



ANALYSIS OF EFFICIENCY OF THE ADMINISTRATIVE MECHANISM FOR COMPENSATION UNDER CHAPTER THREE "A" OF THE JUDICIARY SYSTEM ACT

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I. Introduction

Implementing the pilot judgments *Finger*¹ and *Dimitrov and Hanamov*², since October 1, 2012 in Bulgaria exists new administrative compensatory mechanism for protection against violations of the right of persons and legal persons for a fair and public hearing within reasonable time. The administrative mechanism, as established in the Judicial System Act (JSA), is a part of the newly created national mechanism for just satisfaction and together with the claim under Article 2b of the State and Municipality Liability for Damages Act (SMLDA) is to offer effective protection against excessive length of legal proceedings by guaranteeing to the injured parties, the existence of an effective national mechanism, in accordance with Article 13 of the European Convention on Human Rights (ECHR, "the Convention"). In the decisions on the admissibility from June 18, 2013 on the cases *Valchev and Abrashev v Bulgaria* and *Balakchiev and others v Bulgaria*³, the European Court of Human Rights ("the Court", "ECtHR") while taking into account the proposed legislative framework, accepts that considered altogether, the administrative mechanism and the claim for damages under Article 2b of SMLDA, can be considered an effective domestic remedy, in regard to complaints about the excessive length of civil, criminal and administrative proceedings. However, as stated by the Committee of Ministers in the review of the implementation of pilot judgments, it will be important how the Bulgarian authorities apply the national legislative provisions and the extent to which their case law will be in accordance with the principles established by the Court under Article 6 of the Convention⁴.

The aim of this report is to assess the effectiveness of the new legal remedies and to formulate recommendations for needed changes of the administrative mechanism, including amendments of legal and regulatory framework and proposals for interpretative decisions of the supreme courts, based on the analysis of the case law of the Inspectorate to the Supreme Judicial Council (Inspectorate, ISJC), the Ministry of Justice (MoJ) and the administrative and civil courts.

The report is prepared by experts from the Bulgarian Lawyers for Human Rights Foundation in accordance with a contract between the Ministry of Justice and the Foundation. The analysis covers the period from the entry into effect of chapter Three "A" of the JSA (October 1, 2012) up to July 17, 2015.

¹ *Finger v. Bulgaria*, no. 37346/05, 10.05.2011

² *Dimitrov and Hamanov v. Bulgaria*, nos. 48059/06 and 2708/09, 10.05.2011

³ See judgment § 79.

⁴ [Pending cases: current state of execution](#)



II. THE RIGHT OF FAIR TRIAL WITHIN REASONABLE TIME IN ACCORDANCE WITH ARTICLE 6 OF THE CONVENTION

The right to a fair trial within reasonable time is guaranteed by Article 6, § 1, ECHR, which states:

“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.”

1. ADMISSIBILITY

The most common problems with the admissibility of applications regarding reasonable time of legal proceedings - namely, the objective and subjective scope of Article 6 (*ratione materiae*, *ratione personae*, respectively), are discussed in this chapter. Issues regarding the Court's jurisdiction (*ratione loci*), which do not create difficulties in the context of reasonable time, will not be addressed, and neither will be issues of the temporal scope of the Convention. Procedural grounds for inadmissibility (e.g. the requirement for exhaustion of domestic remedies and the six-month deadline for submission of an application) will not be discussed as they affect only the procedure before the ECtHR and have no relation to the national procedure. The same applies to insignificance as grounds for inadmissibility of applications to ECtHR, recently established in Article 35, § 3, (b), ECHR. As stated by the Constitutional Court of the Republic of Bulgaria (CC)⁵, the provision provides that "an individual application may not be admitted for consideration [by the ECtHR - auth. note] on the basis that the damages were not significant, but it is required, among other things, for the application to have been examined by the national court. Obviously, the Convention does not retreat from the position that the insignificance of the offense and the amount of the sanction may have any bearing whatsoever on the elimination of the access to court when it comes to fundamental rights..."

1.1 Article 6 *ratione materiae*

Article 6 of the ECHR applies to "disputes" (in French "contestations") for the determination of "civil rights and obligations", as recognized by the national law⁶, as well as to the presence of a "criminal charge".

⁵ Judgment no. 1/2012 on constitutional case no.10/2011

⁶ It is required as a minimum of tenable allegation, in this sense



1.1.1. Civil aspect of Article 6

(a) the term “dispute”

The requirement for the existence of a "dispute" is based on the term "contestations", used in the French version of the Convention, which has no analogue in its English version. The ECtHR held that Article 6 requires the existence of a "genuine and serious dispute"⁷ which can refer both to the actual existence of the specific right as well as to its scope and manner of exercise. The outcome of the proceedings must be in direct and decisive consequence for the "civil rights and obligations" that are recognized (or at least there is a tenable argument that they are recognized) by the national law. Indirect and undetermined consequences are insufficient⁸.

(b) the term “civil rights and obligations”

Article 6 is not intended to create new civil rights without a legal basis in the national law but to ensure procedural protection of rights already recognized by the national law⁹.

The term "civil rights and obligations" is autonomous and independent of the legal function of the parties in the proceedings, of the type of applicable national law or of the case's jurisdiction¹⁰. The ECtHR has not provided an abstract definition of the concept and interprets it very broadly. Not only traditional civil disputes between civil parties, but also a number of administrative disputes between public and private entities fall under the definition of "civil rights."¹¹

In a case concerning administrative proceedings, including a referral for a preliminary ruling to the Constitutional Court, the ECtHR ruled that these two procedures were interrelated to the extent that separate consideration for each, would be artificial and would weaken the level of

⁷ In *Kaukonen v. Finland* (dec.), no. 24738/94, 08.12.1997, the Commission held that the dispute was not genuine and serious. See also *Skorobogatykh v. Russia* (dec.) no. 37966/02, 08.06.2006

⁸ *Bentham v. the Netherlands*, no. 8848/80, 23.10.1985, § 32

⁹ *Alatulkkila and Others v. Finland*, no. 33538/96, 28.07.2005, § 48

¹⁰ *Tre Traktörer Aktiebolag v. Sweden*, no. 10873/84, § 41, и *Micallef v. Malta* [GC], no. 17056/06, § 74, 15.10.2009

¹¹ For example in *Ravon and Others v. France*, no. 18497/03, 21.02.2008, § 24, ECHR held, that an administrative dispute regarding lawfulness of a tax inspection and seizure of documents on the premises of the applicants, refers to the "civil" rights - namely the right of respect for home and correspondence. In *Tre Traktörer Aktiebolag*, cited above, § 43, it held that the public policy aspects of granting a license to trade alcohol are not sufficient to exclude the dispute concerning the withdrawal of the license of the applicant from the scope of Art . 6. See also cited above *Alatulkkila and Others*, § 49, which refers to administrative dispute regarding the ban on fishing. In some judgments the ECtHR held that the administrative appeal against the judgment to revoke the driver's license affects "civil rights" (*Becker v. Austria*, no. 19844/08, 11.06.2015, §§ 21-35, and *Junnila v. Finland* (dec.), no. [62963/00](#), 13.01.2004), while in others, applying the criteria “Engel” (see 1.1.2), held that there was a criminal charge (*Mulot v. France* (dec.), no. 37211/97, 14.12.1999; *Hangl v. Austria* (dec.), no. 38716/97, 20.03.2001, и *Boman v. Finland*, 41604/11, 17.02.2015, §§ 28-32).



protection of the rights of the applicants. It concluded that the case as a whole was in regard to the civil rights of the applicants¹².

Article 6 is inapplicable to rights and obligations relating to the "substance of the public prerogatives" such as tax disputes¹³, disputes relating to the expulsion or deportation of aliens to the border, and political rights¹⁴. Disputes regarding civil servants, however, are excluded only in limited cases from the scope of Article 6¹⁵.

(c) stages of the proceedings in which Article 6 is applicable in its civil aspect

In general, Article 6 applies to the submitting of civil claims related to the determination of civil rights and obligations. In many cases, the procedure in challenging an administrative act through administrative proceedings is included in the total duration, if the law requires the exhaustion of the said administrative proceedings, before submitting a claim with the court¹⁶.

In *Micallef v. Malta* [GC]¹⁷, the ECtHR held that Article 6 applies to proceedings relating to interim measures, if the right, contested in the main proceedings and that in the interim measures, is "civil" and if the interim measures essentially "define" said civil right.

The ECtHR has also held that Article 6 applies to the procedure of imposing injunction measures under the Forfeiture to the State of Property Acquired from Criminal Activity Act of 2005 (repealed), due to significant reduction of legal opportunities for the applicants to utilize their property for potentially extended periods of time and to the civil nature of the rights, affected by the injunction measures¹⁸.

Article 6, § 1 also applies in regard to the enforcement proceedings, which are considered an integral part of the "due proceedings", within the meaning of that provision¹⁹. However, it is not required that the enforcement procedure be initiated as a result of finalized judicial proceedings²⁰. The ECtHR expressly rejects the government's objection in regard to the absence of "dispute", by stating that the rights are considered as "defined", after their effective exercise²¹.

¹² Gorraiz Lizarraga and Others v. Spain, no. 62543/00, 27.04.2004, §§ 43-48.

¹³ Ferrazzini v. Italy [GC], no. 44759/98, 12.07.2001, § 29.

¹⁴ Pierre-Bloch v. France, no. 24194/94, 21.10.1997, §§ 49-52, и *Ždanoka v. Latvia* (dec.), no. [58278/00](#), 06.03.2003

¹⁵ Vilho Eskelinen and Others v. Finland, [GC], no. 63235/00, 19.04.2007

¹⁶ König v. Germany, no. 6232/73, § 98, 28.06.1978, и *Kress v. France* [GC], no. 39594/98, § 90, 07.06.2001

¹⁷ Cited above §§ 83-86.

¹⁸ *Nedyalkov and Others v. Bulgaria* (dec.) no. 663/11, 10.09.2013, §§ 107-109.

¹⁹ *Hornsby v. Greece*, no. 18357/91, 19.03.1997, § 40 and *Romańczyk v. France*, no. 7618/05, 18.12.2010, § 53

²⁰ *Buj v. Croatia*, no. 24661/02, 01.06.2006, § 19 and *Estima Jorge v. Portugal*, no. 24550/94, 21.04.1998

²¹ *Estima Jorge v. Portugal*, no. 24550/94, 21.04.1998, §§ 33-38



Implementation of a judgment of a foreign court, falls within the scope of Article 6, if it affects a civil right or an obligation²².

1.1.2 Criminal aspect of Article 6

Article 6 applies in cases, concerning a "criminal charge". This concept is also autonomous in the ECtHR case law. The evaluation of the applicability of Article 6 is based on the criteria set out in the judgment *Engel and Others v. the Netherlands*²³ and developed in subsequent case law, namely:

- Classification of the procedure under national law;
- Nature of the offense;
- Type and severity of the maximum penalty, which might be lawfully imposed on the person concerned.

These criteria are to be alternatively applied, with the first being of no particular importance and usually serving as a starting point for the analysis. When none of the criteria is decisive in itself, considering them in total (or "cumulative application" as stipulated in the case law of the ECtHR) could lead to the conclusion that a "criminal charge"²⁴ exists. In assessing the nature of the offense and the type and severity of the punishment, a number of factors are to be considered, such as the purpose of punishment (deterrence and/or punitive function)²⁵ or the fact that affected is a person and is sanctioned with a severe pecuniary sanction²⁶.

In cases, concerning complaints about excessive length of proceedings, the key moment for calculating the overall length, is the moment of arising of a "criminal charge". This moment often precedes the filing of formal charges and even the start of the criminal proceedings as such²⁷.

The ECtHR has stipulated that "criminal charge" is in fact present in a number of cases where the national legislation of the Member States classifies the sanctions as "administrative"²⁸.

²² *Saccoccia v. Austria* (dec.), no. 69917/01, 18.12.2008, §§ 56-65

²³ *Engel and Others v. the Netherlands*, nos. 5100/71 ..., 08.06.1976, §§ 82-83

²⁴ *Bendenoun v. France*, 12547/86, 24.02.1994, § 47

²⁵ *Öztürk v. Germany*, no. 8544/79, 21.02.1984, § 53

²⁶ *Kapetanios and Others v. Greece*, nos. 3453/12, 42941/12 и 9028/13, 30.04.2015, § 55

²⁷ See below II.2.1

²⁸ Traffic accidents punishable with a fine or withdrawal of points (*Lutz v. Germany*, no. 9912/82, 25.08.1987 no, § 182, *Schmautzer v. Austria*, no. 15523/89, 23.10.1995 and *Malige v. France*, no. 27812/95, 23.09.1998) misdemeanours, violations of the social security legislation *Hüseyin Turan v. Turkey*, §§ 18-21



1.2. *Ratione personae* of Article 6

(a) notion of “victim”

The term "victim" under Article 34 of the Convention, is autonomously interpreted and means the person or legal person who is directly or indirectly affected by the alleged infringement. In order to have standing to submit an application under Article 34 of the ECHR, the person must prove that is directly affected by the measure against which he/it has submitted an application²⁹, i.e. that he/it is a direct victim or that is personally affected by an infringement against another person or that he/it has a valid personal interest in the termination of the infringement, which makes him/it an indirect victim³⁰.

Direct victim in unreasonably long proceedings

In the case of *Finger v. Bulgaria*³¹, related to an application about excessive length of judicial proceedings, the ECtHR noted that although the case was not of a major concern for the applicant, it is undisputable that the length has affected her, and rejected the Government's objection regarding the lack of the status as a "victim" of the applicant. It added that the matter of the existence of damages ("prejudice") is relevant to claims for damages, not to the status of "victim".

Legal persons can also claim to be victims under Article 6, including in regard to excessive length of the judicial proceedings³².

Indirect victim in unreasonably long proceedings

If the direct victim has passed away or disappeared before the submission of the application and the alleged violation of the Convention (for example, unreasonable length of the proceedings, conducted during the lifetime of the deceased) is not closely associated with the death or disappearance of the direct victim, the Court may nevertheless recognize the relatives as entitled to submit an application, if the allegedly violated right belongs to the category of transferable rights, and if the applicants demonstrate personal interest in the case, for example material interest, protection of personal or family reputation, etc. For example, in the case *Sanles Sanles v. Spain* (dec.)³³, the application to ECtHR was submitted by the daughter in law of the direct victim after the latter's death and contains complaints about the excessive length of the proceedings that had been led by the deceased, during his lifetime. The ECtHR has held

²⁹ *Burden v. the United Kingdom* [GC], no. [13378/05](#), 29.04.2008, § 33, and *İlhan v. Turkey* [GC], no. [22277/93](#), 27.06.2000, § 52

³⁰ *Vallianatos and Others v. Greece*, nos. 29381/09 и 32684/09, 07.11.2013, § 47

³¹ Cited above, § 65.

³² *Comingersoll S.A. v. Portugal* [GC], no. [35382/97](#), 06.04.2000, §§ 35-36, *Sovtransavto Holding v. Ukraine* (just satisfaction), no. [48553/99](#), 20.09.2011, §§ 78-82, и *Shesti Mai Engineering OOD and Others v. Bulgaria*, no. 17854/04, 20.09.2011, § 115

³³ *Sanles Sanles v. Spain* (dec.), no. 48335/99, 26.10.2000



that the rights under Article 2, 3, 5, 8, 9 and 14 of the Convention are non-transferable and declared inadmissible *ratione personae* that part of the appeal, but has examined the complaint under Article 6 for the unreasonable length of the case, considering the fact that the applicant is the legal heir of the deceased. In *Micallef v. Malta* [GC]³⁴, the direct victim had died during the examination of her constitutional complaint which had lasted over 10 years, and her brother, who was her legal heir, had intervened in the national proceedings and had paid the legal fees. The Grand Chamber held that the brother had status of a victim in the aspect of his complaints under Article 6, due to the material consequences from his participation in the proceedings. In the cases *Marie-Louise Loyen and Bruneel v. France* and *Ressegatti v. Switzerland*³⁵ the applications to the ECtHR were submitted by their legal heirs, who had not personally participated in the proceedings before the national courts, after the death of the direct victims. The ECtHR held that the applicants, as legal heirs, had status of victims, due to material interest in the outcome of the dispute.

It follows that in the case of complaints about the excessive length of the proceedings, "direct" victims are persons who have participated in the proceedings as the accused/defendant or as a party to a civil dispute. In spite of that, the legal heirs of such persons, under certain circumstances, could claim to be "indirect" victims of unreasonable length of the proceedings. Before the Court in Strasbourg, crime victims and their relatives can claim the status of victim under Article 6 only if they have been constituted as a party to a civil claim for damages.

(b) loss of victim status

The applicant loses the status of a victim when the national authorities implicitly or explicitly recognize the violation, and provide appropriate relief.

In considering this matter, the ECtHR takes into account both the amount of compensatory relief awarded by the national authorities, as well as the quality of the national procedure itself: in the event that the judgment is delivered quickly, is well-founded and immediately implemented, the ECtHR is inclined to accept that the applicant has lost his victim status, even if the authorities have awarded a smaller compensation than what the Court itself would have awarded for a similar infringement³⁶. Compensation should still conform to the legal tradition and the standard of living in the specific country and not be unreasonable. However, in some cases national authorities might provide a minimum compensation or none at all³⁷. In all cases, however, their judgment should be justified and well-founded.

