



Small Claims:

# WHERE DOES SERBIA STAND?

A Comparative Analysis

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## Acknowledgements

This report examines the procedural law and court practice for resolving small claims in Austria, Denmark, Estonia, Germany, Latvia and Slovenia and compares them to the procedures in Serbia in order to assess the effectiveness of the latter and provide actionable recommendations to optimize them. The research was conducted under the Multi-Donor Trust Fund for Justice Sector Support in Serbia (MDTF-JSS) which is generously funded by the United Kingdom Department for International Development (DfID), the Swedish International Development Cooperation Agency (SIDA), and the Netherlands.

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## Acronyms

<b>CEPEJ</b>	Council of Europe European Commission for the Efficiency of Justice
<b>CoE</b>	Council of Europe
<b>ECHR</b>	European Convention of Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court of Human Rights
<b>SFRY</b>	Socialist Federal Republic of Yugoslavia
<b>WB</b>	World Bank



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## Executive Summary

**1. Purpose of the report.** Evidence suggests that poor court performance negatively affects the economy. Complaints about the business climate are often associated with complicated procedural laws and backlogs that beleaguer the system and slow it down. According to the European Commission for the Efficiency of Justice (CEPEJ) 2018 report, it takes on average 315 days to resolve a civil and commercial case in a first instance court in Serbia.<sup>1</sup> This is well above the EU average of 233 days. Small value cases that get stuck in Serbia's Basic Courts perpetuate backlogs, hamper access to justice and consume a disproportionate amount of judicial resources relative to the value of these cases. This report provides a comparative analysis of the procedure for resolving small claims in Serbia and recommendations to improve it, based on lessons learned from comparator jurisdictions: Austria, Denmark, Estonia, Germany, Latvia and Slovenia. The report was developed under the Multi-Donor Trust Fund for Justice Sector Support in Serbia (MDTF-JSS) and is informed by a broader World Bank initiative to support justice policy dialogue and reform in the Western Balkans. The analysis is primarily intended for the legal community in Serbia, including policy makers, judges, lawyers and those in academia.

**2. Definition of small claims and scope of the report.** Small claims procedures are designed to resolve civil and commercial disputes below a certain value threshold in a way that is simpler, quicker and cheaper than the general procedure. The small claims procedure in Serbia is applicable to civil disputes with a value below EUR 3,000 and commercial disputes with a value below EUR 30,000. In terms of scope, the report covers both commercial and civil small claims as the same procedure is applicable to both types of cases.

**3. Thresholds for small claims.** Compared to other jurisdictions, the thresholds below which the small claims procedure applies in Serbia are very high, especially the one for commercial claims. Therefore, the procedure covers a very wide range of cases. As a result, the legal community is likely to be wary of introducing more simplifications given that a high volume of cases would be affected. In light of the potential resistance, Serbia could either reduce the existing threshold for commercial cases or introduce a second, lower threshold under which more simplified rules would apply. Secondly, Serbian judges do not have discretion to decide whether or not to apply the small claims procedure. This means that in the absence of an option to exercise discretion, the simplified rules would also be applied to complex cases with a relatively high value. To address this problem, if the procedure is simplified, it would be helpful if judges are also granted the discretion to not apply small claims rules to complex cases, even if their value is below the threshold.

**4. Court fees.** Among the comparator jurisdictions, Serbia has the highest fees for commercial cases with a value above EUR 1,000. Fees for civil claims with a minimal value are among the lowest. Fees for commercial cases are higher than the fees for civil cases of the same value. Equalizing the fees for civil and commercial cases, for example by lowering the fees for commercial cases, is highly recommended. Furthermore, there are several fees payable within a single court instance (for the claim, the judgment and the defendant's response). This is contrary to international practice and burdensome for courts. It would be

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<sup>1</sup> See European Judicial Systems: Efficiency and Quality of Justice, CEPEJ Studies, No. 26, 2018 Edition (2016 data), p. 103, at <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>, p. 250.

beneficial for the rules to be amended to require the payment of a single court fee prior to commencing litigation. This would discourage frivolous claims, spare judges' and court clerks' time and relieve enforcement authorities of efforts invested in collecting unpaid fees.

**5. Filing the claim.** Under international best practices, small claims are either filed electronically, through a single judicial portal or, if such portal is not available, by using structured forms that facilitate the process for judges and parties. In Serbia, there are no forms and electronic filing through a judicial portal is not possible. The introduction of mandatory forms both for the claimant's action and for the defendant's response in non-utility claims is recommended in the short-term. In the long term, an option to file all claims via an electronic portal could be introduced.

**6. Collection of evidence.** Most jurisdictions simplify the collection of evidence in small claims. Simplifications take two principal forms: they introduce a stricter relevance assessment and/or simplify the form in which evidence is presented. The procedure in Serbia does not include either simplification. As a result, even in cases with minimal value, a first instance court may hear numerous witnesses and admit an expert assessment even if the cost of doing so may greatly exceed the value of the dispute. It is recommended that Serbia consider the introduction of a stricter relevance assessment, simplify the form of evidence and restrict the use of expert assessments in cases where the value of the claim is very low.

**7. Pre-trial stage of the procedure.** In small claims procedures, the pre-trial stage is typically shortened in the interests of increasing speed and decreasing costs. While many jurisdictions omit the preparatory hearing or hold it via phone, it is rare to omit the written phase of the pre-trial stage. The Serbian small claims procedure drastically shortens the pre-trial stage by eliminating the written phase. Judges do not have the discretion to request the exchange of written documents, even in a complex case. This may, further down the line, necessitate more court hearings to clarify issues and collect evidence that could have been clarified and collected quickly and cheaply in a written pre-trial stage. For complex small value cases, it may be more efficient to conduct a written preparatory phase and clarify the issues in dispute in advance rather than go straight to the main hearing.

**8. Hearings.** Hearings tend to be the most time-consuming element of litigation. In Serbia, even though no preliminary hearing is conducted in small value cases, legal practitioners report that numerous other hearings may be necessary. In contrast, many comparator jurisdictions allow small claims procedures to be conducted only in writing. Any measures to avoid hearings or minimize their number could contribute greatly to reducing the time and cost of the procedure. As a rule, small claims should be conducted in writing only unless one of the parties has specifically requested a hearing.

**9. Timelines.** Shorter timelines bring discipline to the processing of small claims. Unlike comparators, Serbia has only shortened a few timelines and they have no significant effect on the duration of the case. Introducing shorter timelines, similar to the ones used in the EU cross-border procedure, would encourage the faster resolution of low-value cases.

**10. Content of the judgment.** Like other comparator jurisdictions, Serbia simplifies the content of the judgment in small claims procedures. This is in line with international practice; therefore, no further simplifications are recommended.

**11. Grounds for appeal.** The grounds for appealing the court's pronouncements in small claims are usually limited. The most typical limitation is to restrict appeal on the facts as established by the first instance. Serbia's existing approach in this regard is reasonable and is consistent with the way in which this aspect of the procedure is typically regulated.

**12. Appellate court rules of procedure.** At the second instance, there is no simplified procedure for small claims in Serbia. Second instance judges spend as much time and effort on small claims cases as they do on general ones. Normally, small claims judgments have limited grounds of appeal; therefore, the expectation is that very few small claims cases should reach the appellate level; however, a significant number of small claims cases are appealed. Therefore, it would be useful to introduce simplified procedures at the second instance as well. For example, simplifications could include having a single judge hear the cases rather than a panel of three judges.

**13. Legal representation and recovery of costs.** The rules on legal representation and recovery of costs in low-value cases in countries from the Roman legal tradition<sup>2</sup> are usually the same as in the general civil procedure: parties may be represented by a lawyer; self-representation is admissible; the costs for legal representation need to be covered by the losing party. Serbia does not deviate from these general rules and in fact, only a few comparator countries do. For example, legal representation by persons with legal education who are not attorneys-at-law may be permitted, and the maximum recoverable cost for a lawyer can be limited. Since limitations on the recoverable costs may restrict access to justice for parties with lesser financial means, this report does not recommend changes to the current rules.

**14. Statistics.** In almost all comparator jurisdictions, except Denmark, case management systems do not differentiate between small claims and general ones and there are no available statistics. Thus, it is impossible to tell what share of the overall caseload these cases represent, what their average processing time is, what the dynamic is over time,<sup>3</sup> as well as how various changes in the procedure affect caseload and/or processing times. It is recommended that Serbia start collecting disaggregated statistics as a basis for future policy decisions.

**15. Main findings.** Serbia has introduced numerous simplifications to its small claims procedure but there are several aspects that could be improved. The improvements likely to have the greatest impact are: limiting the scope of the procedure; reforming the existing payment structure for court fees; introducing a well-structured written pre-trial phase; and allowing for a written-only process, unless parties have explicitly requested a hearing. The conclusion section of this report provides a detailed delineation of the proposed recommendations. Full implementation of the recommendations requires legislative amendments. That said, frequent legislative amendments can negatively affect a legal system's stability and therefore should not be taken lightly. Given this, for each recommendation proposed, the report provides a precursory non-legislative action to inform

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<sup>2</sup> Different jurisdictions use different terms to distinguish between legal traditions. Roman legal tradition is also referred to as the civil law system, Latin legal tradition and continental legal tradition. Anglo-Saxon legal tradition is also referred to as the common law system and precedent legal system.

<sup>3</sup> For example, whether the number of such cases increases or decreases over the years and/or whether they are resolved more quickly or more slowly.

the suggested legislative action and help to determine if such legislative action is indeed necessary and if it is, the form that it should take.

## 1. Background

**16. In recent years,<sup>4</sup> small claims have been receiving increased attention.** The World Bank addresses the issue in various documents. The WB's flagship publication, the Doing Business Report, recognizes that *"small claims courts or simplified procedures for small claims, as the form of justice most likely to be encountered by the general public, play a special part in building public trust and confidence in the judicial system. They help meet the modern objectives of efficiency and cost-effectiveness by providing a mechanism for quick and inexpensive resolution of legal disputes involving small sums of money. In addition, they tend to reduce backlogs and caseloads in higher courts."*<sup>5</sup> Therefore, the WB recognizes the existence of a small claims court or a simplified procedure for small claims as good practice when assessing an economy's performance under the indicator on Enforcing Contracts.<sup>6</sup>

**17. The 2014 Serbia Judicial Functional Review<sup>7</sup> found that overall the country's judicial system performs at a lower standard than EU Member States despite having lighter workloads and more judges and staff than the EU average.** The reasons are manifold, including complicated procedural laws and business processes that cause delay, high court and attorney fees that hamper access to justice, and backlogs that beleaguer the system and slow it down. The Functional Review recommends streamlining the procedure for small claims to accelerate the processing and resolution of these cases. Findings on small claims in the Review were based on perception. It was impossible to quantify the scale, average duration or appeal rates for such cases because the case management system did not (and still does not) regard them as a separate category from general civil or commercial litigation. Interlocutors cited in the Review observed that such cases "languish" or are "stuck"<sup>8</sup> in the Basic Courts.

**18. Serbia's approach to small claims procedures is rooted in a long-standing legal tradition.** The Socialist Federal Republic of Yugoslavia (SFRY) was one of the pioneers in the introduction of small claims procedures in continental Europe. It did so in 1972. The rules were closely based on the Austrian model. They were applicable to claims with a value of less than 800 dinars. These provisions regulated in much detail the content of the protocol of the main hearing and stipulated that the court judgment needed to be pronounced at the end of

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<sup>4</sup> For a historical review of the development of small claims procedures, see Annex 2 of this report.

<sup>5</sup> See The World Bank, Doing Business, Enforcing contracts, Good Practices at <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts/good-practices#Introducing>.

<sup>6</sup> The 'quality of judicial process index' represents a third of the score for the 'enforcing contracts' indicator and measures a series of good practices in the areas of court structure and proceedings, case management, court automation and alternative dispute resolution (ADR). Within a maximum of 18 points for the quality of judicial processes, an economy can obtain up to 5 points in the area of 'court structure and proceedings', out of which 1.5 points for the way it handles small claims. A score of 1 is assigned if such a court or procedure is in place, it is applicable to all civil cases and the law sets a cap on the value of cases that can be handled through this court or procedure. The point is assigned only if this court applies a simplified procedure or if the procedure for small claims is simplified. An additional score of 0.5 is assigned if parties can represent themselves before this court or during this procedure. See The World Bank, Doing Business, Enforcing Contracts Methodology at <http://www.doingbusiness.org/Methodology/Enforcing-Contracts>.

<sup>7</sup> World Bank Group. 2014. Serbia Judicial Functional Review. Washington, DC. © World Bank.

<https://openknowledge.worldbank.org/handle/10986/21531> License: CC BY 3.0 IGO.

<sup>8</sup> Ibid. p. 135.

the main hearing. Grounds for appeal were limited. Interestingly, SFRY's small claims provisions differed from the Austrian ones in that they provided for a compulsory initial conciliation session in some types of small value disputes.

**19. The existing small claims rules have undergone several changes since they were introduced but these have not simplified the procedure.** Firstly, in 2009, the monetary threshold was raised which expanded the scope of the small claims procedure. Also, after the enactment of the Civil Procedure Law of 2011, the small claims procedure became applicable not only to claims for performance but also to declaratory actions thus further expanding its scope. Finally, the 2011 changes specifically restricted second instance courts from scheduling a hearing in the appellate proceedings against a judgment in low-value disputes. The overall direction of the changes has been to expand the scope of the procedure rather than introduce simplifications. Unfortunately, this continuous expansion in scope could decrease the likelihood of meaningful simplifications being introduced as this would inevitably affect a large number of cases.

#### Box 1: Serbia's Small Claims Procedure in a Nutshell

In Serbia, small claims fall under the jurisdiction of the lower first-instance courts (Basic Courts or Commercial Courts). The procedure is regulated in Chapter 33, Articles 467 to 479 of the Civil Procedure Law. In areas where Chapter 33 does not stipulate special rules, the general civil procedure applies.

##### **Scope:**

- civil claims up to EUR 3,000
- commercial claims up to EUR 30,000
- non-monetary claims where the plaintiff has accepted to be paid in money not exceeding the threshold
- non-monetary claims where the value of the dispute as stated by the plaintiff does not exceed the threshold
- cases resulting from an objection against a payment order, if the value of the disputed part of the payment order does not exceed the threshold
- disputes related to real estate, labor relations and trespassing are not considered small claims.

