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LAWYERS' FEES AND LENGTH OF CIVIL LITIGATION.
EXAMPLES FROM CROATIAN AND HUNGARIAN LAW AND PRACTICE

I. In General about the Problem of Unpredictability of Lawyers' Costs and its relation to the Length of Civil Litigation

It is no mystery that civil litigation may be costly. Even if parties are allowed to appear in a procedure *pro se* (without being represented by a lawyer), resorting to a professional lawyer is, in most cases, eventually unavoidable.² Under normal conditions, if the party is being represented by the lawyer outside of the system of free or subsidized legal aid, one recent and comparative – The Oxford Study - suggests that lawyers' fees are in almost all cases (i.e. in most of the countries) higher than court fees and comprise the major element in total costs of civil litigation.³ According to the same study, in those jurisdictions in which lawyers' fees are not tariff system based, it is difficult to predict the amount of work done and hence the lawyers' fees, so the potential range of lawyers' costs vary hugely. Furthermore, findings from the study suggest that, while the court costs are always predictable thanks to tariffs established by the statutes, lawyers' costs are only relatively predictable in those countries where tariffs exist, but otherwise are largely unpredictable.

This lack of predictability is manifestly related to the method of charging lawyers' fees upon hours worked, especially if there is no tariff or any other type of the ceiling applied.⁴ The basic idea behind "billable hours" – ways of charging lawyers' fees according to the amount of time they spend delivering them is that a lawyer records time spent on a matter, usually in increments of one or two tenths of an hour. At the end of the month, bills are prepared that multiply the number of hours logged by the lawyer's hourly rate.⁵

A kind of remuneration per hour began to dominate the legal profession, especially in the world of corporate legal services in the last few decades of the twentieth century, starting in the United States but shortly after spreading to Europe and elsewhere. According to the information from reports that can be found on Internet⁶, billable hours dominate the way

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³ Fernhout, F., „Outcome-Related Fee Agreements in Europe and Hong Kong“ in the „Access to Justice and the Judiciary. Toward New European Standards of Affordability, Quality and Efficiency of Civil Adjudication“, Uzelac, A; van Rhee C.H. eds., 2009., p. 13 and related text. It is worth to note that in Croatia parties may undertake procedural actions either personally or through agents, but in case party decides to hire an agent, party's possible actions are very very narrowed. According to the art. 89 of Croatian Civil Procedure Act only an licensed lawyer may represent a party as an agent before courts, if the law does not prescribe otherwise. In the meaning of Civil Procedure Act otherwise means that party may be represented by a blood relative in a legal line, a brother, sister or marriage partner – if he/she has full disposing capacity and if he/she is not illegally practising law.

⁴ See Hodges, C., Vogenauer, S. etc. (eds.), *The Costs and Funding of Civil Litigation. A Comparative Perspective*, 2010, p. 69 and related text and graphs.

⁵ Cf. *ibid.*, p. 16-17, 70, 88.

⁶ See Derrick, J., *Boo to Billable Hours*, 2007, p. 7-8.

⁷ See reports available on <http://www.csls.ox.ac.uk/COSTOFLITIGATIONDOCUMENTSANDREPORTS.php>.

lawyers' fees are being charged in number of European countries, not just in the world of corporate lawyers. In the Netherlands, for example, lawyers charge their fees mostly according to the hours spent and same had started to be the case in other countries; in Sweden, Denmark, the Republic of Ireland, the UK, Belgium, Portugal, Italy and Germany (for out-of-court work).

Although it has been advertised for a very long time that the system of billable hour is nothing but a clean system in which clients pay for what they get in transparent and linear manner, numerous findings indicate that there might be something wrong with that way of charging lawyers' fees. For instance, it has been alleged that the overreliance on billable hours by the legal profession provides no predictability of costs for client, penalizes the efficient and productive lawyer, fails to discourage excessive layering and duplication of efforts, discourages taking on pro bono work and generally speaking, it puts client's interest in conflict with lawyer's interests.⁷ Still, despite ever louder complaints from various sides that the practice of billing per hours spent encourages lawyers to delay the problem rather than to work it out little has changed so far. In a given sense, financial interests of lawyers are certainly not the fact that should not be taken into account since at the heart of the lawyerly function lies the fee.

Lawyers' fees are, in most of the countries, almost always negotiable rather than strictly regulated; even in the systems which are considered to be extreme – tariff systems where fees are set by statute. In the same time, although we could speak about number of other methods of charging lawyers' fees⁸, fact is that the negotiable hourly fee arrangement persists as dominant method of charging lawyers' fees in many countries of common and civil law systems, not only for the out-of-court work but also in the case of charging representation before courts.

Still, some civil jurisdictions, like Italy and Germany have tariffs set out by statute but they are rarely binding so lawyers can freely agree fees with their clients within the statutory limits. Croatia has also tariff system – lawyers' fee schedule, officially called Lawyers' Fee Schedule and Cost Compensation. Contrary to the conclusion of the Oxford study which says that lawyers' costs are only truly predictable where a straightforward tariff applies irrespective of the amount of work done, as we will see, in Croatian case, previous conclusion might not be correct.