³⁴ Cited above

³⁵ *Marie-Louise Loyen and Bruneel v. France*, no. [55929/00](#), 05.07.2005, §§ 21-31, и *Ressegatti v. Switzerland*, no. 17671/02, 13.07.2006, § 26

³⁶ *Scordino v. Italy* (No. 1), [GC], no. 36813/97, 29.03.2006, §§ 214-215; и *Dubjakova v. Slovakia* (dec.), no. [67299/01](#), 19.10.2004

³⁷ *Nardone v. Italy* (dec.), no. [34368/02](#), 25 November 2004; *Rutkowski and Others v. Poland*, no. 72287/10, 07.07.2015, § 182



The reduction of the sanction in criminal cases, by itself, is not sufficient to remedy the infringement of the requirement for reasonable length of the proceedings, but in cases where national authorities have acknowledged the said infringement and have reduced the sanction to compensate for the excessive length of the proceedings, the Court may accept that the applicant has lost his status as a victim³⁸.

2. THE MERITS OF THE COMPLAINT OF UNREASONABLE LENGTH OF THE PROCEEDINGS

Article 6, § 1 imposes on Member States the obligation to organize their judicial systems in order to allow the national courts to comply with the requirement for reasonable length of the proceedings³⁹.

2.1. Initial and final moment of the proceedings

The starting moment in "civil" cases is considered to be the referral to the respective court, unless the proceedings do not require a compulsory preliminary administrative procedure⁴⁰. The applicability of Article 6 to proceedings for interim measures will depend on the presence of the conditions laid down in the case *Micallef v. Malta* [GC]⁴¹.

The "criminal" proceedings start, when the person is charged with criminal offence. According to the ECtHR case-law, there is a criminal charge from the moment of "*formal notification of a person by a competent authority for allegations that said person has committed a criminal act.*"⁴² The lack of such formal notification, however, does not make Article 6 inapplicable because the charge "*may in some cases take the form of other measures containing statement to the same effect and also materially affect the suspect.*"⁴³ In other words, even when there is no formal charge, Article 6 is applicable from the moment in which the position of the suspect is substantially affected in one way or another. For example, in the case *Yankov and Others*⁴⁴, Article 6 begins to apply from the moment in which the applicant was questioned by the police in connection with stolen fruits, about 8 years before formal charges had been raised against him. Such actions might include serving an act of defalcation, arrest warrant, interrogation or

³⁸ *Morby v. Luxembourg*, no. 27156/02, 13.11.2003 г. Compare *Sheremetov v. Bulgaria*, no. [16880/02](#), § 33, 22.05.2008; *Mladenov v. Bulgaria*, no. [58775/00](#), § 31, 12.10.2006 and *Nachev v. Bulgaria*, no. [27402/05](#), § 30, 21.12.2010., in which the Court held that the national authorities have neither acknowledged the infringement, nor lessened the sanction as a manner of compensation for the excessive duration of the proceedings

³⁹ *Salesi v. Italy*, no. 13023/87, 26.02.1993, § 24

⁴⁰ *König v. Germany*, no. 6232/73, § 98, 28.06.1978, и *Kress v. France* [GC], no. 39594/98, § 90, 07.06.2001

⁴¹ Cited above, §§ 83-86

⁴² *Deweere v. Belgium*, no. 6903/75, 27.02.1980

⁴³ *Deweere v. Belgium*, cited above, § 46; *Neumeister v. Austria*, no. 1936/63, 27.06.1968, § 13; *Eckle v. Germany*, no. 8130/78, 15 July 1982, § 73; *McFarlane v. Ireland* [GC], no. 31333/06, 10.09.2010 г., § 143)

⁴⁴ *Yankov and Others v. Bulgaria*, no. 4570/05, 23.09.2010, §§ 20-23



searching the home or the office of the person against whom the criminal charge is being brought, etc.

The requirement for reasonable length of the proceedings applies to all stages of the proceedings, including appellate and cassation proceedings and enforcement proceedings.

When staying the main proceedings until the conclusion of preliminary proceedings, the relevance and validity of the suspension are assessed with regard to the affected interests of the applicant⁴⁵. In calculating the total length of the proceedings, the period in which it was suspended due to request for a preliminary ruling to the Court of Justice of the European Communities, is not taken into account⁴⁶.

In cases of intervention into the proceedings, the period that is to be taken into account, starts from the moment when the party is constituted, but if the applicant intervenes as legal heir or successor of the current party in the case, he is entitled to lodge a complaint about the entire length of the proceedings⁴⁷.

2.2. Criteria for assessing the length of the proceedings

The assessment, whether the length of the proceedings is reasonable, should be considered in light of all circumstances of the case and the criteria laid down in the case-law of the Court, and in particular the complexity of the case, the conduct of the applicant and the relevant authorities and the importance of the case for the applicant⁴⁸. Even if the different stages of proceedings have had reasonable length, the overall length of the proceedings may be in breach of the requirement for reasonable length⁴⁹. On the other hand, even if specific delays attributable to the authorities could have been avoided, the ECtHR is willing to accept that there is no violation of Article 6, if the total length of the proceedings was not excessive⁵⁰.

In discussing the **complexity of the case**, the ECtHR takes into account a number of factors such as the number of parties, the presence of an international element, complex legal issues and more. The fact that the case was very complicated does not mean that all delays will be considered reasonable⁵¹.

The ECtHR considers **whether the applicant had contributed to the delays**, but this cannot result in restriction of his procedural rights, nor does it mean that he is obliged to actively assist

⁴⁵ Broka v. Latvia, no. 70926/01, 28.06.2007, Tibbling v. Sweden, no. [59129/00](#), § 32, 11.10.2005, и Blaga v. Romania, no. 54443/10, 01.07.2014, § 99

⁴⁶ Pafitis and Others v. Greece, no. 20323/92, 26.02.1998, § 95

⁴⁷ Scordino v. Italy (No. 1), [GC], no. 36813/97, 29.03.2006, § 220

⁴⁸ Price and Lowe v. the United Kingdom, nos. [43185/98](#) and [43186/98](#), 29.07.2003, § 20

⁴⁹ Dobbertin v. France, 13089/87, 25.02.1993, § 44

⁵⁰ Pretto and Others v. Italy, 08.12.1983, no. 7984/77, § 37

⁵¹ Ferrantelli and Santangelo v. Italy, no. 19874/92, 07.08.1996, § 42



in expediting the proceedings⁵². The obligation of the applicant comes down to "demonstrating good faith in carrying out the procedural steps relating to him, and to refrain from using dilatory tactics and to take advantage of the opportunities available to expedite the proceedings."⁵³

In regard to the **conduct of the state authorities**, the ECtHR has held that the state is responsible for structural problems in the organization of the respective judicial systems and for the lack of response to the accumulation of numerous pending cases before the courts⁵⁴, as well as for the conduct of judicial and other authorities and for delays of experts in the course of their assigned duties⁵⁵. The total caseload of the courts cannot in itself be used as an excuse for excessive delays in the judicial proceedings. Lack of fault of a particular judge or of another official is not sufficient to assume that there has been no breach of the requirement for reasonable length. Inefficiencies in the judicial proceedings could lead to a violation of Article 6. For example, in *Petrova*⁵⁶, the ECtHR has noted that most of the delays in the case occurred because of the way in which the district court administered the case - many hearings, during which numerous belated evidentiary claims of the parties were allowed. The ECtHR has noted that most of the delays could have been avoided, if the court had tried to identify the issues and gathered evidence relating to them in a more effective manner from the very beginning. Illegal summoning of participants in the proceedings or the failure to appear of experts or witnesses or the defendant's lawyers, also engage the liability of the state⁵⁷.

Depending on the **importance of the case for the applicant**, some cases should be heard faster. These include cases about custody, labor disputes, matters of life threatening illness, work-related accidents, police violence, criminal proceedings in which the defendant is remanded in custody, etc⁵⁸.

Sometimes national courts need to make difficult decisions in order to **balance different aspects of the right to a fair trial** under Article 6, which are in conflict with one another - for example, the right to trial within a reasonable time and the obligation to provide sufficient time to prepare a defense or to ensure equality of arms⁵⁹. Therefore, the efforts of authorities to secure other key rights guaranteed by Article 6, are among the factors to be taken into account in assessing the merits of the complaint⁶⁰.

⁵² *Eckle v. Germany*, no. 8130/78, 15 July 1982, § 82.

⁵³ *Unión Alimentaria Sanders SA v. Spain*, no. 11681/85, 07.07.1989 r., § 35

⁵⁴ *Unión Alimentaria Sanders SA v. Spain*, no. 11681/85, 07.07.1989, §§ 40-42: temporary overload of courts does not make the state liable, if measures have been taken in time

⁵⁵ Cited, § 95.

⁵⁶ *Petrova v. Bulgaria*, no. 19532/05, 24.04.2012, § 24. See also *Finger v. Bulgaria*, no. 37346/05, 10.05.2011, § 102.

⁵⁷ *Karcheva and Shtarbova v. Bulgaria*, no. 60939/00, 28.09.2006 r., § 47; and *Mincheva v. Bulgaria*, no. 21558/03, 02.09.2010, § 68, where the ECtHR has noted that finding the defendant – who is a public servant, who had lawyer with power of attorney – should not pose difficulty. See also *Guincho v. Portugal*, no. 8990/80, 10.07.1984, § 34.

⁵⁸ *Rachevi v. Bulgaria*, no. 47877/99, 23.09.2004, § 70; *Dimitrovi v. Bulgaria*, no. 7443/06, 04.12.2012, § 22; and *Laino v. Italy [GC]*, no. 33158/96, 18.02.1999, §§ 18 и 22.

⁵⁹ *Piper v. The United Kingdom*, no. 44547/10, 21.04.2015

⁶⁰ See also *Beggs v. the United Kingdom*, no. [25133/06](#), 06.11.2012, § 240, as well as the conclusions of the attorney general on case C-58/12 *Groupe Gascogne SA* before the ECJ: „Making any compromise only for the purpose of faster hearing of cases would be incompatible with maintaining the fairness of the proceedings as a whole.”



2.3. Criteria for defining the amount of compensation, legal persons, multiple of applicants

When determining an infringement of the reasonable time requirement, the ECtHR awards compensation for both pecuniary and non-pecuniary damages directly caused by the breach. It holds that there is a strong but rebuttable presumption that the excessive length of the proceedings causes non-pecuniary damages⁶¹. In the event that some of the damages cannot be precisely calculated or if distinguishing between pecuniary and non-pecuniary damages is difficult, the ECtHR provides an overall assessment of the damages⁶².

In the case *Piper*⁶³, the ECtHR found that the applicant has used all possible means to prolong the case for confiscation of his property, and the judge, faced by multiple requests and objections of the defense, had tried to find a balance between the need to hear the case within reasonable time and the obligation to provide sufficient time for the defense to prepare. It stresses that these findings may not prevent a finding of violation of Article 6, insofar as there had been delays during the proceedings due to actions of the national authorities, which were not insignificant. However, noting that the applicant bears substantial responsibility for the total length of the proceedings, the Court considered that the finding of a violation, constitutes sufficient compensation for any "apprehension" that the applicant might have felt.

The ECtHR has also awarded compensation for non-pecuniary damages to legal persons. Factors, which it considers, should be taken into account, are the consequences for the reputation of the entity, the emergence of uncertainty in the decision-making process, difficulties and disruptions in its management and to a lesser extent - inconveniences and anxieties of the management. For example, in the case *Comingersoll SA v. Portugal*⁶⁴, the Court held that excessively lengthy proceedings have caused the applicant company and its managers and shareholders, considerable inconvenience and prolonged uncertainty, which justify the awarding of compensation.

The presence of multiple applicants could affect the size of the awarded compensation⁶⁵. If the applicants were members of the same household, the ECtHR may award joint compensation⁶⁶.

⁶¹ Scordino v. Italy (No. 1), [GC], no. 36813/97, 29.03.2006, § 204

⁶² B. v. the United Kingdom (Article 50), Series A no. 136-D, 09.06.1988, §§ 10-12; and *Dombo Beheer B.V. v. the Netherlands*, Series A no. 274, 27.10.1993, § 40

⁶³ *Piper*, cited above, §§ 68-74.

⁶⁴ *Comingersoll S.A. v. Portugal* [GC], no. [35382/97](#), 06.04.2000, §§ 35-36. Compare *Sovtransavto Holding v. Ukraine* (just satisfaction), no. [48553/99](#), 20.09.2011, §§ 78-82, and *Shesti Mai Engineering OOD and Others v. Bulgaria*, no. 17854/04, 20.09.2011, § 115.

⁶⁵ *Arvanitaki-Roboti and Others v. Greece*, no. 27278/03, 15.02.2008, § 29; and *Loveček and Others v. Slovakia*, no. 11301/03, 21.12.2010, § 68.

⁶⁶ *Ritter-Coulais v. Germany*, no. 32338/07, 30.03.2010, § 51; *Loveček and Others v. Slovakia*, no. 11301/03, 21.12.2010, § 68, in which the applicants were 33 persons, some of them spouses



The same applies to persons, intervening in proceedings before the Court, as legal heirs of a deceased applicant⁶⁷.

3. OBLIGATION OF THE BULGARIAN AUTHORITIES TO APPLY THE ECHR IN ACCORDANCE WITH THE CASE-LAW OF THE ECtHR

According to Article 1 of the ECHR, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms guaranteed by it. In *Scordino v. Italy* (no. 1) [GC]⁶⁸ the ECtHR notes that its task is to ensure that the way in which national law is interpreted and applied by the authorities, produces effects that are consistent with the principles of the ECHR, as they are interpreted in its case-law. It notes that its supervisory function is easier towards those states, which have effectively incorporated the Convention into their legal system and consider its provisions to be directly applicable, since the supreme courts in such states usually take the responsibility for the implementation of the principles in question.

According to Article 5, para. 4 of the Constitution, international treaties ratified by the constitutionally established procedure, promulgated and in force for the Republic of Bulgaria, are part of the domestic legislation. They take precedence over domestic legislation which contradicts them.

In a decision no. 29/1998 on constitutional case no. 28/1998, the Constitutional court (CC) noted that the ECHR was "part of domestic legislation of the state and the decisions of the European Court of Human Rights are binding to all authorities in the country, including its interpretation according Article 46 of the Convention."

In a decision no. 2/1998 on constitutional case 15/1997 the CC "recognizes, that the norms of the ECHR in the matter of human rights, have pan-european and universal meaning for the legal order of the Member States, that have ratified the ECHR, and are norms of the European public order. Therefore interpretation of the relevant provisions of the Constitution in regard to human rights, should be tailored to the greatest extent possible to the interpretation of the provisions of the ECHR. This principle of conformal interpretation is consistent with internationally recognized by Bulgaria compulsory jurisdiction of the European Court of Human Rights on the interpretation and application of the ECHR."⁶⁹

⁶⁷ *Serafin and Others v. Poland*, no. 36980/04, 21.04.2009, § 98

⁶⁸ *Scordino v. Italy* (No. 1) (GC), no. 36813/97.

⁶⁹ See also judgment no. 1/2012 on constitutional case 10/2011 r.



4. COMPARISON BETWEEN ARTICLE 6 ECHR AND ARTICLE 47 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. APPLICABILITY OF THE CHARTER.

As of 01.12.2009 the Charter of Fundamental Rights of the EU ('Charter')⁷⁰, proclaimed in Nice on 07.12.2000, has the same legal value as the Treaties. According to the established case law of the European Court of Justice ("ECJ")⁷¹, the Treaties and the law adopted by the Union on the basis of the Treaties, have primacy over the national law of the Member States. According to the ECJ, this principle is inherent to the specific nature of the European Community.

Article 47 of the Charter, called "*Right to an effective remedy and to a fair trial*" states:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented...”

According to the Explanations of the Charter⁷², "within the Union the right to judicial protection is not confined to disputes relating to civil rights and obligations [...]. However, with the exception of their scope, the safeguards provided by the ECHR apply in a similar way to the Union." Article 47 of the Charter does not require the case to refer to the "determination" of rights and obligations. That provision is applicable in many cases that fall outside the scope of Article 6 of the ECHR, such as "pure" administrative disputes in which the EU law is applicable, as well as tax and immigration matters, governed by the EU⁷³.

The Member States are obliged to comply with Article 47 of the Charter, when implementing Union law. Under the principle of loyal cooperation established in Article 4, para. 3, TEU, Member States shall take any general or specific measures required to ensure fulfillment of the obligations arising from the Treaties or from acts of the institutions of the Union.

⁷⁰ State paper, 2012/C 326/02.

⁷¹ Case 6/64, Costa v. ENEL [1964]

⁷² State Gazette, 2007/C 303/02

⁷³ In Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, § 56, The General Court held that it was not necessary to state whether Article 6 of the ECHR is applicable towards administrative proceedings, as the principle of a trial within reasonable time is a principle of the EU



In case of administrative or judicial proceedings continued beyond reasonable time before the institutions or the General Court⁷⁴, the concerned parties can claim compensation before the Court. In practice, in such cases, ECJ applies criteria for assessing the length of the proceedings, established in the case-law of the ECtHR⁷⁵.

It takes into account the case law of the ECtHR and Article 47, also regarding inquiries for preliminary rulings addressed to it. For example, in connection with the preliminary referral on national legislation, providing for automatic termination - under certain conditions - of excessively lengthy tax proceedings, provided that the tax authorities have been unsuccessful before the first two instances, the ECJ held that the obligation to ensure effective collection of funds within the Union (in this case VAT) cannot oppose the principle of a trial within reasonable time, which principle under Article 47, para. 2 of the Charter of Fundamental Rights of the European Union, the Member States are obliged to comply with, when implementing Union law, and the protection of which is imposed under Article 6, § 1 of the ECHR⁷⁶. It concluded that the legislation complies with EU law.

