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights*, Oxford University Press, 3<sup>rd</sup> Edition, p. 777.

<sup>15</sup> *Kudla v. Poland*, App No 30210/96, ECHR 2000-XI, [2000] ECHR 512, (2002) 35 EHRR 198, (2002) 35 EHRR 11, [2000] Prison LR 380, (2000) 10 BHRC 269, IHRL 2853 (ECHR 2000), 26th October 2000 par. 155.

<sup>16</sup> Proceedings. European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights, Rome, 3-4 November 2000, Strasbourg: Council of Europe Publishing, 2002, p. 39.

<sup>17</sup> Which includes separate sections devoted to domestic remedies against unreasonably long proceedings

<sup>18</sup> See item III of the Recommendation and paragraphs 20-24 of the Appendix to Recommendation.

Some countries have adopted separate statutes to introduce a judicial remedy addressing the unreasonable length of proceedings. Italy, which was infamous for a high number of applications before the ECtHR and ECtHR judgments in which violations of Article 6 were established, adopted the so-called *Pinto Act*<sup>19</sup>, which allows any party to criminal, civil, administrative and tax proceedings to complain of a breach of the reasonable time requirement and obtain financial compensation from a domestic court.<sup>20</sup> The Act lays down the criteria that judges must follow to verify the reasonable length of the trial, to consider the impact the duration of the trial has on the case, and to quantify and award damages. However, the Act does not provide for any measures to expedite the proceedings. Even though the introduction of the Pinto Act has to some extent reduced the number of applications against Italy before the ECtHR, it has also created an additional burden on domestic courts.<sup>21</sup> As a result, the Pinto Act was perceived by scholars as an expensive placebo.<sup>22</sup> In 2012, the Pinto Act was amended – the novelties included the provisions whereby access to the “Pinto” remedy was made conditional upon the termination of main proceedings, and compensation was excluded or limited in some cases. However, the purely compensatory nature of the “Pinto” remedy has been maintained.<sup>23</sup>

The Czech Republic has instituted reforms following the Hartman judgment<sup>24</sup>, in which the ECtHR found that appeals to the Constitutional Court, enabling individuals to challenge any final decision of another state body, were not effective. In response to the judgment, Act No. 192/2003 was adopted. This Act has added a provision to the Act on courts and judges, under which it is possible to seek a remedy for excessive delays in judicial proceedings by applying for a deadline to be

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<sup>19</sup> Legge 24 marzo 2001, n. 89 “Previsione di equa riparazione in caso di violazione del termine ragionevole del processo e modifica dell’articolo 375 del codice di procedura civile”, Gazzetta Ufficiale n. 78, 3.4. 2001

<sup>20</sup> Crisafulli F., *The Italian Experience*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, *op.cit.* note 10, 39

<sup>21</sup> Candela Soriano M., “The Reception Process in Spain and Italy”, *The Impact of the ECHR on National Legal Systems* (eds. H. Keller and A. Stone-Sweet), Oxford University Press, 2008, p. 427. In *Gaglione and others v. Italy*, Application No. 45867/07, the ECtHR found that delays by the Italian authorities in enforcing “Pinto decisions” ranged from 9 to 49 months, and that in 65% or more of the cases there was a 19-month delay (paragraphs 38 and 8).

<sup>22</sup> See in particular Carnevali D. “*La violazione della ragionevole durata del processo: alcuni dati sull’applicazione della ‘legge Pinto’*”, C. Guarnieri e F. Zannotti (eds), *Giusto processo?*, Milano, Giuffrè pp. 289-314

<sup>23</sup> Report Doc. 1386 Implementation of judgments of the European Court of Human Rights, 9 September 2015, par.15.

<sup>24</sup> *Hartman v. The Czech Republic*, Application no. 53341/99

set for the completion of a particular stage or formality in the process.<sup>25</sup> The ECtHR conducted an examination of *in abstracto* conformity of this remedy with the Convention, and found it was ineffective, because the request only constituted an extension of the ordinary appeal. This prompted an additional legislative amendment, whereby the possibility was established for the court against the decision of which the appeal was filed to deal with the appeal itself, without having to transfer the case to the higher court – given that such practice has caused further delays in proceedings.<sup>26</sup>

In Poland, an Act on complaints against infringements of party's right to be tried without undue delay was adopted in 2004.<sup>27</sup> The Act relates to criminal and civil court proceedings, including enforcement proceedings, and proceedings before administrative courts. According to this Act, a party is entitled to file a complaint, seeking ascertainment of the fact that the proceedings in question infringed the party's right to have a case examined without undue delay. The criteria for evaluating whether the case was examined without undue delay are based on the practice of the ECtHR, and, as a rule, the complaint is examined by a superior court. Complaints may be filed only if the proceedings are still pending. In 2009, the regulatory framework was amended to enable the triggering of this mechanism even in preparatory proceedings, and the obligation to grant just satisfaction was set within a given pecuniary range.

