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**Just satisfaction for non-pecuniary
damage caused by excessive length of
civil proceedings**

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Introduction

The right to hear the case within a reasonable time is an essential part of the right to fair trial enacted in art. 6 par. 1 of the European Convention on Human Rights. Although the Czech Republic is the party to the European Convention on Human Rights with all the obligations which result from it, until 27 June 2006¹ it had not had sufficiently effective system of compensation for non-pecuniary damage sustained from excessive length of proceedings, which had been also in inconsistency with constitutional law of the Czech Republic.²

Therefore the Code no. 160/2006 Coll. was adopted and the § 31a has been added to the Code no. 82/1998 Coll., on responsibility for the damage caused by maladministration. This provision newly regulates the criteria for calculation of the amount of just satisfaction for non-pecuniary damage suffered from the excessive length of proceedings. According to transitional provisions, these criteria should apply even in cases of non-pecuniary damage which occurred before the Code no. 160/2006 Coll. came into force. In our opinion however, this is not in compliance with the fundamental Roman law principle *lex retro not agit* and with the principle of legal certainty.

According to the case law of the European Court of Human Rights in Strasbourg (ECHR)³ reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the individual case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant. These criteria must be also considered when determining accurate amount of just satisfaction for non-pecuniary damage sustained from excessive length of proceedings. However, according to § 31a par. 3 of the Code no. 82/1998 Coll. these criteria should be used only when determining the amount of just satisfaction. Besides these, other criteria may be taken into account and the existence and intensity of all criteria must be assessed carefully.

Since the Czech courts of first and second instance had not interpreted the Czech law in conformity with the case law of the ECHR, the Supreme Court of the Czech Republic decided to adopt the opinion Cpjn 206/2010 which should have unified the way of application of § 31a par. 3 of Code no. 82/1998 Coll. In our thesis we deal with the individual criteria for

¹ Date of entry into force of Code no. 160/2006 Coll.

² Art. 38 par. 2 code no. 2/1993 Coll., Charter of Fundamental rights and Freedoms: „...everybody has the right to have his case heard without unnecessary delays...”

³ *Farlane v. Ireland* [GC], no. 31333/06. § 140 ECHR

determining the amount of just satisfaction for non-pecuniary damage sustained from excessive length of the proceedings in civil cases from the point of the ECHR case law and from the point of the Czech law.

Length of court proceedings – start, end, stay

When determining reasonable compensation for non-pecuniary damage it is necessary to consider not only the specific periods during which there were delays and inactions but the duration of the case in total. Firstly, it is necessary to define the difference between a reasonable length of proceedings and delays in the proceedings. Delays occur, if the court does not act within period set by law. On the other hand, violation of the right to a reasonable length of the proceedings occurs when proceedings take excessively long time regardless of whether this situation was caused by delays or not. There might be a delay in proceedings, but this fact is not automatically considered a violation of the right to a reasonable length of proceedings.⁴

Proceedings is considered to have started at moment of delivery of the motion to commence proceedings to the court and the reasonable time requirement should be also assessed from this moment. Proceedings started “ex officio“ are considered to have commenced upon the delivery date of a notification of the commencement to the parties. In some cases, the beginning of the proceedings may be influenced by necessity for action to be taken prior to the commencement of the proceedings (for example in administrative proceedings), which eventually leads to the shift of the beginning of the proceedings.⁵

The reasonable time elapses when judgement becomes final and effective. However, this limitation does not apply in all types of civil proceedings. For example – where a judgement defines the right to compensation without specifying the accurate amount of compensation, the proceedings cannot be considered as finished.⁶ In Case Wemoff, 1968, Series A-7, page 26, the ECHR ruled that the protection of party against the excessive length of the proceedings does not end at the first hearing before the court and this fact should prevent unnecessary delays in proceedings when there is not going to be another hearing.

⁴ Opinion of the Supreme Court of the Czech Republic no. Cpjn 206.2010, 13. 4. 2011

⁵ *Králíček v. The Czech Republic*, no. 50248/99, 29 April 2004

⁶ *Guincho v. Portugal*, no. 8990/80, 10 June 1984

The proceedings before all types of appellate courts and before the Constitutional court are included to the total length of the proceedings.⁷ Execution of judgement proceedings should also be taken into account when determining the total length of the proceedings. However, the problem is if it is wise to connect proceedings on the merits with the execution proceedings for the purpose of determining the total length of the proceedings. For example, in one of these proceedings there may be no delays and on itself it could not be considered as being excessively long. Also, the fact that the motion to commence the execution proceedings depends on free will of entitled person can lead to delays and prolongation of the total length of the proceedings.