CONCLUSIONS

In the light of Article 47 of the Charter and the development of the legal systems of the Member States of the Council of Europe, towards ensuring effective access to a court in a number of public areas such as taxation, control of foreigners and elections, a number of authors expect the ECtHR to continue to expand the scope of Article 6 of the Convention, applying the principle of dynamic interpretation of its provisions⁷⁷. Therefore, when applying domestic law in relation to the length of proceedings, Bulgarian courts should, under the principle of consistent interpretation, consider national law as a whole and interpret it as far as possible, in light of both Article 6 of the ECHR and the case law of the ECtHR and Article 47 of the Charter and the case law of the ECJ. The ECHR as well as the Charter guarantee a minimum level of protection of human rights and are not a hindrance to the Member States to provide greater protection of certain rights and freedoms.

⁷⁴ C-58/12 *Groupe Gascogne v. Commission*, § 78; C-238/12 *FLSmith & Co. A/S v. Commission* [2014].

⁷⁵ Case C-185/95 P *Baustahlgewebe v Commission* [1998] I-8417, § 29; и Joined Cases F-124/05 and F-96/06 A. and G. v. Commission [2010] "The reasonableness of the length of proceedings must be assessed in the light of the circumstances of each case, and in particular the stake of the dispute to the person concerned, the complexity of the case and the conduct of the applicant and the competent authorities"

⁷⁶ ECJ preliminary ruling on case C-500/10 *Ufficio IVA di Piacenza* [2012]

⁷⁷ For example, Harris, O'Boyle and Warbrick consider appropriate that the term "civil rights and obligations" should be interpreted as all rights and obligations, that do not criminal law nature (Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, third edition, Oxford University Press 2014 г., p. 388).



III. THE ADMINISTRATIVE MECHANISM UNDER CHAPTER THREE “A” OF THE JUDICIAL SYSTEM ACT

The legal framework of the administrative mechanism for providing compensation is covered in chapter Three "a", from Article 60 "a" to Article 60 "m" JSA, in force from 01.10.2012. The Chapter stipulates that private and legal persons may submit petitions against acts or omissions of **the judicial authorities**, which infringe their right to a hearing within reasonable time⁷⁸. Petitions may be submitted by **parties in concluded civil, administrative and criminal cases**, as well as **by persons who are charged or are victims or injured legal persons in terminated pre-trial proceedings**. The amount of the compensation is to conform to the ECtHR case law and may not exceed 10 000 lv. The deadline for submitting a petition is 6 months from the moment of conclusion of the proceedings and it is submitted through the Inspectorate to the Minister of Justice⁷⁹. Pursuant to § 34 of the JSA, in 6 months from the entry into force of chapter Three "a" or from a notification by the Registry of the ECtHR, persons who have submitted applications to the ECtHR against violations of their right to a fair trial within a reasonable time, may submit a petition, except in cases, when the ECtHR has already issued a judgment on the merits of the application or has rejected it as inadmissible. This provision is further substantiated with subsequent amendments adopted in § 8, para. 2, SMLDA, by providing that in six months from the entry into force of this law or from a notification by the Registry of the ECtHR, persons whose applications before the Court were dismissed for **failure to exhaust newly created domestic remedies** and the proceedings regarding them have been concluded before the national courts, may submit a petition for compensation under chapter Three "a", JSA.

According to Ministry, since the entry in to force of the administrative mechanism, up until July 17, 2015, the Inspectorate has sent a total of **1561 petitions** under chapter Three "a" JSA. According to the established practice of the MoJ, the petitions for compensation are grouped into three categories:

- **inadmissible** - petitions which do not meet the legally regulated conditions for applying for compensation under chapter Three "a", JSA. **Such petitions shall not be considered on the merits**. Until July 17, 2015, their number was **676**;

- **unfounded** - petitions considered on the merits, in which no violation of the petitioner's right to a trial within a reasonable time has been found. Until July 17, 2015, their number was **276**;

⁷⁸ Article 60a, para. 1, JSA

⁷⁹ Article 60a, para. 4, JSA



- **founded** - petitions considered on the merits, in which violations of the applicant's right to a trial within a reasonable time have been found. Until July 17, 2015, their number was **570**.

1. ADMISSIBILITY OF THE PETITION

The *ratione materiae* and *ratione personae* of the administrative remedy will be considered in this part as well as the manner in which they are interpreted and applied by the Inspectorate and the Ministry of Justice in determining the admissibility of the petitions. The grounds for inadmissibility, on which government agents determine petitions for compensation as inadmissible, are the following:

- the petitioner has not complied with the term under Article 60a, para. 4, JSA, stating that the submission of the petition is to be made within 6 months from the conclusion of the proceedings or the period under § 8, para. 2 of transitional norms of the SMLDA and § 34 of transitional norms of the JSA;
- the proceedings which length is estimated, are not concluded with a final judicial act in accordance with Article 60a para. 4, JSA;
- the petition in question does not concern pre-trial proceedings or court proceedings or does not meet the requirements of Article 60a, para. 1 of the JSA;
- an application is submitted before the ECtHR by the party in the court- or pre-trial proceedings, which has been declared inadmissible;
- the petitioner has not removed irregularities found in the petition by the Inspectorate within the 7 day period, as required by Article 60c, para. 4, JSA;
- the petitioner is not a party to the court- or pre-trial proceedings, pursuant to Article 60a, para. 2, JSA;
- the prerequisites for the examination of the petition under § 8 of transitional norms of SMLDA are not met;
- the petitioner has received compensation for the same violation through another manner;
- the proceedings in question are outside the scope of chapter Three "a", JSA;
- the procedure under chapter Three "A", JSA, is already exhausted⁸⁰.

⁸⁰ See Audit report, "Internal audit" Directory, MoJ, march 2015, p. 24-25



1.1. *Ratione materiae*. Types of proceedings for the length of which, just compensation could be sought under the JSA

The JSA determines the subject-matter jurisdiction (*ratione materiae*) of the administrative mechanism, on one hand, by providing that petitions for just compensation are submitted against acts or omissions of the **judicial authorities**, and the other – by providing that the petitions for excessive length of the proceedings should concern civil, administrative and criminal proceedings (Article 60a, para. 1 and 2).

As already specified (see "Ratione materiae of Article 6" para. II.1.1), Article 6 of the Convention applies to all proceedings when there is a "dispute" to determine "civil rights and obligations" or examination of "criminal charge"⁸¹, under the autonomous understanding of their meaning, as determined by the ECtHR case law. The provisions of the JSA do not make such a distinction, but as is evident from the case law of the Ministry of Justice and the Inspectorate, they cover different types of civil, criminal, administrative and administrative penal proceedings⁸². For example, subject-matter jurisdiction of the law, includes **civil proceedings** on disputes relating to property rights under the Ownership Act (PC-13-633, PC-13-610, PC-13-644), labor proceedings (PC-13-171, PC-13-170, PC-13-709, PC-13-760), proceedings on claims for partition (PC-13-112, PC-13-139, PC-13-397), proceedings under Article 45 Obligations and Contracts Act (PC-13-628, PC-13-639), proceedings regarding signing of a final contract under Article 19, para. 3 Obligations and Contracts Act (PC-13-727), proceedings under the Protection against Discrimination Act (PC-13-654) and proceedings under the SMLDA (PC-14-30, PC-14-395), disputes under the Family Code (PC-14-155, PC-14-411); **administrative proceedings** - related to the appeal of administrative acts (PC-13-500), appeal against injunction on leaving the country under the Law on Bulgarian identity documents (PC-14-521, PC-14-579), appeals under the Civil Servants Act (PC-13-709); **criminal proceedings** prosecuted by the state (PC-14-404, PC-14-446) or by complaint of the victim (PC-14-302, PC-14-432).

1.1.1. Civil aspect

In regard to the subject-matter jurisdiction of the law, in their case law, the Inspectorate and the Ministry of Justice had to decide several important issues. The first - whether non-contentious proceedings fall *ratione materiae* in the JSA. The second - whether the procedure for just compensation for the violation of the right to a fair trial within a reasonable time, should be

⁸¹ See Compensation for unreasonable duration of proceedings, February 2013, § 10.

⁸² See Compensation for unreasonable duration of proceedings, February 2013, § 11



applied to concluded enforcement proceedings. The third - whether the administrative mechanism applies to order for payment proceedings.

(a) Non-Contentious proceedings

Petition PC-14-411, submitted by the mother of a minor child, regarded complaint of duration of non-contentious proceedings, initiated by a request for approval of a withdraw from a bank deposit, in order school fees for the child to be paid (Article 530, CPC /Civil Procedure Code/ in conjunction with Article 130, para. 3, FC /Family Code/). The proceedings lasted 4 months and 16 days, with the petitioner filing a complaint for the delay with the court. The Ministry admitted that the interest in the specific proceedings was substantial for the petitioner, but held that, in principle, non-contentious proceedings fall outside the scope of the law due to a lack of "dispute" within the meaning of the Convention. There are no data that the denial was appealed, which did not allow for the interpretation of the provision by civil courts. It should be noted, that this approach is consistent with the standards set by the ECtHR, which state that Article 6 of the Convention does not apply to uncontested and unilateral proceedings in which there is no other party⁸³. In Bulgarian law, however there is no requirement for the existence of a "dispute". Non-contentious proceedings are in conjunction with the exercise of civil rights, and such proceedings fall under the JSA, which expressly provides that petitions are to be submitted by parties to concluded civil proceedings. It is true that the case law of the MoJ corresponds to the ECtHR case law in this regard, but the attempt to limit the JSA *ratione materiae* by way of interpretation in order to not exceed the minimum standards set out in the ECHR, does not appear to be justified in this case. Excluding these proceedings from subject-matter jurisdiction of the law, can be disincentive to judges, hearing similar cases which often concern important interests for the plaintiff.

Recommendation: *As far as no case law exists and the courts have not given their interpretation on the scope of the provision, it is appropriate the matter, whether petitions about the length of non-contentious proceedings are included in JSA *ratione materiae* to be settled by the legislator, taking into account, on the one hand, the minimum standards set in the case law of the ECtHR, and on the other hand, the Bulgarian context and the nature of the non-contentious proceedings as proceedings for assistance in exercising civil rights⁸⁴.*

(b) Enforcement proceedings

There is no dispute that Article 6 of the ECHR applies to complaints about excessive length of enforcement proceedings⁸⁵. According to the prevailing case law of the Inspectorate and the

⁸³ Alaverdyan v. Armenia, (dec.), no. 4523/04, 24.08.2010, § 35

⁸⁴ See Bulgarian civil procedure Code, 9th edition, p. 58

⁸⁵ See above: II.1.1.1



Ministry of Justice, however, these proceedings remain outside the subject-matter jurisdiction of the JSA. In petitions, submitted in regard to complaints of excessive delay, caused by the actions of both public executory officer (PC-13-705, PC-14-050, PC-13-599) and the actions of private executory officer (PC -13-111), the Inspectorate and the Ministry of Justice found the petitions inadmissible and not subject to examination on their merits, since public and private executory officers **are not judicial authorities**⁸⁶.

In addition, the liability of the executory officers cannot be engaged through the simplified procedure of the SMLDA but only through general claim procedure under the Contracts and Obligations Act. Interpretative decree of 05.19.2015, on the interpretative decision no. 2/2014 the SCC and the SAC hold that executory officers are authorities within the enforcement proceedings, who, by utilizing state coercion power, carry out specific procedural activities that are neither judicial nor administrative, nor are they themselves administrative authorities within the meaning of Article 1, SMLDA.

Thus, complaints about unreasonable length of enforcement proceedings fall outside the scope of the new remedies in the JSA and the SMLDA, which questions their effectiveness in light of the requirements of Article 13 of the Convention and the pilot judgments of the ECtHR. Uncertainty about the effectiveness of the tort claim under the COA, also confirms this conclusion.

Recommendation: The opinion of the Supreme Court judges reflected in the interpretative decree no. 2/2014, requires the adoption of legislative amendments, which provide a mechanism for protection against unreasonable length of enforcement proceedings, corresponding to the consistent case law of the ECtHR.

(c) Order for payment proceedings

In petitions PC-14-435⁸⁷ and PC-14-536 the Inspectorate and the Ministry of Justice examined complaints of excessive length of proceedings for issuing orders for payment under Article 410 CPC. In both cases, the proceedings lasted more than one year, which far exceed the three-day period provided for in the CPC. Both petitions were rejected as inadmissible on the grounds that the orders for payment do not fall within the scope of the JSA. In the course of a discussion among the agents of the Ministry of Justice, there had been different opinions on the admissibility of the petitions, regarding this set of proceedings. In the opinion of some, such proceedings would be inadmissible under Article 6 of the Convention (apparently referring to

⁸⁶ Judicial proceedings relating to appeals of actions of enforcement officers, fall within the scope of the JSA. In the case R-14-305 the MoJ found unfounded a petition for compensation for a proceedings initiated by appeal against an order of an enforcement officer, with which it returns an objection lodged by the debtor, which lasted two instances for a total of 9 months and 10 days.

⁸⁷ The petitioner complains of the length of enforcement order proceedings under Article 410, CPC. She has been a guarantee on a credit contract, which she paid. The proceedings lasted 1 year, 1 month and 11 days



the ECtHR case law that Article 6 shall not apply to uncontested proceedings). As chapter Three "a", JSA should be interpreted in accordance with the ECtHR case law⁸⁸, petitions regarding the length of the order for payment proceedings did not fall within the scope of chapter Three "a", JSA. According to a smaller part of the agents, such petitions should be considered on their merits according to the provisions of Article 60a, para. 1 of the JSA, which provides for consideration under chapter Three "a", JSA of "[...] petitions of private and legal persons against acts or omissions of the judicial authorities." The law makes no distinction between contentious and non-contentious civil proceedings. Order for payment proceedings are typical judicial proceeding; the same being regulated as strictly formal proceedings, aimed at rapid judicial protection, in view of which short deadlines for the court are set. Given the length of the specific procedures and the stakes for the petitioner, such petitions should be considered as admissible. Whether order for payment proceedings should fall under the guarantees of Article 6, and in particular the consideration of the trial within a reasonable time, depends on how one views the issue. On the one hand, order for payment proceedings aim at creating execution grounds - such is the order for payment. On that basis, a writ is issued, which is an absolute prerequisite for the admissibility and the initiation of the execution proceedings (argument in Article 426, para. 1 of the CPC). In the case of Article 410 of the CPC, writ of execution is issued after the order for payment enters into force and in the case of Article 418 in relation to Article 417 of the CPC - simultaneously with the issuance of the order for payment itself. Given that these proceedings actually replace those that existed under the repealed CPC system of extrajudicial execution grounds, then they could be characterized as a preliminary stage of the enforcement proceedings. This conclusion can be made by the systematic place of the order for payment proceedings in the part "Enforcement Proceedings" of the CPC. Moreover, in the case of an issued order for payment, an enforcement proceedings have already started (argument from Article 420, para 1, CPC).

In its case law, the ECtHR applies Article 6 for enforcement proceedings, which do not follow after regular claim proceedings but are started on the basis of the extrajudicial execution grounds⁸⁹ to which order for payment proceedings could be considered a part of. In such cases, the Court considers for the starting date of the proceedings, the moment when a request for issuing a writ of execution is filed⁹⁰, and as the end - receiving of the specified payment. Furthermore, the Court rejects the government's arguments that the enforcement proceedings are not disputed⁹¹. According to the ECtHR, under the Convention the term "dispute" should not be interpreted too technically and formally, but rather its content matter should be sought. Also, "the determination of civil rights and obligations" continues as long as the specific right

⁸⁸ See the grounds for accepting the Law for amending and supplementing of SMLDA

⁸⁹ See Estima Jorge v. Portugal, no. 24550/94, 21.04.1998, Comingersoll S.A. v. Portugal, no. [35382/97](#), 6.04.2000.

⁹⁰ Comingersoll S.A. v. Portugal, no. 35382/97

⁹¹ See Estima Jorge v. Portugal, no. 24550/94, 21.04.1998, § 33.



becomes effective⁹², regardless of the enforcement ground⁹³. From this perspective, considering order for payment proceedings as possible means to obtain a writ of execution on the basis of which the "real" enforcement proceedings may be initiated, the guarantees of Article 6 should be applied to them and in particular the requirement for reasonable time.

Another view at the order for payment proceedings is possible - namely as a preliminary phase of the regular claim proceedings in cases where there is a contestation by the debtor. In cases where the claimant files positive declaratory claim for facts under Article 422 of the CPC, the order for payment proceedings are transformed into a general claim proceedings. The MoJ considered as admissible petitions with complaints for an unreasonable length of such order for payment proceedings, but there is an issue when establishing the starting point of these proceedings. This issue will be analyzed in a systematic manner below. (see III.2.2.1 - the starting point of proceedings).

