

## **Rights of parties in judicial proceedings during Covid-19 pandemics**

### **1. Precautionary measures and a new model of operation**

Due to the outbreak of Covid-19 in Croatia, epidemiologists recommended introduction of precautionary measures in order to prevent the further spread of the virus. For that purpose, the Croatian Civil Protection Directorate adopted a series of decisions, the most important ones concerning social distancing and ban of public gathering.

Such measures significantly impaired, or even hindered the ordinary course of operation of public sector, which triggered a set of solutions with the aim of ensuring that the public sector resumes its operations as much as possible. Thus, some authorities, such as the Tax Authority, Financial Agency and the Croatian Health Insurance Fund, made it possible to submit certain applications electronically.

### **2. Reaction of the judiciary to the new model of operation**

Unlike the authorities mentioned above, the judiciary failed to appropriately address the new situation. The Ministry of Justice recommended that only urgent judicial proceedings be continued, and that all the other matters be postponed for a period of 14 days. In addition, the Ministry introduced teleworking and recommended electronic communication with parties.

The response of the courts to such recommendation was to render decisions about postponement of hearings scheduled in the period covered by the precautionary measures. In doing so, the courts did not consider the possibility of holding virtual, on-line hearings or of introducing new models of operation.

When it comes to sharing documents with courts (i.e. submission and receipt of motions and decisions), ever since the last amendments of the Civil Procedure Act (September 2019), electronic communication is slowly being introduced.

However, the courts did not make use of technical possibilities enabling remote communication, which would allow for virtual hearings to be held. Generally speaking, the courts are very reluctant to introduce and adapt to the modern technologies, whereas this would not only be beneficial, but necessary in light of the new situation. This problem was also addressed by the president of the Supreme Court of the Republic of Croatia in its letter of 20 March 2020, inviting all the presidents of high and county courts to procure the exploitation of all the available technical possibilities of remote communication.

In light of the foregoing, it is reasonable to question whether the rights of parties to have their case solved within a reasonable time limit have been protected. In other words, postponement of hearings only prolonged the already long-lasting judicial proceedings, to the detriment of the parties.

### **3. Protection of parties' rights pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention")**

Pursuant to the Convention, the right to a fair trial, as one of fundamental human rights, also includes right to a public hearing within a reasonable time. Should the parties opine that their right to a public hearing within a reasonable time has been infringed, they may lodge a complaint with the European Court of Human Rights in Strasbourg ("ECHR"). The parties may do so during the proceedings, as well as upon its completion, even if they were unsuccessful in the proceedings concerned.

The concept of reasonable time includes total duration of proceedings, until the passing of a final court judgment, which also includes appellate proceedings. Reasonable time is determined on a case-by-case basis, depending on the circumstances of each case, including its complexity, parties' behaviour, the importance of the matter at dispute for the party concerned, as well as procedures carried out by courts. For instance, in case of extremely complex proceedings, such proceedings are deemed to be completed within a reasonable time, although it was long-lasting, whereas there might be proceedings that were significantly shorter in time, but which may be deemed not to have been completed within a reasonable time if it has been stalled for the reasons attributable to the courts. Generally, infringement of right to a public hearing within a reasonable time is the most common infringement, in comparison to other infringements set out in the Convention.

Furthermore, in extraordinary situations, a country may implement measures limiting such rights, depending on the circumstances. However, such limitations must be (i) proportional to the purpose for which they have been introduced; and (ii) consistent with their intended objective.

### **4. Protection of parties' rights pursuant to Croatian law and case law**

Other than the Convention, the right to a public hearing within a reasonable time is also guaranteed by the Constitution, Civil Procedure Act and Courts Act.

If the case has not been solved within a reasonable time, pursuant to the Courts Act, the parties may lodge such request to the court where the case is pending. Should the request be upheld, the court shall determine the time limit of not more than six months, in which the case must be resolved. In case such time limit is not respected, the party concerned may seek appropriate monetary compensation.