The total length of proceedings also consists of the period during which the proceedings was stayed.⁸ Proceedings may also be stayed after filing the motion to the Constitution Cour regarding constituonality of an individual legal provision, in case of bankruptcy or insolvency or when one party of the proceedings has lost the capacity to be a party of the proceedings and there is no possibility to continue immediately with a successor. The Supreme Court of the Czech Republic determined that when considering the total length of the stayed proceedings, the length of the collateral proceedings which caused the stay in the proceedings on the merits should be taken into account.⁹

If the proceedings was commenced before the date when binding state accepted the Convention, it must be taken into account at what stage of the proceedings the state ratified the Convention.¹⁰ The Czech courts determined instead that when considering the total length of the proceedings, the part of the proceedings before the ratification of the Convention by the Czech Republic must be included to the total length of the proceedings.¹¹

The Supreme Court of the Czech Republic also held that when considering the amount of non-pecuniary damage sustained by the legal successor from the excessive length of the proceedings, the non-pecuniary damage sustained by the original party should also be included. However, the amount of just satisfaction has to be reduced due to the fact that the successor had not suffered damage from excessive length of the proceedings directly during the whole proceedings but partly through his ancestor.¹²

⁷ *Houřová v. The Czech Republic*, no. 58177/00, 15 June 2004

⁸ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 4107/2009, 15. 12. 2010

⁹ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 4923/2009, 24. 11. 2010

¹⁰ *Bořánková v. The Czech Republic*, no. 41486/98, 7 January 2003

¹¹ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 1614/2009, 8. 9. 2010

¹² Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 4815/2009, 5. 10. 2010

After the right to compensation for non-pecuniary damage was finally awarded in judgement, it is considered a right of personal nature which expires upon death of the natural person and cannot pass to successors.¹³

Prevention – effective remedy that prevents delays

According to the ECHR case law¹⁴ as well as to the opinion of the Supreme Court of The Czech Republic¹⁵ the art. 6 of the Convention imposes on states duty to organize their judicial system in a way that their courts can meet each of requirements enacted in art. 6 par.1 of the Convention, including the obligation to hear cases in reasonable time. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively long is the most effective solution. The states are thus required to provide an available and efficient domestic remedy able to haste proceedings.

In Czech law there are two legal means functioning as prevention from delays. These are called “administrative hierarchical complaint on the length of proceedings” and “motion to determine a period to execute an act”. Regarding the effectiveness of the remedy able to accelerate a proceeding, according to the ECHR, there were no effective legal remedies under Czech law to complain about the length of civil proceedings before 1.7.2009¹⁶. The Code no. 6/2002 Coll., on courts and judges had been amended and a new provision was implemented, providing a remedy „motion to determine a period to execute an act“, which can be applied directly, without previously filing so called hierarchical complaint¹⁷. According to the ECHR¹⁸ and to the Supreme Court of the Czech Republic¹⁹, this is the only available and sufficient remedy able to haste the court’s decision.

The fact whether the State has established such legislation that provides the parties with an effective and efficient remedy is taken into account when reviewing the ECHR complaint for violation of the right to hear the dispute within a reasonable time. The Czech law expressly says that the fact whether an applicant used the means to haste proceedings is a criterion which should be taken into account when calculating the amount of just satisfaction.

¹³ Judgement of the Supreme Court of the Czech Republic no. 25 Cdo 5162/2008, 26. 1. 2011

¹⁴ *Scordino v. Italy* [GC], no. 36813/97, 29. March 2006 §183, ECHR

¹⁵ opinion of the Supreme Court of the Czech Republic no. Cpjn 206/2010, 13. 4. 2011

¹⁶ *Vokurka v. The Czech Republic*, no. 40552/02, 16 October 2007, §54, §55, ECHR

¹⁷ § 174a in law no. 6/2002 Coll., effective since 1. 7. 2009.

¹⁸ *MACREADY vs. The Czech Republic*, no. 4824/06 and 15512/08, 22. April 2010, § 51, ECHR

¹⁹ Judgement of the Supreme Court of the Czech Republic no 30 Cdo 3026/2009, 21. 10. 2010

The Supreme Court of the Czech Republic came to conclusion, that primary responsibility for ensuring the right to a fair trial within a reasonable time is laid on the state and this responsibility cannot be transferred to the applicant.²⁰ Therefore, should applicant choose not to use this mean of protection against lengthy proceeding, it cannot be attributed to his detriment and the basic value of just satisfaction cannot be reduced for this reason. However, should the applicant use this way of protection against delays in proceeding, it has to be taken into account and the basic value should be therefore reasonably increased in this respect. The question is whether this rather narrow interpretation of a statutory provision is in accordance with law, since according to § 31a par. 3 letter c) of Code no. 82/1998 Coll., on responsibility for the damage caused by maladministration, the fact whether applicant does not use means to eliminate delays should be taken into account even in disfavour of the applicant. Therefore in our opinion, the Supreme Court's interpretation is *contra legem* and the fact that the means of protection against the delays have not been used should be a criterion for determining the amount of just satisfaction.