##### **Pre-trial examination of the case:**

- the lawsuit is not submitted to the defendant to answer but is sent to him/her together with the summons for the main hearing
- no preliminary hearing is held

##### **Hearing:**

- the content of the transcript of the hearing is simplified
- if the properly summoned plaintiff does not appear at the hearing, he/she is deemed to have withdrawn the claim
- If the properly summoned defendant is absent at the hearing, the court shall make a judgment due to non-appearance

**Judgment:**

- the judgment in small claims proceedings is pronounced immediately after the trial is closed
- the content of the judgment is simplified

**Appeal against judgments in small claims:**

- an appeal is allowed only against the judgment concluding the proceedings (interlocutory rulings may only be appealed through an appeal against the judgment concluding the proceedings)
- the judgment may only be challenged on grounds of significant procedural violations or improper application of the material law. Challenges of factual findings are not allowed
- the deadline to appeal against such judgments is shorter than the general one (eight days)
- no appeal is allowed against the decision of a second instance court

**20. In 2017, the World Bank, with funding from the Kingdom of the Netherlands, developed a report reviewing small claims procedures in all EU Member States.<sup>9</sup>** The study highlighted the main features of small claims procedures and detailed a series of options available to countries wishing to introduce a small claims procedure or reform their existing one. The report was presented in several Western Balkan countries and was met with interest. In particular, Serbian counterparts were of the view that in order to fully understand and implement the proposed recommendations in the Serbian context, a more in-depth analysis, specific to Serbia and with a comparison to a few EU Member States was required. Based on the request from Serbian counterparts, the team sought to conduct the current analysis.

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<sup>9</sup> Harley, Georgia; Said, Agnes Cristiana. 2017. Fast-tracking the resolution of minor disputes: experience from EU member states (English). Washington, D.C.: World Bank Group.  
<http://documents.worldbank.org/curated/en/670181487131729316/Fast-tracking-the-resolution-of-minor-disputes-experience-from-EU-Member-States>

## 2. Methodology

**21. This comparative analysis examines how the procedure for resolving small civil and commercial claims is regulated in the law and implemented in the court practice of six European Union jurisdictions (Austria, Denmark, Estonia, Germany, Latvia and Slovenia).** It then compares the procedures in the EU countries to the small claims procedure in Serbia. Based on the comparison, the analysis provides recommendations to improve the small claims procedure in Serbia.<sup>10</sup> The aim of this report is to outline and critically examine the types of simplifications used in comparator jurisdictions and discuss which ones could bring about the greatest gains in terms of reducing the length and cost of the procedures while being appropriate for the Serbian context. The intended audience for this analysis is the legal community in Serbia, including policy makers, judges, lawyers and those in academia.

**22. The choice of comparator EU jurisdictions is based on several criteria.** To ensure relevance, the selected countries are part of the Roman law tradition, have similar legal systems to Serbia and do not have standalone small claims courts. To ensure variety of approaches, three of the chosen jurisdictions (Austria, Denmark and Germany) are from the so-called “old democracies” of Western Europe and the remaining three (Estonia, Latvia and Slovenia) represent European nations which were part of the Eastern bloc. Finally, to enhance the qualitative aspect of the analysis, the team identified countries that have justice systems performing at a relatively high level, based on the standards of the Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ). Where appropriate, the research juxtaposes national rules on small claims with the rules on cross-border small value disputes under Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (hereinafter Regulation (EC) No 861/2007).


**23. The premise of the analysis is that the small claims procedure differs from the general one in that certain requirements are eased, simplified or waived in order to ensure a cheaper, faster and more efficient procedure and facilitate access to justice.** Therefore, the research team focused only on those elements of the small claims procedure (referred to in various countries as fast-track procedure, simplified procedure, written procedure, etc.) that deviate from the general civil procedure in the respective country.

**24. The report was produced based on desk research, consultations, as well as focus group discussions with legal practitioners.** The desk research covered legislation, academic papers and caselaw, including that of the European Court of Human Rights (ECtHR). It used extensive input from country rapporteurs (one per comparator jurisdiction and one for Serbia) focusing on various aspects of the small claims procedure compared to the general procedure in each jurisdiction. In May 2018, the project team conducted one focus group discussion with lawyers and one with judges in Belgrade in order to solicit their opinions on appropriate reforms for the local context. The views expressed during the focus groups informed this report.

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<sup>10</sup> The research was conducted in parallel with a comparative analysis of the small claims procedure in Bosnia and Herzegovina undertaken in the framework of the BiH Commercial Justice Technical Assistance Program implemented by the World Bank (WB) and financed by the UK Good Governance Fund. The BiH research juxtaposes BiH procedure with the rules in the same six EU jurisdictions. Progressing with the Serbian and the Bosnian comparative analyses simultaneously allowed for cross-fertilization of ideas among team members. While the comparative information is the same for both reports, findings and analytical emphasis differ significantly due to the considerable differences between small claims procedures and governance structures in BiH and in Serbia.





**25. The report is organized around the development of a typical small claims procedure** exploring elements such as: court fees, threshold below which the procedure is applicable, filing the claim, collection of evidence including the level of initiative admissible for judges in adversarial systems, preparation of the case, hearings, timelines, judgment, grounds for appeal, fees for appeal, rules for the appellate court, and the potential to use alternative dispute resolution in small claims. Finally, the report presents the conclusions and recommendations.

### 3. Court fees

#### ***Findings:***

- The payment of numerous fees per court instance is contrary to international best practice and burdensome for courts. The low fees for cases with a very small value coupled with the payment of a fraction of the total fee at the time of filing the claim may encourage frivolous litigation.
- In Serbia, court fees for small commercial claims with a high value are the highest among comparator jurisdictions, while court fees for claims with minimal value are among the lowest. The fees for commercial cases are higher than the fees for civil cases of the same value.
- In most jurisdictions, a case is not examined if the fee has not been paid. The ECtHR finds that the discontinuation of a civil procedure where there is non-payment of the fee does not constitute a denial of access to justice, provided there are appropriate mechanisms to ensure that the fee is proportionate to the financial situation of the parties.

#### ***Recommendations:***

- Introduce a single fee per court instance payable at the outset of the procedure.
- Equalize the fees for civil and for commercial cases of the same value possibly by reducing the latter.
- Allow the court to discontinue the case if the fee has not been paid unless a fee waiver has been approved.

**26. Court fees are an overarching issue that shape the accessibility of a justice system.** In addition to funding justice services, wholly or in part,<sup>11</sup> fees may regulate the demand for justice by discouraging frivolous or vexatious litigation and motivating parties to determine the value of their claim in a realistic manner. The various aspects of court fees policy, including

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<sup>11</sup> Generally, the European Judicial Systems: Efficiency and Quality of Justice, CEPEJ Studies, No. 26, 2018 Edition (2016 data) report provides statistics on the share of taxes and court fees in the judicial system budget. For different countries, it varies between 1% and 117%. However, no such data is available on Serbia. See at <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>, p. 69.

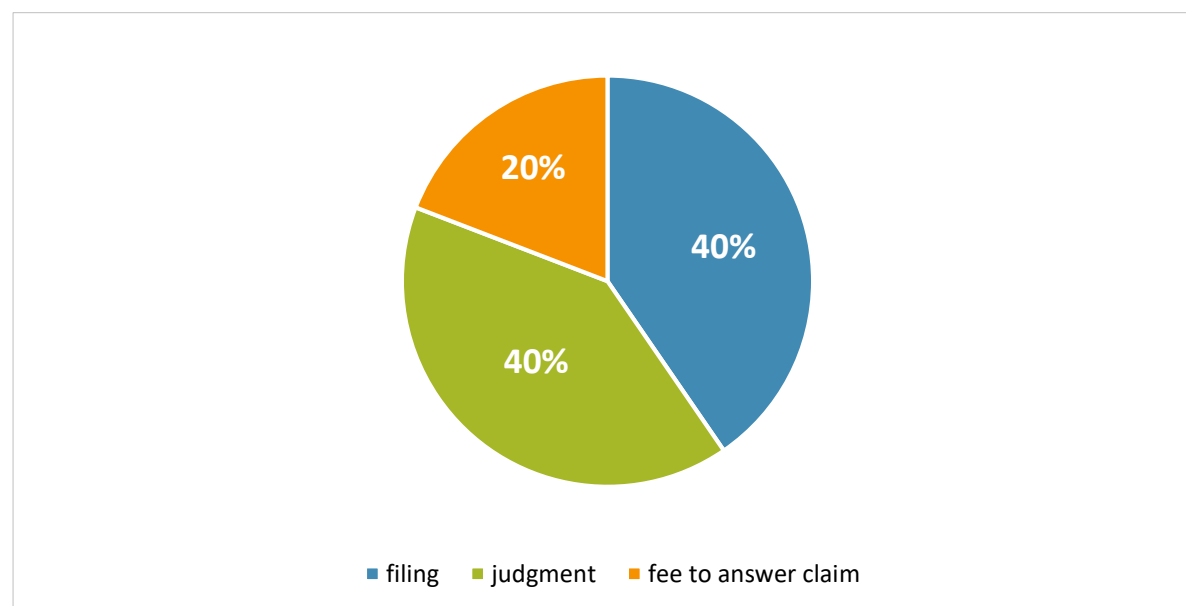
the structure of fees, amount of fees and consequences of their non-payment, all have implications for the workload of courts and the procedural behavior of litigants.

### 3.1. Structure of the court fees

**27. One striking peculiarity of the Serbian system is the payment of several fees within one court instance.** In Serbia, one fee is due at the time of filing the claim and a second fee (usually of the same amount) is due at the time of issuing the court judgment. There is also a fee payable by the defendant for filing the response to the claim.

**28. Having several types of court fees within a single court instance is highly unusual.** The fee for the defendant's response is particularly difficult to justify. A defendant has a procedural right to respond to a claim, and the exercise of a procedural right should not be tied to the payment of a fee. By way of comparison, in all comparator jurisdictions a single fee is due for the case in one instance and it is payable, by the claimant, at the time of filing the claim.<sup>12</sup> If at some point the case is terminated because parties have reached a settlement or for another reason, part of the paid fee may be returned but there are no separate fees for the defendant's response and for the judgment.

Figure 1: Components of the court fee in Serbia



**29. The fee structure in Serbia means that the fee initially paid by the claimant in civil cases is quite low for claims of very low value (e.g. a value of EUR 100).** At the time of filing the claim, the claimant should only pay the fee for filing, i.e. typically 40% of the total fees for the case. When the initial investment for the claimant is very low, it may encourage frivolous or vexatious litigation. Furthermore, having more than one fee per instance poses an additional administrative burden on judges who need to make sure that the fee is calculated properly, notify parties, etc.

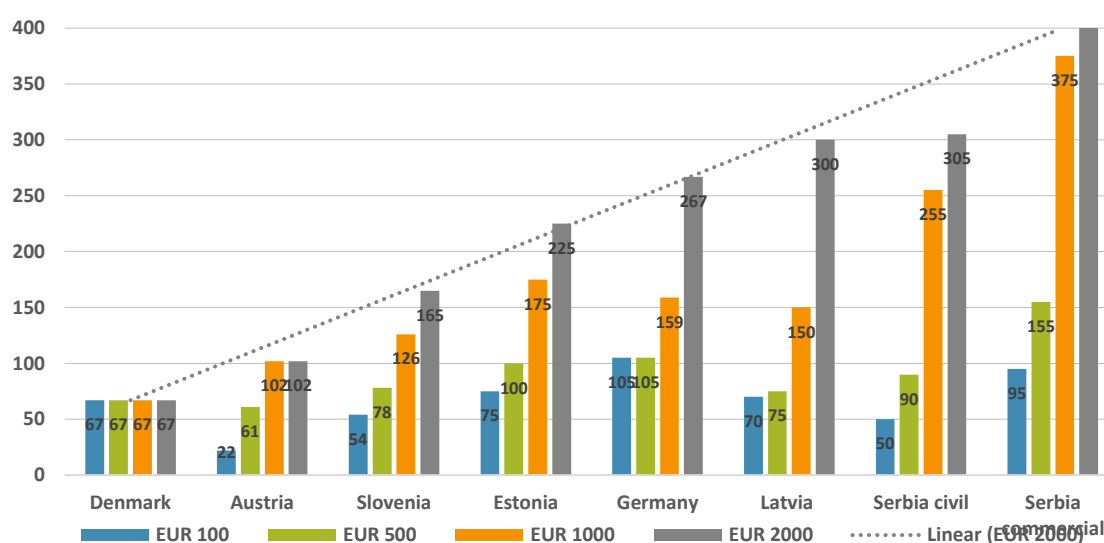
<sup>12</sup> In Denmark, there is a single fee for the small claims procedure; however, for the ordinary civil procedure one fee is due at the time of filing the case and a second one after the preparation of the case has been finalized and the main hearing has been scheduled.

**30. For the above reasons, this report recommends simplifying the court fee structure by having a single fee per court instance payable at the outset of the procedure.** This could discourage frivolous or vexatious litigation by raising the initial investment of the claimant. It would also save the judges and the parties time and effort, and would ease collection. If the fee structure is simplified, an effective mechanism should be put in place to ensure the swift return of part of the fee on the rare occasions when this is necessary (e.g. because the parties have reached a settlement). Comparator jurisdictions do not report any particular problems with the partial return of the court fee upon settlement. Nevertheless, if Serbia chooses to introduce a single fee, it should ensure that the system for returning overpaid fees, where necessary, does not burden either the court or the parties.

### 3.2. Level of court fees

**31. Court fees in Serbia are generally higher than in other comparator countries, especially for claims with higher value.**<sup>13</sup> Of the comparator jurisdictions, only Denmark has a flat fee of EUR 67 that is applicable to all cases with a maximum value of EUR 6,709 in both the general civil procedure and the fast-track one. In the rest of the comparator countries, like in Serbia, there is a progressive scale of fees, depending on the value of the claim. Figure 2 shows the amount of the fee (in EUR equivalent) for claims with a value of EUR 100, EUR 500, EUR 1,000 and EUR 2,000<sup>14</sup> before the courts of first instance.<sup>15</sup>

Figure 2: Court fees (EUR) sorted lowest to highest per EUR 2000 claim



<sup>13</sup> Only the main, indispensable fees are discussed. For Serbia, these include the fee for filing the claim, the fee for the defendant's response and the fee for the issuance of the judgment. In most countries, there are small additional payments related to examining a case which may or may not be referred to as fees but which technically fall in the category of expenses (e.g. fees for sending summons to the parties and rarely – fees for searching for defendant, publications in official gazette about obligation or appear to the court, fee for repeated issue of decision, judgment and executory document, for invitation of witness to the court).