Generally, according to the case law, a case is deemed not to have been solved within a reasonable time if it has been pending before the court of first instance for more than three years, and if it has been pending before the court of second instance for more than three years from the date of lodging an appeal.

The right to a public hearing within a reasonable time has been impaired due to the introduced social distancing measures and bans of gathering. Having in mind that the COVID-19 pandemics evidently represents a threat to human health, some limitations of freedoms and rights may be justified.

However, every limitation of freedom or right must be consistent with the circumstances of a particular case. Therefore, it is important that such limitations do not exceed the purposes for which they have been introduced. In other words, such limitations must not affect the rights of the parties more than necessary.

According to statistics of the Supreme Court regarding civil matters, in 2017, 238 requests for protection of right to a public hearing within a reasonable time have been lodged, while 246 such requests have been resolved. In 2018, 225 such requests have been lodged, and 233 have been resolved. The data concerned shows that the parties are well aware of their right to a public hearing within a reasonable time and that they are prepared to protect this right. Also, the data indicate that prior to the introduction of epidemiological measures, there has been a significant number of cases seeking hearing within a reasonable time, and thus, as a result of inadequate response of the judiciary to the new situation, it is very likely that the number of requests for the protection of right to public hearing within a reasonable time will increase.

## **5. Proposed solutions with respect to continuation of judicial proceedings**

For the judicial proceedings to be continued, please find below some potential solutions pertaining to holding hearings:

### (a) Electronic communication

- When it comes to simpler hearings with not more than three participants (a judge and one proxy of each of the two parties), which are, according to statistics, the most common, the hearing may be organized electronically (online) in real time (the so-called virtual hearing); since this brings up the question of technical feasibility, in case the proxies or the parties that are unable to organize such virtual hearing, the court could dedicate a separate room and equipment for such communication in the court building;
- this is consistent with epidemiological measures pertaining to social distancing;

### (b) Physical presence

- although epidemiologists recommend avoiding physical presence of a greater number of persons in the same place for a long period of time, this could still be taken into account if the room is of a larger surface, such as conference room, making it possible to keep the appropriate social distance;
- it is also necessary to comply with high hygienic standards as determined by the Civil Protection Directorate, the Ministry of Health and the Croatian Institute of Public Health;
- of course, the duration of hearing would in such case need to be limited in advance, in accordance with epidemiological recommendations;
- this model could be applied in case of hearings in more complex bankruptcy or criminal proceedings with a larger number of participants, even though the number of participants would need to be limited as per epidemiologists' recommendations;

(c) Hybrid model

- Some participants are present in person at the hearing, while other participate remotely via means of electronic communication;
- This model also takes account of the appropriate implementation of the recommendations pertaining to physical presence of participants and their remote presence.

## **6. Conclusion**

For the purpose of preventing the spread of Covid-19, certain measures have been introduced that also affected the operation of courts. The response of the judiciary to the new situation was not adequate since judicial proceedings were prolonged, and the parties were exposed to certain legal uncertainty.

Such situation might trigger increase in number of requests for protection of right to a public hearing within a reasonable time. This would in turn increase the workload of judges since they would be required to concurrently deal with a larger number of cases in a short period (i.e. in the period not to exceed six months).

Besides, in such cases, the parties will be entitled to seek appropriate monetary compensation if their case is not resolved within the mentioned time limit. Such monetary compensations will be financed from the state budget, which could, in turn, be another significant burden on the state budget in this demanding period.

On the other hand, if the requests of parties for the protection of right to a public hearing within a reasonable time are not upheld, the parties will have the right to lodge appeal to higher courts, and will ultimately be entitled to seek protection at ECHR.

In light thereof, it is evident that the courts should adjust to the new circumstances. Introduction of virtual hearings as a new model of operation is necessary since it would enable the courts to continue their work even in extraordinary situations. This is very important not only in order to protect the right to a public hearing within a reasonable time, but also for continuity of operation of the entire judicial system in general.