In Bulgaria, following the pilot judgments in *Dimitrov and Hamanov v. Bulgaria*<sup>28</sup> and *Finger v. Bulgaria*,<sup>29</sup> in which the ECtHR required that Bulgaria introduce remedies to deal with unduly long criminal proceedings, and introduce a compensatory remedy in cases of unreasonably long criminal, civil and administrative proceedings, an administrative compensatory remedy was introduced and entered into force in 2012.<sup>30</sup> The remedy was introduced through the Judiciary Powers Act, which prescribes that applications for compensations for unduly long proceedings are addressed to the Minister of Justice through the Supreme Judicial Councils' Inspectorate. The time-limit for examination of applications is six

<sup>25</sup> Schorm, V.A., *The Czech Experience*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, op. cit. note 10, pp.33-38

<sup>26</sup> Schorm, V. A., *Remedies against excessive length of judicial proceedings in the Czech Republic*, The right to trial within a reasonable time and short-term reform of the European Court of Human Rights, p. 39-42, URL=[http://www.mzz.gov.si/fileadmin/pageuploads/Zakonodaja\\_in\\_dokumenti/knjiznica/bled\\_proceedings.pdf](http://www.mzz.gov.si/fileadmin/pageuploads/Zakonodaja_in_dokumenti/knjiznica/bled_proceedings.pdf). Accessed January 28, 2017.

<sup>27</sup> Dz.U. 2004 nr 179 poz. 1843

<sup>28</sup> Application No. 48059/06 and 2708/09

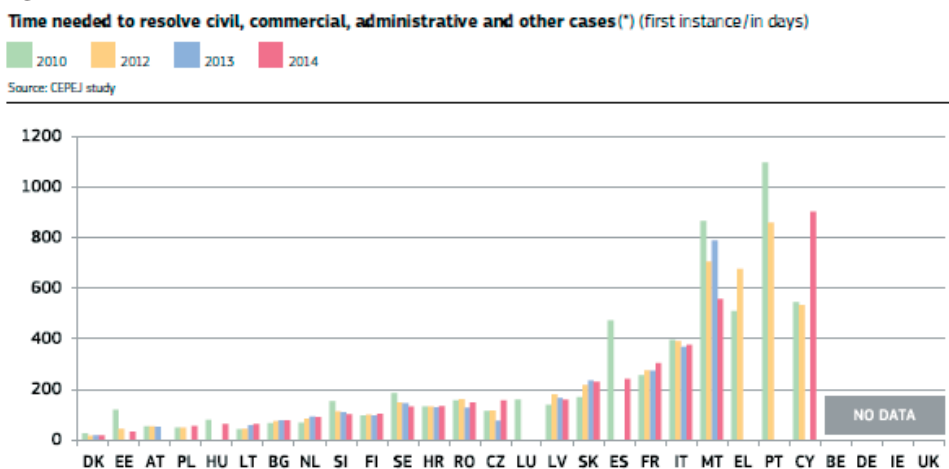
<sup>29</sup> Application No. 37346/05

<sup>30</sup> Impact of the European Convention on Human Rights in states parties - Selected examples, 2016, p. 18.

months. The applications can be directed against acts, actions or omissions of judicial authorities, but not for such delays stemming from the overburdening of the judicial system as a whole.<sup>31</sup> The merits of the application and the amount of compensation are determined in light of the Court's case law.

There are numerous examples of other countries that have developed specific domestic remedies, including Slovenia, Croatia, Cyprus and Germany. Last year's EU justice scoreboard<sup>32</sup> has shown that the length of first-instance proceedings in most countries has been reduced in 2014 compared to 2010, which shows that there are improvements with regards to the length of proceedings before national courts.

**Figure 1.**



Source: 2016 EU Justice Scoreboard, p.6

It must be underlined that the mere existence of national legal remedies in cases of breach of the right to trial within reasonable time is not the sole reason behind reduced duration of the length of proceedings in any Council of Europe country.