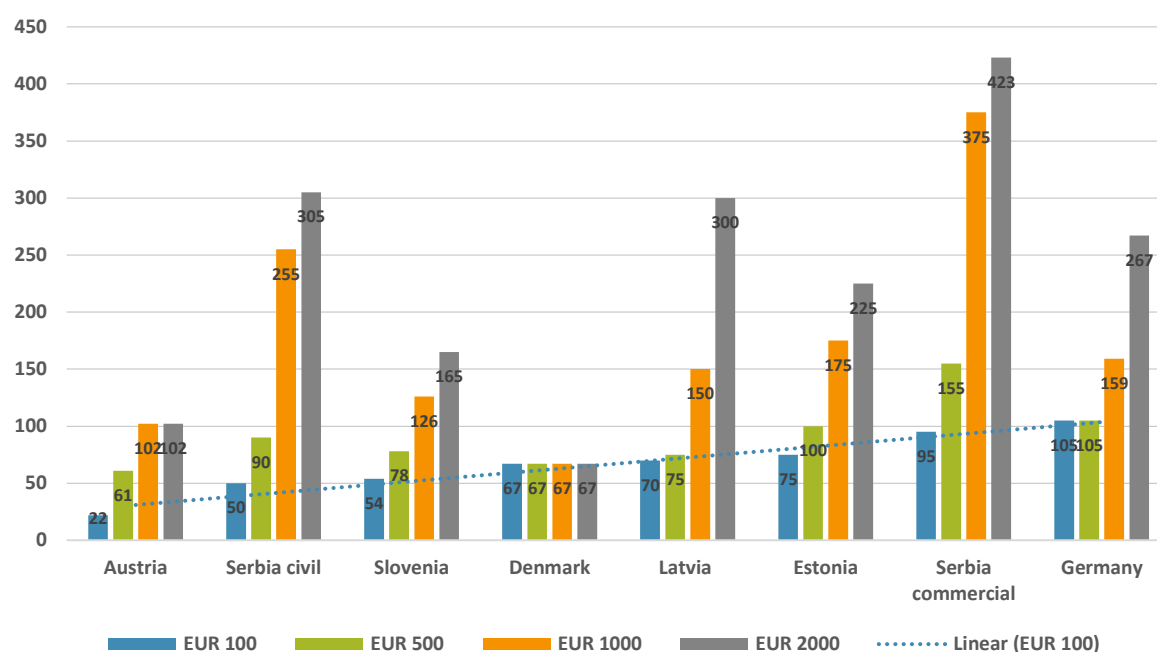
<sup>14</sup> For consistency, the figure includes information on claims above EUR 600 for Germany and claims above EUR 1000 for Austria although these are not considered small claims in these countries.

<sup>15</sup> Figures 2 and 3 show the combined amount of the three main fees for Serbia (the fee for filing the claim plus the fee for answering the claim by the defendant plus the fee for issuing the decision), i.e. the approximate fee for the entire case.

**32. Court fees for claims of relatively high value in Serbia are higher than those in comparator jurisdictions.** A small claim with a value of EUR 1,000 or more would be cheapest to process in a court in Denmark. Conversely, Serbian court fees are among the highest, especially as the value of the claim increases. These trends are particularly striking in light of the fact that Denmark is among the comparator countries with the highest GDP per capita whereas Serbia has the lowest GDP per capita of all comparator countries.

**33. Small claims procedures in Serbia are more affordable for claims that have very low value, e.g. EUR 100.** Figure 3 below ranks the same court fees from lowest to highest based on the fee due for a claim of EUR 100. In this value range, the differences between jurisdictions are not so pronounced but still the fees for commercial cases in Serbia rank among the highest. However, the fees for non-commercial cases in Serbia, for very small value claims, rank among the lowest. While this makes such claims affordable, it may (similarly to the structure of fees) encourage the proliferation of frivolous or vexatious litigation. By way of comparison, the court fee for claims with a value of EUR 100 in Germany is EUR 105, i.e. it exceeds the value of the claim. In this way, Germany strongly discourages litigation over very small amounts and these claims would only be brought if the claimant is not only convinced that the case has merit but also that the defendant has sufficient resources to cover the costs of litigation at the end of the case.

Figure 3: Court fees (EUR) sorted lowest to highest per EUR 100 claim



**34. Not only are fees in Serbia overall significantly higher than those in comparator countries, but also the fees for commercial cases are higher than those for civil cases of the same value.** This puts commercial entities at a disadvantage compared to individual litigants. Indeed, commercial cases are examined by commercial courts while civil ones fall under the jurisdiction of general courts. Nevertheless, the content of the procedure is the same. A

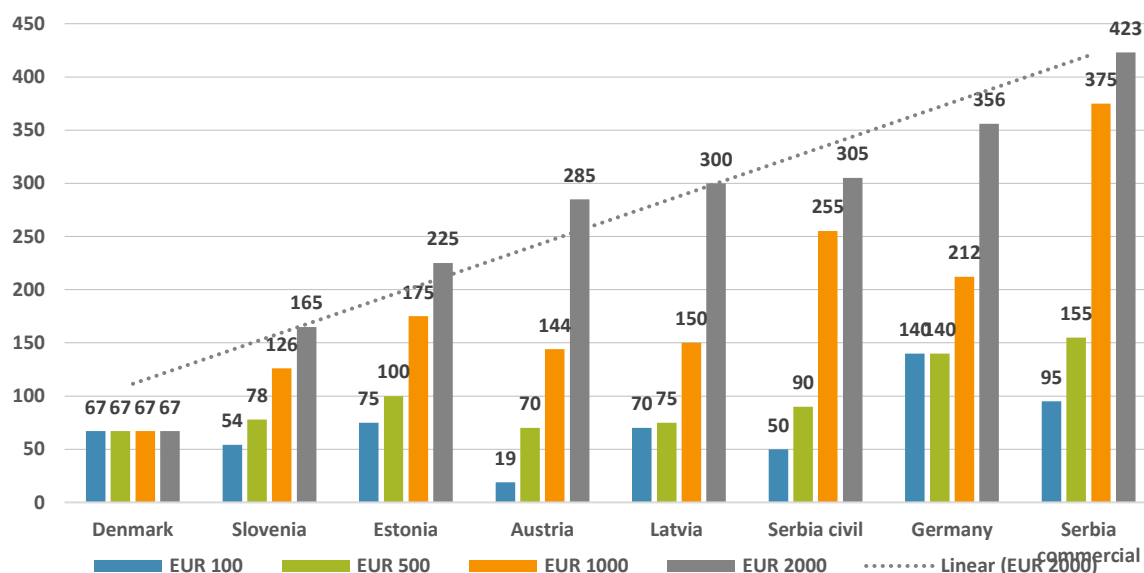
situation where access to justice is particularly expensive for businesses may be burdensome for small and medium-sized enterprises that have fewer financial resources to defend their rights in court. Furthermore, it is a principle of EU law that fees for administrative services shall be cost-based, i.e. “proportionate to the cost of the procedures and formalities with which they deal.”<sup>16</sup> For the purposes of this rule, courts are equated with administrative authorities.<sup>17</sup> When the fee for a service with the same content varies, the perception is that the fee is not based on the cost of the service.

**35. In order to address the issues identified, Serbia could re-examine the level of court fees.** Firstly, it could equalize the fees for civil and for commercial cases of the same value possibly by reducing the latter. This would put businesses and individuals on equal footing from an access to justice perspective. Secondly, if cases of minimal value abound, filing of such cases could be discouraged by a slight increase of the fee in this value segment. These adjustments could be coupled with a change in the fee structure as recommended above.

### 3.3. Second instance court fees

**36. In most of the jurisdictions examined, including Serbia, the court fee to appeal a judgment is the same as the fee for the first instance case.** Only in Austria and Germany are the fees for appeal generally higher than in the first instance.<sup>18</sup> As illustrated in Figure 4, the fees payable at the second instance for small value commercial cases in Serbia are the highest among comparator jurisdictions.

Figure 4: Second instance court fees (EUR) sorted lowest to highest per EUR 2000 claim



<sup>16</sup> See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, (49).

<sup>17</sup> Ibid., Article 1, p. 9.

<sup>18</sup> As discussed previously, only claims below EUR 600 are considered small claims in Germany. Also, appeals in such cases are very rarely allowed. Nevertheless, for the purposes of comparison, the court fees that would be payable to the second instance court in Germany for claims with a value of EUR 100, EUR 500, EUR 1000 and EUR 2000 have been presented.

**37. The high value of second instance fees in Serbia, like in the first instance, is counterbalanced by the fact that the court examines the case even if the fee has not been paid, and that, in practice, the fees are paid in installments** (fee for filing of the appeal, fee for the defendant's response and fee for the judgment). Court fees are one of the mechanisms to influence the behavior of litigants and may act as a deterrent to appeal. As with first instance litigation, the lower financial burden at the outset of the procedure as well as the possibility to avoid payment altogether can contribute to frivolous and vexatious appeals. Therefore, it is advisable to consider the payment of a single fee at the outset of the second instance procedure as a prerequisite for the case to be reviewed.

### 3.4. Consequences of non-payment of the fee

**38. In most jurisdictions, the court discontinues the case if the fee is not paid within the prescribed deadline, whereas in Serbia, the court reviews the case regardless.** Indeed, the party that has failed to pay the fee is obliged to pay an additional 50% as penalty. Still, the fact that litigation proceeds even without any initial payment creates a conducive environment for frivolous claims. This is especially true for cases with very small value, which have merit and the claimant is sure to win.<sup>19</sup> In such situations, the court system may in essence be subsidizing the litigants. It is not clear how actively the state enforces claims for unpaid court fees. If it is excessively expensive or burdensome for the government to collect unpaid fees, it may give up enforcement and this may in turn lead to a perception that justice is free.

**39. Contrastingly, in most comparator jurisdictions, the court does not review a case if no fee has been paid, unless the claimant has been granted a fee waiver.** This is the rule in Denmark, Germany, Estonia, Latvia, and Slovenia. In Austria, like in Serbia, the court proceeds with the case even if the fee has not been paid. However, the non-payment of fees in advance is extremely rare in Austria since most claims are filed by attorneys through an IT system and the law authorizes the system to automatically withdraw the amount due from the attorney's account.

**40. In its practice, the ECtHR finds that discontinuing civil proceedings due to non-payment of the court fee does not, in principle, violate access to justice.** Access to justice forms part of everyone's right to have a claim relating to their civil rights and obligations brought before a court or tribunal under Art. 6 § 1 of ECHR. The ECtHR consistently reiterates that the right of access is an important aspect of the right to a court since the *"fair, public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated."*<sup>20</sup> However, the ECtHR has also repeatedly proclaimed that the right to a court is not absolute and states may introduce limitations to it, as long as these limitations have a legitimate aim, are proportionate and ensure that the very essence of the right is not impaired. One of the most common limitations is the obligation to pay a fee. The ECtHR has on numerous occasions examined whether the requirement to make prior payments such as court fees or security deposits violate Art. 6 § 1 and has found that the obligation to pay a fee in order to initiate court proceedings is not a violation of the

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<sup>19</sup> Such as claims for small amounts of interest on delayed payments owed by the state.

<sup>20</sup> ECtHR, Case of Kreuz v. Poland, Application no. 28249/95, at <http://hudoc.echr.coe.int/eng?i=001-59519>, para 52.

Convention *per se*. The Court found that a violation is only present in cases where the amount of the fee was prohibitively high.

#### Box 2. Case of Kreuz v. Poland<sup>21</sup>

In the Case of Kreuz v. Poland, the court had to specifically answer the question of “whether the obligation to pay court fees in civil proceedings imposed by Polish law in itself amounted to a violation of Article 6 § 1 of the Convention”. In answering this question, the Court stated:

*“In the instant case the applicant first contested the general rule whereby access to Polish civil courts depended on the payment of a court fee amounting to a certain percentage or fraction of the claim being lodged [...] The Government maintained that collecting court fees for proceeding with civil claims could not be seen as in itself contrary to Article 6 § 1 [...]”*

*[...] the interests of the fair administration of justice may justify imposing a financial restriction on the individual’s access to a court [...] Furthermore, the Court considers that while under Article 6 § 1 fulfilment of the obligation to secure an effective right of access to a court does not mean merely the absence of an interference but may require taking various forms of positive action on the part of the State, neither an unqualified right to obtain free legal aid from the State in a civil dispute, nor a right to free proceedings in civil matters can be inferred from that provision [...]*

*The Court accordingly holds that the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 § 1 of the Convention.”*

In this particular case, the Court proceeded to examine the amount of the fee, which was equal to the average annual salary in Poland at that time, together with the applicant’s ability to pay, and concluded that in the particular case the amount of the fee was excessive and had impaired the very essence of the applicant’s right of access.

**41. To conclude, as long as there are mechanisms in place to ensure that the fee is proportionate to the financial position of the litigants, the fact that the court discontinues the case due to non-payment does not constitute a denial of access to justice.** Given the fact that in most EU jurisdictions court fees need to be paid in advance otherwise the court does not proceed with examining the case, it is worth considering whether Serbia could introduce such a rule. Paying a single court fee in advance, as a precondition for commencing litigation, would discipline claimants, spare the time of judges and court clerks spent on repetitive notifications to the parties regarding the obligation to pay numerous court fees and relieve enforcement authorities of the efforts invested in collecting unpaid fees.

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<sup>21</sup> Ibid. paragraphs 58 – 60.



## 4. Thresholds

### ***Findings:***

- Systems with high thresholds for small claims are conducive to fewer procedural simplifications. In Serbia, the thresholds are very high, especially for commercial claims.
- Unlike in comparator jurisdictions, judges in Serbia do not have the discretion to choose whether or not to apply the small claims rules. If the simplifications become more significant and the thresholds remain high, complex small value cases might not receive due attention.

### ***Recommendations:***

- Consider reducing the commercial cases threshold in parallel with the introduction of more significant procedural simplifications, as recommended in this report. Alternatively, keep the current threshold with the current simplifications and introduce an additional, lower threshold with more significant simplifications.
- If the threshold remains high but additional simplifications are added to the procedure, judges could be given discretion not to apply some, or all, of the simplifications if they consider that a particular case is too complex to be examined under the small claims procedure.

**42. Regardless of the differences among various small claims procedures, they share one common feature – the application of the procedure is triggered by a monetary threshold.** The special rules apply when the value of the dispute, calculated in the manner prescribed by the respective procedural law, is below that threshold.