In the same time, what was not in the focus of respectable Oxford study is relation of the regulation of lawyers' fees with the length of civil proceedings in respective countries. Answer to the latter – could various ways of charging lawyers' fees influence the length of civil litigation may not only confirm Oxford study finding on unpredictability of lawyers' costs but could also serve as an indicator that the problem of unpredictability of costs lies primarily within the lawyers for a simple reason; if we take into account that it is in best client's interest to resolve a legal matter efficiently and quickly, the efficient and quick lawyer will earn a lower fee than an inefficient and slow lawyer. That is why lawyers will show an incentive to work even harder and longer on the case, to use the tactics before the courts that

⁷ See American Bar Association Commission on Billable Hours Report 2001-2002. See also Derrick, J. Boo to Billable Hours, where he is honestly stating how when he first became a lawyer and joined a firm that he was presented with a simple directive: "Record all your time". However, later on he realized that the more time he spent lawyering, a lot of time should not even be recorded – time spent looking for lost files, time spent managing his time, time spent distracted and so forth.

⁸ List of the national approaches to the lawyers' fees can be found in the Evaluation report of European judicial systems - Edition 2010 (2008 data): Efficiency and quality of justice published and presented by the European Commission for the Efficiency of Justice (CEPEJ).

are inherently unethical, tactics that may cause delays in litigation such as bringing frivolous contentions before court, filling a not-needed motions to restore a prior status, motions to adjourn the hearing just to provoke delay and similar.

1. FEE CONTRACTS AND TARIFF SYSTEM REGULATION IN CROATIA

Croatian lawyers charge their fees according to the Tariff for Lawyers' Fees and Cost Compensation Act (hereinafter referred to as: Tariff⁹), fee schedule according to which fees must be calculated on the basis of the amount in dispute. Before 2008, Croatian Bar Association was solely empowered to adopt Tariff for Lawyers fees and cost compensation.¹⁰ Pursuant to the amendments of the Act on Legal Profession¹¹, new rule was introduced, so Tariff drafted by the Bar had to be given consent of the Minister Justice who was obliged to seek the opinion of Economic and Social Council – a special governmental body that consist of representatives of the Government, trade unions and employers. At first, Tariff was denied by the Minister on the ground that proposal of the Tariff adopted by the Bar needs to be changed in order to better reflect the problem of social sensitivity (in terms of prices for legal services) as well to integrate a mechanism that will encourage concentration of court procedure and decrease number of hearings and additionally, to encourage different models of alternative dispute resolution. After corrections done by the Bar adopted, Tariff has changed only slightly. For certain types of procedures (such as trespassing, housing relations and tenancy disputes, divorce or annulment of the matrimony, labor relations as well some other), regardless of the number of undertaken actions lump sum was introduced. Also, the limit on the number of possible submissions in first instance proceedings was set, so now no more than a total amount of 4 submissions in first instance proceedings may be drafted, filed and calculated by lawyers. As to the all other services (especially those related to the property litigation and services), price and method of calculation per single lawyer's action maintained.¹² These cosmetic changes satisfied Minister, who gave his consent in December 2009 and commented that adopted changes will contribute to the further shortening of proceedings since lawyers will not be able to charge their fees for every single action (drafting civil action claims, counterclaims, motions, pleas, representation at court hearings, drafting an applications for the issuance of a writ of enforcement etc.).

In order to better explain nature of the present Tariff it is necessary to point out how Croatian Tariff is rather flexible since it widely accepts freedom of contract principle.

Tariff permits lawyers to make special arrangements for the provision of legal services with a legal person or a self employed person to be paid in a lump sum, they can also agree with client on the amount of remuneration, in criminal as well property law cases lawyers may agree with their in writing on remuneration based on an hourly rate which may be higher but not lower than the remuneration fixed in Tariff. Contingency fees are allowed also.¹³

However, even if a special agreement on fee is reached, court will still be obliged to calculate the costs according to the fixed indexes provided in the Tariff. The latter arises from the rule

⁹ Tariff for Lawyers' Fees and Cost Compensation Act (The fee schedule was published in the Official Gazette (OG) No. 148/09 of 11 December 2009).

¹⁰ According to the old art. 18 of the Act on the Legal Profession (OG 9/94) lawyers were entitled to a fee for his or her legal services and to compensation of the costs incurred in connection with the work done according to the tariff established by the Bar Association itself.

¹¹ See art. 3 of the Amendments of the Act on the Legal Profession (OG 117/2008).

¹² See art. 7-8 of the Tariff.

¹³ See art. 38, 39 and 40 of the Tariff.

of Civil Procedure Act on costs of procedure which says that if there is a prescribed tariff for lawyer's fees and other costs, these costs shall be calculated according to this tariff.¹⁴

The Lawyers' Code of Ethics also contains different rules on lawyer's relationship to a client. For an example, rule that calls for attention is one which says that lawyer shall not cause unnecessary procedural costs to the client.¹⁵ On the other side, it is in question how does this rule relate to the fact that Croatian lawyers are entitled, in most of the court cases, to calculate their fees for every single rendered action. Although the primary intention of tariff system should be to prevent excessive charging for legal services as well to ensure the availability of legal services to citizens and legal persons, it seems that Croatian tariff does the opposite. Moreover, although the issue of judicial delay is issue which was researched mainly in the context of the right to a fair trial within reasonable time and judicial reform for EU accession, from the perspective of the court case management, there are some serious indications that a part of the problem lies in the model of calculation of legal services prescribed in the present tariff. In order to reach a more precise answer it is necessary to shortly address some solutions from comparative law as well.