Evidence from the EU Justice Scoreboard source shows that numerous national judicial systems, including the ones that have introduced special national legal remedies in cases of violation of the standard of trial within reasonable time, are also taking other steps to ensure that justice is not delayed, such as the intro-

<sup>31</sup> CM/Inf/DH(2012)36

<sup>32</sup> The 2016 EU Justice Scoreboard, available at URL=[http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2016\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf). Accessed March 15, 2017.

duction of timeframes in proceedings or introducing active case monitoring and backlog reduction systems.<sup>33</sup> Some countries as the case was in the Netherlands, have introduced additional programmes to reduce the excessive case backlog and provided instruments that will, in addition to ensuring that those whose right to a trial within reasonable time is violated have access to an effective remedy, also steer the judges towards working more efficiently and with a view to respecting the standards set by the ECtHR. After all, as indicated above, the domestic judicial systems are instrumental in ensuring that the rights set out in the ECHR are indeed exercised and duly protected.

### 3. PROTECTION OF THE RIGHT TO A PUBLIC HEARING WITHIN REASONABLE TIME IN THE CONTEXT OF ARTICLE 47 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

The right to a hearing within reasonable time is one of the general principles of EU law – it is enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights, but also draws inspiration from the ECHR and its interpretative case law.<sup>34</sup> The way in which the EU interprets and implements the right to a public hearing within reasonable time is specifically important given Serbia's path towards EU accession and in particular the negotiation of Chapter 23.<sup>35</sup>

The Court of Justice and the General Court have developed jurisprudence on this issue, especially in the field of competition law. As Advocate General Mengozzi pointed out, “the observance of a reasonable time has been seen by the Community judicature above all as a test for establishing a possible breach of certain general principles of community law such as...protection of legitimate expectations, the principle of legal certainty, protection of the rights of defence, as well as the right to due process.”<sup>36</sup> Moreover, he claimed that this right imposes on institutions a time limit for exercising the powers vested in them.

In landmark *Baustahlgewebe* case<sup>37</sup> the Court of Justice of the EU (hereafter: CJEU) recognized the violation of that right by the Court of First instance. More

<sup>33</sup> *Ibid.*, p. 32

<sup>34</sup> Borraccetti M., *Fair Trial, Due Process and Rights of Defence in the EU Legal Order*, The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, p. 102.

<sup>35</sup> On judicial inefficiency and slowness as an obstacle to EU accession see Uzelac, A, *Vladavina prava i pravosudni sustav: Sporost pravosuda kao prepreka pridruživanju*, Pridruživanje Hrvatske Europskoj Uniji, Izazovi institucionalnih prilagodbi, Drugi svezak, Institut za javne financije Zaklada Friedrich Ebert, Zagreb, 2004. pp. 99-123.

<sup>36</sup> Opinion of Advocate General Mengozzi, Case C-523/04 *Commission v the Netherlands*, pars. 57-60

<sup>37</sup> Case C-185/95 *Baustahlgewebe GmbH v Commission of the European Communities* [1998], ECR I-8417, par. 29



importantly, in this case the CJEU, by analogy with the ECtHR judgments in *Erkner and Kémache* judgments<sup>38</sup> declared that the reasonableness of the time of the trial must be appraised in the light of circumstances that are specific to each case, the complexity of the case and the conduct of the applicant and of the competent authorities. As in other human rights issues, the CJEU has drawn inspiration from various human rights instruments, most notably the ECHR, but also from the European Social Charter.<sup>39</sup> However, the ECHR was only an inspiration and the CJEU did not find itself bound by these interpretations.

However, concerning the issue of just satisfaction with regards to breaches of the right to trial within reasonable time, in landmark cases *Kendrion*<sup>40</sup>, *Gascogne*<sup>41</sup> and *Gascogne Germany*<sup>42</sup> the CJEU opted to follow the solution already utilized in the *Der Grüne Punkt* judgment<sup>43</sup>, where it had concluded that there had been an infringement of the right to trial within reasonable time, but had also required a separate action for damages to be lodged before the General Court. Firstly, the CJEU started its analysis regarding Article 47 of the CFR and the related principle of effective judicial protection. Referring to the ECtHR case *Kudła v. Poland*, the CJEU asserted that if a violation of the right to trial within reasonable time was breached, an effective remedy had to be available. However, contrary to what was considered to be an effective remedy in that case by the applicants – the setting aside of the judgment on the appeal – the CJEU found that it would not remedy the infringement.<sup>44</sup> However, the CJEU found that a claim for damages brought against the EU pursuant to Articles 268 and 340, paragraph 2 of the Treaty on Functioning of the European Union did constitute an effective remedy for sanctioning such a breach.<sup>45</sup> Moreover, the Court stated that such a claim may not be filed to the CJEU as a part of the appeal, but has to be made directly to the General Court.<sup>46</sup>

<sup>38</sup> Application No. 9616/81, *Erkner Hofauer v. Austria*, Application Nos. 12325/86 and 14992/89 *Kémache v. France*