### 4.1. Threshold levels

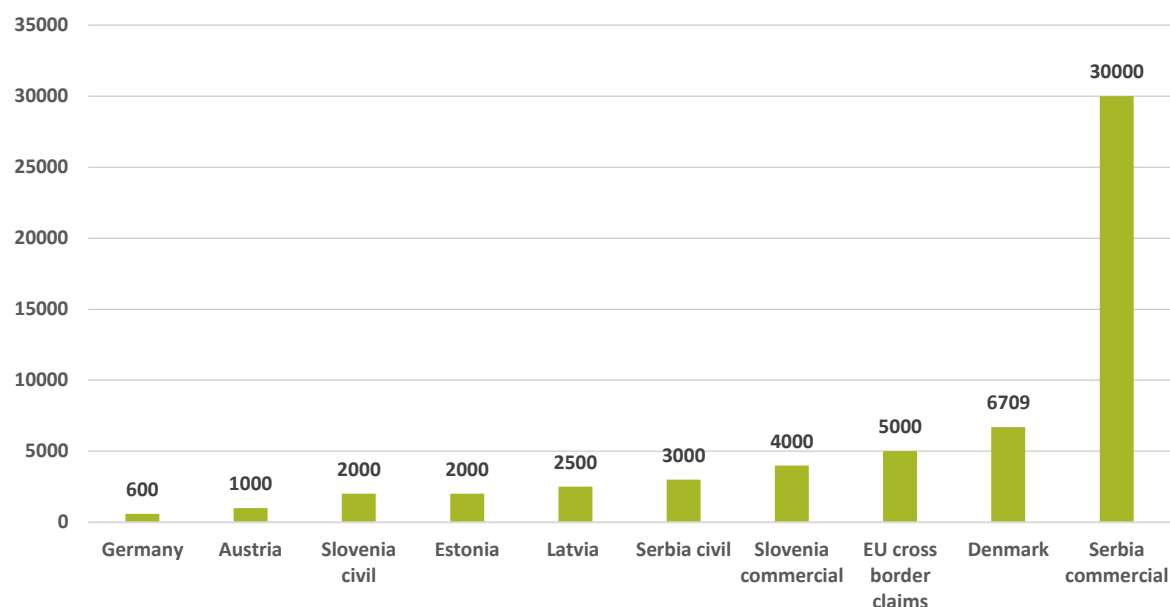
**43. The level of the threshold in a country represents an important policy choice since it determines the range of claims to which the special rules would be applicable.** If the threshold is low, the procedure has a narrower scope of application. It might then be conducive to more simplifications because fewer cases with a relatively low pecuniary interest would be affected. In contrast, if the threshold is high, a large percentage of all cases would qualify for the special rules. Such procedures typically have fewer simplifications because more caution needs to be exercised when a simplified rule would affect a broad range of cases.

**44. The small claims threshold in Serbia is set at EUR 3,000 for civil claims and EUR 30,000 for commercial claims.** As illustrated in Figure 5, the thresholds in the comparator countries vary greatly.<sup>22</sup>

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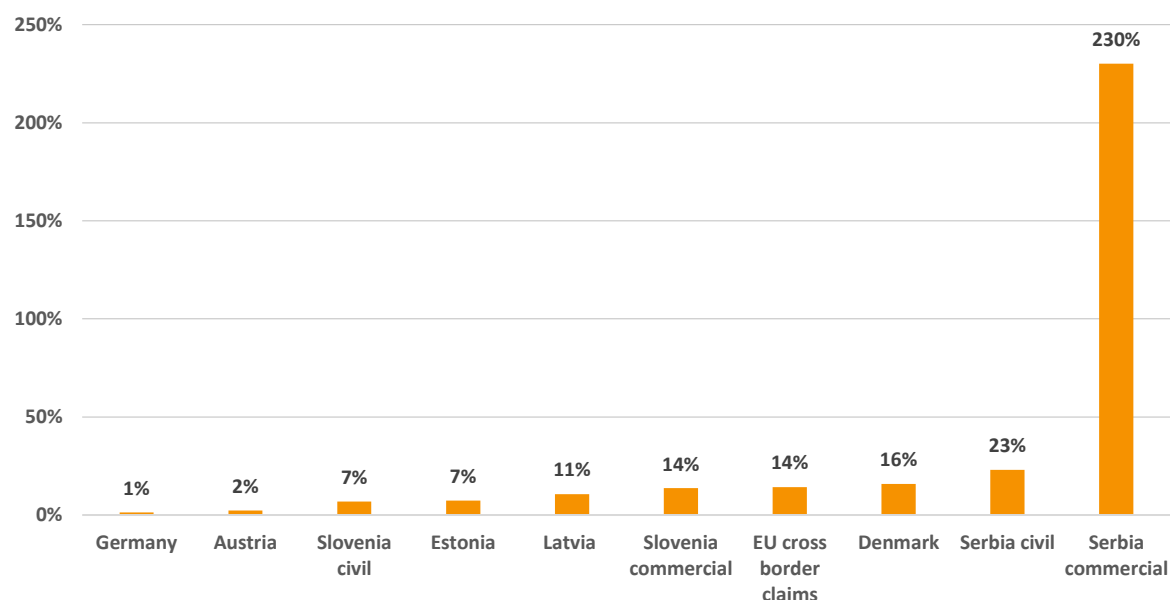
<sup>22</sup> All monetary amounts (thresholds, fees) for jurisdictions that are not part of the Eurozone were converted to Euro using applicable exchange rates as of the time of drafting this report. Since fluctuations of exchange rates occur on a daily basis, slight inaccuracies of these Euro equivalents are possible.

Figure 5: Thresholds (in EUR)



**45. The threshold should be examined in light of economic conditions.** Serbia's commercial claims threshold and civil claims threshold rank, respectively, as highest and second highest among the compared jurisdictions as percentages of the GDP per capita.<sup>23</sup>

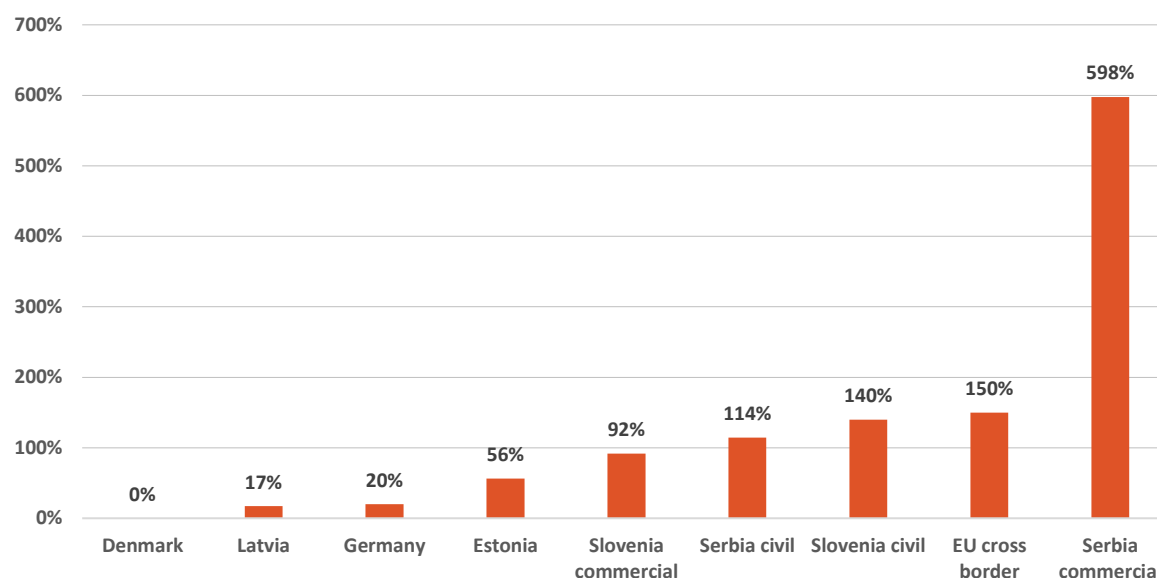
Figure 6: Threshold as % of GDP per capita



<sup>23</sup> Data on GDP per capita is obtained from The World Factbook of the Central Intelligence Agency at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>. The latest available data on GDP per capita for each country was selected. The US Dollar values provided therein were converted to EUR at the time of drafting this report.

**46. Thresholds for small claims procedures tend to undergo evolution over time. Usually, they increase.** For example, when simplifications were introduced to Germany's small claims procedure in 1991, the threshold was DM 1,000 (EUR 500) and in 1993, it was raised to DM 1,200 (corresponding to the current value of EUR 600). Similarly, in Slovenia, the EUR 834 threshold for small civil claims was increased to EUR 2,000 in 2008, and the threshold for small commercial claims – from EUR 2,086 to EUR 4,000. In Estonia, the initial amount of EUR 1,278 was raised to EUR 2,000 in 2009. The threshold applicable to cross-border small claims under Regulation (EC) No 861/2007 was increased from EUR 2,000 to EUR 5,000 in 2017. The same upward movement can be observed in Serbia. In 2009, the threshold for civil claims in Serbia was increased from EUR 1,400 to EUR 3,000 and for commercial claims – from EUR 4,300 to EUR 30,000. The percentage increase of the threshold in comparator jurisdictions from the introduction of the procedure until today (including the one for EU cross-border claims) is illustrated in Figure 7 below.

Figure 7: Percentage increase in threshold for small claims over time



**47. Thresholds tend to increase over time but the steep increase of the threshold for commercial claims in Serbia is unparalleled.** Increases are usually prompted by a desire to open up the fast-track procedure to a wider range of cases. This approach is often balanced against a recognition that any simplification in the procedure could affect the parties' right to a fair trial and therefore should be undertaken with caution. In the case of Serbia, while there was a general understanding that the purpose of increasing the threshold was to broaden the scope of the procedure, the law that introduced the increase in the threshold did not explicitly explain or justify why the threshold for commercial disputes was being raised so drastically.

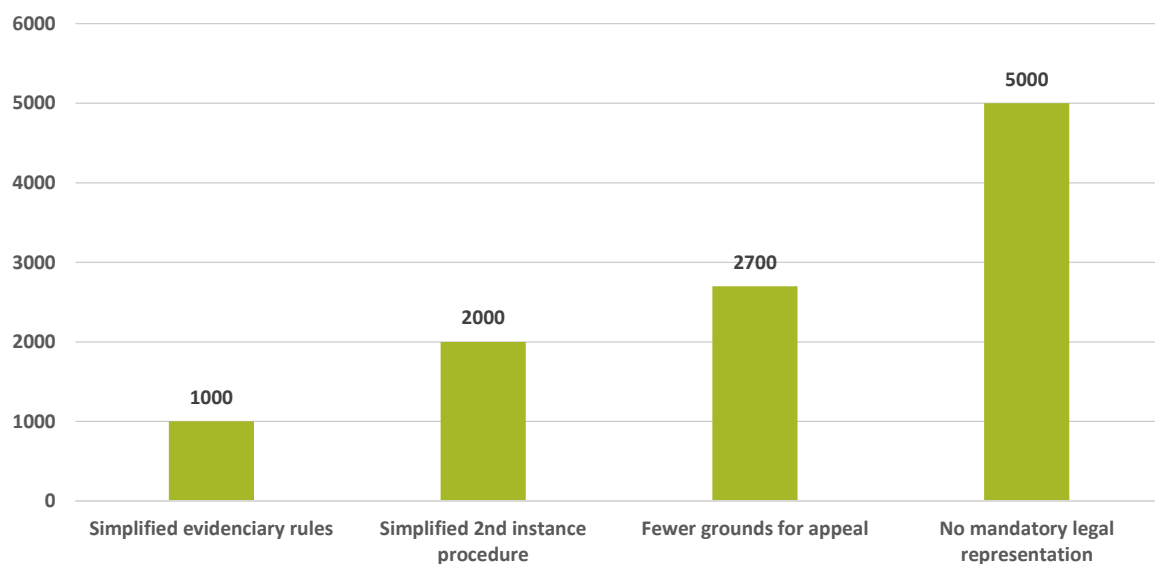
**48. A high threshold means that the small claims procedure has a very broad scope of application.** This scope is even broader in Serbia where the procedure is not only applicable

to claims for performance but also to declaratory claims.<sup>24</sup> When a country has set a high threshold, it is harder for its legal community to accept significant simplifications to the procedure as the impact of such simplifications could be great. Conversely, if the threshold is low and the simplifications would only affect cases with low material interest, practitioners tend to accept significant simplifications more readily. Given that the current threshold in Serbia is very high, it can be expected that there would be resistance to introducing more significant procedural simplifications for small claims. Therefore, reducing the threshold for commercial claims in parallel with the introduction of additional simplifications is recommended. The reduction of the threshold would ease the acceptance of the simplifications while ensuring that cases of high monetary value would not need to be examined under overly simple procedural rules.

## 4.2. Multiple thresholds

**49. Although most of the systems examined introduce a single threshold, multiple thresholds can also be introduced in one jurisdiction.** In some countries, different thresholds trigger the easing of different procedural requirements. Austria is one such example. The threshold of EUR 1,000 referenced in the Figure 1 is applicable to the simplification of evidentiary rules. However, the threshold for simplifying the second instance procedure is set at EUR 2,000, the one for limiting the grounds for appealing the court judgment at EUR 2,700 and the threshold for allowing self-representation at EUR 5,000. This system works well in practice.

Figure 8: Types of thresholds in Austria (EUR)



**50. The status quo in Austria illustrates that a system can function well with multiple thresholds.** If a country wishes to assess the effects of increased simplifications to the procedure, it could introduce these additional simplifications only in respect of claims with a

<sup>24</sup> A declaratory claim is when the claimant asks the court to pronounce a judgment, which makes a legal determination on a matter in which the party has a legal interest thus resolving a legal uncertainty for the litigants.

very small value, thus significantly reducing the risk of them negatively affecting cases with a high value. This would mean adding a second, lower threshold to the currently existing one and further levels of simplifications that would only be applicable to claims with a value under that lower threshold.

**51. Serbia also offers an example of a different threshold that triggers the application of a particular rule.** Specifically, an appeal against a first instance judgment that orders an individual to pay a sum of money for which the principal amount does not exceed EUR 300, or EUR 1,000 for legal persons, does not postpone its execution. Thus, the Serbian legal system may be amenable to a situation where some rules are applicable to claims with a value lower than the general thresholds for small claims. Therefore, if an overall reduction of the threshold is found unacceptable, Serbian policymakers could consider keeping the current threshold with the current simplifications while introducing an additional, lower threshold with more significant simplifications. That said, this would complicate the existing system by, in essence, creating two small claims regimes. However, it would allow Serbia to test more significant procedural simplifications knowing that these would only affect cases of very low value.