A third option would be to consider order for payment proceedings separately, as the MoJ has done, but given its functional relation with and the possibility to transform into general claim proceedings or into enforcement proceedings, it should be considered, whether Article 6 would be applicable in accordance with the criteria established in *Micallef v. Malta*. In this case, the claim proceedings or the enforcement proceedings⁹⁴ could be considered as main proceedings, while the order for payment proceedings - as provisional. Subject to both proceedings are, unquestionably, civil rights under the Convention, given the fact that the order for payment proceedings apply to monetary obligations and obligations to deliver movable property, while in the main general claim proceedings the object is to establish the existence of the claim itself (right), and in the enforcement proceedings - ensuring its enforcement. Secondly, it is important for the application of Article 6, whether the provisional proceedings "define" the said civil right. The purpose of the order for payment proceedings is to avoid the claim proceedings, in cases where the claim is not contested, and therefore to create an enforceable ground for the quick and easy collection of the claim. If the debtor does not file an objection, the order shall enter into force by acquiring full stability that mimics the stability of a final judgment⁹⁵ and from this perspective it can be assumed that the order for payment proceedings, in essence, determines the claim (civil right). Given this, it could be concluded that in this case, the order for payment proceedings fall within the scope of Article 6.

Of course, the lack of explicit case law of the ECtHR on a Bulgarian case, which considers a complaint about length of order for payment proceedings, makes the above reasoning conditional, though it largely supports the conclusion that the order for payment proceedings should fall within the scope of Article 6, and respectively - the JSA. Moreover, order for

⁹² Di Pede v. Italy, 26.09.1996, Reports 1996-IV, §§ 22–24, and Zappia v. Italy, 26.09.1996, §§ 18–20

⁹³ Ramadhi and others v. Albania, no. 38222/02, § 46

⁹⁴ Imobilije Marketing D.O.O. and Ivan Debelić v. Croatia (dec.), no. 23060/07, 3.05.2011

⁹⁵ Kiurkchiev, Stephan, Order for payment proceedings, European order for payment Siela, 2009, p. 90



payment proceedings are carried out before a court, as opposed to actual enforcement proceedings in which complaints about unreasonable length are not for acts or omissions of judicial authorities. Therefore, the approach adopted by the Ministry to exclude from the scope of the JSA order for payment proceedings, because of the perception that this type of proceedings are unilateral and non-contentious (which to a large extent they are), could not be criticized, although it cannot be shared either. Therefore, it would be better that the approach of the Ministry of Justice be submitted to a more detailed and thorough analysis, taking into account the other possible ways of reasoning, mentioned in the report. In our opinion, the most suitable, would be the first option in which order for payment proceedings are considered as part of the enforcement proceedings. We believe that this is consistent with the ECtHR case law on enforcement proceedings, initiated on the basis of the extrajudicial execution grounds.

Recommendation: *The best would be that the issue, whether order for payment proceedings fall ratione materiae of the JSA, be settled by legislative means. Possibly through an interpretative decision under Article 124 in relation to Article 125 JSA, as well.*

(d) The application of Article 6 in its civil aspect to different proceedings` stages

According to the ECtHR case law Article 6 is applicable to interim measures. Of the petitions reviewed, no case of a petition against the length of such proceedings has been identified.

1.1.2. Criminal aspect

In their case law under chapter Three "a", JSA, the Inspectorate and the Ministry have examined complaints of excessive length of criminal proceedings. Among the petitions in question, none on administrative penal proceedings have been identified. The complaints were both in relation to the length of the pre-trial and trial phases of the criminal proceedings. Of interest are petitions submitted against prosecution files ending with **a refusal to initiate pre-trial proceedings** (PC-14-303, PC-14-442). The Inspectorate and the Ministry of Justice find that such claims are inadmissible because the JSA applies to "terminated pre-trial proceedings." In this case, according to the Ministry of Justice and the Inspectorate, proceedings have never been initiated in order for them to be terminated. This practice poses no issues, as Article 6 of the Convention does not guarantee the right of prosecution of other persons.

Another issue is the case when the MoJ declares as inadmissible petitions from victims or injured parties (incl. legal persons) in **terminated pre-trial proceedings**. This practice poses no problems under the Convention, but is not consistent with the provisions of the JSA (Article 60a para 2, item 2).



1.1.3. Proceedings outside the scope of Article 6

Article 6 of the Convention does not apply to proceedings relating to the exercise of public functions of the state, such as tax proceedings, disputes related to the expulsion or deportation of aliens to the border. Unlike Article 6, the JSA does not place such a restriction, although Article 60a, para. 3, indicates that under this Chapter, compensation is determined and paid in accordance with the European Court of Human Rights' case law.

The Ministry considers as admissible, but unfounded, a petition about the length of proceedings on an appeal against detention order for temporary accommodation of foreigners in a specialized institution (petition PC-14-488 MoJ).

It follows from this case law that proceedings, relating to the appeal of tax audit acts, would also fall within the scope of the law. Such a practice is consistent with the subject-matter jurisdiction of the JSA and should be congratulated as it provides a more comprehensive protection of citizens and legal persons affected by slow administration of justice.

1. 2. *Ratione personae*

According to Article 60a para. 2, JSA, petitions with complaints about excessive length of proceedings may be filed by private and legal persons. These persons are to be **parties** to concluded civil, administrative and criminal proceedings, and defendants, victims or injured parties - in terminated pre-trial proceedings. The *ratione personae* of the administrative mechanism has been extended in comparison with Article 6, which, as stated above, applies to injured legal persons, only in cases with civil claim, that is submitted and is admissible.

Persons from whom an object has been seized as physical evidence during criminal proceedings do not fall *ratione personae* with JSA. According to Judgment no. 210 of 06.15.2015, the Supreme Court of Cassation on case 3053/2014, these persons, however, are proper claimants under Article 2b of SMLDA. From the perspective of the Convention and the ECtHR case law, the right of persons from whom an object has been seized as evidence, is guaranteed by Article 1 of Protocol No. 1 (protection of property rights), rather than Article 6 of the Convention. However, that judgment was delivered under Article 290 CPC and is compulsory for all courts until an interpretation ruling⁹⁶ or a refinement of the legislation are present.

Given this, it should be decided, whether the mandatory requirement for the administrative procedure under the JSA to be exhausted, before a claim under Article 2b SMLDA is submitted, should be abolished for these petitioners.

⁹⁶ See Article 280, para. 1, item 1 CPC and interpretation judgment no. 1/2009 from 19.02.2010 of CC



While analyzing the case law of the Inspectorate and the Ministry of Justice, we discovered an interesting approach to docket cases, brought by a signal or a complaint by the **victim** against an **unknown perpetrator** and terminated due to expiration of the absolute prescription period without discovery of the perpetrator. These petitions are declared inadmissible and are not considered on their merits (PC-14-428 and PC-14-236). The reasoning of the administrative authority is that the petition relates to pre-trial proceedings, which were terminated without charges being filed during the investigation. Therefore, the petition is not against the unreasonable length of the proceedings as a period of time, but against inaction by the state authorities, for which the Minister of Justice has no material competence. As far as the case law of the ECtHR is concerned, crime victims cannot claim to be a victim under Article 6 of the Convention, unless they have been constituted as a party to a civil action for damages in the trial phase, therefore this practice raises no issues under the Convention. However, whether such an interpretation and reformulation of the request of the petitioner, complies with the letter of the law, which guarantees the right of "injured or harmed legal persons in terminated pre-trial proceedings" (Article 60a para. 2, item 2 of the JSA) to submit petitions, that are to be examined on the merits, is debatable. At present, the courts have not ruled on a similar case. We are more inclined to accept the thesis that the petitions by the victims should be considered on their merits; in cases where it appears, that despite the efforts of the pre-trial investigative authorities, the offender is not identified, then the petition should be considered unfounded because the state is not liable for the actions of private persons. Important in assessing, whether such proceedings are reasonable, would be not only the behavior of the pre-trial authorities, but also the behavior of the victim - whether it appealed against termination order and whether the person has shown interest in the way in which the investigation has been led. Such an interpretation, in our view, is to a large extent compatible with the provisions and purpose of the JSA and creates a motivating effect on the pre-trial authorities.

Recommendation: *In view of the express provisions of the JSA, it is prudent to rethink the practice of the Inspectorate and the Ministry of Justice on petitions, filed by injured entities or victims in discontinued pre-trial proceedings against unknown perpetrators, in order to examine these claims on the merits.*

In connection with the injured parties, as subjects of the right to submit an application under the JSA, the following problem was observed: petition PC-14-186 concerns a petition by a victim. The person has been constituted as a victim in the pre-trial phase, but during the trial, his civil claim for damages was not admitted for consideration by the court. When submitting his petition, the victim complains of the entire length of the criminal proceedings. The MoJ leaves the petition without consideration, accepting that 1) the trial - the person was not constituted as a party, thus he was not legitimized within the meaning of Article 60, para. 2, item 1 of the JSA; 2) the pre-trial phase - the person is a victim within the meaning of Article 74, para. 1 of the Criminal Procedure Code, but the petition was filed outside the time limit



under Article 60a, para. 4 of the JSA, because the last decree for the partial termination and staying of the proceedings was from 23.09.2010. The petitioner appealed against the refusal to examine the petition before the Administrative Court - Sofia⁹⁷, which remitted the case to the Ministry of Justice for a ruling on the merits. The Court held that since criminal proceedings include both pre-trial and trial phase, it was sufficient that the petitioner had been involved in one of these phases - in the case, as a victim in the pre-trial phase - to have the quality as a party in the criminal proceedings. Therefore, the six-month period should be calculated from the completion of the criminal proceedings, not the pre-trial phase alone. After remitting, the application was examined on its merits, but was rejected as unfounded.

The approach of the administrative court corresponds to the ECtHR case law, under which complaints about the length of concluded proceedings should cover the total length of the proceedings. For assessing whether the length of the proceedings was excessive, the entire period is important. The approach of the Ministry of Justice not only does not comply with the case law of the ECtHR, but also leads to an artificial separation of the two phases of the criminal proceedings and *de facto* bars the defense of the petitioners, as far as the exhaustion of administrative procedure is essential for filing claims under Article 2b of the SMLDA⁹⁸.

Direct victims

At the time of writing this report, most petitions for excessive length have been submitted by natural persons, including sole traders, but there are some submitted by legal persons - companies, cooperatives and NGOs. In this aspect, no problematic issues have been found.

Indirect victims

There are petitions, regarding complaints about excessive length of proceedings by legal heirs of deceased persons. The following hypotheses should be distinguished: 1) petitions from the heirs (successors) where the direct victim has died after completion of the proceedings, but before submitting the petition under chapter Three "a", JSA; 2) petitions filed by heirs (successors) where the direct victim has died after filing the petition under chapter Three "a", JSA; 3) petitions, where the direct victim has died during the proceedings and its heir (successor) has intervened in the pending proceedings; 4) petitions submitted under § 8, para. 2, SMLDA by heirs who have intervened in the proceedings before the ECtHR; 5) petitions under § 8, para. 2, SMLDA submitted by heirs who did not intervene in the proceedings before the ECtHR.

⁹⁷ Ruling no.5311 of Administrative court – Sofia on civil case no. 9694/2014

⁹⁸ See more in the cited case law regarding the application of Article 2b, SMLDA



1) petitions, filed by heirs (successors) where the direct victim has died after completion of the proceedings, but before submitting the petition under chapter Three "a", JSA

Petition PC-13-762 filed by the heir of victim of the delayed proceedings, was declared inadmissible on the grounds that it was filed by a person who had no standing to claim compensation for breach of the right to a trial within a reasonable time. According to the Inspectorate and the Ministry of Justice, filing a petition by an heir under chapter Three "a", JSA requires his constitution as a party to the proceedings before the conclusion of the same with the final act. In this case the deceased died after the end of court proceedings and before submitting the petition to the Inspectorate. Therefore, the petitioner is not a party to the concluded civil proceedings and is has no standing to seek compensation under chapter Three "a", JSA.

The practice of the Inspectorate and the Ministry of Justice, largely follow the case law of the ECtHR, according to which, as a general rule, direct victims are those who may seek compensation for the violation of the right to a trial within a reasonable time. However, from the reviewed cases, it is not clear whether under such a hypothesis, the Inspectorate and the Ministry of Justice would review a petition submitted by indirect victims who, according to the ECtHR case law, in some cases have the right to seek compensation for slow administration of justice, if they can demonstrate a personal stake in the case (for example, material interest, protection of private or family reputation).

Recommendation: *The possibility that in special cases, the Heirs of the parties in concluded civil, administrative and criminal proceedings, which have not participated in the proceedings, may be able to submit a petition under Chapter three "a", JSA, should be regulated in the Internal rules of the Ministry of Justice. In these cases, petitioners should specify and justify personal stake in the proceedings and how they have affected their rights, and to provide evidence to support their allegations.*

2) petitions submitted by heirs (successors) where the direct victim has died after filing the petition under Chapter three "a", JSA

PC-13-775 (civil case) and PC-13-246 (criminal case) are submitted by petitioners who, after filing the petition, have died. In these cases, the Ministry of Justice acknowledges the wish of their heirs to continue the proceedings and accordingly accepts them for standing under the JSA. This practice is fully consistent with the case law of the ECtHR - heirs of deceased applicants have the right to intervene in the proceedings before the Court and to continue the proceedings on their behalf.



Recommendation: *For more clarity it would be better in the Internal Rules of the Ministry of Justice to be added that the heirs and successors have the universal right to continue proceedings under Chapter Three "A" JSA.*

3) petitions, where the direct victim has died during the main proceedings and its heir (successor) has intervened in the pending proceedings

In such a case the Inspectorate and the Ministry of Justice⁹⁹ accept the heirs (successors) as parties within the meaning of Article 60a, paragraph 2 of the JSA and they have standing to submit petitions under Chapter three "a", JSA. In accordance with the ECtHR case law, in determining the amount of compensation, the MoJ considers the entire length of the proceedings.

4) petitions submitted under § 8, para. 2, SMLDA by heirs who have intervened in the proceedings before the ECtHR

In the decision on admissibility of 05.27.2014, of the ECtHR on application no. 30474/05 - *Tashev v. Bulgaria*, the Court has held that the application under Article 6 § 1 of the Convention for the alleged excessive length of civil proceedings in which the initial applicant was a party, should be dismissed for failure to exhaust newly created domestic remedies. In the absence of administrative and judicial case law, restricting the access to the new remedies of heirs or successors of the original parties to the proceedings, they should try to take advantage of these.

Considering the ECtHR case law in which in case of death of the original applicant, his/her heirs have the right to intervene in the proceedings under the Convention, the Inspectorate and the Ministry of Justice, despite the absence of an express statutory provision in this regard, consider on their merits petitions from the heirs who have expressed their willingness to continue the proceedings before Strasbourg and whose applications were declared inadmissible on the basis of the new remedies that have not been exhausted¹⁰⁰.

Taking into account the limited possibility that in the future would emerge petitions in which legal heirs of the original parties, who have expressed their willingness to intervene in the application of their legator and which was subsequently dismissed by the ECtHR as inadmissible for failure to exhaust the new remedies, concerning excessive length of judicial proceedings, it is advisable to provide for a legislative amendment to § 8 (2) of the SMLDA.

Recommendation: *The Internal rules of the Ministry of Justice (or § 8 (2) of the SMLDA) should be supplemented in the sense that in proceedings before the ECtHR, heirs whose*

⁹⁹ See petition PC-13-139

¹⁰⁰ See petitions PC-13-309 and PC-13-450



claims have been rejected for failure to exhaust the new remedies, have the right to submit a petition under Chapter three "a", JSA within six months of the receipt from the Registry of the Court.

4) petitions under § 8, para. 2, SMLDA submitted by heirs who did not intervene in the proceedings before the ECtHR

Petition PC-13-716 was lodged by the wife of an applicant, who died during the proceedings before the ECtHR. In the case, his wife asked to continue the proceedings, the Court has considered the application in the part, concerning the length of the proceedings, and it rejected it as inadmissible for failure to exhaust the new remedies. While the proceedings have lasted more than 13 years for three instances, the Ministry has dismissed the petition as inadmissible on the grounds that the wife was not involved as a party in the proceedings before the ECtHR.

This practice corresponds to the ECtHR case law and raises no problems as far as it is the obligation of the applicants (applicants) to notify the Court of any relevant changes to the proceedings.

Loss of victim status

According to the established case law of the ECtHR, reduction of punishment in criminal cases as compensation for the excessive length of the proceedings in an explicit and measurable manner, accompanied by an explicit recognition of the violation to resolve the case within a reasonable time by national authorities, results in loss of the status as a victim. This case law is applied by the Inspectorate and the Ministry of Justice in a number of cases (PC- 13-203, PC-13-123, 13-272, PC- 14-98, PC-14-117, PC-14-177, PC-14-381). It is noteworthy that it is not always clear, whether those petitions are considered inadmissible or unfounded. Some notification letters (PC- 13-203, PC- 14-98, PC- 381-14) explicitly state that the person has been granted a non-monetary compensation and therefore there is no basis for claiming pecuniary damages under the JSA. In others (PC-14-117, PC-14-177), after the person was compensated by the court for a violation of the right to a trial within a reasonable time, it is noted that the petition should be rejected as unfounded, pursuant to Article 60e, para. 1 item 1 of the JSA, as the length of proceedings does not exceed the reasonable time. In view of the exhaustion of the administrative procedure, the opportunity to submit a claim under the SMLDA, is created for the person.

That heterogeneous case law should be harmonized, given the different implications of holding a petition as inadmissible or as unfounded, and the different procedures for seeking redress for the petitioners - in the first case through an administrative mechanism, and the second - through the SMLDA.



We consider that the specificity of criteria for inadmissibility - loss of victim status used by the ECtHR, requires the examination of such petitions on their merits. The Ministry should consider whether the judgment contains the acknowledgment of the violation of the right of the accused to a trial within a reasonable time and explicit and measurable reduction of the penalty. In the absence of such non-pecuniary compensation, the petitioner should be offered compensation.