<sup>39</sup> Lawson R., “*International and European Human Rights Instruments*”, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency (Essays in European Law)* (Philip Alston, Olivier De Schutter, eds.), Hart Publishing, 2005, p. 233

<sup>40</sup> C 50/12 P *Kendrion v Commission* [2013] EU:C:2013:771, (judgment of 26 November 2013)

<sup>41</sup> Case C 58/12 P *Groupe Gascogne v Commission* [2013]EU:C:2013:770, (judgment of 26 November 2013)

<sup>42</sup> Case C 40/12 P, *Gascogne Sack Deutschland v Commission* [2013]EU:C:2013:768, (judgment of 26 November 2013)

<sup>43</sup> Case C 385/07 P *Der Grüne Punkt – Duales System Deutschland v Commission* [2009] ECR I -6155, par. 190-196

<sup>44</sup> *Op. cit.* note 40, par.88

<sup>45</sup> *Ibid.*, par. 93

<sup>46</sup> *Ibid.*, par. 95

When it comes to the relationship between the protection of the right to trial within reasonable time in the ECHR and the Charter, in its case *Europese Gemeenschap v Otis NV and others*,<sup>47</sup> the CJEU stated that Article 47 of the Charter secures in the EU law the protection afforded by Article 6(1) of the ECHR and that was therefore necessary to refer only to Article 47. Clearly, the CJEU will go on to set its own standards regarding the interpretation of the standard of reasonable time as protected by the Charter and the notion of effective remedies for protecting that right and resort to the already existing remedies in cases of breach of that right.<sup>48</sup>

However, in some cases, this remedy also means that the party whose right to hearing within reasonable time has been violated by the General Court would have to seek judicial protection and just compensation before that same court. Moreover, the General Court would have to ascertain that there was a causal link between the excessive length and the harm. Despite the general suspicion regarding the lack of impartiality in such a solution (there is no guarantee that a different composition of the General Court will decide in the action on damages), the instrument itself is not particularly different from other effective remedy instruments that have been put in place for violation of the same right, as guaranteed by the ECHR, in national legal systems. Consequently – it suffers from the same drawbacks; its resolution seeks additional time, it creates more work for the court (which is already heavily burdened with cases), and just compensation is reduced to pecuniary compensation. Interestingly, the Court was very firm in its position that there was no need for creating additional instruments to ensure an effective remedy for breaches of this provision of the Charter. Rather, the Court decided to rely on the existing remedy system, which is a practice rather contrary to the one taken by national systems after the *Kudla v. Poland* judgment.

For a country on its path to EU accession, such as Serbia, this means that, before the closing of Chapter 23 and becoming a full EU member, it must ensure that the observance of the standard of trial within reasonable time is fully internalized in its judicial system. Serbia will have to ensure that national judicial remedies for breach of this standard are just an auxiliary measure to ensure that a case is tried within reasonable time rather being the core measure for ensuring this right.

<sup>47</sup> Case C-199/11 *Europese Gemeenschap v Otis and Other* [2012] EU:C:2012:684 (judgment of 6 November 2012)

<sup>48</sup> More on the relationship between the European Court of Justice and the ECtHR see Coric Eric, V., *Odnos Evropskog suda pravde i Evropskog suda za ljudska prava*, doctoral thesis, Law Faculty, Belgrade University, 2013. When it comes to the issue of just satisfaction, the approaches of the CJEU and the ECtHR are also somewhat divergent – for more see Ćoric V, Knežević Bojović, A, Vukadinović, S. *Odstetni zahtevi pred evropskim nadnacionalnim sudovima*, Naknada štete i osiguranje – Savremeni izazovi, XIX Međunarodni naučni skup, Udruženje za odštetno pravo, Institut za uporedno pravo i Pravosudna akademija, 2016, p. 167-182

#### 4. THE RIGHT TO A FAIR TRIAL IN THE SERBIAN LAW

Serbia has taken a number of steps to ensure that cases are tried within reasonable time. These include, inter alia, the setting of the timeframe for taking of procedural actions in the Civil Procedure Act,<sup>49</sup> introducing the right to trial within reasonable time as a principle in the Criminal Procedure Code,<sup>50</sup> and the adoption the National Backlog Reduction Programme.<sup>51</sup> In 2015, Serbia has adopted a separate statute introducing a new effective legal remedy for breaches of the right to trial within reasonable time, in line with comparative tendencies, mainly focusing on the fulfilment of its obligations related to the implementation of the ECHR.<sup>52</sup>