Complexity of a case

Another criterion to take into account when calculating the final amount of just satisfaction is the complexity of a case. In general, the more complex case is, the more time it takes to hear it and to give a final and binding judgment. The question is how to define a „complex case“? The complexity is usually given by, for example, the number of stages in which the case was heard, by procedural, legal and factual complexity, by procedural activity of parties (e.g. number of unclear submissions, number of appeals and their reasonableness), by difficulties with application and interpretation of law and legal actions, by absence of previous case law, by duty to file a request for a preliminary ruling to the Court of Justice of the European Union, by the presence of an international element or by complication caused by legal succession.

For example, in the case *Borankova vs. The Czech Republic*²¹ the ECHR took account of the factual complexity of extensive division of matrimonial property. The bigger the marital estate, the more there is to fight over and a case may be both legally and factually complex.

²⁰ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 4761/2009, 5. 10. 2010, and judgement of the Supreme Court of the Czech Republic no. 30 Cdo 1250/2011, 15. 3. 2012

²¹ *Borankova vs. The Czech Republic*, no. 41486/98, 7 January 2003, ECHR, §64

Strong tension between parents and subsequent constant and never-ending need of reassessing the child's best interest may determine the complexity of a case as well²² and account should be taken of this fact when calculating the amount of just satisfaction.

Complexity is not usually given by the mere fact that it is a high value dispute and other circumstances shall be taken into account²³. The value of the dispute can be taken into consideration in connection with the criterion what is at stake for the applicant.

On the other hand, a case may be complicated legally, for example if the particular issue has not been previously settled down by case law of higher courts. This problem might arise in a case of legislation change, however, according to the opinion of the ECHR, change of legislation is not an excuse and does not justify delays in proceeding, as it is the state's task to organize its judicial system in order to be able to cope with legally difficult and therefore time demanding cases.²⁴

Number of instances

The total length of domestic proceedings may result from the fact that the case was heard in more stages. Time needed to hear a case for example before an appellate court has to be taken into consideration and must be included to the total length of a proceeding, provided that the appeal itself was heard within a reasonable time.²⁵ Generally, in this respect, the basic amount should be therefore decreased.

However, using procedural remedies provided by domestic law and thus prolonging the procedure cannot be attributed to the detriment of an applicant.²⁶ According to the Supreme Court of the Czech Republic, although the length of proceedings can be affected by applicant's procedural activity, account should be taken of whether the appeals were reasonable and whether the applicant refrained from delaying tactics. Successful appeals and repeatedly quashed judgments (due to formal errors, disrespecting of an opinion of appellate court, not respecting a finding of a constitutional court) do not justify the length of proceedings, may indicate maladministration and should be attributed to the detriment of state when modifying the basic amount.²⁷ For example in the case *Kriz vs. The Czech Republic*²⁸ the ECHR came to a conclusion that the fact that an appellate court disagrees with

²² *Kriz vs. The Czech Republic*, no. 26634/03, 9 January 2007, ECHR

²³ Judgement of the the Supreme Court of the Czech Republic no. 30 Cdo 4761/2009, 10. 5. 2009

²⁴ *Heska vs. The Czech Republic*, no. 43772/02, 23 May 2006, ECHR, §31

²⁵ Opinion of the Supreme Court of the Czech Republic no. Cpjn 206/2010, 13.5 2011

²⁶ *Patta vs. The Czech Republic*, no 12605/02, 18 April 2006, ECHR, § 69

²⁷ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 2301/2009, 4. 11. 2010

²⁸ *Kriz vs. The Czech Republic*, no. 26634/03, 9 January 2007, ECHR

conclusions made by a lower court and first instance judgment is therefore repeatedly quashed and returned, cannot be attributed to the detriment of the applicant.

International element

Complexity of a case is usually given by international elements in cases, where a foreign law is being applied, or where evidence have to be obtained abroad, legal documents has to be delivered abroad, etc. Such cases objectively require more time to be heard and this should be taken into consideration when assessing the length of proceeding or when modifying the basic amount of just satisfaction.

Evidence

A case may be considered complex having regard to the fact that court had to obtain high number of expert evidence or that high number of witnesses had to be heard. Difficulties in taking evidence may occur due to significant time which may elapse between the facts and the judicial proceedings or due to youth witnesses, who call for special prudence when questioning²⁹. Generally speaking, time needed to work out an expert opinion or to take other evidence has to be included to the total length of proceeding. For instance, in *Skodakova vs. Czech Republic*³⁰, the ECHR considered the case to be of some complexity, having regard to the fact that the domestic court had to obtain number of expert evidence, which created difficulties for the processing of the case. On the other hand, state cannot waive liability for delays caused by experts, unless the parties of the proceedings contributed to the delays by their behavior³¹. The primary responsibility for delays resulting from the provision of expert opinions rests ultimately with the state³².