### 4.3. Flexibility of the threshold

**52. In Serbia, the threshold for small claims is inflexible; neither the court nor the parties can choose whether or not to apply the simplified rules.** Whenever the value of the claim is below the threshold, courts are obliged to apply the simplified rules. As a result, claims that may be relatively high in value and complex in nature but fall below the threshold go through the simplified procedure. Similar rules are applicable in Latvia and Slovenia where the small claims procedure cannot be waived at the court's or parties' discretion.

**53. In the other comparator jurisdictions, the court may choose not to apply the simplified rules even when the value of the claim is below the threshold.** In Denmark, the court may decide not to apply the simplified procedure due to the complexity of the case. It is also possible not to apply the small claims procedure if the case, even though not very complex, is deemed to be of great importance to the party. In Austria, Estonia and Germany, the general procedure is applicable by default unless the court decides to use the available simplifications, e.g. to apply some of the rules more liberally.<sup>25</sup>

**54. In Denmark, the threshold is flexible in one additional dimension: depending on the parties' choice.** They may select whether the small claims procedure should apply or not without regard to the value of the claim. The parties may agree that the fast-track procedure shall apply although the value of the dispute exceeds the threshold. If the parties are consumers, they may enter into such an agreement only after the dispute has arisen. If the parties are non-consumers, they may make this choice both before and after the dispute has arisen. The parties may also agree that the fast-track procedure shall not apply even though the value of the dispute is below the threshold. This is only possible after the dispute has arisen.

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<sup>25</sup> Approaches to and examples of regulating small claims in the jurisdictions examined are presented as Annex 3 to this report.

**55. The purpose of judicial discretion in small claims procedures is to encourage efficiency in the resolution of disputes by ensuring an individual, rather than a one size fits all approach.** For complex disputes of relatively high value, applying all simplifications could be counterproductive, and instead of ensuring efficiency, could burden the court and the parties and even slow down the trial. Furthermore, the lack of flexibility in the application of simplified rules makes legislators more cautious about introducing newer and more ambitious simplifications of the procedure since in the absence of discretion, simplifications may adversely affect some complex cases. Therefore, the ability to exercise judicial discretion in small claims procedures is considered good practice.

**56. If Serbian policy makers choose to keep the threshold high, judges could be given discretion not to apply some, or all, of the simplifications, if they consider that a particular case is too complex.** Such discretion would be even more appropriate if more simplifications are added to the procedure while keeping the current thresholds. In exercising discretion, judges could consider both the value of the particular case and its complexity. Interestingly, during the focus group discussions, judges were of the view that discretion would be beneficial, while lawyers expressed skepticism. This report takes the position that judicial discretion on whether to apply simplifications and which ones to apply is advisable. If allowed, such discretion needs to be formulated narrowly, i.e. for use in specific circumstances, and be viewed as an exception rather than the rule to avoid possible overuse.

#### **4.4. Litigation over minimal amounts**

**57. In Serbia, legal practitioners voiced a particular concern – that the justice system is burdened with claims of minimal value.** An often-cited example are the claims of Serbian court experts and lawyers who provide legal aid but receive payment late from the state for their services. According to interviews, these professionals often sue the state for the small amounts of interest accrued due to the delay. Even though the value of the claims is minimal, the goal is to recover the legal fees for the proceedings (if successful), which may far exceed the value of the claim. Some legal practitioners see such claims as frivolous or vexatious, or as an abuse of procedural rights and suggest the introduction of a minimum amount below which monetary civil claims should not be admissible.

**58. The introduction of a minimum value under which a claim would be inadmissible is not advisable and would violate the right of access to justice.** Parties may want to sue even for minimal amounts because the results of a court case do not only have financial consequences, some may be reputational. Claims for defamation or libel are very good examples of where claimants may seek damages of just one unit in the respective currency (e.g. EUR 1) because the objective of the proceedings is simply to clear their name and reputation. This view is also supported in the practice of the European Court of Human Rights.

### Box 3: Case of Urechean and Pavlicenco v. The Republic of Moldova

(Applications nos. 27756/05 and 41219/07)

The President of Moldova Mr. Voronin participated in two television programs. While being interviewed he stated that *“during the ten years of activity as a Mayor of Chisinau, Mr. Urecheanu did nothing but to create a very powerful mafia-style system of corruption”*. When referring to the second applicant and to other persons, the President stated that all of them *“came straight from the KGB”*.

Both applicants brought libel actions against the President, seeking a retraction of the impugned statements and compensation. The first applicant sought compensation of 0.1 Moldovan lei (MDL), while the second applicant claimed MDL 500,000 plus payment of her court fees and legal costs. Both the first instance and the appellate court discontinued the proceedings in the case on the grounds that the President enjoyed immunity and could not be held responsible for opinions expressed in the exercise of his mandate. The applicants brought a claim with ECtHR alleging that their right of access to a court had been breached.

While the main arguments in this dispute related to the immunity of state representatives, one aspect of the decision is relevant to minimal value claims:

*“24. The Government further maintained that the first applicant was not a victim within the meaning of Article 34 of the Convention, because the amount of compensation he had claimed before the domestic courts (MDL 0.1) had been so low as to suggest that the true purpose of his libel action had not been to obtain redress for being defamed, but rather to make a political example of the President and the governing party. In the alternative, the Government submitted that the first applicant’s application was inadmissible under Article 35 § 3 (b) of the Convention because he had suffered no significant disadvantage. [...]*

*26. The Court does not consider the amount of compensation claimed by the first applicant in the libel proceedings instituted by him of any importance to the assessment of his victim status for the purposes of the present case (see, mutatis mutandis, Thoma v. Luxembourg, no. 38432/97, §§ 39, 50 and 51, ECHR 2001 -III).”*

**59. While prohibiting litigation over minimal amounts may not be advisable, there are other mechanisms to discourage frivolous and vexatious litigation over minimal amounts.** In most jurisdictions, businesses and citizens rarely file minor claims because there is hardly a business case for seeking to collect minimal amounts through expensive and slow litigation.<sup>26</sup> Mechanisms to discourage frivolous and vexatious litigation extend to a country’s rules on court fees, on recovery of legal expenses and on limiting the abuse of procedural rights. These mechanisms, rather than an outright prohibition, can effectively manage the procedural behavior of litigants without affecting access to justice. Voluminous litigation over

<sup>26</sup> A survey of EU citizens commissioned by Directorate-General Justice of the European Commission asked respondents in EU member states what is the minimum amount for which they would be willing to go to court over a dispute with a retailer, provider or business partner. The survey shows that generally the respondents would not go to court for less than EUR 458 (in Latvia). In other EU member states, the amount was even higher. See Special Eurobarometer 395, European Small Claims Procedure, April 2013, page 46 at [http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs\\_395\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_395_en.pdf).



minimal amounts could also be processed more quickly by the introduction of a second, lower threshold below which some additional simplifications are applicable, as suggested above.

## 5. Filing the claim

### ***Findings:***

- Under international best practices, small claims are filed using forms that structure the claim and make the process easier for judges and parties. In Serbia there are no such forms.
- Under international best practices, claims are filed electronically through a single judicial portal. In Serbia this is not possible.

### ***Recommendations:***

- In the short term, introduce mandatory forms both for the claimant's action and for the defendant's response. Such forms should be available in electronic format.
- In the long term, make it possible to file all claims via an electronic portal.

**60. Small claims procedures should be as accessible as possible to litigants; therefore, simplifications to the procedure may be introduced from the outset when the claim is filed.** These simplifications may range from advice to litigants provided by court staff to options for electronic filing and the use of forms that structure the claim. In Serbia, court staff are not authorized to assist non-represented claimants wishing to file a small claim. Also, there are no forms for filing small claims and the structure of the suit follows the general rules. Furthermore, there is no electronic portal for filing civil claims. It is in principle possible to file a claim via an e-mail signed with an electronic signature but this option is used infrequently. In contrast, comparator jurisdictions have such simplifications. The following paragraphs document some of the simplification options that are available in comparator jurisdictions.

**61. The first possible simplification entails allowing oral claims and having court personnel aid claimants, if necessary.** If a person who wishes to file a claim is not represented by a lawyer and is not qualified to draft the text themselves, they may need assistance. German and Austrian law permit the oral filing of claims in the lower courts. In Austria, oral claims are recorded by judges or by court trainees on behalf of judges. This option is applicable to all civil claims filed in the lower courts, i.e. claims with a value of up to EUR 15,000. Germany also allows parties to file oral claims in the lower courts; these courts have the jurisdiction to hear claims that are below EUR 5,000 in value. In Germany, oral claims are recorded by court clerks.

**62. The option of filing oral claims is not used frequently.** In Austria, oral claims are rare, not least, due to a perception that the case may end up being presided over by the judge who documented the oral claim when it was filed, which could affect the judge's impartiality. In Germany, interviews with judges indicate that recording oral claims is regarded as routine work for court clerks, and this option is used more frequently. Article 11 of Regulation (EC)

No 861/2007 contains an obligation for Member States to provide parties to cross-border small claims with practical assistance in completing the forms. Research on the implementation of the cross border small claims procedure in the then 27 EU Member States found that this requirement is being implemented in slightly more than half of the Member States.<sup>27</sup>

**63. Simplifications could also introduce easy-to-use forms to be completed by claimants and sometimes by defendants.** Such forms are used in Latvia,<sup>28</sup> and Denmark<sup>29</sup> and are also applicable to cross-border disputes under Regulation (EC) No 861/2007.<sup>30</sup> User friendly forms that have clear formats can help to encourage claimants to file claims without the assistance of a lawyer. Such forms are also beneficial for judges because they create structure and improve the clarity of claims that are filed. While it is possible to only have user friendly forms for claimants, a more even-handed approach would entail making such forms available to defendants for their response. This is the case in Latvia. Regulation (EC) No 861/2007 also requires the use of such forms for the defendant.

#### Box 4. Civil Procedure Law, Latvia

##### Section 250.<sup>23</sup> Explanations of a Defendant

(1) Explanations regarding a statement of claim in simplified procedure shall be drawn up in conformity with the sample approved by the Cabinet.

(2) A defendant shall indicate the following information in the explanation:

1) the name of the court to which explanations have been submitted;

1.1) the given name, surname, personal identity number, declared place of residence of the plaintiff, but, if none, the place of residence; for a legal person - the name, registration number and legal address thereof;

1.2) the given name, surname, personal identity number, declared place of residence and the additional address of the defendant indicated in the declaration, but, if none, the place of residence; for a legal person - the name, registration number and legal address thereof. In addition, the defendant may also indicate another address for correspondence with the court;

1.3) an electronic mail address for correspondence with the court, and if he or she has registered his or her participation in the online system, also include an indication of registration if the defendant (or his or her representative whose declared place of residence or indicated address for correspondence with the court is in Latvia) agrees to electronic correspondence with the court or he or she is any of the subjects referred to in Section 56, Paragraph 2.3 of this Law. If the declared place of residence or indicated address of the representative of the defendant is outside Latvia, in addition he or she shall indicate an electronic mail address or notify regarding registration of his or her

<sup>27</sup> ECC-Net European Small Claims Procedure Report, September 2012, page 20 at [https://ec.europa.eu/info/sites/info/files/small\\_claims\\_international\\_claims\\_2012\\_en.pdf](https://ec.europa.eu/info/sites/info/files/small_claims_international_claims_2012_en.pdf).

<sup>28</sup> See Justice portal, Latvia at <https://likumi.lv/ta/id/299326-noteikumi-par-vienkarsota-ja-procedura-izmantojamam-veidlapam>.

<sup>29</sup> See Justice portal, Denmark at <http://www.domstol.dk/selvbetjening/blanketter/staevningogsvarskrift/Pages/default.aspx>.

<sup>30</sup> See Justice portal, EU at [https://e-justice.europa.eu/content\\_small\\_claims\\_forms-177-en.do?clang=en](https://e-justice.europa.eu/content_small_claims_forms-177-en.do?clang=en).

participation in the online system. If the representative of the defendant is a sworn advocate, an electronic mail address of the sworn advocate shall be indicated additionally;

1.4) the name of the credit institution and the number of the account to which court expenses is to be reimbursed;

2) [Repealed on 29 November 2012];

3) the number of the case and subject-matter of the claim;

4) whether he or she recognizes the claim fully or in any part thereof;

5) his or her objections against the claim and substantiation thereof, as well as the regulatory enactment on which they are based upon;

6) evidence that confirms his or her objections against the claim;

7) requests for requisition of evidence;

8) the fact whether it is requested to recover the court expenses;

9) the fact whether it is requested to recover expenses related to conducting of the case, indicating the amount thereof and attaching the documents justifying the amount;

10) the fact whether the trial of the case in a court hearing is requested, by justifying his or her request;

11) other circumstances that he or she considers as important for examination of the case;

12) other requests;

13) the list of documents attached to explanations;

14) the time and place of drawing up of explanations.

**64. In Denmark, the document instituting the procedure must comprise only a short description of the case,** compared to the general civil procedure, where the description must be detailed. This simplification gives the claimant the option not to engage a lawyer at the filing stage as the process is relatively simple.

**65. IT platforms provide an effective way to file claims.** None of the comparator jurisdictions have introduced an IT platform that only services small claims.<sup>31</sup> In the countries where such platforms are available, they are applicable to all civil and commercial claims. This is the case in Austria, Denmark and Estonia. For example, in Estonia, documents can be submitted by e-mail or through an information system accessed via a dedicated portal.<sup>32</sup> If petitions and other documents can be submitted through the IT portal, then they should not be submitted by e-mail, unless there are exceptional circumstances. The system enables citizens to initiate civil, administrative and misdemeanor proceedings online, monitor them, and submit documents to be processed while allowing parties to view and access only the proceedings in which they are involved. The electronic filing of civil claims via a court portal is also available in Austria. The system<sup>33</sup> can be used by anyone, but its use by lawyers, notaries, banks and insurance companies is mandatory.

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<sup>31</sup> For example, for uncontested claims procedures such as orders for payment, there are often dedicated IT systems for filing and processing the claims.

<sup>32</sup> See Justice portal, Estonia at <http://www.rik.ee/en/international/public-e-file>.

<sup>33</sup> See Justice portal, Austria at <https://webportal.justiz.gv.at/at.gv.justiz.formulare/Justiz/Geldleistung.aspx>.