The right to a fair trial is guaranteed by the Constitution of the Republic of Serbia, which prescribes that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, in the determination of their rights and obligations.”<sup>53</sup> The Constitution established the Constitutional Court<sup>54</sup> and introduced constitutional appeal that “can be filed against individual acts or actions of state institutions in charge of public authorities, which breach or deny human and minority rights and the freedoms guaranteed by the Constitution, provided that other legal remedies for their protection are either exhausted or unavailable”.<sup>55</sup> In the *Vinčić and Others vs. Serbia* (44698/06 et al.)<sup>56</sup> ECtHR maintained that a constitutional appeal is generally considered effective for all applications submitted after August 7, 2008, when the first meritorious decision on

<sup>49</sup> Articles 10, 303 and 308 of the Serbian Civil Procedure Act, Official Gazette No. 72/2011, 49/2013- decision of the Constitutional Court, 74/2013- decision of the Constitutional Court and 55/2014.

<sup>50</sup> Article 14 of the Criminal Procedure Code Official Gazette No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

<sup>51</sup> The latest Programme for the 2016- 2020 period was adopted on August 10, 2016, available at URL=<http://www.vk.sud.rs>. Accessed 10 February 2017.

<sup>52</sup> Even though a remedy did exist in the Civil Procedure Act as will be explained below.

<sup>53</sup> Article 32 of the Constitution.

<sup>54</sup> Article 166 of the Constitution which prescribes that the Constitutional Court is an “autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms”, whose “decisions are final, enforceable and generally binding“.

<sup>55</sup> Article 170 of the Constitution. The same is envisaged by Article 82 of the Law on the Constitutional Court (Official Gazette of the Republic of Serbia, No. 109/2007, 99/2011, 18/2013 – a decision by the Constitutional Court and 40/2015 – other law).

<sup>56</sup> The European Court of Human Rights passed a verdict on Dec. 1, 2009 concerning thirty one applications against the Republic of Serbia, Nos.: 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, filed because of the breach of the right to a fair trial (Article 6 Par. 1 of the Convention) in domestic court proceedings-labor disputes.

a constitutional appeal passed by the Serbian Constitutional Court was published in the Official Gazette of the Republic of Serbia.<sup>57</sup> Given the number of constitutional appeals submitted to the Constitutional Court, as well as the duration of the proceedings before this court, it was questionable whether a constitutional appeal complies with the criteria established in the practice of the ECtHR in terms of urgency and speeding up of proceedings.<sup>58</sup> In order to resolve this dilemma, the Law on Court Organization introduced new provisions,<sup>59</sup> which brought a new means of legal protection – a request to protect the right to trial within a reasonable time.<sup>60</sup>

#### 4.1. The Law on the Protection of the Right to Trial within a Reasonable Time

The Law on the Protection of the Right to Trial within a Reasonable Time<sup>61</sup> (hereafter: the Law) was passed on May 7, 2015. However, the provisions of the Law on Court Organization apply to the proceedings for the protection of the right to trial within reasonable time initiated before this Law entered into force, and those proceedings are continued in line with the Law on Court Organization. According to the new law, the right to trial within reasonable time, in addition to litigation and criminal proceedings also covers enforcement proceedings and non-contentious proceedings.<sup>62</sup> This law does not cover administrative proceedings, which, according to the standards of the ECtHR, should be also be covered by the right protected under Article 6 – namely, ECtHR case law established that Article 6 of the ECHR also covers disputes between private persons and state bodies if administrative proceedings affect the realization of property rights.<sup>63</sup> Contrary to that, the Supreme Court of Cassation, at the 5th session of the Department for

<sup>57</sup> URL=<http://www.zastupnik.mpravde.gov.rs/cr/articles/presude/u-odnosu-na-rs/vincic-i-drugi-protiv-srbije-44698-06-i-dr..html>. Accessed 29 July 2015.

<sup>58</sup> It should be noted that Article 8 of the Law on Court Organization (Official Gazette of the Republic of Serbia, No. 116/2008, 104/2009, 101/2010, 31/2011- and other law, 78/2011, 101/2013, 106/2015, 40/2015 other law and 13/2016) prescribes that “a party and other participants in court proceedings are entitled to appeal against the work of the court when they believe proceedings are delayed, irregular or under any illicit influence on their course and outcome”.

<sup>59</sup> Articles 8a, 8b i 8v, but all of the provisions ceased to be valid when the Law on the Protection of the Right to Trial within a Reasonable Time entered into force on Jan. 1, 2016, URL=<http://www.vk.sud.rs>. Accessed 8 November 2016.

<sup>60</sup> Milutinović, Lj, *Facing the implementation of the Law on the Protection of the Right to Trial within a Reasonable Time in court proceedings*, Supreme Court of Cassation of the Republic of Serbia, the Council of Europe, 2015, p. 8.