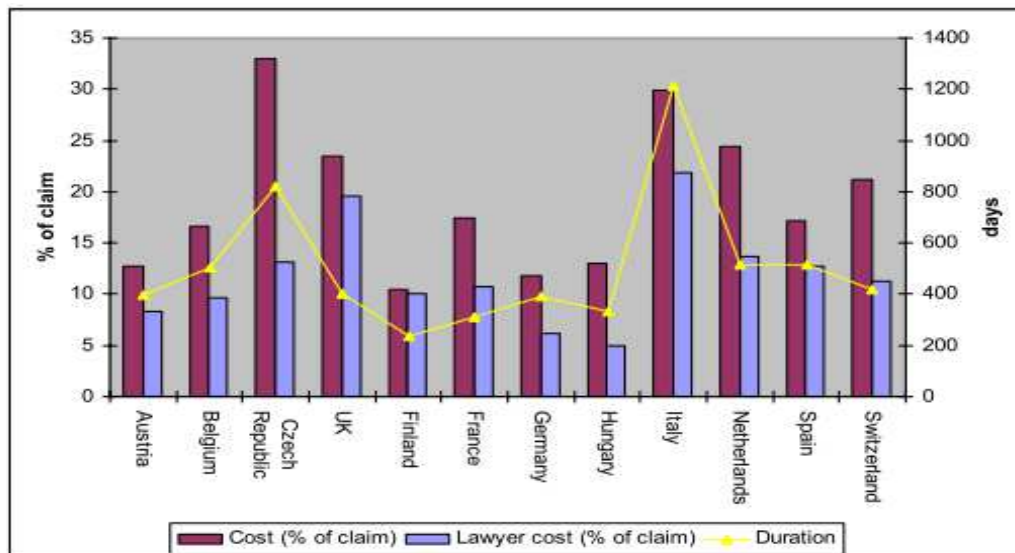
A) CROATIAN LAWYERS' FEE SYSTEM, ITS RELATION TO THE LENGTH OF CIVIL LITIGATION AND WESTERN EUROPEAN PERSPECTIVE

A closer look into systems where fees are prescribed by a schedule of fees that lawyers are bound reveals some interesting information. It is well known fact, for example, that German civil litigation cost system has always placed its emphasis on the equal availability of civil justice for all regardless of their social status. That is why German system is burdened with a high level of regulation for all types of costs incurred in civil litigation which is supposed to deliver a greater predictability of costs of any proceeding.¹⁶ In German context, it seems that this kind of approach results in a high operational efficiency of the system of civil justice, as the next data analysis suggest.

¹⁴ See art. 155 of the Civil Procedure Act (OG 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011). Unlike in the other countries where fees for cost-shifting purposes are established by the statute, in Croatia we are witnessing one rather strange situation – while applying the lawyers' Tariff is not compulsory for lawyers themselves (since they enjoy wide possibility of entering different kind of arrangements with their clients on the basis of freedom of contract principle), court is obliged to calculate the costs according to tariff. Yet, in deciding which costs are to be paid to the party, the court has to take in consideration only costs which were necessary for the conduct of the case, taking careful consideration of all the circumstances.

¹⁵ See art. 52 of the Lawyers' Code of Ethics (OG 72/2008).

¹⁶ Hess, B.; Hübner, R., General Overview and Trends in the German Civil Litigation Cost System in the Hodges, C., Vogenauer, S. etc. (eds.), *The Costs and Funding of Civil Litigation. A Comparative Perspective*, 2010, p. 349-351.



According to the given graph¹⁷ which provides information on access to law for small and medium-sized enterprises, duration for enforcing a contract is relatively low in Germany, while the lawyers' fees as a percentage of the claim remain low in relation to the total cost of enforcing the contract. Supposedly, part of the explanation may lie in the fact that lawyers' fees in Germany for in-court work are calculated on the basis of statute (since 1st July 2004 the *Rechtsanwaltsvergütungsgesetz (RVG)* – Act on Lawyers' Fees) which recognized only three types of fees for judicial work: fee for proceedings (*Verfahrensgebühr*), fee for court hearing (*Terminsgebühr*) and fee for settlement (*Einigungsgebühr*). The fees depend on the value in dispute.¹⁸ One of the main features of the RVG is tied to the principle of only-once levy of the lawyers' fees. The only-once levy of the fees means that in each instance lawyer may calculate and receive fees only once at certain stage of proceeding irrespective of whether he or she appears in court once or several times and irrespective of whether he or she writes one or more submissions.¹⁹ A lawyer can also agree with his or her client on remuneration based on negotiated fees rather than statutory fees provided for in the RVG, but still, when deciding on the fees for cost-shifting purposes courts will always follow RVG principles. The statutory fees are specified in the provisions and schedules of the RVG and are thus transparent and predictable in advance.

Situation is however very different in the countries without statutory schemes where charging according to the hourly rates is frequent and popular (Switzerland, Spain, Netherlands, UK etc.) or with statutory schemes but with calculation per action permitted (Italy²⁰). One other thing which can be distinguished from the mentioned graph evidences how lawyers' fees and cost grow as the duration of enforcing a contract lengthen.

Does this mean that the way lawyers charge their fees deeply influences the speed of civil litigation? Certainly, a positive answer to this question cannot emphasise the entire complexity of the way in which judicial systems in Europe function and complexity of the relationship between the lawyer and the justice system in a given states. No doubt, a lot more should be taken into account in order to confirm the answer; the way courts are organized and

¹⁷ Source: International Bank for reconstruction and Development/The World Bank (2007), as found and edited by SEO Economic Research paper, Regulation of the Legal Profession and Access to Law, 2008., p. 72.

¹⁸ See Questionnaire on funding, costs and proportionality in civil justice systems – Germany, report available on <http://www.csls.ox.ac.uk/COSTOFLITIGATIONDOCUMENTSANDREPORTS.php>.

¹⁹ Ibid.

²⁰ In Italy lawyers' fees are regulated by statute which establishes minimum and maximum amounts that lawyers can charge per service rendered.

managed, public expenditure on the operation of judicial system, professionalism and salary of judges, number of lawyers and judges in different states, rules of civil procedure on party control over the scope and nature of proceedings, the judge's duty to structure the proceedings and intervene, judicial reforms taken on to ensure more efficiency and quality in the European judicial proceedings and etc.