**66. In Latvia, like in Serbia, documents can be signed by e-signature and submitted by email.** This option is used with growing frequency, as more natural persons and representatives of legal persons have e-signatures. Supporting documents to a claim can be signed by e-signature and submitted electronically or hard copies can be sent to the court by mail. Latvia uses the e-signature system and issues confirming documents on payment of court fees signed by e-signature. In Slovenia and Germany, it is not possible to file civil claims electronically.

**67. Interviews with the legal community in Serbia suggest an interest in introducing user-friendly forms for small claims procedures.** This would be in line with the findings of the 2014 Judicial Functional Review, according to which “[t]here are no checklists, standardized forms or templates for routine aspects of case processing, nor is there a consistent approach to drafting routine documents, such as legal submissions, orders, or judgments.”<sup>34</sup> The forms would be available on the websites of justice institutions in downloadable and editable formats and would be completed electronically, regardless of whether they are subsequently submitted in paper form or electronically. The introduction of forms, for the claimant as well as for the defendant, is the simplification in filing that can be implemented in the shortest term and at a low cost. Forms would help structure the claim, may in some simple cases allow for self-representation and could be convenient for judges. Measures should be taken to discourage the completion of forms by hand. In the longer term, the goal should be to file not only small claims but all types of claims through an IT portal.

## 6. Collection of evidence

### **Findings:**

- Unlike comparator jurisdictions, Serbia has no stricter relevance assessment in small claims and no criteria on rejecting evidence.
- Unlike most comparator jurisdictions, judges in Serbia are not able to reduce the cost or length of small value cases by applying simpler requirements to the form of evidence.
- Experts assessments are expensive and time-consuming but judges in Serbia are not able to forego such assessments even in cases with very small value.

### **Recommendations:**

- Stipulate that in small claims judges shall apply a stricter relevance assessment than in general litigation and shall admit only evidence which is necessary and not excessively costly relative to the value of the claim.
- Stipulate that in small claims witness statements shall, as a rule, be submitted in writing and oral hearings of witnesses shall be admitted only as an exception.
- Stipulate that expert assessments shall be approved in small claims only in exceptional circumstances and considering the value of the claim and the cost of the assessment.

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<sup>34</sup> World Bank Group. 2014. Serbia Judicial Functional Review. Washington, DC, p. 16.

**68. The small claims procedures in all the jurisdictions examined, except Latvia, allow some type of simplification in the collection of evidence and the use of court experts.** It is worth noting that great caution ought to be exercised in the introduction and implementation of procedural simplifications related to evidence as the evidence presented in a case directly impacts its outcome. Therefore, imposing significant limitations on evidence may violate the parties' right to a fair trial. However, if the value of the case is fairly small, it could also be unreasonable to invest significant resources in collecting inessential or expensive evidence. The main criteria for determining whether resources are excessive should be a comparison of their costs with the value of the case.

**69. Compared to other jurisdictions, Serbia has introduced very few simplifications in the area of collecting evidence.** The only rule is that in small claims, the parties must present all the facts on which they base their claim and propose evidence that confirms the presented facts no later than the conclusion of first hearing. In contrast, in the general civil procedure, all facts and evidence should be presented at the preparatory hearing, which is not held for small value disputes. The parties may, through filings or at later hearings, present new facts and propose new evidence only if, by no fault of their own, they could not present or propose them in the preparatory hearing, or at the first hearing of the trial, if the preparatory hearing was not held. This rule is applied generously both in general and small claims proceedings. As regards the use of court experts, the rules for Serbian small claims are no different than those under the general civil procedure. On the form of evidence, general civil procedure in Serbia allows for written witness statements as opposed to oral ones but this rule is rarely applied. No special rules on evidence are available in the small claims procedure.

**70. Austria has introduced minimal deviations from general evidentiary requirements.** For claims with a value below EUR 1,000, the court can disregard evidence proposed by the party if the process of fully clarifying all the relevant circumstances would be disproportionately difficult. In such cases, the judge must make a non-arbitrary ruling in good faith. This decision may be reviewed on appeal. Even though there are no special rules on the use of court experts, the option to refuse to admit evidence extends to that aspect as well. Specifically, given that the court can disregard evidence due to disproportionate difficulty, the use of an expert could be considered difficult and/or expensive and may not be allowed.

**71. In Slovenia, the court can limit the time and scope of evidence to balance the protection of parties' rights and the need to resolve proceedings swiftly and in a cost-effective manner.** In order to do that, the judge is required to develop a precise and rational plan of procedural actions and give priority to evidence that can be taken quickly, simply and at a relatively low cost (e.g. submitting written witness statements; concentrated and clear hearing of parties and witnesses). To this end, if there are several witnesses, the judge can request a party to select only those who will provide compelling evidence. Furthermore, the judge can make certain inquiries (e.g. with state authorities) more informally, for example by telephone instead of in writing.

**72. In Estonia, the court can also deviate from formal requirements when collecting evidence and can recognize means of proof not provided by law, including statements not given under oath.** This provision is used when a party has requested the hearing of a witness. Instead of summoning the witness to court, the court can accept a written statement. It is

also possible to question a witness over the phone. In Estonia, the rules on the use of expert witnesses are the same for the small claims procedure and the general one.

**73. In Denmark, under the small claims procedure, only evidence that is important to the case may be presented.** Under the general procedure, evidence may be presented unless it is deemed to be irrelevant to the case. Thus, the rule in small claims rule requires only a slightly more stringent relevance assessment compared to the general civil procedure. Therefore, evidence that is presented under the fast-track procedure is subject to the court's approval. The court approves the presentation of such evidence if it determines that it is *likely* that the evidence will be important for the case. Furthermore, the court determines the form in which evidence may be presented. This determination is usually reached following a discussion with the parties. Therefore, the judge has more leeway to decide if a witness should be summoned and heard in person or if a written statement suffices.

**74. The procedural rules on the use of court experts in small claims cases in Denmark are significantly different to the rules used under the general civil procedure.** If a complex expert opinion is required, the case is referred to the general civil procedure. In the fast-track procedure, the court may, upon request from a party, request a simplified expert opinion in the form of a written statement from an organization or an individual expert. An expert is not usually summoned to give expert testimony in person unless there are weighty reasons for an appearance. If a written expert statement is given by an organization, it is only followed by an oral explanation in exceptional circumstances. Another difference is that in small claims cases, questions for the expert are prepared by the court, while in the general civil procedure, questions are prepared by the parties. Under the small claims procedure, the court presents its questions to the parties for comments before sending them to the expert.

**75. In Germany, the rules on taking evidence for claims below EUR 600 are flexible and allow judicial discretion.** In the general civil procedure, the principle of direct evidence gathering applies, i.e. witnesses, experts or parties must be heard in front of the court in the presence of the parties, while in the simplified procedure, the court may question witnesses, experts or parties over the telephone or in writing.

**76. Regulation (EC) No 861/2007 also introduces a stricter relevance assessment and simplifications in the form of the evidence.** To avoid holding a hearing, unless one is absolutely necessary, oral testimony or expert evidence is only heard if it is necessary to help the court to come to a decision. Like in Austria, the court takes costs into account when deciding whether to collect certain evidence.

**77. To summarize, simplifications regarding evidence take two principal forms.** They may give the court flexibility to assess and determine which evidence to admit (i.e. stricter relevance assessment) and/or they may simplify the form in which the evidence is presented. The two simplifications can be used in combination. Serbia has introduced a slightly different rule on evidence (as regards the time at which it should be presented and only because there is no preparatory hearing in the small claims proceedings and therefore it would be impossible to apply the general rule) in the small claims procedure but it has not utilized either of the two most typical forms of simplification. The 2014 Judicial Functional Review points out that *"judges are reluctant to decide on a case without reliance on an expert witness,*

*but the cost of engaging the expert witness may outweigh the value of the claim.*"<sup>35</sup> Regardless of the costs and delay that expert assessments can result in, no simplifications are available in the small claims procedure.

**78. Based on the above, Serbia could consider the introduction of further simplifications in the area of the admissibility and form of evidence.** The explicit introduction of a stricter relevance assessment in the small claims procedure based on criteria such as necessity and cost could empower judges to exercise discretion and common sense when admitting evidence to a larger extent than they currently do. The extended use of written witness statements instead of oral ones in the small claims procedure (as a rule rather than as an exception) is also an option supported by the comparative analysis. Lastly, it is particularly appropriate to introduce restrictions on the use of expert witnesses in cases with very small value since the use of expert opinions is costly and causes delays.

## 7. Principle of adversarial proceedings

### ***Finding:***

- It is not considered to be contrary to the adversarial principle for a judge to guide the collection of evidence or instruct the parties on their rights and obligations.

### ***Recommendation:***

- If Serbia seeks to give a more active role to judges in small claims, the appropriate place to start is to grant them more discretion and initiative in the collection of evidence.

**79. A typical feature of small claims procedures is to assign a more active role to the judge in order to make the process faster and more efficient and to assist self-represented litigants.** Some judges are overly cautious about taking a more active role, fearing that they may violate the principle of adversarial proceedings. The following paragraphs discuss the adversarial principle and its relationship to a fair trial.

**80. The development of civil procedure in Anglo-Saxon and in Roman legal tradition has witnessed gradual convergence between the adversarial principle, which was initially typical to Anglo-Saxon legal systems, and the inquisitorial process associated with Roman legal systems.** Traditionally, a judge in the adversarial procedure was seen as a referee of the parties' competition and was not necessarily under a duty to ascertain the truth.<sup>36</sup> This was a passive judge who sought procedural rather than substantive justice.<sup>37</sup> However, the classical adversarial process in England proved costly and time-consuming. Therefore, the new Civil

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<sup>35</sup> World Bank Group. 2014. Serbia Judicial Functional Review. Washington, DC, p. 135.

<sup>36</sup> In a landmark case of the English adversarial system, *Air Canada v Secretary of State for Trade*, [1983] 2 AC 394, the prominent English justice Lord Denning held that *"when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side."*

<sup>37</sup> Jolowicz, J. A. Adversarial and Inquisitorial Models of Civil Procedure, *The International and Comparative Law Quarterly*, Cambridge University Press, Vol. 52, No. 2 (Apr., 2003), pp. 281-295.



Procedure Rules of 1999 implemented wide-reaching reforms that introduced the role of the informed judge who had more control and initiative in managing the case. This judge *“can use his knowledge of the case and the powers given to him for the purpose of case management to ensure that he gets the information he needs to create a real prospect that the decision will be based on the nearest approximation possible to the truth”*.<sup>38</sup> The reforms of British civil procedure imported features that were previously seen as inquisitorial in nature.

**81. In contrast, traditional civil procedure in the Roman legal tradition was considered to embody inquisitorial elements.** Thus, a 1965 reform of French civil procedure saw a great enhancement of the powers of the French court to control the progress and preparation of cases. A judge could engage in fact-finding, make orders that are binding on the parties and had a duty to seek the truth.<sup>39</sup> This was an active judge who would strive not only for procedural but also for substantive justice. Still, these inquisitorial features of the procedure would be balanced against the principle of equity of arms, guaranteeing that the judge’s involvement in instruction and fact-finding would not give an unfair advantage to either party.

**82. Countries of the former Eastern bloc traditionally belong to the Roman legal family but before the fall of the Iron Curtain, the inquisitorial element in their civil procedure was more pronounced than in Western Europe.** After the end of the Cold War, the pendulum swung in the opposite direction. East European nations introduced wide-ranging reforms to make civil procedure adversarial. In some cases, these reforms were perceived to limit the power of judges to introduce a measure of efficiency in the courtroom and ascertain the truth. Therefore, in recent years, these countries have cautiously started to allow judges to take a more active role in directing procedure thus redefining once again the meaning of the adversarial principle.

**83. Nowadays, some inquisitorial elements in the adversarial process are so common that they are rarely questioned.** In its practice, the ECtHR sees adversarial proceedings as one of the key elements of a fair trial. However, it does not interpret the term “adversarial” in the same sense as the classical common law doctrine and does not view the judge’s active participation in fact-finding or her/his instruction to parties as violations of the adversarial principle. According to the ECtHR, *“the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision”*.<sup>40</sup> The violations of the adversarial principle that the ECtHR finds are usually related to instances where evidence and documents have been obtained by the court and one party has not been provided with access to the documents or evidence and has not had an opportunity to comment on them.

**84. In light of the above, a certain degree of initiative by judges in guiding the collection of evidence or instructing the parties on their rights and obligations is not considered to be contrary to the adversarial principle.** Quite the opposite, striving for efficiency, many countries allow judges to be active and to provide limited guidance to the parties, especially under the small claims procedures where litigants may not have legal representation.

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<sup>38</sup> Ibid., p. 288.

<sup>39</sup> Ibid. p. 291.

<sup>40</sup> Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), Updated to 31 December 2017.

Examples of a judge taking an active role are presented in section 6 on the collection of evidence.

**85. In Serbia, the judge is not expected to guide the parties to a small value case more actively than he or she would in the general civil procedure.** The summons that parties receive upon initiation of the procedure contain instructions on their rights and obligations and the consequences of non-appearance. However, this is a standard form and its contents are not influenced by the judge. Also, because the judgment in small claims proceedings is pronounced immediately after the trial is closed and orally, the law obliges the judge to briefly explain the judgment and advise parties on the requirements/conditions to file an appeal. However, in conducting the proceedings, the judge is as active as in the general civil process.

**86. Similarly, in Austria, Latvia and Slovenia, the role of the judge in small claims procedures is no different than that in the general civil process.** Indeed, in Slovenia, for example, the judge needs to see that all decisive facts are stated, incomplete statements are supplemented, means of evidence are adduced, and all necessary explanations are given in order to establish the facts and legal relations in dispute. In the general civil procedure this is usually done orally in the main hearing. Since the small claims procedure is often conducted in writing, the judge may do so earlier on and in writing. However, this difference in the judge's behavior does not stem from her/him having an essentially different role but from the very structure of the procedure.

**87. In Denmark, Estonia and Germany judges take a more active role than usual under the small claims procedure.** In Denmark, once the claim has been filed and the defendant has responded, the judge seeks to clarify the case as well as further evidentiary needs through a discussion with the parties. The court gives guidance to parties who have no legal skills and are not assisted by a lawyer. The aim is to reduce the need for legal representation substantially. In contrast with the general civil procedure, the court prepares the main hearing by making a list of claims, arguments and evidence. During the main hearing, the judge is responsible for guiding and helping the parties, but less so if a party is represented by a lawyer. Furthermore, in the fast-track procedure in Denmark, questions for the expert witness are written by the court and not by the parties. In Estonia, the court is entitled to collect evidence on its own initiative. This rule saves a significant amount of time because the court is not dependent on a party's motion to collect evidence. In Germany, the judge is expected to provide some instruction and guidance to parties who do not have legal representation. Of course, these rules are applied very cautiously so as to not tilt the balance of powers between the parties thereby violating the equity of arms principle.