<sup>61</sup> The Law on the Protection of the Right to Trial within a Reasonable Time, Official Gazette of the Republic of Serbia, No.40/2015.

<sup>62</sup> Article 2 of the Law

<sup>63</sup> Milutinović, Lj., *op.cit.* note 60, pp. 13-14.

the Protection of the Right to Trial within a Reasonable Time, held on Sept. 15, 2014, adopted a legal position that the beginning of a reasonable time starts when the Administrative Court receives an application. Consequently, the duration of the proceedings before administrative bodies does not count in when reasonable time is assessed.

The holders of the right to trial within a reasonable time are all parties in court proceedings, including enforcement proceedings and the participants in non-contentious proceedings, as well as injured parties in criminal proceedings, private plaintiffs and injured persons as plaintiffs, provided that they filed a property-legal claim. According to the law, a public prosecutor as a party in criminal proceedings is not entitled to protection against the breach of the right to trial within a reasonable time<sup>64</sup>. Assessment criteria for the duration of trial within a reasonable time as prescribed by the Law<sup>65</sup> and interpreted by the Supreme Court of Cassation in line with the interpretation of the ECtHR<sup>66</sup> in relation to the application of Article 6 of the ECHR.

Legal remedies for the protection of the right to trial within a reasonable time envisaged by the Law are the following:

1. a complaint to speed up the proceedings
2. an appeal, and
3. a just satisfaction claim.

A complaint and an appeal can be filed by the end of the proceedings. A decision which acknowledges or rejects an appeal or complaint must be thoroughly explained, and it must not affect the factual or legal issues that were the subject of the trial or investigation.<sup>67</sup>

#### **4.1.1. Complaint**

According to the Law, a complaint is filed to the court that adjudicates upon the proceedings, if the right to trial within a reasonable time was breached by the public prosecutor, considering that it is the court chairman, not the public prosecutor, who decides if there was a breach. If the breach was committed during court proceedings, the complaint is filed to the court in charge of the proceedings.<sup>68</sup> A

<sup>64</sup> Article 2 of the Law on the Protection of the Right to Trial within a Reasonable time.

<sup>65</sup> Article 4 of the Law

<sup>66</sup> Poznić, B, Rakić-Vodinelić, V., *op. cit.* note 1, pp. 175-176.

<sup>67</sup> Article 3 and Article 5 of the Law on the Protection of the Right to Trial within a Reasonable Time.

<sup>68</sup> Milutinović, Lj., *op.cit.* note 60, p. 16.

decision about a complaint must be made within two months after its filing.<sup>69</sup> A complaint can be rejected or dismissed without an examination procedure if it is obviously ungrounded, considering the duration of the proceedings stated in the complaint.<sup>70</sup> The court chairman dismisses or acknowledges the complaint and establishes if the breach of the right to trial within a reasonable time occurred, a decision against which the judge and the public prosecutor cannot appeal. In the decision that acknowledges a complaint and establishes a breach of the right to trial within a reasonable time, the court chairman points out the judge or public prosecutor the reasons of the breach of the party's right and orders the judge to conduct procedural actions which effectively speed up the proceedings. The immediate higher public prosecutor has maximum 8 days since the reception of the decision to issue a binding instruction that orders the public prosecutor to conduct procedural actions to effectively speed up the proceedings.<sup>71</sup>

#### 4.1.2. *Appeal*

A party is entitled to an appeal if their complaint was dismissed, or if the court chairman does not pass a decision within two months since the filing of the complaint. The appeal can also be filed if the complaint was acknowledged, but the immediate higher public prosecutor failed to issue a binding instruction within 8 days after the court chairman's decision was received. An appeal can also be filed if the court chairman or immediate higher public prosecutor failed to order the judge or public prosecutor to conduct procedural actions which effectively speed up the proceedings, or if the judge or public prosecutor failed to conduct the requested procedural actions within a given deadline.<sup>72</sup> The appeal is filed to the court chairman who adjudicated on the complaint, and if in the proceedings in question a party claims to have suffered a breach of its right to trial within a reasonable time before the Supreme Court of Cassation, a three-member chamber of the Supreme Court of Cassation conducts and decides on the appeal proceedings.<sup>73</sup> According to Article 17 of the Law, no appeal is possible against a decision dismissing an appeal.<sup>74</sup> A decision may dismiss an appeal without an examination procedure if it

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<sup>69</sup> Oral hearing is not held, and the Law on Non-Contentious Proceedings is implemented on other matters (Article 7 of the Law).

