

Analysis and evaluation of the achievements and problems in the up-to-date activities of the Supreme Court of Cassation

The status and assessment of the activities of the Supreme Court of Cassation are analyzed in detail and in depth in the annual reports on the activities of the court, in particular for 2020, which are public and available on the website of the court. Therefore, I will highlight only the key circumstances from which conclusions can be drawn about the current achievements and problems of the judicial body.

1. Staffing

The judges are distributed in three colleges – Criminal, Civil and Commercial.

There are three divisions in the Criminal College, in which the judges sit without the existence of permanent panels, being formed at random by computer for each session. There are 31 judges on the staff in the Criminal College, including the Deputy Chairman of the SCC and the Head of the Criminal College. Currently, the staff is not fully occupied, so the college operates in a reduced number of judges – 26 titular judges (of which one judge is excluded from distribution due to prolonged sick leave) and three seconded judges.

The judges of the Civil College are grouped in four divisions, in each of them permanent panels are formed. The cases are distributed pursuant to the procedure of Article 9 of the Judicial System Act according to the specialization of the judges, established from 1 January 2009, as follows: in I and II divisions – property disputes and partitions, in III and IV divisions – contract law disputes, employment disputes, disciplinary proceedings, etc. Private proceedings and applications for revocation are distributed in accordance with the specialization of the divisions in the Civil College established by Order no. 21/28.02.2017 of the chairman of the college of 1 March 2017: incoming private complaints under Article 274, paragraph 2 and paragraph 3 of the Civil Procedure Code and the applications for revocation of effective decisions under Article 303 and Article 304 of the CPC are distributed among the judges, pursuant to the specialization established in the college in accordance with the type of case on the grounds of Order no. 1015/27.05.2008 of the chairman of the SCC. Currently, the panel has 48 judges, of which 43 are titular judges and five are seconded.

The Commercial College consists of two divisions, in which the judges also work in permanent panels. The staff consists of 24 judges, and there are 3 additional vacant posts transferred from the Civil College in April 2019. Currently, the College employs 17 titular judges (from April there will be 16) and 6 seconded. Two of the titular judges have their proceeds suspended, given their forthcoming release on the grounds of Article 165, paragraph 1 item 1 of the JSA and the filling of their schedules up to 2 months before the release.

Currently, out of a total of 110 judges on the staff in the SCC, 87 judges are employed and 14 judges have been seconded.

Seven years ago, at the time of the previous procedure for electing a chairman of the SCC, the total number of judges on the staff in the court was also 110, with 94 judges on the staff and 8 seconded magistrates.

It is evident from the above that in the past period no development has been achieved in the staffing of the Supreme Court of Cassation, but on the contrary – there is a clear trend of regression, as the number of seconded persons is gradually increasing.

2. Assessment of the workload of judges

2.1. Workload of the judges of cassation in view of the direct activity of hearing cases

It is no exaggeration to say that the failure of recent competitions to appoint judges to the SCC has dealt a severe staffing blow to the court.

For example, with the five vacancies in the Criminal College, it will have to nominate members of commissions for the competitions for the Criminal College of the SCC, as well as for the criminal divisions of the courts of appeal. This automatically means that the receipt amount will be actually distributed among the 21 judges.

The staffing potential of the Civil College is threatened by an almost similar scheme, and the same trend can be traced: of the 43 current titular judges (with a reduction of 41 due to the forthcoming retirement of colleagues throughout the year), 8 judges should also be set apart in connection with the holding of cancelled competitions, and the number of seconded judges is likely to increase. Due to the uneven workload of the two streams of the Civil College, which is reflected in the schedules of cases, in 2021 part of the matter considered by the Second Stream was transferred to the First Stream. Despite the great factual and legal complexity of part of the matter of the First Stream, it was considered that the relative alignment of the schedules for a shorter scheduling period is in the interest of the parties.