When calculating the value of just satisfaction, account should be taken of whether evidence was taken within a reasonable time. Based on these facts the basic amount should be reduced when for example an expert work is, due to the expert's approach, provided after a long time and thus causing delays in proceedings. On the other hand, delays in giving expert opinions caused by lack of cooperation from participants should not be attributed to the detriment of state. The length of proceedings may be caused by taking evidence, which is

²⁹ *Szeloch vs. Poland*, no. 33079/96, 22 February 2001, ECHR, §108

³⁰ *Skodakova vs. The Czech Republic*, no. 71551/01, 21 December 2004, ECHR, concerning an action for the termination and settlement of a co-ownership arrangement

³¹ *Golha vs. The Czech Republic*, no. 7051/06, 26 May 2011, ECHR

³² *Szeloch vs. Poland*, no. 33079/96, 22 February 2001, ECHR

from the beginning obviously redundant or irrelevant³³. In this respect, it is always necessary to consider whether evidence was taken reasonably.

Degree of complexity leads to percentual increase or reduction of the basic amount of just satisfaction. When considering a modification of the basic amount it is necessary to assess the reasons for complexity separately. If the case is complicated in facts, in procedural or substantive law, the basic amount can be increased up to 50 %. On the other hand, in simple or even trivial cases, the basic amount can be reduced up to 50 %. However, according to the Supreme Court of the Czech Republic, this criterion should be always interpreted with regard to the fact that the authority should be able to cope even with a more demanding case within a reasonable time.

The conduct of the parties in the proceedings

Parties of the proceedings may influence the length of court proceedings by their actions both positively and negatively. They can contribute to the increase in the length of proceedings through their inaction (for example if one of the party does not come to court after being summoned) or by their actions (for example if they often change their action, propose to proceed much evidence etc.).

There are many ways of action of the party of proceedings which influence the total length of the proceedings. For example when the party of proceedings files incomplete motion to the court, the court has to notice the party to complete the motion and correct the defects of the motion. Similarly, where a motion is filed to a court which does not have territorial jurisdiction in the proceedings, the court has to transfer the case to the competent court. That is why these types of conduct of the party should not be attributed to the detriment of the state when calculating the amount of just satisfaction of non-pecuniary damage for the excessive length of proceedings.³⁴

The length of the proceedings can also be prolonged by the conduct of parties if they frequently use actions (such as application for release from paying court fees, application for

³³ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 3759/2009, 16.11.2010

³⁴ *Patta v. The Czech Republic*, no. 12605/02, 18 April 2006

appointment of a adversary counsel), objections (actual bias, lack of territorial and subject-matter jurisdiction) and legal remedies (regular, extraordinary).³⁵

The conduct of the party of proceedings should be considered as an objective criterion when deciding whether there has been failure to comply within a reasonable time requirement and this fact cannot be considered as a failure of the state, when deciding upon the amount of the just satisfaction.³⁶

It cannot be in disfavour of parties of the proceedings if they exercise their right to appeal, because this instrument is their legal claim and when determining the total length of the proceedings the duration of the proceedings before the appellate court should also be considered as a part of total length of proceedings.³⁷

The conduct of the court in the civil proceedings

The state is responsible for the fulfillment of the right of fair trial and right to hear a case in a reasonable time. State cannot transfer this duty on the parties of the proceedings.

Account should be taken of the fact that the party which sustained the non-pecuniary damage from excessive length of the proceedings used all available procedural means to prevent delays in proceedings when determining the amount of just satisfaction.

The state has the duty to provide domestic remedies against inaction of courts, but their adoption does not relieve states from the general obligation to solve structural problems that cause delays.³⁸ When determining whether there are delays in the civil proceedings, it should be taken into account if the court reacted to procedural actions of parties promptly and without delays.

During civil proceedings the public authority should act as it is defined in § 6 of the Code of Civil Procedure: „The court in the proceedings cooperates with all parties in order to provide prompt and effective protection to their rights and to find out all relevant facts in issue.“ Civil proceedings should be smooth, without periods of inactivity, and it should lead to delivery of decision on the merits within the reasonable time. The overburden of courts, the

³⁵ *Dostál v. The Czech Republic*, no. 52859/99, 25 May 2004

³⁶ *Erkner and Hofauer v. Austria*, no. 9616/81, 1987

³⁷ *Lechner and Hess v. Austria*, no. 9316/81, 23 April 1987

³⁸ *Apicella v. Italy*, no. 64890/01, 29 March 2006

lack of personal staff and the lack of technical equipment are no excuse for the excessive delays in the civil proceedings.³⁹

It is necessary to consider as maladministration of the court the situation when the judgement of the inferior court was quashed because it failed to respect the binding legal opinion of the superior court or the Constitutional Court.⁴⁰

However, temporary and short-term overburden of the court is under certain circumstances excusable, but only if the total length of the proceedings is not excessive.⁴¹ If there is a danger that the overburden of the courts will be more permanent, it must be taken all necessary measures to avoid delays.⁴² If there are delays in the civil proceedings, the prompt progress at the end of proceeding does not excuse inaction during the rest of duration of the proceedings.