**88. Overall, judges in all the jurisdictions examined are cautious when showing initiative or assisting self-represented parties.** Generally, they are hesitant to assist and guide self-represented litigants. However, judges are more open to taking initiative in the collection of evidence as this ultimately contributes to establishing and determining the facts of the case. Therefore, if Serbia seeks to give a more active role to judges in small claims, it may be useful to build on the existing receptivity to taking a more active role in the collection of evidence, rather than focusing on encouraging judges to advise and guide parties to the proceedings.

## 8. Preparation of the case

### ***Finding:***

- Drastically shortening the preparatory phase of the case, as Serbia has done, may necessitate a larger number of court hearings in order to clarify issues and collect evidence that could have been clarified and collected more quickly and inexpensively within a well-structured preparatory phase conducted in writing.

### ***Recommendation:***

- Introduce a well-structured written-only preliminary phase in small value cases with short timelines and an obligation that parties should present/request all evidence that is available to them during that phase. Such a written phase could be used to determine whether a hearing shall be conducted at all or the case could be resolved in a written-only procedure.

**89. In all the comparator jurisdictions, a standard civil case has a pre-trial stage and a trial.** The pre-trial stage normally involves a written and an oral phase. The written phase comprises exchanges of documents between the parties, submission of evidence and other similar activities. The oral phase entails a preliminary hearing. Not all systems differentiate between a preliminary hearing and a main hearing. Some civil procedure acts may regulate hearings without classifying them as 'preparatory' or 'main'. A typical feature of small claims procedures is that the preliminary stage of the process is either shortened or omitted altogether, in the interests of resolving the case quickly and reducing costs. While many jurisdictions omit the preparatory hearing of the pre-trial phase or hold it via the phone, it is much rarer to omit the written phase.

**90. In Serbia, the preparatory phase of the process has been shortened drastically compared to the other countries examined.** The claim is not submitted to the defendant for a response and no preliminary hearing is scheduled under the small claims procedure. Instead, upon receiving the claim, the court directly summons the parties to the main hearing.

**91. Most comparator countries shorten the preparatory stage of the small claims case.** In Estonia, the court can shorten the preparatory stage by either waiving the written phase or deciding not to hold a court session. The judge may also decide to shorten the timelines. It is up to the individual judge to decide whether to use these options or not, as well as which ones to apply, i.e. whether to request a response to the claim, whether to hold a preliminary hearing and what timelines to apply. If a preliminary hearing is held, it may take the form of a phone call with each party. Phone calls, instead of in person preliminary hearings, are also used in Denmark to save the parties' time and money. In Denmark, it is also possible to have the phone call outside of regular office hours. In Germany, the court can set a very short time limit, of approximately 3-5 days, for the defendant to file his or her response. It is also possible for a judge in Germany to clarify additional matters on the phone rather than hold a preliminary hearing.

**92. Not all judges feel comfortable talking to parties on the phone.** In the framework of this research, some Serbian judges expressed concern that verifying the parties' identities on a phone call is not always reliable. However, this did not appear to be a cause for concern in Estonia, where judges are of the view that since the party itself provided the telephone number, he or she would personally respond to the phone call. Instead, for some judges in Estonia, the challenge with conducting pre-trial proceedings over the phone is the need to inform the other party about what was discussed during the call. In accordance with the provision that allows simplified protocols in small claims, judges take notes of the conversation, but it can be difficult to ensure that the information obtained from one party is disclosed to the other in its entirety.

**93. The written phase of the preliminary proceedings is regulated in a fair amount of detail in the laws of some of the comparator countries.** In Latvia, the written phase for small claims proceedings is extensive and includes mandatory forms for the defendant's written response. In Slovenia, preliminary hearings are generally not scheduled, however, the law imposes restrictions on the written submissions; each party may only file one preparatory pleading within short timelines. Facts and evidence presented outside of these pleadings shall be ignored. The procedure for cross-border small claims under Regulation (EC) No 861/2007 also does not incorporate a preliminary hearing but provides clear rules and timelines for the exchange of documents.

**94. Overall, the main function of the preparatory phase is to clarify issues and evidence so that the main hearing is as effective as possible.** In small claims, the preparatory phase of the case often helps the court to decide whether a main hearing is necessary at all. It is striking that compared to judges in the other countries examined judges in Serbia have no discretion on how to conduct the small claims procedure. Not only do they not have the right to decide that the case is too complex for the simplified track but they also cannot choose to request a written response to the claim or to conduct a pre-trial hearing.

**95. For some types of complex small value cases, it may be more efficient to conduct a written preparatory phase and clarify the issues in dispute in advance rather than go straight to the main hearing.** A mechanical elimination of the preparatory phase by law may, further down the line, necessitate a larger number of court hearings in order to clarify issues and collect evidence that could have been collected and clarified more quickly and cheaply during a well-structured preparatory stage conducted in writing. Therefore, it is recommended to allow the exchange of documents in the preparatory stage of the small value case or, alternatively, give judges discretion to evaluate whether conducting a written phase would contribute to making the procedure more efficient. It could also be useful to bring more discipline to the preliminary phase by obliging parties to present/request all their evidence in writing with the claim and the defendant's response and preclude them from presenting evidence that was available to them during the preliminary stage at a later stage (e.g. the hearing).

## 9. Hearings

### ***Finding:***

- Unlike other comparator jurisdictions, Serbia does not have rules that limit the number of court hearings in small value cases.

### ***Recommendation:***

- Stipulate that small claims shall, as a rule, develop only in writing unless one of the parties has specifically requested a hearing.

**96. The most typical simplification regarding the hearing of a small value case relates to whether an oral hearing is mandatory or can be avoided.** Other simplifications, albeit of lesser significance, relate to the manner in which the minutes of the hearing are taken.<sup>41</sup> In Serbia, small claims procedures include a hearing. Given the absence of a preliminary phase in the proceedings and the obligation for parties to present all facts on which they base their claim and propose evidence that confirms the presented facts no later than the conclusion of first hearing, the hearing is extremely important. Like Serbia, Austria and Denmark also have main hearings under their small claims procedures.

**97. In contrast, the approach in Estonia, Germany, Latvia and Slovenia, is to conduct the proceedings in writing and if possible avoid a hearing.** For example, in Slovenia, the court can decide on a small claims case without a hearing if, after the written exchange of documents, it finds that there is no dispute on the facts and no other obstacles to handing down a judgment. Thus, the hearing is avoided unless a party specifically requests it during the written phase of the case. Similarly, in Latvia, the default position is that small claims are reviewed in writing. A judge may decide to conduct a hearing if a party explicitly requests one. The request must be accompanied by reasons justifying why a hearing should be held. Also, a judge may, at their own discretion, decide that an oral hearing is required, even if neither of the parties has requested it. In Germany, too, small claims cases can be processed exclusively in writing unless the parties specifically request a hearing. In Estonia, even if a party requests a hearing, it is not necessary to conduct it in the court or in person; the party can be heard by phone. It is also possible to avoid a hearing under the EU cross-border small claims procedure.

**98. As discussed above, countries that allow the hearing to be waived usually require it to be held if one of the parties explicitly requests it since a party's right to a fair trial may be violated if the court disregards its request for a hearing.** That said, according to international standards, the right to a fair trial is not necessarily violated if a party requests an oral hearing and the court declines the request. However, a court may only decline a

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<sup>41</sup> The simplification regarding the rule on taking minutes of the hearing is available in two comparator jurisdictions. In Estonia, the court enters procedural acts in the minutes only to the extent it deems it necessary and the parties may not file any objections to the minutes. Similarly, in Slovenia, the court draws up only a summarized record of the main hearing that includes the most important statements made by parties, the essential data on the evidence produced and the decisions announced at the main hearing which are subject to appeal. This simplification contributes to the more informal nature of the procedure and may facilitate conducting of some stages of the process by phone, especially the preliminary stage.

request for an oral hearing in exceptional circumstances and the decision to decline the request must be substantiated by reasons that are clearly explained. Furthermore, the hearing does not necessarily have to be conducted in person, modern forms of technology such as video conferencing equipment and software may be used. The ECtHR decision in *Ponka v Estonia*, summarized below, comments on the principle of the right to a fair trial in simplified procedures, and focuses specifically on the importance of providing reasons for opting to conduct the process in writing when a party has requested a hearing.

#### Box 5. Case of Ponka v. Estonia<sup>42</sup>

The applicant, Mr. Ponka, a Finnish national, was convicted of murder in Estonia and transferred to Finland to serve his sentence. The owner of the apartment where the murder took place brought a civil suit against Mr. Ponka in Estonia claiming damages in an amount corresponding to approx. EUR 1,806. The court ruled that the case was to be resolved in simplified proceedings and that if the parties wished to be heard, they had to inform the court. In his response, Mr. Ponka requested a court hearing and asked that he and two witnesses be questioned. The court dismissed the request and based its judgment on the findings of the criminal case.

Mr. Ponka brought a case before the ECtHR contending that he did not receive a fair civil trial due to the lack of an oral hearing, which constituted a violation of Article 6 § 1 of the Convention. Indeed, the Court found a violation of the right to fair trial in this case.

*“The Court recognises [...] that member States may find it useful to introduce a simplified civil procedure for the adjudication of small claims. Such a simplified procedure may be in the interest of the parties as it facilitates access to justice, reduces the costs related to the proceedings and accelerates the resolution of disputes. The Court also accepts that member States may decide that such a simplified civil procedure should normally be conducted via written proceedings – unless an oral hearing is considered necessary by a court or a party requests it – and that the court may refuse such a request. Such a simplified civil procedure for the adjudication of small claims must of course comply with the principles of a fair trial as guaranteed in Article 6 § 1. The domestic provisions and their application in the domestic courts must therefore ensure respect for the right to a fair trial, in particular when deciding on the necessity of an oral hearing, on the means of taking evidence, and the extent to which evidence is to be taken. [...] In this context the Court also reiterates the obligation under Article 6 § 1 for the domestic courts to give reasons not only for judgments but also for major procedural decisions issued in the course of the proceedings [...].*

*According to the Court’s established case-law, [...] the right to a “public hearing” within the meaning of Article 6 § 1 entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with such a hearing [...] [A] hearing may not be required when the case raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations [...] The Court has also held that, other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, even though the court may refuse the request and hold the hearing in private [...]. With regard to the opportunity to*

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<sup>42</sup> ECtHR Case of Ponka v. Estonia, Application no. 64160/11, at <http://hudoc.echr.coe.int/eng?i=001-142950>.

*request an oral hearing, the applicant had such an opportunity and he made use of it [...] The Court observes that the domestic court in substance gave no reasons for deciding the case in written proceedings [...]. It merely cited a provision of the law that set a threshold amount for cases which could be examined in written proceedings and explained that such proceedings could be used if a party had significant difficulty in appearing before the court due to the length of his or her journey or for another good reason. The court did not explain why this provision was applicable in the applicant's case.*

*[...] The Court has also taken account of the practical problem of the applicant serving his prison sentence in Finland [...], whereas the civil proceedings against him took place in Estonia. It notes that "hearing" the applicant did not necessarily have to take the form of an oral hearing in a court room in Estonia. However, it does not appear that the domestic court considered other alternative procedural options (such as the use of modern communications technology) with a view to ensuring the applicant's right to be heard orally. [...]*

*The above considerations are sufficient for the Court to conclude that there has been a violation of the applicant's right to an oral hearing under Article 6 § 1 of the Convention."*

**99. Hearings are a major source of delay in court cases.** Reducing the number of hearings or avoiding them altogether could contribute to decreasing the time it takes to resolve small claims and the costs involved. In Serbia, even though no preliminary hearing is conducted in small value cases, legal practitioners report that numerous other hearings might be necessary. The 2014 Judicial Functional Review reports that there is an average three-month time lag between hearings in Serbian courts.<sup>43</sup> Thus, scheduling a second hearing in a small value case could prolong it excessively. Any measures to avoid hearings or minimize their number could contribute greatly to reducing the time and the costs of the procedure.

**100. Therefore, this report recommends the introduction of a written-only small claims process unless the parties have specifically requested a hearing.**<sup>44</sup> Such a measure could greatly reduce the duration and cost of proceedings. This is also one of the reforms which, if unacceptable for claims with a value up to the current threshold, could be more readily acceptable for claims under a lower threshold. Alternatively, the number of hearings in small claims procedures could be limited to just one.

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<sup>43</sup> World Bank Group. 2014. Serbia Judicial Functional Review. Washington, DC, p. 83.

<sup>44</sup> In Serbia, the option to decide a case without scheduling a hearing is available for administrative disputes. Specifically, under Art. 33 (2) of the Law on Administrative Disputes, the administrative court shall decide without scheduling a hearing if the subject matter manifestly does not require a hearing of the parties and the determination of the facts or if parties expressly agree to that.



## 10. Timelines

### ***Finding:***

- Shorter timelines bring more discipline to small claims cases and make it possible to resolve them more quickly. Serbia has shortened very few timelines in the procedure. Most of them are applicable once the first instance judgment has been pronounced and do not affect the overall speed of the procedure.

### ***Recommendation:***

- Introduce shorter timelines for small claims similar to the ones in the EU cross-border procedure.

**101. The swift resolution of small claims cases can be enhanced by shortening the timelines for certain procedural actions.** In Serbia, a shorter timeline is provided for pronouncing the court judgment. Both under the small claims procedure and the general one, the judge is obliged to pronounce the judgment immediately although under the general civil procedure, for more complex cases, the law allows the judge to postpone announcing the judgment by 8 days after the conclusion of the trial. In small claims this option is not available. The judgment under both the general and the small claims procedure must be put in writing within 8 days of being announced. Under the general procedure, if a case is complicated, this timeframe is extended by 15 more days. Other timelines, which are shorter under the small claims procedure apply once the judgment has been pronounced. For example, under the small claims procedure, parties may file an appeal against the first instance judgment within 8 days from its delivery. In the general civil procedure, the deadline for filing an appeal is 15 days. Also, the deadline for undertaking the action ordered by the judgment is 8 days under the small claims procedure and 15 days under the general one. If there are omissions in the court's judgment, the deadline for filing a request for a supplementary judgment is shorter in small claims proceedings - 8 days compared to 15 days under the general procedure. Finally, the deadline for filing the response to the appeal is also 8 days instead of 15.