Even so, a closer look to the map on disposition time and clearance rate of litigious civil (and commercial) cases at 1st instance courts in 2008 which may be found in the newest CEPEJ's evaluation of European judicial systems²¹ indicates that Croatia is one of the nine states which have the highest disposition rates (the number of days that are necessary to resolve the cases pending in first instance) – an average of 498 days. If the latter fact is adjoined with a serious criticism of tariff's method of calculation of fees which allegedly stimulates lawyers to produce more actions than actually needed, a serious dose of doubt exists that Croatian tariff method of calculation, although seemingly transparent, may be linked with the length of civil litigation and high costs of judicial proceedings in Croatia.

II. Interests of parties and their lawyers and the length of civil procedure

As has been pointed out in the previous sections, several ways of calculating the lawyers' fees are known, which can influence lawyers' attitudes in civil procedure, altering the procedure's style and length. As a consequence, the various legal systems induce lawyers to a variety of behaviors, but there's something common in all of them: lawyers try to maximize their benefits within the limits of the system. Nevertheless this natural economic interest can be opposed with other interests, in particular with the interests of the society, the court or the opposite party, or even with the interests of their own clients. In this section we would like to describe the kinds of interests lawyers have in the civil litigation, with particular attention to those, which lead to the application of dilatory tactics.

With respect to the length of a civil lawsuit, traditionally the opposite interests of the parties are emphasized. "It is believed, and that is often true, that the plaintiff is interested in a quick, the defendant in a slow completion of the lawsuit. Perhaps it is better to put it a bit more complicated: the party who believes he has a greater chance of winning hastens, while the party who believes he has a lesser chance of winning delays the completion of the lawsuit."²² The basic idea of the liberal civil procedure that the fight emerging from the opposing interests of the parties can resolve the dispute most efficiently is based on this traditional, but, in our opinion, overly simplistic viewpoint. Kengyel points out that while this idea was mostly present in the English adversary system and, as a result, in English jurisprudence, "these arguments were not unknown in the continental jurisprudence. According to Habscheid, the 19th century codifications, which granted unlimited autonomy to the parties, were built on two axioms: 1. civil action is an institution for the enforcement of private claims, so it is the parties' private affair. 2. The "free play of powers" must prevail, so the interests of the parties, who fight for their own rights, are the most efficient catalysts to resolve the legal situation as soon as possible."²³ History has proven the false nature of this assumption. From the aspect of making correct decisions its results are undeniable, but from

²¹ See European Judicial Systems, Efficiency and Quality of Justice, Edition 2010 (data 2008), Council of Europe, 2010, p. 149 and related text.

²² D. Kiss, *Az ügyvédek nagy kézikönyve* [The Lawyers' Great Handbook] (Budapest, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft. 2010) p. 347.

²³ M. Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben* [Court's power and party autonomy in the civil procedure] (Budapest, Osiris Kiadó 2003) p. 79

the aspect of efficiency it has failed utterly. The weakness of the system was due to the overstretching of the limits and the misuse of the rights. Zuckerman notes – in line with the findings of Lord Woolf – that “the cause of complexity, delay and cost is due not to the nature of our procedural devices but, rather, to the excessive and disproportionate use and abuse of the procedural tools”²⁴. The social civil procedure had evolved at the end of the 19th century in Austria as a response to the anomalies of the liberal civil procedure. It transferred the procedural tools of case-management from the parties to the judge. “For the realization of the social function of the civil procedure the role of the court has become crucial. As an opposite of party autonomy, Klein emphasized the court’s vigorous activity”²⁵. The social function of the civil procedure was intensified across Europe in the last century and as one of the most spectacular results of it we can mention the English civil procedure reform, which can be associated with Lord Woolf.

The demand for efficient procedures has become particularly relevant after the intensification of the civil procedures’ social function. In our opinion, to achieve this, it is crucial to recognize the underlying problems and find their causes first. From all the causes we examine only one in our paper: the dilatory tactics.

The above mentioned thesis leads to an erroneous conclusion because of its overly simplistic nature. It suggests that in a civil procedure only opposite interests, intended to extinguish each other, exist, which are only expressed by the lawyers, as if they would be a device, without their own will and interests²⁶. But this theory does not take the lawyers’ own interests into account. Nick Armstrong notes that “the adversarial system rests on the assumption that the parties are best placed to act in their own interests. This, it may be said, ignores the fact that the parties are represented by lawyers, who may not always be acting in their client’s interests due to incompetence, a desire to inflate fees, or due to factors inherent to the lawyer-client relationship”²⁷. Verkijk systematized the interests of the clients and their representatives and concluded that in the civil procedure, beyond their client’s interests, lawyers have various interests too²⁸. The first group is the lawyer’s own interests as a good professional, in particular to represent his client in a good, professional manner. Another group is his illegal interests, and the last group is other legitimate interests of his own that are not strictly related to a good professionalism. Of these, from the aspect of our topic, we should deal with the latter more closely. Verkijk mentioned the lawyers’ fees as an example, which is legitimate, but not strictly related to a good professionalism²⁹. As we stated above, the lawyers are interested in maximization of their fee. This in itself can not be regarded as morally reprehensible, it is value-neutral, because it follows from the fundamental contexts of the market economy. However, if it conflicts with other interests, then it loses its value neutrality, because lawyers have such duties to their clients, to the court and to their professional community, which would be infringed if they would act only to maximize their

²⁴ A.A.S. Zuckerman, ‘Reform in the Shadow of Lawyers’ Interests’, in A.A.S. Zuckerman and Ross Cranston, eds., *Reform of Civil Procedure, Essays on ‘Access to Justice’* (Oxford, Clarendon Press 1995) p. 62.