<sup>70</sup> The very examination procedure begins when the court chairman requests a judge or a trial chamber, or the public prosecutor to deliver a report within 15 days or as soon as possible (if a special law prescribes urgency for such proceedings).

<sup>71</sup> Articles 7-12 of the Law).

<sup>72</sup> Article 14 of the Law.

<sup>73</sup> Article 16 of the Law.

<sup>74</sup> An appeal is not filed to the response and an oral hearing is not held. For other matters, the provisions of the Law on Non-Contentious Proceedings are applied.

is obviously ungrounded in terms of the proceedings duration stated in the appeal. If an appeal is not dismissed or rejected for the given reason, an examination procedure is conducted.<sup>75</sup> No appeal can be filed against the decision of the chairman of an immediate higher court on an appeal.<sup>76</sup>

#### 4.1.3. *Just satisfaction claim*

The Law envisages the following types of just satisfaction:

- the right to monetary indemnification for non-property damage suffered by a party through a breach of their right to trial within a reasonable time;
- the right to the announcement of a written statement by the State Office of the Ombudsman which establishes that the party suffered a breach of their right to trial within a reasonable time; and
- the right to the announcement of a verdict which acknowledges the breach of the party's right to trial within a reasonable time.

A party whose complaint was adopted and who did not file an appeal, a party whose appeal was dismissed and the first-instance decision about the acknowledgement of the complaint confirmed, and a party whose appeal was acknowledged are entitled to just satisfaction. The Republic of Serbia has an objective responsibility for non-property damage caused by a breach of the right to trial within a reasonable time.<sup>77</sup>

The law also envisages a possible attempt of settlement with the Office of the Ombudsman and the possibility to submit a settlement proposal. If an agreement is reached, the Office of the Ombudsman concludes an out-of-court settlement with the party, which represents an executive document.<sup>78</sup> During the attempt of settlement and after concluding the settlement, the party has no right to initiate an action against the Republic of Serbia for monetary indemnification.<sup>79</sup> A party may also initiate an action for the indemnity of property damage caused by a breach of the right to trial within a reasonable time against the Republic of Serbia within one year since it acquired the right to just satisfaction. The Republic of Serbia has

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<sup>75</sup> Article 18 of the Law.

<sup>76</sup> Article 21 of the Law.

<sup>77</sup> Articles 22-23 of the Law.

<sup>78</sup> Article 24 of the Law.

<sup>79</sup> A party may initiate an action against the Republic of Serbia within one year since the day it acquired the right to righteous redress. The proceedings for such action are based on the provisions of the Civil Procedure Law. The monetary indemnification may amount between EUR300 and EUR3000 per case in RSD countervalue .

an objective responsibility for such damage and monetary indemnification and a remuneration for property damage are paid by the court or the public prosecutor's office which breached the right to trial within a reasonable time.<sup>80</sup> The concluded settlement has the power of an executive document.

#### **4.2. STATISTICAL DATA ABOUT THE NUMBER OF VERDICTS REGARDING BREACHES OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME BEFORE NATIONAL COURTS AND THE ECTHR FROM 2015 TO 2017**

According to the Serbian Constitutional Court's data, 543 decisions were passed in 2015, which acknowledged constitutional appeals about a breach of the right to trial within a reasonable time in finalized proceedings.<sup>81</sup> Even though in most cases a breach of the right to a fair trial was established, the number of such breaches was significantly less in 2015 than in 2014 (a total of 544, which is 1,415 less compared to the previous year). The situation is the same with the reduced number of breaches of the right to trial within a reasonable time (in 2015 the court investigated such breaches only in relation to finalized proceedings).<sup>82</sup>

In 2015, the Department for Trial within a Reasonable Time of the Supreme Court of Serbia<sup>83</sup> received 4,114 cases, compared to the 1,117 received in 2014. 3,400 cases were resolved, while in 2014, 543 cases were resolved. Of that number, in 2015, 3,024 cases were resolved meritoriously, compared to 392 in 2014, with 1,297 cases remaining unresolved in 2015, compared to 583 from 2014.<sup>84</sup> Therefore, the percentage of resolved cases in 2015 was 72.39%, of which number 88.94% cases were resolved meritoriously.<sup>85</sup>

According to the Council of Europe's data, from January 1, 2016 to January 11, 2017 five verdicts were passed against the Republic of Serbia due to a breach of the right to trial within a reasonable time. In the past 5 years (from Jan 11, 2012

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<sup>80</sup> Articles 31-31 of the Law.

<sup>81</sup> Constitutional Court of the Republic of Serbia, Review of the Constitutional Court's Work in 2015, URL=[http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Преглед\\_2015.pdf](http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/Преглед_2015.pdf). Accessed 9 January 2017, p. 11.