Recommendation: *It is necessary to provide in the Internal Rules of the Ministry of Justice that when the judgment contains no acknowledgment of the violation of the right of the accused to a trial within a reasonable time and there is no explicit and measurable reduction of the penalty, the accused is entitled to a monetary compensation.*

Other criteria for admissibility

Petition no. PC-14-186, discussed above, is interesting in another aspect. It concerned a stolen tape recorder and two remote controls. In the course of an appeal before the administrative court, in its opinion the MoJ has introduced an additional argument, namely that the petition is inadmissible given the insignificance of material injury suffered by the petitioner, as well. According to the MoJ, similar application before the ECtHR would also be inadmissible.

Application of the criterion "no significant disadvantage" as grounds for inadmissibility was not found in other petitions among those selected for review for this analysis. However, it is important to note that such an approach should not be allowed and can be criticized for the lack of such a requirement for admissibility within the JSA. Considering the fact that the resources of an international jurisdiction should be used in the most efficient manner, "the absence of significant harm" under Article 35, § 3, (b) ECHR as an admissibility criterion, is introduced in order to reduce the workload of the Court. This criterion does not apply if the complaints have not been duly considered by a national court¹⁰¹. Its application in considering the admissibility of the petitions under the JSA, will put a barrier against the exercise of the right to seek redress for slow administration of justice that risks calling into question the effectiveness of the administrative mechanism. Another issue for consideration is the amount of the damages and its significance in determining the amount of the just compensation¹⁰².

Recommendation: *When considering the admissibility of petitions, submitted under Chapter three "a", JSA, the criterion "no significant harm" should not be taken into consideration.*

¹⁰¹ See above II.1. and the cited constitutional judgment

¹⁰² See below III. 2. See also petition PC-14-383 regarding pre-trial proceedings for unlawful taking of a vehicle, that was subsequently returned to the petitioner. Taking into account the lack of damages for the petitioner and the fact that he did not appeal against termination order, the petition has been rejected as unfounded on the basis of Article 60e, para. 1, item 1, JSA.



2. FOUNDED PETITIONS

Member States' obligation under Article 6, § 1 of the Convention requires the former to organize their judicial systems in such a way as to ensure the implementation of the reasonable time requirement for the proceedings. The case law of the administrative bodies is in line with the standards set by the ECtHR, regarding the calculation of the length of the proceedings.

2.1. Starting point of the proceedings

In civil proceedings, the starting point is the date of filing the document which brings the case before the court. This rule is followed and there is no contradictory application. No problems have been observed in determining the starting point when the petitioner is complaining about the unreasonable length of the proceedings and is a respondent or another intervening party. In these cases, the Inspectorate and the Ministry of Justice accepted that for him, the starting point is the date on which he had been notified officially for proceedings stated against him or on the intervention of the intervening party in the proceedings. This approach is evident, for example, in the petition no. PC-14-137, in which this rule is applied.

We found issues in determining the starting point of the proceedings under Article 422 CPC - claim for the existence of the claim in order for payment proceedings. In this case, the Ministry of Justice examined the petitions on their merits, but held that the starting point of the proceedings is the moment of submitting the claim with the court and accordingly does not include in the total length the order for proceedings (see petition no. PC-14-539). We believe this approach to be wrong. Firstly, undoubtedly the proceedings under Article 422 CPC are civil, i.e. they fall under Article 60a para. 2 item 1 of the JSA. According to the CPC, the claim is considered filed from the moment when a request to issue an order for payment is lodged (Article 422 (1) CPC) and not from the moment of the filing of the claim, provided that the claim is brought within one month period under Article 415 of the CPC¹⁰³. Furthermore, the petitioner should only deposit the rest of the state tax and not a new tax. Therefore, in these cases, the calculation of the length of the proceedings should start from the date of the filing of the request for order for payment, as these proceedings are transformed into classic civil proceedings, which should fall under the guarantees of Article 6 of the Convention.

When reviewing the petitions, we examined several entirely administrative proceedings, with same principle applying for them - the starting point is the date of the initiation of the administrative proceedings or the moment in which a "dispute" occurs between the person concerned and the administration¹⁰⁴.

¹⁰³ Kiurkchiev, Stephan, Enforcement order proceedings. European order for payment, Siela, 2009, p. 19

¹⁰⁴ Božić v. Croatia, no. 22457/02, 29.06.2006, § 26



The principle is that proceedings, challenging the administrative act before a higher (or another) administrative authority, are included in the total length if a law stipulates that, before filing a complaint to the court, the administrative procedure for appeal must be exhausted. For example, in the proceedings under the Law for compensation to owners of nationalized property (petition no. PC-13-777)

This rule also applies in cases where, before turning to the court, the applicant challenged the act through an administrative procedure, although he was not obliged to do so.

In criminal proceedings, the starting point, according to the standard of the ECtHR, is the indictment, and in the absence of formal charges, Article 6 is applicable from the moment in which the position of the suspect is substantially affected in one way or another. Implementation of this rule is observed in case no. PC-14-241, where the starting point is judged to be namely the day on which the person has been detained for 24 hours by the Ministry of Interior, with the formal indictment being later; in petition PC-14-479 the starting point was established as the date when the person was interrogated as a suspect; similar is petition PC-14-359. The correct approach in determining the starting point is also applied for the initiation of a preliminary examination, and not the indictment, in petition no. PC-14-321. In these cases, there is consistency and full compliance with the standard, according to the ECtHR case law¹⁰⁵.

In cases where a person was initially questioned as a witness and was subsequently indicted, the case law of the Inspectorate shows that the inspectors generally apply the approach established by *Asenov v. Bulgaria*¹⁰⁶, and not the standard in the *Yankov and others*¹⁰⁷ where the Court held that Article 6 applies from the moment when the applicant was questioned by the police as a witness, though the indictment followed at a later stage. In petition no. PC-13-131 for example, the period is counted from the date of the indictment - six months later than the date of the interrogation, as the Inspectorate finds that "the interrogation as a witness of a person, who at a later stage of the investigation, is indicted, in itself, cannot be considered sufficient grounds to assume that a "charge" had been made under Article 6 [...] in this case it concerns initial interrogation of a person who is directly involved in the traffic accident."

In petition no. PC-14-098 the Inspectorate has fulfilled its obligation to analyze which of the measures against the petitioner has significantly affected his legal sphere. The Inspectorate has held that in this case, giving explanations on the prior investigation in 2000, did not affect the petitioner's interest. All subpoenas have been received by his father, as the petitioner was abroad and therefore indicting him as defendant in 2011, was the relevant starting point of the period under investigation, in the context of a reasonable time within the meaning of the Convention. The same reasoning and approach are utilized in petition no. PC-14-058, where it had been

¹⁰⁵ See more above II.2.2.2

¹⁰⁶ *Asenov v. Bulgaria*, no. 42026/98, 15.07.2005, § 102

¹⁰⁷ *Yankov and Others v. Bulgaria*, no. 4570/05, 23.09.2010, §§ 20-23



argued that in this case, the initial interrogation of the petitioner does not constitute interference in his personal sphere, despite the ECtHR case law.

Contradictory approach in assessing the starting point, was found in petitions filed by victims. For example, in petition no. PC-14-111, the starting date adopted, was the date on which the pre-trial proceedings were initiated, and not the date of the lodged complaint to the SDP, with which the victim stated that he had become a subject of fraud. Contrary approach is adopted in petition no. PC-14-186. Such piecemeal approach could lead to misapplication of the mechanism as the proper determining the starting point of the proceedings is crucial.

Recommendation: *The case law of the MoJ, when calculating the starting point for the relevant period in matters under Article 422 CPC, should be changed. If necessary, the matter may be referred to the Supreme Courts for interpretation ruling under Article 124 in relation to Article 125, JSA.*

Given the heterogeneous case law of the ECtHR, the estimation for the starting point for proceedings where a person has been questioned as a witness, and subsequently charged, should be done carefully and on case by case basis; it is important that the Inspectorate should articulate sufficient grounds about which date it considers as the start of the proceedings. It is necessary to unify the case law for determining the starting point of the period, regarding petitions filed by victims and injured parties.

2.2. Final point of the proceedings

The established standard in the ECtHR case law for determining the end point of the proceedings, is applicable to all types of proceedings - civil, administrative, and criminal¹⁰⁸.

We believe that when calculating the number of instances that have examined the case, the cassation instance should be included even in cases when, under Article 288 CPC, the SCC did not admit the cassation appeal. The arguments for this are that the cassation instance is regular instance and the assessment whether it should be exhausted or not, does not depend on the party.

It is not in accordance with the ECtHR case law, however, the vague and unsubstantiated approach in petition no. PC-14-178, where from the total length of criminal proceedings is deducted the period in which the case was not available to the investigating authorities. Such an argument should not be grounds for reducing the length of the proceedings. The obligation of Member States to organize their judicial systems so as to ensure administration of justice within a reasonable time, precludes the possibility for the case to not be available to the

¹⁰⁸ See above II.2.1



investigating authorities for a long period and for this to be grounds for a reduction in the overall length.

2.3. Deviations from the normal course of the proceedings, extraordinary measures

The period, which length should be assessed, also covers the time period when a request to supplement or amend the judgment is considered. In this sense is the opinion of the Inspectorate and the Ministry of Justice in petition no. PC-13-719, in which they had rightly accepted that proceedings to supplement the judgment in the part on costs, is a part of the overall length of the main proceedings. Accordingly, the 6-month deadline for submission of the petition under Chapter three "a", JSA, begins to run from the date on which the ruling entered into force, whereby the court has ruled on the request for costs¹⁰⁹.

Upon resumption of civil or administrative proceedings, the period that elapsed between the two proceedings, is not included in the assessment of the length, because there is no pending dispute in between. To calculate the total length, the period from the beginning of the initial proceedings is added to the period after their resumption. This principle is followed without exception in the application of the administrative mechanism (petitions no.PC-14-228, PC-14-312, PC-14-095).

The reopening of a criminal case is provided for in Article 422 CPC (Criminal Procedural Code). The ECtHR held that with the reopening of criminal cases that have concluded with sentences, judgments and rulings which were not examined in cassation instance (Article 422, para. 1, p. 5 CPC), a submission of a request to reopen the case represents normal exhaustion of domestic remedies and not a use of an extraordinary remedy¹¹⁰. In this case, the length of the first proceedings is added to that of the subsequent one and they are calculated in their whole. Such an approach is adopted in the implementation of the administrative mechanism in the JSA. In petition no. PC-14-359, the length is correctly calculated for the two separate proceedings. The gap is not taken into account, as is done by the ECtHR in a case against Austria¹¹¹. However, since the proceedings under Article 422 para.1, item 5, CPC are considered regular means, then, in our view, the gap should be included in the total length of the proceedings.

2.4. Criteria for assessing the length of the proceedings and the amount of the just compensation

As a rule, the Inspectorate and the Ministry of Justice strictly follow the standards set out in the ECtHR case law, mentioned above. Consideration is also given to the criteria, appearing in the

¹⁰⁹ See petition no. PC-14-014

¹¹⁰ Paraskeva Todorova c. Bulgarie, no. 37193/07, 25.03.2010, §§ 24-30

¹¹¹ Löffler v. Austria, (no. 30546/96), 3.10.2000



Interpretative Decision no. 35/1990 on criminal case no. 26/1990, the General Assembly of the Penal College of the SC, regarding the factual and legal complexity of the case. It should be noted that when taking into account the number of instances in proceedings, the number of referrals to the lower courts are not taken into account as is the case law of Strasbourg.

An element in assessing the procedural conduct of the parties and their procedural or legal representatives is whether they have used the opportunity to complain about delays when there was a procedural possibility. Lack of use of this tool has caused the behavior of the petitioner, to be considered insufficiently active (petition no. PC-14-137), respectively, to reduce the amount of the awarded damages.

References to two reference cases from the ECtHR case law, in determining the amount of compensation, can also be defined as a positive aspect.

Among the cases examined, none were found regarding compensation for pecuniary damages for excessive length of proceedings. The material interest of the petitioner, however, has been considered in petition PC-13-764, where the MoJ has accepted that regardless of the length of the proceedings at 8 years and 7 months, and its factual and legal complexity, the petition is unfounded. According to the MoJ, the material interest of the petitioner of 100 (one hundred) BGL, is negligible and there was no information from which it could have been concluded that the loss of such a sum would have any significant impact on her personal life.

It is true that the criterion "suffered by the petitioner pecuniary and/or non-pecuniary damages" is provided in the Internal Rules of the Ministry of Justice, in determining the amount of compensation. As far as within the current legislative framework, the MoJ does not seem to be allowed to dismiss a petition as unfounded, because the damages suffered by the petitioner are minor, it would be better for this issue to be explicitly settled in the JSA.

Recommendation: *To regulate on legislative level that the compensation for the violation of the right to consider and resolve the case within a reasonable time may not be granted, if it is found that despite the length of the proceedings, the petitioner has suffered minor damages. In these cases it is sufficient to establish actual infringement.*

3. CASE LAW OF THE ADMINISTRATIVE COURTS UNDER CHAPTER THREE "A", JSA

Since the entry into force of the administrative mechanism for redress for complaints against unduly prolonged proceedings, it has accumulated case law of the administrative courts, though



small in volume. Although Chapter three "a" does not specify a procedure for appealing the decisions taken within these proceedings, there is no doubt that those of them that affect the rights of citizens and legal persons may be appealed before a court (Article 120, para. 2 of the Constitution).

3.1. Legal nature of the acts issued in proceedings under Chapter three "a", JSA

The JSA states that the procedure under Chapter three "a" starts with a petition, filed by the person or legal person, which has to satisfy the requirements of Article 60b. Along with the petition, a declaration is filed under Article 60b, para. 2, which stipulates that the person has not made a claim for compensation for the same offense, and no compensation has been awarded under a different procedure. If the petition does not meet the requirements of Article 60b para. 1 and 2, the Inspectorate sends to the petitioner a communication to eliminate the irregularities within 7 days of receipt. If the petitioner fails to remove the irregularities, then the petition, together with the attachments, is returned.

No case law has been identified in connection with appeals against decisions on removing irregularities, but so far as there would be no obstacle for the person to resubmit a petition, if the prescription period has not expired, this provision poses no problems.

For the purposes of examination, the Inspectorate prepares a **statement of facts**. When a complaint is lodged against the statement, the administrative courts¹¹² recognize that it is not an **individual administrative act** (IAA) under Article 21 APC (Administrative Procedure Code). According to the judges, the statement of facts is part of the procedure under Chapter three "a" JSA, and according to Article 21, para. 5, APC, statements, acts and omissions are not IAAs when they are a part of the procedure to issue an IAA. The decision on the merits of the petition is taken by the Minister of Justice, and the statement of the Inspectorate has the character of an opinion, which may be accepted or not by the MoJ. This means that the statement in itself, does not directly affect the legal rights and interests of the petitioner and does not create rights or obligations for him¹¹³. Therefore complaints about statements of facts of the Inspectorate are inadmissible.

While the case law concerning the character of the statement is unitary, the matter of the case law on appeals against refusal notifications, sent by the Ministry, is not. According to the established practice, the Ministry of Justice sends two types of notifications of refusal, even though officially these names do not appear in the letters themselves. The first is the

¹¹² See ruling no. 6852 of 21.05.2014 of SAC on adm. case no. 3613/2014 confirming ruling no. 47 of 6.01.2014 on adm. case no. 7164/2013, ACSC

¹¹³ SAC on adm. case no. 3613/2014



notification of refusal on grounds of inadmissibility, the second - **notification of refusal because of groundlessness**¹¹⁴.

In the appeal proceedings of notification letters, which indicate that petitions are left without consideration because of the failure to observe the 6-month period, the administrative courts had to decide whether these notification letters are IAA, respectively what is the procedure for their appeal. Courts agree that the assessment of the administrative body on compliance with the term under Article 60a para. 4, JSA, concerns the **admissibility** of the administrative proceedings, therefore is not an act on merits¹¹⁵.

Controversial case law, however, has been noted regarding the nature of the **notification of refusal**. For example, in adm. case. no. 281/2014 the Administrative Court - Sofia City (ACSC) has held that a refusal to consider a petition under Chapter three "a", JSA, cannot be a subject to judicial review, pursuant to Article 197 - Article 201 of the APC. According to the court, the final act in the proceedings under Chapter three "a", JSA, does not contain the characteristics of an administrative act under Article 21 from APC, as it has civil nature and is not subject to judicial review under the Administrative Procedure Code. As the final act does not constitute an administrative act, then, respectively, the refusal to issue such, also is not subject to administrative control under the APC¹¹⁶.

In another case, the ACSC ruled that the administrative procedure under Chapter three "a", contains characteristics of mediation, i.e. goodwill, and aims at extrajudicial settlement of disputes, in which the Minister of Justice assists with reaching an settlement between the petitioner and the judicial authorities, but is not always obliged to offer such an settlement. Therefore the appealed act - notification of refusal to consider the petition on the merits - does not contain characteristics of an administrative act, as the volition has a civil nature and is not subject to judicial review under the Administrative Procedure Code. According to the court, in this case, the general provision for appeals does not apply either, as referred to in the provision of Article 120, para. 2, Constitution whereby any administrative act may be subject to appeal, unless otherwise provided for by law, and the appealed letter does not bear the characteristics of an administrative act. Therefore the appeal is dismissed as inadmissible, and the proceedings terminated pursuant to Article 159, item 1 and 4 of the APC¹¹⁷.