²⁵ Kengyel, op. cit. n. 23, at p. 105.

²⁶ „According to Savigny’s theory of representation, the act of the representative is actually the act of the represented, so the representative is no more than a device to enforce the will of the represented.” M. Kengyel, *Magyar polgári eljárásjog* [Hungarian civil procedure] (Budapest, Osiris Kiadó, 2010) p. 159.

²⁷ N. Armstrong, ‘Making Tracks’, in A.A.S. Zuckerman and Ross Cranston, eds., *Reform of Civil Procedure, Essays on ‘Access to Justice’* (Oxford, Clarendon Press 1995) p. 107.

²⁸ R. Verkijk, ‘Beyond Winning: Judicial case management and the role of lawyers in the principles of transnational civil procedure’, in C.H. van Rhee, ed., *Judicial Case Management and Efficiency in Civil Litigation* (Antwerpen, Intersentia, 2008) p. 72

²⁹ Verkijk, loc. cit. n. 28, at p. 72.

benefit instead of fulfilling their duties. Zuckerman also noted that representatives have interests separated from the interests of their clients, such as their fees. He remarks in this context, that “yet, given the scope for procedural maneuvering and low client resistance, it would be a miracle if there were no substantial connection between lawyers’ financial interests and litigation practices”³⁰.

From the aspect of dilatory tactics we can examine two groups of interests, the clients’ and their representatives’. The legal representative can recognize his client’s interests in a late decision and use procedural tools which can delay the lawsuit. Such tools could be, for example, “torpedo claims”³¹, the withholding and “dripping” of relevant information³², playing to adjournments, repeated groundless requests for withdrawal of the judge assigned to hear the case³³, or suing correlated lawsuits at different courts for the purpose that they will wait with trial until the other decisions. The number and efficiency of different methods depends on the given legal system and on the judge hearing the case, but the final purpose of them is the same, the delaying of the procedure. Furthermore, as we have stated above, regardless of the client’s interest in delay, it may be the intention of the lawyer to delay the process. Delay can be the result of an active or passive conduct, so a lawyer can use dilatory tactics or refrain from preventing or even cooperate in the dilatory tactics of the opponent’s lawyer. Lord Woolf also draw attention to this matter in his reports. According to his researches “delay is of more benefit to legal advisers than to parties”³⁴. He pointed out that “it may even be in the interest of the opposing side’s legal advisers to be indulgent to each other’s misdemeanours. Judicial experience is that it is for the advisers’ convince that many adjournments are agreed. This is born out by the fact that when the courts have required the client to be present to support a late application to adjourn the trial, the number of such applications has reduced dramatically.”³⁵ In our opinion this can be explained by two reasons, first the above mentioned interests of the lawyers and second the “professional solidarity” of the lawyers with each other. Beside all of the above mentioned reasons, Zuckerman highlighted an other correlation. In his opinion “self-interest finds expression not only in seeking maximal remuneration, but also in acquiring immunity from claims in negligence. In order to minimise liability for negligence lawyers would naturally tend to follow all procedural avenues open to their client.”³⁶

In most legal systems it is a high priority aim to reduce the length of procedure. A wide range of solutions were found to solve this problem. In this paper we do not undertake to examine all of these solutions, but make an attempt to systematize them and try to find out how various systems try to fight off dilatory tactics.

III. Techniques of fighting against dilatory tactics

³⁰ Zuckerman, loc. cit. n. 24, at p. 65.

³¹ F. Sander and S. Brebler, ‘Das Dilemma mitgliedstaatlicher Rechtsgleichheit und unterschiedlicher Rechtsschutzstandards in der Europäischen Union - Zum Umgang mit sogenannten "Torpedoklagen"’, 122 *Zeitschrift für Zivilprozess* (2009) p. 157.

³² See F.J. Rinsche, *Prozeßtaktik* (Köln, Carl Heymans Verlag KG 1993) p. 62.; Prütting in G. Lüke and A. Walchshöfer, eds., *Münchener Kommentar* (München, C.H. Beck'sche Verlagsbuchhandlung 1992) p. 1668.

³³ Grgič, ‘The Length of Civil Proceedings in Croatia: Main Causes of Delay’, in A. Uzelac and C.H. van Rhee, *Public and Private Justice – Dispute Resolution in Modern Societies* (Antwerpen, Intersentia 2007) p. 155.

³⁴ Lord Woolf, *Access to Justice: Interim Report*, 1994, Chapter 3 Nr. 31.

³⁵ Lord Woolf, *Access to Justice: Interim Report*, 1994, Chapter 3 Nr. 31..

³⁶ Zuckerman, loc. cit. n. 24, at p. 65.

As we have mentioned previously, we think dilatory tactics are only applied if they serve someone's interests. Thus it seems to us logical that if we extinguish or offset this interest, then can we take up the fight against dilatory tactics. Different systems have tried various techniques against these tactics, partly by neutralizing this interest, partly by reducing their maneuvering grounds, and finally by applying sanctions to deter those interested from using these tactics. In our opinion these techniques can be classified into three groups according to their objective and means.