Often the delays in the proceedings can be caused by work of other persons involved in proceedings, such as for example experts that were authorized to work out an expert work. The ECHR found states responsible for delays based on these grounds even they were not responsible for this situation directly.⁴³

The proceedings before the Constitutional Court is considered a specific one according to Czech law. The ECHR held that even the length of the proceedings before the Constitutional Court should be included to the total length of the proceedings. In this case there is also responsibility of the state for compliance of the Czech law system with the requirement of fair trial.⁴⁴

The significance of the matter for the applicant

One of the important criteria for the amount of a just satisfaction is what is at stake for the applicant. Therefore, the award of satisfaction should be made in respect of pain, suffering, physical and mental injury, feelings of anxiety, helplessness and frustrations⁴⁵.

Although the delays in proceedings usually negatively influence only the natural person, legal person has also the right to claim satisfaction for breach of its right for fair trial

³⁹ *De Micheli v. Italy*, no. 12775/87, 26 February 1993

⁴⁰ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 1637/2009, 20. 10. 2010

⁴¹ *Guincho v. Portugal*, no. 8990/80, 10 June 1984

⁴² *Martins Moreira v. Portugal*, no. 11371/85, 26 October 1988

⁴³ *Capuano v. Italy*, no. 9381/81, 25 June 1987

⁴⁴ *Buchholz v. Italy*, no. 7759/77, 6 May 1981

⁴⁵ *Frydlender v. France* [GC], no. 30979/96, ECHR 2000-VII

enacted in art. 6 par. 1 of the Convention due to failure to deliver judgement within reasonable time.

In the case of natural persons, there are objective and subjective subcriteria which should be considered. For the purpose of this consideration the ECHR usually employs two comparative terms in two degrees: „particular or special diligence“ and „exceptional diligence“. This distinction also represents the speed at which the cases should be carried on. The exceptional diligence should be used in cases where any delay would result in a particular quality of irreversibility of unfavourable results e.g. in matters dealing with custody of children.

As for the objective subcriteria, firstly, there are some types of proceedings in which the criterion „what is at stake“ would be usually of greater significance. The ECHR ruled that the significance is greater in matters dealing with custody of children⁴⁶, civil status and capacity⁴⁷, labour disputes⁴⁸, property ownership⁴⁹ and pension disputes⁵⁰.

When typical civil proceedings as mentioned above are held at the court, there is no need to prove the objective subcriteria, because these result directly from the nature of the matter proceeded.

In judgement *Apicella v. Italy*, application no. 64890/01, 10 November 2004, the ECHR (before the case was referred to the Grand Chamber by the First section of the ECHR) held that the basic figure for the calculation of the remedy should be increased in these typical cases where the stakes involved in the dispute are considerable (in this specific case by EUR 2,000).

Secondly, as for the subjective subcriteria which should be particularly considered when deciding upon the range of just satisfaction for non-penunciary damage, the court should consider the physical (exceptional diligence in the case of incurable diseases)⁵¹ and mental⁵² health of the applicant, age of the applicant⁵³, influence on reputation of the applicant⁵⁴, the fact that the applicant has been charged to pay high interest of the sum in dispute while the case is pending⁵⁵.

⁴⁶ *Niederböster v. Germany*, no. 39547/98, 27 February 2003

⁴⁷ *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I

⁴⁸ *Frydlender v. France* [GC], no. 30979/96, ECHR 2000-VII

⁴⁹ *Hentrich v. France*, no. 13616/88, 22 September 1994

⁵⁰ *H. T. v. Germany*, no. 38073/97, 11 October 2001

⁵¹ *X v. France*, no. 18020/91, 31 March 1991

⁵² *Bock v. Germany*, no. 11118/84, 29 May 1989

⁵³ *Hartman v. Czech Republic*, no. 53341, ECHR 2003-VIII

⁵⁴ *Kryzstov Pienazek v. Poland*, no. 57465/00, 28 October 2003

⁵⁵ *Schouten adn Meldrum v Netherladns*, no. 19005/91, 9 December 1994

In the case of subjective subcriteria, when the applicant alleges the extent of damage sustained by him and the change of his life situation caused by the delays in civil proceedings, the burden of allegation is on applicant. He has to allege the facts that distinguish his position from the position in typical cases, where the objective criteria should be considered and he has to allege the causal link between the delay in proceedings and the non-pecuniary damage suffered too.⁵⁶

On the other hand, the ECHR within its judicial activity also creates negative list of proceedings in which it should not be considered what is at stake for the applicant. For example, in our opinion in the case of road accidents, it depends on the consequences of these accidents. Generally, the ECHR does not consider road accident a typical case in which should be considered what is at stake for applicant.⁵⁷ However, if a serious injury which affects life of the applicant in the future is alleged in the case, it should be considered with special diligence.⁵⁸