On the other position is the Supreme Administrative Court (SAC), which finds that there should be distinguish between the refusal to consider a petition as inadmissible or unfounded. In the case in which the Minister of Justice or a person authorized by him, refuses to consider the

¹¹⁴ More on individual grounds for inadmissibility and unfounded see in Audit report, prepared by the "Internal audit Directory", 2015

¹¹⁵ See ruling no. 1000 of 25.02.2014, ACSC on adm. case no. 281/2014

¹¹⁶ See ruling no. 6969 of 18.11.2013, ACSC on adm. case no. 6676/2013

¹¹⁷ Ruling no. 193 of 14.01.2014, ACSC on adm. case no. 282/2014



petition under Article 60a of the JSA on the ground that it was filed after the expiry of the term under Article 60a para. 4, JSA, a refusal to consider a request for issuance of an administrative act under Article 60e of the JSA on its merits, is present. In this case, it is not a refusal to issue the requested administrative act, but a refusal to examine on its merits the submitted petition. In this case, there is a procedural obstacle for bringing an action under Article 2b, para. 2, SMLDA, because the requirement of Article 8, para. 2, SMLDA, for exhaustion of the administrative procedure, is not fulfilled. Under Article 197, para. 1 of the APC, the explicit refusal of the administrative authority to examine on its merits a request for issuance of IAA, can be appealed to the court and this is the legal procedure for appeal against the contested before the ACSC letter¹¹⁸.

Difference in case law between ACSC and the Supreme Court is also found, regarding appeals against **notifications for refusal because of unfoundedness**. For example, in ruling no. 3819, ACSC on adm. case no. 4432/2013, it is held that in the case in question, it is not a matter of a statement of authority by the administrative body, but of acceptance or dismissal of a petition, to conclude an a settlement which always depends on the will of the parties. In this sense, the court cannot compel the Minister of Justice to propose a settlement if it quashed the notification, nor to require the petitioner to conclude such a settlement if the proposal does not satisfy him. Unlike the administrative court, the SAC finds that the act under Article 60e of the JSA, whether positive or negative for the applicant, **is administrative in nature because it is a statement of administrative authority within the meaning of § 1, p. 1 Additional provisions to APC, through which in the name of the State is recognized, respectively is denied, the alleged by the petitioner and incurred pursuant to Article 2b, para. 1, SMLDA, individual right to compensation for damages**. Given their nature, **these acts constitute a declaratory administrative acts within the meaning of Article 21, para. 2 of APC**. According to the SAC, when the petition was rejected as unfounded, pursuant to Article 60e, para. 1 of the JSA or the applicant refused to sign the proposed settlement, the administrative procedure has been exhausted and protection of the right to compensation is performed via civil action before the competent civil court. The provisions of Article 2b, para. 1 and Article 8, para. 2 of the SMLDA, exclude the judicial review under the Administrative Procedure Code. The judicial review of these acts will be carried out under Article 17, para. 2 of the CPC in the claim proceedings before the competent court¹¹⁹.

Summary: According to the administrative courts' case law, when appealing the acts issued under Chapter three "a", JSA, the following conclusions can be drawn: all acts issued by the **Ministry of Justice** during the administrative procedure are IAA. Given the character of the act – on admissibility or on merits - a different order of protection is provided. In the case of

¹¹⁸ Ruling no. 3992 of 24.03 2014, SAC on adm. case no. 3558/2014 and Ruling no. 890, 22.01.2014, SAC on adm. case no. 740/2014

¹¹⁹ Ruling no. 3992 of 24.03 2014, SAC, adm. case no. 3558/2014



issued **notification of refusal on grounds of inadmissibility**¹²⁰, the petitioner should appeal the notification within 14 days of notification before ACSC. When a notification is issued in refusal **on grounds of unfounded petition** or the petitioner refuses to conclude its proposed settlement, it opens the way for protection under the SMLDA. The statement of facts of the Inspectorate is not subject to independent judicial review.

3.2. Persons with standing in appeal proceedings

According to the case law of the SAC, in case of quashing a notification of rejection as inadmissible, the court's ruling cannot be appealed, as it is entirely favorable to the petitioner, and the respondent - the Ministry of Justice - has no locus standi to challenge it, as the approached with the petition administrative body is not a party, but a **deciding authority** in the administrative proceedings. The private complaint without locus standi is inadmissible and not subject to review, and the legal proceedings should be terminated¹²¹.

3.3. Beginning and end of the proceedings

In accordance with the ECtHR case law, administrative courts hold, like the Ministry of Justice, that for a final act and conclusion of the proceedings, it should be considered the final decision, which concludes the particular proceedings, and not the decision which rejects the request for repeal¹²².

Also, on several complaints against petitions which the MoJ held as overdue, the ACSC had to decide the issue, which was the final act in the criminal proceedings, which had concluded with a termination act, that was not appealed by the petitioner - the defendant - but by another participant in proceedings – accomplice or a victim. In these cases, the court found that the MoJ had wrongly held that lack of contesting of the termination act by the petitioner, leads to its entry into force for him. According to the court, although the participants have not challenged the termination act, it has been challenged by a witness (victim) or from another defendant in the case. So until the entry into force of the ruling, the proceedings had been pending - both for the appellant and the petitioner¹²³.

¹²⁰ See above – III.1.

¹²¹ Ruling no. 6584, 16.05.2014, SAC, on adm. case no. 5391/2014, confirmed by Ruling no. 3668, 01.04.2015 SAC, on adm. case no. 10723/2014 ; Ruling no. 10959, 17.09. 2014 SAC, on adm. case no. 10597/2014; Ruling no. 10017, 16.07. 2014 SAC, on adm. case no. 7374/2014

¹²² Ruling no. 1170 of 11.03.2014, ACSC on adm. case no. 6676/2013 r., Ruling no. 1521, 23.03.2015 r. on adm. case no. 8985/2014

¹²³ Ruling no. 1670 of 7.04.2014, ACSC on adm. case no. 282/2014; Ruling no. 1696 of 8.04.2014 ACSC on adm. case no. 280/2014 confirmed with Ruling no. 10017, 16.07.2014 SAC, on adm. case no. 7374/2014; Ruling no. 1000 of 25.02.2014, ACSC on adm. case no. 281/2014



Comment: *The opinion of the administrative court corresponds with the case law of the ECtHR so far as the Court has held that one of the objectives of the right to a trial within a reasonable time is to protect people from the prolonged state of uncertainty about their fate (see *Withey v. The United Kingdom (dec.)*, no. 59493/00, ECHR 2003 X; which cites *Stogmuller v. Austria*, judgment of 10 November 1969, Series A no. 9, p. 40, § 5)¹²⁴. For example, in the case of *Ivan Hristov v. Bulgaria*¹²⁵ the ECtHR considers as conclusion of the proceedings the judgment of the district court with which the appeal is considered and the termination act has been confirmed.*

3.4. Calculating the six-month period

With § 34 ASA to the JSA a possibility was created for persons who have filed applications before the ECtHR, to either wait for notification from the Registry of the Court, or to apply for compensation under Chapter three "a", JSA, on their own, within six months of entry into force of the amendments to the law. The provision was criticized because it did not make a distinction on the basis of which application was declared inadmissible; it was subsequently refined with § 8 ASA of the SMLDA¹²⁶ by providing that such a right have only applicants whose applications have been dismissed on the basis of failure to exhaust the new remedies. It is important to note, however, that § 34, ASA to JSA, applies only to persons who have lodged applications before the ECtHR. Another opinion, however, is held by the ACSC¹²⁷ with regard to a complaint against the notification of refusal to consider the petition because of expired term. In that case, the Administrative Court held that the six-month period for submitting a petition is not calculated from the final judgment, which ended the proceedings, but rather from the entry into force of Chapter three "a", JSA - 01.10. 2012, given the provision of § 34 para. 1, ASA to JSA¹²⁸. However, the Court did not require proof that the person has lodged an application before the ECtHR. As a result, the refusal of the Ministry of Justice was quashed with instructions that the case be reviewed on its merits.

In another complaint, the ACSC held that if there are no evidence for lodged and registered applications before the ECtHR, then §34, para. 1, Law for amendments and supplements to JSA, does not apply in assessing the admissibility of the petition¹²⁹.

¹²⁴ *Kalpachka v Bulgaria*, no. 49163/99, 2.11.2006, § 66

¹²⁵ *Ivan Hristov v Bulgaria*, no. 32461/02, 20.03 2008, § 50 in connection with § 30

¹²⁶ *Balakirev v Bulgaria (dec.)*, no.65187/10, 18.06.2013, §§ 9-10 и §§ 32-34

¹²⁷ Ruling no. 1170 of 11.03.2014, ACSC on adm. case no. 6676/

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*



3.5. Obligations of the Ministry of Justice

According to the Administrative Court, the MoJ is obliged *ex officio* to gather evidence, regarding the date on which the petitioner has been notified by the Registry of the ECtHR for a decision on his application, in order to determine, whether the term under § 8, para. 2 TFP to ASA of SMLDA, has been kept. According to the court, in cases where there is no evidence of the date on which the notification letter from the Registry of the ECtHR has been mailed and respectively received by the addressee, information on the date of dispatch and receipt of the letter should have been collected by conducting a reference with the Registry of the Court, with the "Bulgarian Posts", with the specialized unit of the MoJ and any other means possible. The date of the notification letter cannot be considered as date on which the applicant has been notified by the Registry of the ECtHR, in assessing the deadline under § 8, para. 2, TFP to ASA of SMLDA¹³⁰.

Conclusion: The case law of the administrative courts plays an important role as a corrective, which ensures higher effectiveness rate of the administrative mechanism. However, it is important that it is in accordance with the standards of the case law of the ECtHR. If the possibility of filing a private complaint by the MoJ against the rulings of first instance courts is provided, it would provide even greater guarantees for the proper application of the law.

¹³⁰ Ibid.



IV. CASE LAW UNDER ARTICLE 2b, SMLDA¹³¹

With the Law for amendments and supplements to the SMLDA of December 15, 2012, the liability of the State for damages caused to private and legal persons for violation of the right to consider and resolve the case within a reasonable time in accordance with Article 6 § 1 of the Convention, may be engaged before a court. Compensation may be sought only under this act, and not under the general procedure (Article 8, para. 1).

The claims are be considered under the CPC and the claim for just compensation can be lodged both during the pendency of the proceedings and after their conclusion (Article 2b). Exhaustion of the administrative procedure under JSA (Article 8, para. 2) is an absolute procedural prerequisite for admissibility of a claim for compensation for concluded proceedings.

Article 2b para. 1, SMLDA, explicitly refers to Article 6 § 1 of the Convention with regard to the term "reasonable time", respectively to the criteria and standards set out in the ECtHR case law. The provision outlines the circumstances that the court is take into account when resolving the dispute. The non-exhaustively listed criteria match those, drawn from the ECtHR case law. Although the criterion "importance of the case for the applicant" is not explicitly mentioned, it should be included in the "other facts that are important for the proper solving of the dispute." Within the reviewed case law no explicit reference by the court to this criterion has been found. The assessment that the deciding authority should perform, does not cover the matter whether the investigating authorities or courts have complied with their obligations.

Since the entry into force of the Law for amendments and supplements to the SMLDA, courts have ruled on a significant number of claims under Article 2b of the Act, which allows us to address the key problems and issues that are raised in applying this remedy. The following aspects in which the case law of the courts is contradictory or inconsistent or creates preconditions for such practices in the future, can be outlined:

- Action of the provision of Article 2b in time;
- Subsidiary nature of this provision to the mechanism for compensation of damages for slow administration of justice by the JSA;
- Active and passive locus standi;
- Determination of the total length of the proceedings;

¹³¹ The cases when the judgments cited below have entered into force are marked. The rest are either not enforced or there is no evidence for this.



- Application of criteria "reasonable time" for consideration and deliberation of the case;
- Proof of the damages suffered and the causal link with the slow review of the case;
- Determining the amount of compensation;
- prescription period.

1. Issues relating to the action of the provision of Article 2b in a time period

According to Article 2b, para. 3, claim for damages for infringement of the right to a trial within a reasonable time that has been brought before the conclusion of the proceedings, which length of the claimant complains from, is admissible. Judgment no. 661 of 8.07.2014, of District Court (DC) of Veliko Tarnovo on civil case no. 611/2014, considers the matter of the moment from when the total length of the criminal proceedings is calculated, that have not yet been concluded by the lodging of the claim under Article 2b of SMLDA. The defendant maintained that the total length of proceedings and delays in them, are to be calculated from the entry into force of Article 2b of SMLDA, i.e. from 15.12.2012. The court disagrees, considering that the provision of Article 2b SMLDA is retroactive and it is sufficient that a violation of the right to have existed at the time of the referral to the court¹³².

The case law, regarding claims for damages in proceedings that have concluded with a judicial act more than six months before the entry into force of the Law for amendments and supplements to the SMLDA, is inconsistent. Most courts apply § 9 of the transitional and final provisions to the Act, which states that "the right to apply for compensation under Chapter three "a" JSA in a 6-month period from the entry into force of this Act, belongs to persons whose domestic pre-trial or trial proceedings have been concluded at the date of entry into force of this Act and no more than six months from the issuance of the final act have expired". Thus, in the judgement no. 396 of 04.24.2014, of DC Veliko Tarnovo¹³³ on civil case no. 3407/2013, the court held that the claim is inadmissible because the final court decision had been issued more

¹³² The Court stated that: "under Article 5 para. 4 of the Constitution, the Convention is part of domestic law since 07.09.1992, and the right to a trial within a reasonable time has occurred then. With the entry into force of Article 2b, SMLDA, the right to compensation for violations of the right to a trial within a reasonable time is recognized, i.e., the provision of Article 2b SMLDA is retroactive...". The judgment was upheld by a final judgment no. 391 of 11.27.2014, on civil case no. 800/2014, Regional Court Veliko Tarnovo.

See also the judgment no. 788 of 11.26.2013, on civil case no. 430/2013, Regional Court Rousse, where the court stated that "The right to a fair trial within a reasonable time as stipulated in Article 6, § 1 is directly applicable right, subject to independent redress, despite the lack of legal provision in SMLDA. Given the foregoing, the Court finds that the claim is admissible for the entire period from the start of pre-trial proceedings to the filing of the claim. ... The above stated, justifies the conclusion that the period of the still ongoing investigation, is excessive and with long periods of inactivity is unreasonable within the meaning of Article 6, § 1 of the Convention.". (Judgment entered into force).

¹³³ The judgment has entered into force in the part in question.



than 6 months prior to the entry into force of Article 2b of SMLDA, and also the administrative compensation mechanism had not been exhausted, which is a positive procedural prerequisite for filing the claim under Article 2b of SMLDA in cases of concluded proceedings.

Other courts, such as SoCC (Sofia City Court) with judgement no. 16742 of 11.9.2014, on civil case no. 11331/2013, held that Article 2b, para. 1 SMLDA does not apply in cases before its entry into force, thus considering the claim unfounded and dismissing it¹³⁴. In this case, the procedural act, of which the plaintiff complains, entered into force in 2009. Judgment no. 17612 from 10.22.2014, on civil case no. 2101/2013 of the SoCC, in which the court dismisses the claim as unfounded and unproven, is similar.

With decision no. 18 791 of 01/12/2014, on civil case no. 5616/2013, the SoCC examined on its merits a claim for violation of the right to consider and resolve the case within a reasonable time for proceedings, which have concluded in 2008, without addressing the issue of the date of the amendments to the SMLDA¹³⁵.

In ruling no. 535 of 07.11.2014, on civil case no. 2927/2014, the SCC held that when the proceedings are concluded with a final act more than six months from the entry into force of the LAW FOR AMENDMENTS AND SUPPLEMENTS to the SMLDA, persons cannot claim compensation under Chapter three "a" JSA, nor claim compensation under Article 2b SMLDA. In this hypothesis, the State is liable pursuant to Article 49 of the COA for acts of law enforcement authorities, which in violation of Article 6 of the ECHR, have not been concluded in reasonable time. In this case, the plaintiff should submit the state fee for the examination of the claim under the general litigation order¹³⁶.

¹³⁴ The Court noted that "*the provision of Article 2b, para. 1, SMLDA is material. As such, it has no retroactive effect, unless the law has attributed such. Therefore, it applies only to cases where the right to compensation arose after the entry into force of the amendment of SMLDA, i.e., only when the right to compensation arose after 15.12.2012... In light of the adopted in item 4 in interpretative judgment 4/2005, on interpretative civil case 4/2004 of the SCC, the court held that this is the point of entry into force of the final act, which marks the end of proceedings. Therefore, the court held that the right to compensation under Article 2b, para. 1, SMLDA, arise at the time of entry into force of the final act of the proceedings... In this case, the act entered into force in 2009. The Court held, however, that Article 2b, para. 1 SMLDA does not apply to cases before its entry into force. Therefore this claim is unfounded and the court rejected it.*" (from § 36 to § 38 of the judgment).