<sup>82</sup> *Ibid.*, p. 12.

<sup>83</sup> Supreme Court of Cassation of the Republic of Serbia, Analysis of the Work of Courts of General and Special Jurisdiction for 2015, URL=[http://www.vk.sud.rs/sites/default/files/attachments/Analiza\\_rada\\_svih\\_sudova\\_u\\_Republici\\_Srbiji\\_za\\_2015\\_godinu.pdf](http://www.vk.sud.rs/sites/default/files/attachments/Analiza_rada_svih_sudova_u_Republici_Srbiji_za_2015_godinu.pdf), p 3. Accessed January 10, 2017.

<sup>84</sup> *Ibid.*, p. 14.

<sup>85</sup> There is no available information for 2016 and 2017 yet.



and Jan. 11, 2017) a total of 27 verdicts were passed due to breaches of the right to trial within a reasonable time.<sup>86</sup>

While there seems to be some improvement in the number of established breaches of the right to trial within reasonable time, the length of certain proceedings in Serbian courts has not been reduced. Quite to the contrary, in the Doing Business report, the ranking of Serbia related to enforcement of contracts has been reduced compared to its' 2016 ranking<sup>87</sup> with a staggering 635 days needed for enforcement of a commercial contract from the time the action is filed to payment, which includes 495 days for trial and judgment. The Supreme Court of Cassation reports do not measure the average length of proceedings, but it is indicative that according to this court's data for 2015, that the workload of judges sitting in courts of general jurisdiction consisted, on average, of 49.11% of old cases, where as much as 875099 cases were between 5 and 10 years old.<sup>88</sup> In case of courts of specialized jurisdiction in Serbia (Administrative court, commercial courts), this percentage was much lower – 18.49 on average, where the majority of old cases were 2-5 years old.<sup>89</sup>

## 5. CONCLUDING REMARKS

It seems that despite the efforts made over the last decade in various national systems to ensure that breaches of the right to trial within reasonable time are duly sanctioned and that this right is duly observed, there is no universal answer or model on how to best proceed with this exercise. Some models have in fact created additional workload for courts while only marginally contributing to the overall reduction of the instances of breach of this right – regardless of whether such breaches are registered before national courts or the European Court of Human Rights. The approach taken by the European Union, while strongly re-affirming the right to trial within reasonable time, did not however provide a practical mechanism that could be easily replicated on national level. The EU

<sup>86</sup> URL=<http://www.hudoc.echr.coe.int>. Accessed 11 January 2017.

<sup>87</sup> URL=<http://www.doingbusiness.org/data/exploreconomies/serbia#enforcing-contracts> shows that Serbia has gone down by 8 places in 2017, so now it ranks 61<sup>st</sup> in relation to this indicator compared to the 53<sup>rd</sup> place it held in 2016. Accessed March 15, 2017.

<sup>88</sup> Statistika o radu sudova opšte nadležnosti u Republici Srbiji u 2015. godini, Vrhovni kasacioni sud, Beograd, 2016, p. 9. URL=<http://www.vk.sud.rs/sr-lat/godi%C5%A1nji-izve%C5%A1taj-o-radusudova>. Accessed March 15, 2017.

<sup>89</sup> Statistika o radu sudova posebne nadležnosti u Republici Srbiji u 2015. godini, Vrhovni kasacioni sud, Beograd, 2016, p. 8. URL=<http://www.vk.sud.rs/sr-lat/godi%C5%A1nji-izve%C5%A1taj-o-radusudova>. Accessed March 15, 2017.

seems to rely on the integrity of the judges sitting at its court rather than create additional mechanisms as outside incentives for its judges to observe their duties. In that respect, the jurisprudence of the Court of Justice of the European Union has not done much in changing the procedural law in the EU member states or accession countries

However, this approach may still be sending a strong message – one of the need to instill the core values of both the European Convention on Human Rights and the European Charter of Fundamental Rights into the actions of each and every judge acting in the European justice area. This is not just an issue of knowledge of law, although informed and trained judges are more likely to abide by these rules. This is also an issue of attitude, and an issue of integrity. And while the existence of effective remedies can serve a very straightforward purpose – compensating the party that sustained harm due to excessive length of proceedings - the need to have judges who observe this rule in their everyday work remains as strong as ever. As Lord Heward CJ stated in a seminal English case on impartiality of judges (*R V. Sussex*), “not only must justice be done, it must also be seen to be done”. The core problem with the observance of this value will not be remedied through compensation alone – all such efforts must be coupled with those aimed at increasing knowledge and attitudes towards the observance of this rule.

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