In the first group we classified those measures which neutralize those interests of the lawyers which induce them to use dilatory tactics. As an example we can mention the German cost rules, where reimbursable lawyer fees are independent from the working hours spent on the case, and are determined by the achieved stage of the trial instead. Leipold writes that "the evidence fee can also only be earned once in the same instance. So lawyer doesn't get more money when ten witnesses and three expert witnesses are heard than he gains if there is only one witness. The lawyer has an economic interest that the procedure reaches the stage of taking evidence by the court, but he has no economic interest in expanding the evidence."³⁷ The purpose of this rule is to cause lawyers lose interest in prolonging the lawsuit. In Leipold's opinion "the influence of cost regulations must not be underestimated and if you want to influence the reality of the procedure, you have to think about the degree to which the behaviour of the parties and especially of their representatives is influenced by economic factors"³⁸. This cost regulation can hinder the use of dilatory tactics by reducing the lawyers' interest in cases where only the lawyer is interested in delay, but it does not have the same effect in cases where the delay serves the client's interests.

Another technique is the reduction of the maneuvering opportunities of the parties. This does not affect interests of those involved, but focuses on procedural tools instead. In this group legal limitations and judicial case-management can be distinguished, which both have the objective to concentrate the procedure. In the first sub-group we can mention in particular the time limits for change of action or for presentation of the evidence. As an example, we can mention the reform of the Hungarian civil procedure from 2008. According to the new rules of small claims procedure, the plaintiff can not change his claim after the first hearing, and parties can present their motions for the performance of taking of evidence on or before the first day of the hearing. The purpose of these provisions was to reduce the opportunities of changing the subject of the case thereby concentrating the lawsuit. Active judicial case-management has the same object. Indeed, by giving procedural tools into the judge's hand to manage the lawsuit, parties lose maneuvering ground. Andrews states, that "under the new system of judicial case-management, it might be expected that there will be fewer opportunities for the parties to engage in adversarial manoeuvres"³⁹ and by it a speedy and efficient civil procedure can be achieved. A great selection of judicial case-management tools exists. In our paper we can not examine all of them, but highlight only one, the procedural sanctions.

To the third group, in our opinion, belong those procedural sanctions, which try to achieve their goals by deterrence. They form a part of judicial case-management, but because of their special objectives we handle them as a separate group. We can examine the differences between sanctions from various aspects. Taruffo writes that "such differences stem from the interaction of several factors, as for instance: variety in the legal regulation of abuse of

³⁷ D. Leipold, 'Limiting Costs for Better Access to Justice: The German Approach' in A.A.S. Zuckerman and Ross Cranston ,eds., *Reform of Civil Procedure, Essays on 'Access to Justice'* (Oxford, Clarendon Press 1995) p. 272.

³⁸ Leipold, loc. cit. n. 37, at p. 266.

³⁹ N. Andrews, 'Abuse of Process in English Civil Litigation' in M. Taruffo, ed., *Abuse of procedural rights: comparative standards of procedural fairness* (The Hague, Kluwer Law International 1999) p. 96.

procedural rights (APR) (e.g.: general clause vs. specific provisions); differences concerning the allocation of responsibility (e.g.: client vs. lawyer); differences in considering the state of mind of the author of APR (e.g.: subjectivism vs. objectivism); use of private law remedies (damages) rather than procedural devices, and so forth.”⁴⁰

Based on these, Taruffo outlined the following system of sanctions of APR. In his opinion there are three groups of sanctions:

- To the first group monetary sanctions belong: (1) damages, (2) share of costs between the parties, by derogating totally or partially the general rules concerning the ordinary allocation of costs and (3) penalties and fines⁴¹.

- To the second group sanctions as nullity, voidness, preclusion, illegality, rejection, denial belong. This includes for example the procedural institution of preclusion, which is one of the main sanctions of the German and Austrian civil procedures. It attempts to ensure the concentration of procedure by excluding those “attack and defense devices” of the parties which are not submitted in due time⁴². So, the violation of the obligation to support the process (Prozessförderungspflicht) can lead to the loss of the lawsuit. Leipold also highlights that the risk of losing the lawsuit because of the exclusion of the motions forces the parties to take their obligation to support the process seriously⁴³.

- The third class of sanctions is characterized by the fact that their subject is the lawyer. For example, the sanction for the violation of the rules of professional ethics belong to this group.

In the following, we will examine those monetary sanctions to which not only the party, but his lawyer can also become a subject.

1. Procedural sanctions for lawyers

As we have seen, most of the sanctions affect the party directly, among these, the most serious ones, for example the preclusion or striking out, because of their effect to the outcome of the case, can only affect the party. Naturally the party can take revenge on his lawyer afterwards by claiming damages based on professional negligence. However, in this situation the judge has no possibility to directly sanction the lawyer, so he can not deter him, who is directly responsible for the delay, from using dilatory tactics. Only some legal systems know the sanctioning of lawyers beside their clients. Jacques Normand notes, that “on the whole lawyers are the main initiator of procedural abuses and stalling tactics. Nonetheless there are few legal systems which have potential sanctions against them.”⁴⁴

The judge’s sanctioning powers differ from country to country. At the one end of a hypothetical scale are the common law countries, in particular the USA, at the other end of it

⁴⁰ M. Taruffo, ‘Abuse of procedural rights: comparative standards of procedural fairness’ in M. Taruffo, ed., *Abuse of procedural rights: comparative standards of procedural fairness* (The Hague, Kluwer Law International 1999) p. 22.

⁴¹ Taruffo, loc. cit. n. 40, at p. 22.

⁴² U. Foerste in H.J. Musielak, *Kommentar zur Zivilprozessordnung* 3., neubearbeitete Auflage (München, Verlag Franz Vahlen, 2002) p. 712.

⁴³ D. Leipold in *Stein-Jonas Kommentar zur Zivilprozessordnung*, 20. Auflage, 11. Lieferung, (Tübingen, J.C.B. Mohr (Paul Siebeck) 1985) p. 268.