¹³⁵ See also judgment no. 253 of 05.28.2014, on civil case no. 172/2014, the Regional court Haskovo, quashed by Judgment no. 638 on appellate civil case no. 822/2014 Appellate Court Plovdiv. In the appellate judgment, the court does not discuss possible legal qualification under Article 49 of the COA and stated that the defendant "*has not made a request under Chapter Three "A", JSA ... In these circumstances, the claim under Article 2b of SMLDA is inadmissible due to lack of established in Article 8, para. 2 SMLDA procedural prerequisite.*"

¹³⁶ See also Judgment no. 4341 from 10.16.2014, on civil case no. 446/2014, the Regional court Blagoevgrad, where the court stated that "*... SMLDA in the version before the amendment of the law [...] did not contain rules, governing State liability by law enforcement for delayed justice in completed with an entered into force act in domestic pre-trial or judicial proceedings. This legal void in the special law - SMLDA to the introduction of Article 2b does not mean that the state should not be held responsible by law enforcement at infringing the right to review of criminal proceedings within a reasonable time, which is protected under Article 6 para. 1 of the ECHR. Breach of that subjective substantive right give rise to liability for damages from the State under the general rules of tort. ... The responsibility of the defendant ... shall be determined by Article 49 COA in conjunction with Article 6, para.*"



With judgment no. 210 / 06.15.2015 SCC held that "the claim for damages from infringed right to review and resolve the case within a reasonable time under Article 6 § 1 of the Convention, is classified and considered under the general litigation proceedings of the CPC, when the case in which an infringement has occurred, has been concluded with a final act as of the date of entry into force of the [amendments] SMLDA and more than six months from the issuance of the final act have expired. The admissibility of this claim is not determined by the absolute procedural prerequisites under Article 8, para. 2, SMLDA. The special procedure of the SMLDA that requires those, is excluded (argument from the opposite of § 9 of the transitional and final provisions of SMLDA)".

However, when the case is pending, but had been initiated before the entry into force of the Amendment and Supplement Act of the SMLDA, legal classification of the claim for damages for violation of the right under Article 6 § 1 of the Convention, is Article 2b, SMLDA.

Evidenced by the above-mentioned judgments, there is conflicting case law on the issue whether the claim in this case is inadmissible or unfounded. In some of the judgments the claim is considered inadmissible for improperly exercising the right to claim. In other judgments such claims are dismissed as unfounded. In the third group of cases, the court considers that these claims should be reviewed by the general civil procedure, pursuant to Article 49 of the COA¹³⁷; there are those who state that the plaintiff is not legally obliged to classify the claim and it is up to the court to do it, based on the subject matter introduced by the plaintiff with the claim¹³⁸.

Regarding cases which, at the time of entry into force of Article 2b of SMLDA and Article 60a and the following of the JSA, have been pending before the ECtHR, of interest is a judgment of the District Court of Burgas, in which the court held that, although the plaintiff was informed by the ECtHR that the application is inadmissible for failure to exhaust of the new domestic remedies with a letter from 26.09.2013, he was obliged to file a petition for compensation under Article 60a JSA up to 1.04.2013, when the prescription period under § 34 of the transitional and final provisions of JSA would have expired. The Court stated that "*The six-month period under Article 60a of the JSA cannot and should not be counted for the plaintiff from receipt of the letter by the ECtHR, precisely because the letter informed the applicant that his application was inadmissible. [...] The decision of the ECtHR on the application of the plaintiff and its*

1 of the ECHR. ". The judgment entered into force as with Ruling no. 295 of 24.02.2015 on civil case no. 599/2015 SCC, IV Chamber, did not allow cassation request; also Ruling no. 420 of 05.06.2014 on civil case no. 3252/2014, SCC, IV Chamber;

¹³⁷ However, seen from the cited judgment Finger, § 89, and the cited in it more than 20 judgments against Bulgaria, the Bulgarian government has failed to convince the ECtHR that an action under the COA would be an effective remedy against unreasonably lengthy proceedings. The Court expressly stated that examples of successful cases conducted with such an object were not provided.

¹³⁸ See also ruling no. 14094 of 22.7.2013 on civil case no. 4719/2013 of Sofia City Court, where the court stated that: "*Given that the responsibility of the state ... cannot be realized in SMLDA, the liability for damages is realized on the basis of Article 49 COA. Legal classification of claims brought by the applicant under Article 49 COA are admissible, and how justified are they, is a matter on the merits.*"



inadmissibility is an obstacle for the subsequent conduct of the procedure under Article 60 of the JSA - respectively Article 2b of SMLDA, provided that the plaintiff has not exercised the existing domestic remedies within the legal period".¹³⁹

This judgment is in contradiction with the provision of § 8, para. 2, SMLDA, whereby within a 6 month period from the entry into force of this Act or of their notification by the Registry of the ECtHR, the persons, whose application before the ECtHR have been dismissed for failure to exhaust the newly established remedies and the original proceedings have been concluded before the national courts, can file a petition for compensation under Chapter three "a" JSA."

2. Issues related to the exhaustion of the administrative procedure under the JSA for concluded proceedings

According to Article 8, para. 2, SMLDA, the exhaustion of the administrative procedure under JSA is a procedural prerequisite for lodging the claim under Article 2b of SMLDA in case of concluded proceedings; according to the majority of the reviewed judgments, its non-exhaustion makes the claims inadmissible¹⁴⁰.

However, the provision of Article 8, para. 2, SMLDA, raises a question, which may lead to contradictory judgments, namely when is the administrative procedure for compensation under the JSA deemed to have been exhausted? This procedure is, in fact, a mixed factual composition comprising: (i) a petition for compensation to the Inspectorate; (ii) verification of the regularity of the petition and guidance to eliminate the irregularities, if any are identified; (iii) the preparation and presentation to the Minister of Justice of the statement of facts on the findings made on the petition; (iv) the issuance of an act of the Minister to reject the petition or to determine the amount of compensation and (v) a proposal for a settlement with the petitioner.

Therefore, in the absence of an express statutory rule, certain questions arise, that courts might respond to differently:

- Would the procedure under the JSA be deemed to have been exhausted if the petition is returned, because the petitioner has not eliminated the irregularities in time or if it is filed after the six-month period under Article 60e of the JSA?

¹³⁹ Judgment no. III-66 on 26.05.2015 on civil case no. 657/2015; A cassation request is lodged against the judgment (civil case 404/15, SCC, IV chamber)

¹⁴⁰ Ruling no. 274 of 04.11.2014, on civil case no. 914/2014, SCC, IV Chamber, according to which "*the judgment of the civil court on the admissibility is determined by overriding condition, which is procedural and explicitly spelled out in Article 8 paragraph 2 of the SMLDA.*" See also Instruction no. 23307 of 12.06.2013 on civil case no. 3001/2013 SoCC; Ruling no. 2635 of 8.07.2014 DC Pleven, on civil case no. 728/2014 r.



- Is the procedure exhausted if it was completed by an act of the Minister of Justice, which rejects the petition, and this act was not challenged by the petitioner in an administrative procedure?
- At what point the administrative procedure under JSA is considered to be exhausted if the petitioner did not respond to their overtures to conclude a settlement?
- Is there a period after exhausting the procedure of the JSA, in which a claim under Article 2b of the SMLDA can be filed?

As mentioned above, the Supreme Administrative Court gave an answer to some of these issues - all acts issued by the **Ministry of Justice** during the administrative procedure are IAA. Given the nature of the act - on admissibility or on the merits - a different order of protection is provided. In the case of issued **notification of refusal on grounds of inadmissibility**, the petitioner is to appeal the notification within 14 days of receiving it before the ACSC. When a notification is issued **to refuse because the petition is unfounded** or the petitioner refuses to conclude a proposed settlement, the way for redress under the SMLDA is open to the petitioner¹⁴¹. The statement of facts of the Inspectorate is not subject to independent judicial review¹⁴².

So far there is no clarity on the moment in which the administrative procedure is considered completed, and what are the deadlines for filing claims under Article 2b, SMLDA, after its completion. The question will have to be resolved at the level of interpretative decision or under Article 290 CPC.

And what's more - is it necessary to exhaust the administrative procedure when the petitioner's claim exceeds the maximum compensation allowed by the JSA - 10 000 lv.? Undoubtedly, in such a case, compliance with the requirement of Article 8, para. 2, SMLDA, represents unnecessary spending of administrative resources and time. At the time of preparing of this report, we have not encountered a solution that solves this issue. But we consider that the problem is better to be clarified at the legislative level.

With the above-mentioned judgment no. 210/15 of June 2015, under Article 290 CPC, the SCC has given an answer to the question whether a claim with legal basis Article 2b SMLDA is admissible for damages for infringement of the right under Article 6, § 1 Convention for pending proceedings, if the requirements of Article 8, para. 2, SMLDA are not met. The court held that “the admissibility of the claim under Article 2b, SMLDA, in this case does not depend on the absolute procedural prerequisites of Article 8, para. 2, SMLDA - the administrative

¹⁴¹ Ruling no. 3992 of 24.03 2014, SCC, on adm. case no. 3558/2014 r., Ruling no. 890, 22.01.2014r, SAC, on adm. case no. 740/2014, Ruling no. 10563 of 07.11.2013 on adm. case no. 9171/2013

¹⁴² See §III.3.1



proceedings for damages under Chapter three "a" JSA to be exhausted and there is no settlement."

3. Locus standi of the petitioner in the proceedings under the SMLDA

It is undisputed that locus standi in proceedings under SMLDA have all legal and private persons that may submit a petition under the JSA. After the entry into force the amendments of SMLDA, however, claims have been lodged by persons who were not parties to criminal proceedings or accused, defendants, but injured parties in pre-trial proceedings, or individuals whose assets were confiscated as evidence in criminal proceedings.

The case law on these claims is inconsistent. There are judgments in which the court has considered such claims unfounded, referring to the ECHR, noting that the provision of Article 6, § 1 of the Convention does not guarantee the effective investigation and solving of crime. For example, in judgment no. 2065 of 10.31.2014 on civil case no. 271/2014 regarding pending criminal proceedings against an unknown perpetrator, in which the pre-trial phase lasted seven years, the Burgas District court stated that Article 6, § 1 *"sets no abstract right to a hearing within a reasonable time but the right of access to court within a reasonable time in case of violated civil rights. In this case the violation of the so-proclaimed right is not evident. [...] While in the pending criminal proceedings, the plaintiff has had the opportunity to file a claim before a civil court for the established, under Article 45 COA, right to compensation for damages caused by the wrongful act, which she claims has caused her damages. Such claim is admissible, without the need to previously establish criminal liability of the guilty person¹⁴³".* In another group of cases, the court held that such claims are inadmissible and the case was terminated¹⁴⁴.

With judgment no. 210 of 06.15.2015, on civil case no. 3053 from 2014, the SCC ruled that the person, from whom an object has been seized as material evidence because of criminal proceedings, is also a proper plaintiff under Article 2b, SMLDA. With this judgment, the SCC has extended the scope of the law in comparison with the scope of Article 6 of the Convention, but that in no way affects the effectiveness of the protection of the right to a reasonable time.

It now remains to be resolved the issue whether persons who had property seized as material evidence during criminal proceedings, are required to exhaust the administrative procedure, before lodging their claim under the SMLDA. There are two possibilities - to extend legislatively the scope of JSA or SCC to issue decision under Article 290 CPC to be accepted

¹⁴³ Confirmed with judgment no. IV-28 of 21.03.2015 on appellate civil case no. 2183/2014, RC Burgas

¹⁴⁴ See ruling no. 8160/2014 on civil case no. 8512/2014, DC Plovdiv, confirmed with Ruling no. 3185 of 14.11.2014 on appellate civil case no. 3014/2014, RC Plovdiv



that for them the admissibility under Article 2b SMLDA, is not determined by the absolute procedural prerequisites of Article 8, para. 2, SMLDA.

4. Passive locus standi

The Court has had to rule on occasion on the matter of persons who may be liable under Article 2b of the SMLDA. For example, the Inspectorate cannot be proper defendant under Article 2b of the SMLDA. The case law accepts that proper defendant in a claim for damages under SMLDA is the state authority, under whose budgetary and organizational system is the official that has directly caused the damages; but not the body that appointed him and exercised disciplinary authority¹⁴⁵.

According to some judgments, the specific Directorate of Ministry of Interior is not liable under Article 2b of the SMLDA, as the claim under this provision may be brought against judicial authority, which is responsible for its actions in connection with violations of the right of private and legal persons to a hearing within a reasonable time. According to these judgments, that state authority is the prosecution which led the investigation, initiates and maintains the prosecution for criminal offenses, as well the court, but a claim against District Directorate of Ministry of Interior would be inadmissible for lack of passive locus standi. According to other judgments, a claim against the Directorate of Ministry of Interior is not inadmissible, but is *"unfounded only because the Sofia Directorate of Ministry of Interior is not a judiciary authority but of the executive, i.e. Sofia Directorate of Ministry of Interior is not the materially legitimate defendant in the claim"*¹⁴⁶. Therefore, only on this basis a claim against Sofia Directorate of Ministry of Interior should be rejected.¹⁴⁷ There are examples from case law under which the bodies of the Ministry of Interior can be proper defendants under Article 2b of the SMLDA. For example, in ruling no. 1032 of 04.28.2014, on civil case no. 999/2014, the Sofia Appellate Court stated that *"as far as in criminal proceedings, within their different phases /pre-trial and trial/, it is likely separate infringements to be committed, the provision of para. 3 Article 2b of SMLDA provides for the opportunity to file a separate claim for a separate infringement; such a claim does not preclude the right to seek redress for violations of the right to trial within a reasonable time in cases where the proceedings as a whole, is delayed. [...] i.e. the provision of Article 2b of the SMLDA provides state liability for violations committed by the investigating authorities, including those in the structure of the Ministry of Interior [...]."*

¹⁴⁵ See ruling no. 529/2014, SCC, I Chamber

¹⁴⁶ See judgment no. 66 of 12.03.2014 on appellate civil case no. 3/ 2014, AC Veliko Turnovo, quashed as inadmissible judgment by the RC Veliko Turnovo in regard to the defendant - Regional Directorate of Ministry of Interior

¹⁴⁷ See judgment no. 872 of 10.02.2014, SCC, on civil case no. 17/2013



5. Issues concerning the determination of the total length of the proceedings and the assessment of whether this length is "reasonable"

Article 2b, para. 2, SMLDA, explicitly sets out criteria for assessing the "reasonable" length of a procedure, as they are outlined in the ECtHR case law (see above II.2.2).

In applying this provision, however, we identified two groups of issues in the case law of the courts. First, not all courts that hear claims under Article 2b of the SMLDA, present detailed and specific reasoning for each of the objective criteria, enumerated in the provision. In some cases, the reasoning regarding the total length of the proceedings cannot be distinguished from that relating to the procedural conduct of the participants in the proceedings. The specific periods of inactivity and who caused the inactivity, are not discussed. We believe that in providing reasoning for the judgments under Article 2b of the SMLDA, the approach from the administrative procedures for determining compensation under the JSA, in which all these aspects are treated separately¹⁴⁸, should be adopted. Second, in some judgments are drawn conclusions about the connection between the actions of the plaintiff, or the deciding authorities, and the reasonableness of the length of proceedings, which are contrary to the European Court's case law. For example, it is held in some judgments, that the plaintiff has contributed to the delay of the case by exercising the right of appeal as conferred by law¹⁴⁹. According to the ECtHR case law, if the state exercises its legal rights in good faith (e.g., appealing the judgment or the ruling), this additional time is not considered a delay for which the state is liable, and the time elapsed is included in the total length of the proceedings¹⁵⁰. There are a number of judgments in which the court has applied the law in accordance with the Convention, explicitly emphasizing that as far as the conduct of the plaintiff is concerned, it did not create obstacles to the progress of the case: *"The Court does not hold such actions on requests for change of the security measure and appeal of such taken by courts of first instance, as it concerns the implementation of a procedural right granted by the law and not an abuse of rights. Moreover, in these periods of the pre-trial proceedings, the authorities have had the opportunity for further investigation..."*¹⁵¹.

In assessing the behavior of the injured party, some courts accept that delays caused by its deliberate behavior, should be considered in terms of the total length of the proceedings, with the court considering that they are not decisive and crucial to the overall length and takes them into account only when determining the amount of compensation due. In other cases, such

¹⁴⁸ See Judgment no. 737 of 24.10.2014 on civil case no. 2341/2014 DC Vratsa; Judgment no. 713 of 12.07.2013 on civil case no. 5007/2012 DC Veliko Turnovo (the judgment is confirmed by the RC Veliko Turnovo and has entered into force)

¹⁴⁹ See judgment no. I-45-21.08.2014 on civil case no. 8016/2013 Sofia City Court

¹⁵⁰ See II.2.2

¹⁵¹ See judgment no. 377 of 17.10.2014 on civil case no. 696/2014 DC Dimitrovgrad, confirmed with judgment no. 102 of 10.03.2015 on appellate civil case no. 28/2015, RC Haskovo; judgment no. 462 of 09.12.2014 on civil case no. 811/2014 DC Dimitrograd



behavior of the plaintiff, is determined by the court as a reason to be found that no breach exists of the reasonable time requirement.

There are also judgments in which it is held that the length of the proceedings does not exceed the reasonable time requirement because of the usual excessive workload of the respective court. In this regard it should be noted that, according to the ECtHR case law, congestion of the courts is not a valid excuse for delays, unless the state can show that the problem has been identified in time and timely and effective measures to deal with it have been taken¹⁵². It can serve as no excuse that the judge, who was assigned the case, was busy with other, more important cases - the state should organize the judicial system in a way that can ensure consideration of each case within a reasonable time.