Just satisfaction for the non-pecuniary damage suffered by legal persons caused by delays in proceedings

The ECHR ruled that legal persons also have the right to claim just satisfaction for non-pecuniary damage including political parties⁵⁹, associations⁶⁰ or commercial companies⁶¹. The basic reasons for the existence of moral damage caused to legal persons by excessive length of the proceedings were set by the ECHR in the case *Comingersoll S.A. v. Portugal*[GC], no. 35382/97, 2000-IV. In this case, the total length of the civil proceedings was 17 years and 6 months. The ECHR held that although this case was complex, the applicant did not contribute to the delays and the duration of the proceedings cannot be considered to be reasonable.

In this case, the ECHR ruled that a judgement in which it finds a breach imposes on the state a legal obligation to make compensation in such way as to restore as far as possible the situation existing before the breach. The ECHR also held that one of the arguments in favour of the compensation being awarded for non-pecuniary damage was the fact that the

⁵⁶ Opinion of the Supreme Court of the Czech Republic no. Cpjn 206/2010, 13. 4. 2011

⁵⁷ *Süirmeli v. Germany* [GC], no. 75529/01, ECHR 2006-VII

⁵⁸ *Silva Pontes v. Portugal*, no. 14940/89, 23 March 1994

⁵⁹ *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94

⁶⁰ *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, no. 15153/89

⁶¹ *Comingersoll S.A. v. Portugal* [GC], no. 35383/97, 2000-IV

company was unable to claim the value of its debt because the proceedings were still pending. Finally, the ECHR held that there should not be any general exclusion on the compensation for non-pecuniary damage being awarded to legal persons and all the circumstances of the individual case have to be considered. The ECHR took into account the fact that under the former Convention system, the Committee of Ministers has in many cases awarded the compensation for the non-pecuniary damage sustained by commercial companies and also many signatory states of the European Convention on Human Rights award the compensation for non-pecuniary damage to commercial companies. The reasons considered should be both subjective and objective and such criteria as the reputation of the company, uncertainty in decision-making, disruption in management and to a lesser degree anxiety and inconvenience caused to the members of management⁶² should be taken into account.

In judgements against the Czech Republic, the ECHR also determines arguments in favour of the compensation of moral damage caused by an excessive length of proceedings to legal persons. For example, when the member of management of the company is a majority owner of the company, there is a higher possibility that he suffers from the anxiety and inconvenience caused by delays in proceedings where the company is a participant⁶³. If the company is deprived of the possibility to effectively claim the debt and the debt is unenforceable due to the excessive length of the proceedings, the company is left in uncertainty („dans une situation d’incertitude“) which should also be taken into account when considering the satisfaction for non-pecuniary damage.⁶⁴

According to the Supreme Court of the Czech Republic, the amount of satisfaction awarded to legal persons does not have to be obligatorily lower than the amount awarded to natural persons. In case of legal persons, such criteria as a reputation of the legal person, insecurity in management planning, uncertainty in decision-making, disruption in the management of the company and anxiety and problems caused to the members of management should be considered in conformity with the judgements in *Comingersoll S.A. v. Portugal* cited above. However, the Supreme Court also held that the moral damage suffered by members of the management due to excessively long proceedings is usually lower than the damage suffered by legal or natural person itself.⁶⁵

The Supreme Court namely holds the opinion that the will of a legal person derives from the wills of the members of the management of a legal person. Natural persons in the

⁶² *Comingersoll S. A. v. Portugal*[GC], no. 35382/97, 2000-IV

⁶³ *Skoma, spol. s r.o. v. Czech Republic*, no. 21377/02, 14 February 2006

⁶⁴ *Fackelmann ČR v. Czech Republic*, no. 65192/01, 26 October 2004

⁶⁵ Opinion of the Supreme Court of the Czech Republic no. Cpjn 206/2010, 13. 4. 2011

management are directly and closely connected to the results of legal person and that is why in reasonable cases the satisfaction should be also awarded to legal persons.⁶⁶

That is why the courts should not apply at large the presumption that the legal person's damage suffered is automatically lower than the natural person's one without considering all the circumstances of the case although the Supreme Court admits that statistically, this type of damage is less common.⁶⁷

The amount of just satisfaction for non-pecuniary damage caused by delays in proceedings in civil cases in the Czech Republic

In the Czech Republic the right to just satisfaction enacted in art. 41 for breach of art. 13 and art. 6 par. 1 of the European Convention on human rights is enacted in § 13 and § 31a of Code. No. 82/1998 Coll., on responsibility for the damage caused by maladministration. These enactments allow applicant to claim just satisfaction for delays in proceedings beyond the reasonable length. According to this enactment the just satisfaction for non-pecuniary damages (including the damage due to delay in proceedings) could be awarded in cash, if there is no other way of compensation and the ruling on breach of law is not sufficient. All the circumstances of the case and the amount of damage should be considered as well as the total length of the proceedings, complexity of the proceedings, conduct of the applicant, conduct of the courts and the significance of the proceedings for the applicant („what is at stake“ criterion).