⁴⁴ J. Normand, ‘Final Report: The Two Approaches to the Abuse of Procedural Rights’ in M. Taruffo, ed., *Abuse of procedural rights: comparative standards of procedural fairness* (The Hague, Kluwer Law International 1999) p. 246.

is Germany. While in the USA the Federal Rules of Civil Procedure allows, in excessively many cases, the use of sanctions against lawyers, the German civil procedure code (ZPO) does not allow the sanctioning of lawyers by judges.

In the USA courts, federal district courts in particular, have long been able to exercise a panoply of powers to regulate attorneys⁴⁵. These powers derive from multiple sources and courts can punish by fine or imprisonment, award fees and costs. The range of penalized conducts varies enormously. From these, we would like to emphasize only one: “By far the most visible and controversial sanctioning mechanism, however, is Rule 11 of the Federal Rules of Civil Procedure, which empowers federal district courts to sanction attorneys who fail frivolous pleadings, motions, or other papers.”⁴⁶ The purpose of this sanction is deterrence, so attorneys do not waste the court’s time with ill-planned, half-baked legal claims⁴⁷. This rule can entail potential risks from various aspects, on one hand, it can hinder legal development in a precedent based jurisprudence, and on the other hand, it can impede access to justice. There is a possibility that those who have modest financial background will be deterred from bringing legally right, but hardly provable claims. Beside the risks, it also carries possibilities; therefore it was not removed from the rules, but frequently amended in the last decades. After 1993, the sanctions may be imposed on law firms as well, which is more consistent with the American realities.

At the other extreme is Germany, where the rules do not allow for any disciplinary powers, nor procedural sanctions on lawyers, because the independence of lawyers. Breyer compared the common law systems with the German one and stated that until the judge can order lawyers to pay the cost caused by their actions, in the German system it is unimaginable.⁴⁸ By now the situation is similar in Austria. Previously the Austrian civil procedure code (öZPO) allowed the judge to impose fines upon the attorney who delays the proceedings by gross negligence.⁴⁹ This was changed by the reform in 1983, which abolished judicial disciplinary power with regard to attorneys.⁵⁰ Application of dilatory tactics in Austria is considered a violation of professional regulations and the bar has disciplinary power in these cases.⁵¹

The sanctioning of lawyers is also known in the English civil procedure. According to the English rules, the court has the power to disallow a legal representative from recovering costs from his own client, or order that the legal representative personally pay costs to another party.⁵² Examples of conduct that may justify a wasted cost order include failing to attend a hearing, causing an unnecessary step to be taken in proceedings, or prolonging a hearing by gross repetition or extreme slowness in the presentation of evidence or argument.⁵³ The court apply the wasted cost order on its own initiative, or on request. In connection with the purpose of sanctions Lord Woolf noted that “as part of a case-management system, sanctions should be designed to prevent, rather than punish”⁵⁴.

⁴⁵ ‘Developments in the law: Lawyer’s Responsibilities and lawyer’s responses’, 107 *Harvard Law Review* 1993-1994, p. 1629

⁴⁶ Loc.cit. n. 45, at p. 1630.

⁴⁷ ‘Deterring dilatory tactics in litigation: Proposed amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure’, 26 *Saint Louis University Law Journal*, 1981-1982, p. 904.

⁴⁸ M. Breyer, *Kostenorientierte Steuerung des Zivilprozesses* (Tübingen, Mohr Siebeck 2006) p. 12.

⁴⁹ Normand, loc.cit. 44., at p. 246.

⁵⁰ W.H. Rechberger, *Kommentar zur ZPO* (Wien, Springer-Verlag 1994) p. 558.

⁵¹ B. König and A. König, ‘Landesbericht Österreich in G. Walter’, ed., *Professional Ethics and Procedural Fairness* (Bern, Verlag Paul Haupt 1991) p. 196.

⁵² P. Loughlin and S. Gerlis, *Civil procedure* (London, Cavendish Publishing Limited, 2004) p. 537.

⁵³ Loughlin and Gerlis, loc. cit. n. 52., at p. 538..

⁵⁴ Lord Woolf, *Access to Justice, Final Report*, 1996, Chapter 6

Regarding the suing of hopeless cases, the English courts have an interesting case law. Andrews mentions a decision where the Court of Appeal restated its determination to make a wasted costs order against lawyers “who acted for misplaced reasons of altruism in pursuing a hopeless and vexatious action”⁵⁵ (Count Tolstoy-Milaslovsky v Lord Aldington [1996] 1 WLR 736, CA). However, the House of Lords decided to the contrary in a subsequent case, so “it will not be enough to justify an order that the court considers that an advocate has been arguing a hopeless case”⁵⁶ (Mecalf v Weatherill [2002] UKHL 7, per Lord Hobhouse).