As for the starting point of criminal proceedings, in the majority of examined judgments the courts hold that that is the moment in which the person has been indicted. While determining this date is not difficult, according to the ECtHR case law, it is not always the initial date of the proceedings. In some judgments¹⁵³, although there are data for some actions before the date of the indictment, which substantially affect the defendant, for example carrying out searches of inhabited by the plaintiff residence, the court has erroneously held that the date of the actual indictment and not the date of these actions, is the starting point of the proceedings. However, there are judgments in which the court accepted as the starting date the opening of an investigation¹⁵⁴.

The right under Article 6, § 1 of the ECHR is a right to a trial within a reasonable time¹⁵⁵, not a right to obtain a favorable decision for the party. Therefore the court, before which the claim has been lodged, should not base its decision on arguments, concerning the prospects for a favorable outcome of the case, as they are not relevant to the assessment of the reasonable length of proceedings¹⁵⁶ and cannot justify the failure to conclude the case within a reasonable time.

¹⁵² See judgment no. 6497 of 25.09.2013 SCC on civil case no. 314/2013; Judgment no. 6497 of 25.09.2013, SoCC, on civil case no. 314/2013

¹⁵³ See judgment no. 123 of 24.03.2015 on civil case no. 955/2014 DC Dimitrovgrad

¹⁵⁴ See judgment no. 788 of 26.11.2013 on civil case no. 430/2013 RC Ruse (entered into force)

¹⁵⁵ See judgment no. of 29.12.2014 on civil case no. 28210/2014 DCS in which the court states that the provision of Article 6 "establishes self-contained subjective right, which has independent protection – the right to a trial within reasonable time."

¹⁵⁶ See judgment no. 1112 of 11.12.2014 on civil case no. 2025/2014, DC Veliko Turnovo, stating that: "*To consider that the court is responsible for the lack of end of the proceedings with satisfaction of the plaintiffs, which is their expectation as the outcome of proceedings, is tantamount to hold the court responsible for an employer becoming insolvent. Undoubtedly, the plaintiffs were worried and frustrated, but their subjective experiences do not arise from the actions of the court, but from the fact of falling of their former employer in insolvency and therefor - fast and complete inability to get their outstanding claims.*"



6. Prescription period

Special attention should be given to judgments in which the court ruled on the prescription period of claims for damages for breaches of the right to trial within a reasonable time. In some judgments, rendered after the entry into force of amendments to the SMLDA, regarding proceedings, commenced beforehand, the court held that although there was no specific redress provision, the injured party could lodge a claim under the general rules of tortious liability under Article 49 of the COA. In these cases, the court held that for each day from the date of commencement of the delayed proceedings, the five year general prescription period runs. The prescription period is suspended only by filing a claim for damages¹⁵⁷. Even the petition under the JSA does not stop the expiration of the prescription period and it continues to run, even though for concluded cases the administrative procedure is obligatory, before filing claims under Article 2b of the SMLDA¹⁵⁸. It is questionable whether the imposition of such a practice is in accordance with the principles set out in the ECtHR case law under Article 6 § 1 and whether a similar approach in the application of Article 2b of the SMLDA can be regarded as an effective domestic remedy within the meaning of Article 13 of the ECHR, in claims about excessive length of proceedings. Implementation of the common five-year prescription period from the first day of the case, would render the newly established national mechanism for redress under a JSA pointless, as people will have to file claims before the fifth year of the starting point of the case, although it is still pending, in order for their right to claim not be barred. Next, validating this approach, would lead to a situation where no matter how long proceedings have lasted, persons can seek compensation for a maximum of five years prior.

7. Fault; the causal link between slow proceedings and damages suffered; proof of damages; determining the amount of just compensation

In some judgments regarding Article 2b of the SMLDA, it is held that no "illegal" actions of the state authority, that has caused a delay in the proceedings, can be found¹⁵⁹.

¹⁵⁷ See judgment of 12.29.2014, on civil case no. 28210/2014, DCS, 29 chamber, concerning the proceedings examining a claim of the 2007 for compensation under Article 122, para. 3 of the State Servant Act and for establishing the existence of labor relation. The proceedings ended with a judgment of 01.11.2013, of the Supreme Court of Cassation. On 06/11/2013, the claimant filed a petition to the Inspectorate and the MoJ for finding a violation of the right to consider and resolve the case within a reasonable time and for awarding compensation. The claimant did not accept the compensation settlement and on 05/27/2014 filed a claim under Article 2b SMLDA. The court held that, since in this case the applicable period is the 5-year general prescription period for the claim under Article 110 of the CPC, the claim appears to be time-barred for the period before 26.05.2009

¹⁵⁸ See a contrario judgment no. 788 of 11.26.2013 on civil case no. 430/2013, RC Ruse on pending lengthy proceedings, where "*the court found that the claim as admissible for the entire period of pre-trial proceedings till the filing of the claim.*"

¹⁵⁹ See judgment no. 872 of 10.02.2014 SCC on civil case no. 17/2013, confirmed with Judgment no. 1146 of 2014, SAP, on civil case no. 1138/2014



From this judgment, the unprejudiced reader could reach the wrong conclusion, that the liability of the authorities in the proceedings could only be engaged in the presence of illegal actions. Such a deceptive perception could also create judgment no. 210 / 06.15.2015 of the SCC, where the Court rejected the appeal that "*in the contested judgment, Article 2b, SMLDA is incorrectly applied, because there is no illegal act of the prosecutor in pre-trial proceedings, which infringed the rights of the defendant in cassation of the consideration and resolution of pending criminal proceedings within a reasonable time*", but has reasoned its judgment with the conclusion that in this case there were illegal actions of the prosecution and not with the principle, laid down in the ECtHR case law, that the state is responsible for delays in the proceedings, whether the delays are intentional or due to bad procedural law or the its ineffective implementation¹⁶⁰.

In cases regarding Article 2b of the SMLDA, the plaintiff is to fully prove the pecuniary damages suffered and the causal link between them and the unreasonable length of the proceedings. This is not the case, however, in proving the non-pecuniary damages. According to the ECtHR case law, there is a strong but rebuttable presumption, that the unreasonable length of the proceedings causes non-pecuniary damages. And it is presumed for damages to both private and legal persons. In some of the judgments, this peculiarity of proving non-pecuniary damages is taken into account¹⁶¹. But there are judgments that reject claims for damages because the plaintiff has not proven that non-pecuniary damages occurred as a result of the violation or that such damages are in causal link with the delayed proceedings¹⁶². The ECtHR holds that in some cases, the unreasonable length of proceedings may result in minimal or even none non-pecuniary damages. However, when the court awards minimal or no compensation, it must expressly provide reasoning why it assumes that the plaintiff has not proved the existence of significant damages.

¹⁶⁰ See II.2.2

¹⁶¹ See judgments no. 661 of 8.07.2014 DC Veliko Turnovo on civil case no. 611/2014 confirmed with judgment no. 391 of 27.11.2014 on civil case no. 800/2014, RC Veliko Turnovo; judgment no. 377 of 17.10.2014 on civil case no. 696/2014 DC Dimitrovgrad, confirmed with judgment no. 102 of 10.03.2015 on appellate civil case no. 28/2015, RC Haskovo; judgment no. 468 of 01.11.2013 on civil case no. 962/2013 RC Veliko Turnovo; Judgment no. 737 of 24.10.2014 on civil case no. 2341/2014 DC Vratsa, respectively judgment no. 81 of 25.02.2015 on appellate civil case no. 5/2015 RC Vratsa, which entered into force; judgment no. 123 of 24.03.2015 on civil case no. 955/2014 DC Dimitrovgrad; Judgment no. 326 of 14.07.2015 on civil case no. 385/2015, the RC Haskovo adheres to the reasoning of the RC Dimitrovgrad in regard to proving of non-pecuniary damages; Judgment no. 462 of 09.12.2014, on civil case no. 811/2014, the DC Dimitrovgrad; Judgment no. 18 791 of 01/12/2014 on civil case no. 5616/2013 of the SoCC.

¹⁶² Judgment no. 532 of 06.23.2014, DC Pazardzhik on civil case no. 4083/2013, confirmed by Judgment no. 507 of 07/11/2014 on civil case no. 681/2014 RC Pazardzhik; judgment no. 17 293 of 09/10/2014, on civil case no. 9405/2013 of Sofia City Court, where the court stated that "... even to accept the argument that the trial exceeded the so-called. reasonable time ... no evidence were gathered to establish that the plaintiff allegedly suffered the damages claimed in his claim as a direct consequence of the defendant's conduct in delaying the proceedings. ... Testimony cannot establish the existence of the alleged constant stress and depression, as proof of such specific mental states is to be an opinion of an expert - specialist. Request by the plaintiff in this regard is not done and such evidence is not collected."; Judgment no. I-45-21.08.2014 on civil case no. 8016 RC Sofia; judgment no. 82 of 01.28.2015, on civil case no. 2044 DC Veliko Tarnovo; judgment no. 463 of 03.16.2015, on civil case no. 1156/2014, RC Plovdiv - the case was heard under Article 49 of the COA.



In ruling on civil case no. 1243/2014 in connection with determining the amount of compensation for proceedings, the length of which does not meet the reasonable time requirement, the SCC relies on the judgment of the SCC, IV chamber, on civil case no. 1416/2012, in which it is stated which are the legally relevant circumstances for determining just compensation for non-pecuniary damages, namely "*the length of the criminal prosecution, the seriousness of the allegation, mandatory measures exercised against the defendant, and any data on the impact of the criminal actions taken against his personal life*".

In judgment no. 3293 from 07.29.2014, on civil case no. 85/2014 the district court Blagoevgrad, in connection with a claim for damages for wrongful indictment, by noting that the grounds under Article 2b of the SMLDA did not exist at the time of appearance of the plaintiff's right to claim compensation for the damages, takes into account the length of the proceedings in calculating the amount of compensation¹⁶³. The court, in this case assumes that in determining the amount of compensation, it should be taken into account the length of criminal proceedings against the plaintiff, "*which in itself is associated with negative emotions, worries and stressful experiences*".¹⁶⁴

¹⁶³ The legal basis for the claim is Article 2, para. 1 item 3, SMLDA, for damages suffered in result of proceedings that has ended in 2011. In assessing the damages, the court stated: "*The negative reaction of the plaintiff is in connection with the length of the criminal proceedings ... Indeed, the criminal proceedings took place for more than 3.5 years, which is beyond the concept of reasonable time within the meaning of Article 6 §1 of the ECHR ... It should be noted that the basis of Article 2b, SMLDA, is introduced only with the amendment of the Act and it never existed alone at the time of generation of the applicant's right to request redress for damages from the terminated criminal proceedings. Therefore, the court found that in determining the amount of compensation, it should take into account the duration of criminal proceedings against the applicant, which itself is associated with negative emotions, worries and stressful experiences.*"

¹⁶⁴ See also judgment no. 310 of 01.07.2013, on civil case no. 268/2013, RC Pazardzhik, in which the court stated: "*Last but not least is the fact that the court shall take into account in determining the amount of compensation due, the length of the criminal proceedings against the plaintiff ... It is a fact that could justify a higher amount of compensation for the unlawful charges, provided that the new provision of Article 2b of SMRLA does not apply in this case.*" The amount of compensation is reduced by judgment no.550 from 11.11.2013, on appellate civil case no. 967/13, the AC Plovdiv. Also judgment no. 253 of 05.28.2014, on civil case no. 172/2014, the RC Haskovo, quashed with judgment no. 638 on civil case no. 822/2014 AC Plovdiv. In the appellate judgment, the court stated that the continuation of criminal proceedings nearly 10 years was regarded by the district court and this court of appeal in determining the compensation under Article 2 para. 1, item 3, SMLDA.



V. CONCLUSIONS AND RECOMMENDATIONS

Since the entry into force of the administrative mechanism in October 2012 to July 2015, it has shown a potential to become an effective remedy for complaints against proceedings that have lasted unreasonably long. The case law of the Inspectorate and the Ministry of Justice shows that they are striving to apply the new mechanism in accordance with standards established by the Court in Strasbourg. To a large extent these efforts are supported by the good cooperation between the Inspectorate and the Ministry of Justice and the Registry of the Court. The two-stage nature of the proceedings also has a positive effect, which allows gaps and inaccuracies made by the Inspectorate to be "corrected" by the Ministry of Justice. The analysis identified deficiencies in the interpretation and application of the new provisions in the JSA, due on the one hand of inadequacy of existing legislation, but on the other - the insufficient analysis of the problems that arise in connection with petitions. It is found that the case law is heterogenic that should be fixed. It is also recommended to clearly identify the criteria for admissibility, and in the notifications that are sent to petitioners is should be indicated the procedure and the term for their appeal.

The conclusions and recommendation ascertained in the analysis could be summarized as follows:

1. Regarding Chapter III "A", JSA *ratione materiae*:

*1. As far as no case law exists and the courts have not given their interpretation on the scope of the provision, it is appropriate the matter, whether petitions about the length of non-contentious proceedings are included in JSA *ratione materiae* to be settled by the legislator, taking into account, on the one hand, the minimum standards set in the case law of the ECtHR, and on the other hand, the Bulgarian context and the nature of the non-contentious proceedings as proceedings for assistance in exercising civil rights.*

2. The opinion of the Supreme Court judges reflected in the interpretative decree no. 2/2014, requires the adoption of legislative amendments, which provide a mechanism for protection against unreasonable length of enforcement proceedings, corresponding to the consistent case law of the ECtHR.

*3. The best would be that the issue, whether order for payment proceedings fall within JSA *ratione materiae*, be settled by legislative means. Possibly through an interpretative decision under Article 124 in relation to Article 125 JSA, as well.*



2. Regarding *ratione personae* of Chapter III “A”, JSA:

1. In view of the express provisions of the JSA, it is prudent to rethink the practice of the Inspectorate and the Ministry of Justice on petitions, filed by injured entities or victims in discontinued pre-trial proceedings against unknown perpetrators, in order to examine these claims on the merits.

2. The possibility that in special cases, the heirs of the parties in concluded civil, administrative and criminal proceedings, which have not participated in the proceedings, may be able to submit a petition under Chapter three "a", JSA, should be regulated in the Internal rules of the Ministry of Justice. In these cases, petitioners should specify and justify personal stake in the proceedings and how they have affected their rights, and to provide evidence to support their allegations.

3. For more clarity it would be better in the Internal Rules of the Ministry of Justice to be added that the heirs and successors have the universal right to continue proceedings under Chapter Three "A" JSA.

4. The Internal rules of the Ministry of Justice (or § 8 (2) of the SMLDA) should be supplemented in the sense that in proceedings before the ECtHR, heirs whose claims have been rejected for failure to exhaust the new remedies, have the right to submit a petition under Chapter three "a", JSA within six months of the receipt from the Registry of the Court.

5. It is necessary to provide in the Internal Rules of the Ministry of Justice that when the judgment contains no acknowledgment of the violation of the right of the accused to a trial within a reasonable time and there is no explicit and measurable reduction of the penalty, the accused is entitled to a monetary compensation.

6. When considering the admissibility of petitions, submitted under Chapter three "a", JSA, the criterion "no significant harm" should not be taken into consideration.

3. Regarding the starting and final points of the proceedings

1. The case law of the MoJ, when calculating the starting point for the relevant period in matters under Article 422 CPC, should be changed. If necessary, the matter may be referred to the Supreme Courts for interpretation ruling under Article 124 in relation to Article 125, JSA.

2. Given the heterogeneous case law of the ECtHR, the estimation for the starting point for proceedings where a person has been questioned as a witness, and subsequently charged, should be done carefully on case by case basis; it is important that the Inspectorate should



articulate sufficient grounds about which point it considers as the start of the proceedings. It is necessary to unify the case law for determining the starting point of the period regarding petitions filed by victims and injured parties.

3. To regulate on legislative level that the compensation for the violation of the right to consider and resolve the case within a reasonable time may not be granted, if it is found that despite the length of the proceedings, the petitioner has suffered minor damages. In these cases it is sufficient to establish actual infringement.

4. Regarding the judicial control over the administrative procedure

The case law of the administrative courts plays an important role as a corrective, which ensures higher effectiveness rate of the administrative mechanism. However, it is important that it is in accordance with the standards of the case law of the ECtHR. If the possibility of filing a private complaint by the MoJ against the rulings of first instance courts is provided, it would provide even greater guarantees for the proper application of the law.

5. Regarding the case law of the civil courts under Article 2b, SMLDA

Given that the provision was in force for only 2 years and 7 months and there is still no sufficient number of judgments entered into force, in order to outline clearer and more consistent trends in implementing the new mechanism. However, in order to achieve the main objective, namely to ensure a domestic remedy in cases of violations of the right to a trial within a reasonable time, in our opinion, the courts should adhere to at least the standards in application of Article 6 of the Convention and the recommendations of the Committee of Ministers, including through trainings.

Based on the analysis, the following recommendations could be derived:

1. It is necessary to legislative or judicially clarify, whether persons who had property seized as SDC on finalized criminal proceedings, are required to exhaust administrative procedure before filing a claim under the SMLDA.

2. It is necessary to refine through legislative amendments which point is considered that the procedure under the JSA, is exhausted and in what period after the notification for refusal, respectively the proposal for an settlement, a claim under Article 2b of SMLDA should be brought.

3. It is necessary to unify the case law on the matter for the due standard of proof of non-pecuniary damages suffered, taking into account the case law of the ECtHR for the presence of "strong but rebuttable presumption that the excessive length of the case causes non-pecuniary damage".



4. It is necessary the courts to provide detailed reasoning when determining whether there is a breach of Article 6 § 1 of the Convention, taking into account the objective criteria as defined in the law.