According to the Constitutional Court of the Czech Republic⁶⁸ and the ECHR⁶⁹ the amount of the satisfaction awarded at national level could be lower than the amount awarded by the ECHR (45% of the amount awarded by the ECHR is the adequate amount) and the amount should correspond to the national traditions, standard of living and legal system of the Czech Republic⁷⁰. This is also due to the amendment no. 106/2006 Coll. which added § 31a to the code no. 82/1998 Coll., on responsibility for the damage caused by maladministration, and by which an effective system of remedy for non-pecuniary damages resulting from delays in proceedings was established in the Czech legal order. Therefore, the amount of remedy could

⁶⁶ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 3908/2009, 29. 12. 2010

⁶⁷ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 3326/2009, 9. 12. 2010

⁶⁸ Finding of the Constitutional Court of the Czech Republic no. I. ÚS 192/11, 28. 3. 2011

⁶⁹ *Apicella v. Italy*[GC], no. 64890/01, 29 March 2006

⁷⁰ *Dubjaková v. Slovakia*, no. 67299/01, 19 October 2004

be lower, as in the case of the Czech Republic, the ECHR does not have to consider the criterion of insufficient remedy at the national level.

The calculation introduced in the opinion Cpjn 206/2010 of the Supreme Court of the Czech Republic is based on the ECHR judgement *Apicella v. Italy*, application no. 64890/01, 10 November 2004, before it was referred by request of the Italian government to the Grand Chamber in conformity with art. 43 of the Convention. The Supreme Court based its opinion on this judgment because according to the opinion of the Supreme Court, the Grand Chamber of the ECHR confirmed the method of calculation of the satisfaction declared in the judgement of the First section from 10 November 2004. In this judgement, the First section of the ECHR ruled that a sum varying between EUR 1,000 and 1,500 per year of the duration of the proceedings is a basis for this calculation. The ECHR set in this judgement that the basic figure should be increased according to what is at stake for the applicant or decreased if satisfaction is awarded at the national level or if violation of law is declared. This decrease should motivate states to enact effective remedy corresponding as much as possible to the remedy provided by the ECHR.

Ministry of Justice of the Czech Republic is of the opinion that the satisfaction should correspond to CZK 15,000 per year of the duration of the proceedings. According to the statement of the government of the Czech Republic, the average satisfaction awarded in 2006 was cca EUR 5,000 which is about 66,7 % of the average awarded by the ECHR.⁷¹

Therefore, considering the facts mentioned above the Supreme Court of the Czech Republic hold⁷² that based on situation in the Czech Republic the appropriate basic figure is the amount varying between CZK 15.000 and 20.000 CZK (cca EUR 600-800) per year of the duration of the proceedings, and that in the first two years of the duration of the proceedings the amount should be reduced to half.

The reduction in first two years is derived from the fact that according to Czech statistical office in 2010⁷³ the average length of the civil proceedings was 631 days (1,77 year), which means, that during this period it is less probable that delays in proceedings will occur and the non-pecuniary damage sustained by the applicant is likely to be lower.

However, in case of longer proceedings the basic figure should be increased on the basis of the total length of the proceedings and the length of compensatory proceedings

⁷¹ *Vokurka v. Czech Republic*, no. 40552/02, 16 October 2007

⁷² Opinion of the Supreme Court of the Czech Republic no. Cpjn 206/2010, 13.4.2011, judgement of the Supreme Court of the Czech Republic no. 30 Cdo 3026/2009, 21.10.2010

⁷³ Statistická ročenka České republiky 2011. Web site:

<http://www.czso.cz/csu/2011edicniplan.nsf/kapitola/0001-11-2010-2700> (accessed March 12, 31)

should also be considered. The ratio of the increase of the basic figure to the increase in the duration of proceedings is demonstrated in following table:

Length of proceedings	Basic figure – CZK	Basic figure – EUR
2 years and less	0 – (7,500 – 10,000)	0 – (300 – 400)
3 years	30,000 – 40,000	1,200 – 1,600
4 years	45,000 – 60,000	1,800 – 2,400
+ 1 year	(+15,000) – (+20,000)	(+15,000) – (+20,000)

After determining the basic figure it should be increased or decreased by up to 50 % considering the other circumstances of the case, i.e. complexity of the case, conduct of the applicant and the court and what was at stake for the applicant. In the Supreme Court's view the increase or decrease by up to 50 % reflects the relation between the damage suffered and remedy awarded, however in exceptional cases the decrease and increase should go beyond this range. Applying each of the criteria should result into percentual increase and decrease of the basic figure and the total sum of modifications due to application of the criteria should result into decrease or increase of the basic figure in total.