The staff of the Commercial College of the SCC, which has the smallest staff, is in critical condition. In the first half of this year, the 17 titular judges employed in the college will be reduced to 16 in view of the forthcoming retirement. Characteristic of the work in the Commercial College of the SCC is the consideration of cases of legal and factual complexity, for which special proceedings in commercial disputes are provided (Article 365 et seq. of the Civil Procedure Code). The Commercial College decides insolvency cases under a special procedure provided for in the Commerce Act, as well as claims for annulment of arbitral awards under Article 47 et seq. of the International Commercial Arbitration Act, disputes arising from entries in the register of political parties, the register of religions, etc. The procedure for bank insolvency under Article 45 et seq. of the Bank Insolvency Act is also special. Some of the cases before the College are related to the application of European Union law (regulations and directives), as well as to the implementation of international multilateral and bilateral agreements. Despite the variety and complexity of the legal matter related to the activity of commercial judges, for some of the proceedings there are short deadlines for their completion.

According to the statistics for the completed calendar year 2020, the college has considered 4,313 cases. In that year alone, the receipt amounts to 2,522 cases, with 2,407 cases completed.

It is evident from the cited data that the received and completed cases are comparable in number. It is essential, however, that these are cases initiated in the previous year/years, and in addition, in view of the specifics of the cassation proceedings under the Civil Procedure Code, in the case of cassation proceedings in the phase under Article 288 of the CPC and admitted cassation appeal and decision under Article 290 of the CPC, the judicial activity is statistically recorded as a completed case. In this case, the greatest suspension was found in the cassation proceedings, in which an appeal was allowed. They end for a period of more than a year from the date of initiation of the case until the date of announcement of the decision.

The long period of suspension of cassation proceedings is objectively determined by the fact that the large number of cases is distributed to a small number of judges, who should include them in their schedules. This in turn leads to scheduling of cases ahead of time for the phase under Article 288 of the Civil Procedure Code (the assessment of whether to allow the optional cassation review), ending with the non-appealable ruling

under Article 288 of the Civil Procedure Code. For comparison – the cases that are not related to the preliminary phase under Article 288 of the Civil Procedure Code – under Article 47 of the International Commercial Arbitration Act, Article 303 et seq. of the Civil Procedure Code shall be scheduled in open session and shall be completed within a completely reasonable time. The proceedings under this law are completed within the shortened terms provided by the Political Parties Act.

Delays in commercial litigation are a very serious problem. It leads not only to adverse consequences under Chapter IIIa of the JSA, but also to significant property damage to the parties given the fact that the college considers disputes over large amounts of receivables, in which delayed execution, respectively, the suspension of the execution under Article 282 of the Civil Procedure Code, is essential. As an illustration: as of March 2022, nearly BGN 89 million have been accumulated on the interest-free accumulation account of the SCC with the BNB for collateral. This value is formed mainly by collateral admitted in cases of the Commercial College. In view of the long suspension of cases, the retention of similar amounts for a long period of time can understandably generate tensions in the field of trade.

The adverse effects of delayed proceedings cannot be overcome by organizational measures alone. As mentioned above, the main reason is rooted in the severe staffing of the college. The activity of the competition committee selected in the Commercial College is currently almost finalized. However, the end of the competition is not expected in the foreseeable future, not only in view of the extremely cumbersome attestation procedure, but also due to the fact that the competition commission was elected by the SCC Plenum according to the rules valid for all commissions for the last 7 years. The result of the decisions of the SAC in connection with the competitions gives grounds to predict that the competition for judges in the Commercial College will have the same outcome.

Perspectives for the development of the Supreme Court of Cassation

1. Measures to strengthen the human resources potential of the SCC and workload regulation

1.1. The main and decisive step in overcoming the staff shortage in the SCC is its adequate provision with human resources, for the achievement of which the interaction of all authorities is necessary.

The good organization of the activity of the SCC is inconceivable without human resources, allowing adequate workload, in which the judges have objective conditions for quality and timely administration of justice and precise execution of the remaining duties and responsibilities. In view of the great responsibility in resolving cases as a last resort, an adequate workload should provide judges with the necessary time for in-depth preparation of cases, for examining changing legislation, for reviewing CJEU and ECtHR case law, and ultimately for drafting of well-motivated judicial acts in accordance with the legal provisions and the spirit of the laws.

The staffing concerns both the availability of a sufficient number of judges and the filling of the staff of judges of the SCC after the selection of the best professionally trained judges with high moral qualities. In this regard, and on the basis of prepared objective information on the workload in the individual colleges, the chairman of the SCC should use all available staff, if necessary, engage the Judicial College of the SJC with a request to disclose additional staff of judges.