2. Procedural sanctions and tools of fighting against dilatory tactics – Croatian and Hungarian rules

Croatian Civil Procedure Act (CPA) contains a general rule which says that the court is obliged to conduct without any delays, within a reasonable time and with minimum of costs and to prevent any form of abuse of rights in the proceedings. The court shall fine with a monetary fine anyone who attempts to abuse the rights they have in the proceedings, unless prescribed otherwise. Fine may be imposed on a party or intervener or their legal representative if he/she is responsible for the abuse of rights.⁵⁷

It is, however, hard to say how often courts recourse to the mentioned rule. It seems that this will mostly depend on the way individual judge operates. For instance, CCP makes clear that in deciding which costs are to be paid to the party (on the basis of a loser pays rule), the court shall take into consideration only costs which were necessary for the conduct of the case. It continues; the court shall decide which costs were necessary and on the level of these costs taking careful consideration of all the circumstances.⁵⁸ It seems that some judges will indeed approach the problem of deciding on costs with a reasonable care and that they will be ready to reject any costs which were unnecessary for the conduct of the case. On the other hand, it is no secret that quite often it happens that the costs of submissions are duplicated by the costs of representation at court hearings which are actually serving very same aim and have identical content. A devoted judge will certainly watch out for such an occurrence and in his/her decisions on costs reject costs which were duplicated. Making this kind of conduct generally accepted and frequent would lead to a better alignment of client interests and a lawyer’s duty to expedite litigation. This is of course, not only matter of lawyers’ ethics which calls for fair relationship between the lawyer and client, but also the matter of lawyer’s relation and his obligations to the justice system.

Otherwise, there will be always the risk that the lawyer might use his professional engagement and different kinds of tactics in the adversary system of civil justice to pursue his own personal interest rather than that of the client and at the expense of the client. Consequently, if the fee arrangement meets lawyer’s financial interest during the litigation, lawyers may neglect an important ethical rule which says that in order to offer a client expeditious legal protection at the lowest expense, lawyer shall avoid dragging out or misusing of any right in a lawsuit before the court.⁵⁹

⁵⁵ Andrews , loc. cit. n. 39, at 85 p.

⁵⁶ Loughlin and Gerlis, loc. cit. n. 52., at 18, p. 538.

⁵⁷ See art. 10 of the CPA.

⁵⁸ See art. 155 of the CPA. Also, court may decide that the legal representative of the party must pay the opposing party costs he or she has caused by his or her own fault.

⁵⁹ See art. 97 of the Lawyers Code of Etics.

The Hungarian civil procedure code⁶⁰ (HCPC) summarizes those expectations which are required from the parties and their representatives in the principle of exercising rights in good faith. So the court shall take measures to prevent any and all procedures, acts and actions which contradict the principle of exercise of rights in good faith, such as efforts taken to delay the proceedings or that may lead to delays. The court shall apprise the parties to exercise their legal rights in good faith, including the consequences applicable for litigating in bad faith [HCPC 8.§ (2)]. The court shall impose a financial penalty (Section 120) upon any party (counsel), and other litigants for making a statement in delay without justification, or for their failure to make the statement in spite of being so notified, hence delaying the conclusion of the proceedings [HCPC 8.§ (4)]. Besides these, the court shall impose a financial penalty upon any party (counsel) for delaying legal actions without justification, for any failure to meet a deadline, or for causing unnecessary expenses any other way, in addition to ordering the party in question to pay for such expenses on the strength of law - regardless of whether the courts decision is for or against the party in question -, and shall have powers to impose other legal sanctions as well [HCPC 8.§ (5)]. However, where a party fails in carrying out certain acts during the proceedings, or falls in delay with certain acts without justification, or fails to meet a deadline or time limit, or causes unnecessary expenses in any other way, such party may not claim any reimbursement for the expenses resulting therefrom even if he succeeds in the litigation, or may be ordered to cover the costs of the opposing party resulting therefrom irrespective of the outcome of the litigation [HCPC 80.§ (2)].

As we could see, the Hungarian civil procedure utilizes sanctions not only against the parties, but the lawyers as well, however the HCPC, contrary to the English CPR, only refers to the parties when regulating costs and does not allow the court to disallow a legal representative from recovering costs from his own client. In addition, we can state that the HCPC does not generally prohibit malicious actions, rather it lays down a list of actions which may be sanctioned.⁶¹ One example of such conducts is where the report made by a party for recusation is clearly unfounded or if makes another clearly unfounded report against the same judge in the same litigation. The HCPC sanctions this apart from the others, in Section 18. But in this case only the party is subject to the sanction, his lawyer is not. In comparison it can be said that the Hungarian judicial practice clearly rejects the sanctionability of suing hopeless cases⁶².

V. Conclusion

We believe that a significant relationship exists between how lawyers charge their fees and the length of civil procedure. In our study we tried to demonstrate this relationship and its components through comparative examples. After identifying the problem, we examined the most common procedural instruments which are used in various jurisdictions to eliminate delay. In our view, the most effective devices are those cost rules which try to neutralize lawyers' interests in delay. As an example for this, we presented the German model where – due to cost rules - lawyers do not become interested in using dilatory tactics. In addition, we attach great importance to active judicial case management which can handle dilatory tactics in an early stage. Particular attention was paid to sanctions which are directly applicable against lawyers. Although we consider these to be two-edged weapons, their usefulness as instruments of active judicial case management can not be questioned. However, we do not

⁶⁰ 1952. évi III. törvény a polgári perrendtartásról [Act III of 1952 on the Code of Civil Procedure]

⁶¹ M. Kengyel and V. Harsági, *Civil Justice in Hungary*, Vol. 4. Nagoya University Comparative Study of Civil Justice (Tokyo, Jugakusha 2010) p. 30.

⁶² Legfelsőbb Bíróság P. IV. 20551/1961. sz. döntése [High Court decision]

find it satisfactory if the judge lets the procedure to be delayed then sanctions post factum. Ex post punishment should not be in the hands of the judge. The judge should seek to prevent the use dilatory tactics, before they express their effects, and not penalize them later.

In our opinion, lawyers' interests should neither be underestimated or forgotten. Although their role in undue delay is not exclusive, but rather significant. Adoption of appropriate measures alone does not solve the problem, because the will of the participants of the procedure, especially of the judge is also necessary for that. However, without an adequate legal background, the judge can not act effectively against dilatory tactics.