The Constitutional Court of the Czech Republic however declared that the methodology of calculation of satisfaction introduced by the Supreme Court should not be applied automatically, all individual circumstances should be considered and the courts of the first and the second instance are allowed to award satisfaction beyond the range set by the Supreme Court.⁷⁴

Finding the violation of law as a just satisfaction

In exceptional cases the ECHR does not award just satisfaction in cash and rules that finding a violation of law is sufficient just satisfaction for the applicant. For example, in case *Affaire Berlin v. Luxembourg*, no. 44978/98, 15 July 2003 the court admits that the applicant may have suffered non-pecuniary damage from delays in his divorce proceedings, however as the conduct of the applicant significantly influenced the extent of the delay, the ECHR ruled, that this moral damage is sufficiently satisfied by statement of violation of law. It follows that finding of violation of law should be considered as a sufficient just satisfaction only in

⁷⁴ Finding of the Constitutional Court of the Czech Republic no. III. ÚS 1320/10, 9. 12. 2010

exceptional cases, after consideration of all circumstances, if the method of domestic remedy is sufficiently effective⁷⁵, if the court cannot be blamed for the delays and if there is not much at stake for the applicant.

The Supreme Court of the Czech Republic has the same opinion.⁷⁶ The Supreme Court as well as the ECHR assumes that there is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage.⁷⁷ That is why the burden of proof and burden of allegation that the excessively long proceedings did not occasion non-pecuniary damage lies on the state as the defendant. However, the Supreme Court has also ruled that it is not possible both to award just satisfaction in cash and to declare violation of law cumulatively. Firstly, the court of the first and second instance has according to the Supreme Court to consider if the declaration of violation of law is sufficient. If it is not the case, it should then calculate the amount of just satisfaction in cash.⁷⁸

Conclusion

The states which are parties to the European Convention on Human Rights have to adopt a compensation system which also has to include the criteria for determining the just satisfaction. When deciding upon the amount of just satisfaction the ECHR usually justifies this amount with only a few sentences and a reference that the assessment is made on equitable basis.

The Supreme Court of the Czech Republic gave a guidance as to the quantification of non-pecuniary loss in „reasonable time“ cases in its binding opinion Cpjn 206/2010, in which it prescribes criteria and system in order to determine the amount of just satisfaction. In its binding opinion the Supreme Court bases his compensation system on the §31 of the Code no. 82/1998 Coll. and the judgment *Apicella v. Italy*, no. 64890/01, 10 November 2004. Although the compensation system introduced by the Supreme Court uses somewhat mechanical pattern for assessment of the amount of just satisfaction, we believe that it is in conformity with the ECHR case law and it will effectively contribute to unification of judicial practice in the Czech Republic. In this respect it should be mentioned that according to § 31a par. 3 letter c) of Code no. 82/1998 Sb., about the responsibility for the damage caused by maladministration, not using of the means of protection against the delays has to be in our

⁷⁵ *Apicella v. Italy*[GC], no. 64890/01, 29 March 2006

⁷⁶ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 2742/2009, 10.3.2011

⁷⁷ *Apicella v. Italy*[GC], no. 64890/01, 29 March 2006

⁷⁸ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 1684/2010, 29.6.2011

opinion considered as criterion in disfavor of the applicant, although this is without any doubt in clash with the opinion of the Supreme court of the Czech Republic.⁷⁹

Although statutory criteria (§ 31 of the Code no. 82/1998) and guideline opinion (Cpjn 206/2010) were adopted for quantification of amount of just satisfaction, each case will turn on its own facts and specific circumstances of a case must be taken into consideration and different system of quantification may be applied if it is more suitable for the case.⁸⁰ It would be interesting how superior courts and the ECHR would react on different system of remedy developed in the judgments delivered by the courts of the first instance when the judgment is reviewed.

An effort to build up a sufficient precedent and case law is apparent, but still determining the value of harm and quantifying the amount of just satisfaction in “beyond reasonable time” cases is particularly difficult.

There can be short delays in proceedings because of its complexity, but this fact does not relieve states of responsibility to ensure the right to a fair trial held within the reasonable time. In order to avoid the danger of prolongation of proceedings, states should lay the foundations of an effective judicial system so that they can meet the requirement of hearing cases within reasonable time. In such an effective and functioning judicial system, there would be no need to compensate for non-pecuniary damages and no need of creating a system of quantification of just satisfaction.

⁷⁹ Judgement of the Supreme Court of the Czech Republic no. 30 Cdo 4761/2009, 5. 10. 2010

⁸⁰ Finding of the Constitutional Court of the Czech Republic, no. III. ÚS 1320/10, 9. 12. 2010

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