1.2. The timely organization and holding of competitions for judges for the

respective colleges of the Supreme Court of Cassation is also of key importance. Currently, the conduct of these competitions is difficult to the point of meaninglessness, given the significant backlog in organizing competitions after the release of judges, unclear legal regulations in the JSA and the Rules for competitions for junior judges and junior prosecutors, for initial appointment and promotion and transfer of judges, prosecutors and investigators adopted by the Supreme Judicial Council, the cumbersome procedure for their conduct, non-compliance in certain cases with the results of the ranking of candidates by the competition committee, cancellation of competitions in whole or in part due to insignificant violations during their conduct, found by the SAC. Therefore, the chairman of the SCC should hold consultations on the possibilities for legislative amendments to the JSA as far as the procedure for conducting competitions for the promotion of judges, prosecutors and investigators is concerned.

1.3. The most expeditious possible means of overcoming staff shortages is the secondment of judges.

This model was also used to fill vacancies at the time of the previous procedure for electing a SCC chairperson (see the SCC Activity Report 2013). As a temporary measure to overcome the excessive workload, the mechanism was considered relatively successful, as the vacancies were filled more expeditiously, the secondment was shorter, and on the other hand, its use provided staffing, allowing effective absorption of incoming cases. However, the cited report also expressed reservations against the use of this institution, arguing that it could only be used as a temporary and extraordinary measure, especially in the Criminal College.

In the Judicial System Act, secondment is actually regulated as an exception – only in isolated cases, when it is objectively impossible to overcome otherwise unplanned temporary staffing difficulties. The unfavourable consequences of the widespread use of secondment are well known – when it is not applied as an exception, it can replace the system of legitimate career advancement: as the seconded magistrates actually perform the duties of a position for which they are not appointed and receive the corresponding higher remuneration, in case of subsequent competition, the seconded magistrates may be preferred on the grounds that they know the relevant subject better, have gained work experience and are integrated into the staff of the court in which they were seconded. This, in turn, generates inequality in comparison with the other participants in the competition for the respective position, who for reasons beyond their control have not had the chance to prove their professional qualities before the higher instance. The impact on the seconded magistrate himself is also negative, as his professional position remains unclear for an indefinite period of time, he is not only uncertain that he will actually be able to take the higher position, but works at the risk of termination of the secondment. In addition, secondment practices are, in principle, a real lever for illegitimate strengthening of the power of the respective administrative heads competent by an individual decision to second and terminate secondment, including the chairman of the SCC, which creates conditions for dependence.

In the current critical situation in the Supreme Court of Cassation, the secondment is the only way to compensate, at least temporarily, for the serious difficulties in the staffing of the court. Therefore, the need for the wide application of this institution in the composition of the Supreme Court of Cassation is obvious and inevitable.

However, even a compromise with the secondment is not able to overcome the difficulties. The fact that almost 1/3 of the members of the Commercial College consists of seconded judges is eloquent enough. This college has reached a limit that must not be crossed. With the forthcoming dismissal of another judge from the Commercial College due to retirement in April 2022, it is necessary to consider the issue of significant shifts

in the panels in order to prevent two seconded judges from sitting in one panel with one titular judge.

The harmful influence of the practice of secondment can be radically overcome by timely and rhythmic announcement and conduct of competitions for promotion and transfer, which is beyond the powers of the judicial body.

In order to limit partially the negative impact of the secondment in the SCC, a reasonable positive practice has been established, aimed at reducing the scope of the chairman's authority to second magistrates. As a rule, their personal selection is carried out by the general assemblies of the colleges, which propose to the chairman the respective judge for secondment.

1.4. However, it is imperative in all colleges of the SCC to establish explicit criteria for selecting seconded persons, as well as to assess the duration of their secondment. Any decision on the secondment of a judge (to start or to terminate) must be taken on the basis of pre-known criteria and must be duly substantiated.

In this regard, the Supreme Court of Cassation is currently drafting rules for secondment, and it has been agreed for the temporary period until the approval of these rules that seconded persons will be determined by decision of the general assemblies of the colleges.