**102. Some of the comparator jurisdictions have also shortened statutory timelines under the small claims procedure.** Slovenia has shorter timelines for the parties to file written statements in the preparatory phase (8 days after receipt of the plea from the other party as opposed to 30 days under the general procedure); for performance of the adjudged obligation (8 days as opposed to 15 days); and to appeal the judgment (8 days as opposed to 30 days). Denmark has shorter deadlines for the issuance of the judgment (14 days as opposed to 4 weeks in the general procedure) and for the duration of the main hearing (a maximum of half a day as opposed to no limits in the general procedure). Latvia also has shorter timelines for the issuance of the judgment in small value cases (14 days as opposed to 30 days) and its entry into force (10 days as opposed to 20 days).

**103. The rules on small claims in Estonia and Germany grant judges the discretion to shorten non-mandatory timelines as appropriate.** In Estonia, indicative timelines such as the

timeline for filing the defendant's response or the interval between the date the summons are served and the first court session can be shortened by the court. The period in which an appeal can be lodged can also be shortened, if the parties agree and inform the court. In Germany, the law does not specifically prescribe shorter timelines for claims that are below EUR 600 in value. However, judges may use their discretion and reduce the timelines to speed up proceedings. For example, under the German Code of Civil Procedure, the period between serving the summons and the date of the hearing should be at least one week in cases in which legal representation is mandatory and at least three days in other proceedings. Since judges have wide discretion in this area, under the general civil procedure they normally give the defendant two weeks to indicate his or her intention to defend the claim, and two additional weeks to prepare a response. In a small claims case, the judge may give the defendant the minimum 3-day notice to appear before the court or respond to the claim.

**104. The EU procedure for cross border small claims has numerous timelines:**

- The claim and the supporting documents should be dispatched to the defendant within 14 days of receiving the properly completed claimant's form;
- The defendant should submit his response within 30 days of service of the claim;
- The court should dispatch a copy of the defendant's response, together with any relevant supporting documents, to the claimant within 14 days of receiving the response;
- The claimant should have 30 days from service of the defendant's response to respond to any counterclaim;
- The court should give a judgment within 30 days of receiving a response from the defendant or the claimant if an oral hearing is not necessary and additional information is not required;
- If an oral hearing is deemed necessary, it should be scheduled within 30 days from the time that summons is sent; and
- The court should give a judgment within 30 days of the oral hearing, if one is held.

**105. Serbia could introduce additional shorter timelines, similar to the ones used in the EU cross-border procedure, to bring more discipline to small claims cases and make it possible to resolve them more quickly.** It is important to note that most comparator jurisdictions only shorten a few timelines and not significantly so. The reduction in timelines is informed by the provisions of the law or judicial discretion.

## 11. Content of the judgment

### ***Finding:***

- In Serbia, the judgment in small claims is simpler than in the general procedure. This is in line with international best practices.

### ***Recommendation:***

- No changes are recommended.

**106. Another area where jurisdictions tend to introduce simplifications is the content of a court's judgment.** In Serbia, the law prescribes that a judgment in a small claims case should be simpler than a judgment in the general procedure.<sup>45</sup> The judgment only needs to contain established facts, indicate the evidence used to establish these facts and the legal rules upon which the judgment is based. It may therefore omit the detailed description of all the allegations parties have made.

**107. The other comparator jurisdictions also allow judges to omit certain parts of the judgment in small claims procedures.** In Estonia, Latvia and Slovenia, the court can choose whether to issue a full or a short judgment. In the descriptive part of a short judgment, courts in Latvia only state the claim and the legal basis for the parties' actions and may omit the parties' explanations. In the reasoning, the court is only required to cite the legal provisions which it has applied and may omit the facts of the case, the evidence on which it bases its conclusions, the arguments for rejecting evidence as well as conclusions on the validity of the claim. Within 10 days of a short judgment being issued in Latvia, a party may request a full one. This is usually done when the party intends to appeal the decision handed down by the court. In Estonia, the court's judgment can comprise only an introduction and conclusion, omitting the descriptive part of the judgment and the reasoning. If a party notifies the court of its intention to appeal the decision, within 10 days of the judgment being issued, the court will supplement the judgment. Alternatively, the court may issue a simplified judgment. A simplified judgment contains limited reasons for the decision, setting out the legal grounds and the evidence upon which the court based its conclusions. A simplified judgment cannot be supplemented. In Slovenia, if the court opts to issue a short judgment, it should contain the legal basis of the claim and the facts upon which it is based, a notice of the right to appeal and that full reasoning will only be added to the judgment if a party announces an appeal within 8 days of receiving the short judgment and pays a court fee. In Germany, the legal provision that allows simplifications for claims under EUR 600 does not exempt the court from providing a reasoned judgment. However, the court may omit the grounds upon which a judgment is based in cases where the reasons have been included in the minutes of the court session.<sup>46</sup>

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<sup>45</sup> Art. 477, para 3, Civil Procedure Law, Serbia.

<sup>46</sup> For this interpretation of the rule § 495a ZPO, see Chamber Decree of 19.07.1995 (ref.: 1 BvR 1506/93), BVerfG.

**108. The extent to which the content of the judgment is simplified in Serbia is reasonable in the light of similar rules in comparator jurisdictions.** Overall, while the simplification allowing the court to shorten its decision may be convenient for judges, it is by no means significant enough to lead to measurable economies.

## 12. Grounds for appeal

***Finding:***

- Serbia's existing laws and practices to appeal small claims judgments are reasonable and consistent with the way in which this aspect of the procedure is typically regulated in comparator countries.

***Recommendation:***

- No changes are recommended.

**109. Another typical feature of small claims procedures is that appeals against the court's judgment may be limited.** This rule has two dimensions. First, the grounds for appeal may be fewer than those available in general civil cases. Second, appeals against specific rulings of the court made during the course of the trial other than the final judgment (interlocutory appeal), can also be restricted. Both simplifications are available in Serbia.

**110. In Serbia, the judgment of the first instance court in small claims proceedings may be appealed against only on the grounds of explicitly enumerated significant violations of the civil procedure and and/or due to improper application of substantive law.** The judgment cannot be appealed against based on procedural violations other than the ones that are specifically listed in the law or on the basis of incorrectly or incompletely established facts. Furthermore, in small claims proceedings, an appeal is only allowed against court rulings that conclude the proceedings. Other court rulings, which under the general rules may be subject to appeal, can in this case only be challenged by an appeal against the court ruling that concludes the proceedings.

**111. In Slovenia and Austria, the grounds for appeal in small claims procedures are very similar to those in Serbia.** In Slovenia, the judgment may be appealed against only on grounds of severe violation of civil procedure provisions and violations of substantive law. Like in Serbia, the judgment may not be appealed against on grounds of erroneous or incomplete determination of facts. The second type of restriction on appeals also exists in Slovenia; appeals are only allowed against court rulings, which conclude the proceedings. Other rulings may only be challenged by an appeal against the court ruling concluding the proceedings. Austrian law only allows limited appeals in cases that are below EUR 2,700 in value. The grounds for appeal in such cases are restricted to points of law or grounds for invalidity (i.e. extremely serious procedural errors). Other procedural errors cannot be challenged, neither can the findings on the facts or the assessment of the evidence by the first instance court.

**112. In Estonia and in Latvia, the grounds for appeal in small claims procedures extend to facts and evidence.** In Estonia, an appeal can be lodged in any of the following circumstances: (i) if permission to appeal is granted in the judgment of the first instance court; or (ii) if a provision of substantive law was clearly applied incorrectly; or (iii) a provision of procedural law was clearly violated, or evidence was clearly evaluated incorrectly and this could have materially affected the decision. If the appellate court refuses to accept an appeal, the party can challenge this ruling in the Supreme Court. In Latvia, the grounds for appeal are only slightly narrower than in the general civil procedure. Appeals are admissible if the first instance court has incorrectly applied or interpreted substantive law, breached a provision of procedural law, established facts incorrectly or assessed the evidence incorrectly. When lodging the appeal, it is also necessary to state the specific substantive law provision that was incorrectly applied or interpreted, the procedural law provision that was breached, the facts that were incorrectly established, and the evidence assessed erroneously and how it has affected the trial of the case. These grounds are rather broad, but they are still stricter than in general civil procedure.

**113. Germany has the most restrictive rules on appeal.** Essentially, appeals against the first instance judgment are not permitted in cases below EUR 600. There is one exception to this rule. An appeal is possible if it is specifically permitted in the judgment of the first instance court. This is rare, but the court may decide to allow an appeal if it deems the case to be of fundamental importance (regardless of its relatively low monetary value) or if the court believes that a decision from the appellate court is required to further develop the law or ensure consistent caselaw. Furthermore, if a party is of the view that its right to be heard has been violated, it can file an objection and the first instance court is required to re-open the proceedings to rectify the situation. However, the latter option does not constitute a right to appeal.

#### Box 6. Civil Procedure Code, Germany

##### Section 511

##### Appeal available as a remedy

(1) Appeals are an available remedy against the final judgments delivered by the court of first instance.

(2) An appeal shall be admissible only if:

1. The value of the subject matter of the appeal is greater than 600 euros, or if
2. In its ruling, the court of first instance has granted leave to appeal.

(3) The plaintiff in the appeal is to demonstrate to the satisfaction of the court the value pursuant to subsection (2) number 1; the plaintiff in the appeal may not file a statutory declaration in lieu of an oath.

(4) The court of first instance shall admit an appeal in cases in which:

1. The legal matter is of fundamental significance or wherever the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court of appeal, and wherever
2. The judgment does not adversely affect the party by an amount higher than 600 euros.

The court of appeal is bound to the admission.

**114. Serbia's restrictions on the grounds for appeal in small claims are consistent with international practice.** Most countries limit the grounds for appeal in small claims. The only exception is Denmark, where the grounds of appeal are the same for both the small claims and the general civil procedure. The most typical restriction is to disallow appeals based on the facts of the case as established by the first instance court. This is the position in Serbia, Slovenia, and Austria. The existing rules in Serbia are adequate, therefore, no recommendations are proposed.

## 13. Appellate procedure

### *Finding:*

- The second instance procedure for small claims in Serbia is only slightly different from the general one.

### *Recommendation:*

- Have second instance small claims be examined by a single judge as opposed to a panel of three.

**115. Usually, simplified procedural rules in small claims only apply to the first instance examination of the case.** In Serbia, the examination of a case in the second instance, for both small claims and general ones, should in principle be done without an oral hearing. However, in the general civil procedure, the second instance court may schedule a hearing, if it finds it necessary to repeat the presentation of evidence or to examine evidence that was rejected by the first instance court, in order to establish the facts correctly. Also, the second instance court can schedule a hearing if a first instance judgment is revoked and the contested decision was based on incorrectly and incompletely established facts or when the procedure before the first instance court substantially violated procedural rules. The option to schedule a hearing before the second instance court in Serbia is generally not available for small claims given that appeals based on the facts are not allowed. The second instance court can only return a case to the first instance court once. Therefore, in exceptional circumstances, if a first instance court consistently violates procedures significantly, and the case cannot be returned to it a second time, in compliance with Article 6 of the ECHR and the principle of a fair trial, the second instance court can hold a hearing and pronounce a final judgment in a small value dispute. Therefore, the second instance procedure for small claims in Serbia is only minimally different from the general one. Comparably, some of the comparator jurisdictions have more significant simplifications at the appellate level.

**116. Denmark has the most numerous simplifications in the second instance procedure.** For example, the requirements to document the initiation of an appeal are less formal than those under the general civil procedure. The same applies to the defendant's response, which under the fast-track procedure should only include his/her remarks without any other formal requirements. Furthermore, under the general civil procedure the appellant is required to submit a complete set of hard copies of the documents presented in the case to the court.

There is no such requirement under the fast-track procedure. Finally, in the general second instance procedure the main rule is that there should be an oral hearing, but the court may decide to omit it. In the fast-track procedure the rule is the opposite – there should be no oral hearing unless the court deems that it is necessary to have one. Thus, as a rule, the appeal in small claims is decided based on the written documents.

**117. In the other comparator countries, the simplifications of the second instance small claims procedure are minimal, if any.** In Austria, if the value of the claim is up to EUR 2,000, then an oral hearing is scheduled only if the court considers it to be necessary. In Slovenia, such appeals are normally examined by one judge unless the case is considered complex, which would warrant examination by a panel of three judges. Estonia and Latvia do not introduce any simplifications in the appeal procedure for small claims. In Germany, there is practically no appeal of decisions for claims with a value below EUR 600.

**118. Serbia could simplify its second instance procedure for small claims, e.g. based on the Slovenian example, by reducing the number of judges on appeal from a panel of three to a single judge.** Because of the limited grounds for appeal, the expectation is that most small claims cases do not reach the second instance. However, in reality, in most countries first instance judgments handed down in small claims cases are often appealed. One of the purposes of small claims procedures is to relieve courts from spending too much time and effort on cases that have low monetary value. If this principle applies to first instance courts, it ought to apply in higher courts as well.

## 14. Legal representation and recovery of costs

### ***Finding:***

- If limitations are imposed on the admissible recovery of costs in small claims cases and the limitations differ from the ones applicable to the general civil procedure, this may create a perception of injustice and limit access to justice for parties with lesser financial means.

### ***Recommendation:***

- No changes are recommended.

**119. Small claims procedures are often designed with the expectation that they require a smaller degree of legal assistance than the general civil procedure.** This expectation is linked to the idea of reducing the cost of the procedure. However, small claims procedures in comparator countries do not display striking differences in the rules on legal representation compared to general civil procedure. Usually, the same rules apply as the general first instance cases: parties may be represented by a lawyer, self-representation is admissible, and the costs for legal representation need to be covered by the losing party. In Serbia, there are no special rules on legal representation and recovery of costs applicable to small value disputes. Below, the report examines only the deviations from the general rules.



**120. Self-representation is almost always allowed in first instance disputes with a low value and to which small claims procedures are applicable.** One exception is the Slovenian small claims procedure for commercial claims. In these cases, parties need to be represented by a practicing lawyer or person who has passed the state judicial examination. In Austria, legal representation is mandatory for claims above EUR 5,000.

**121. In Estonia and Denmark, parties to a small claims dispute can be represented by persons who are not attorneys-at-law.** In Estonia, the court can allow legal representation by persons who are not specified by law as contractual representatives of participants in the proceeding.<sup>47</sup> For example, a contractual representative in simplified proceedings in Estonia could be a law student or a lawyer without a Master's Degree. Similarly, in Denmark's small claims procedure, it is possible for a party to choose to be represented by a non-lawyer, and it is also possible to recover expenses incurred for a non-lawyer in the same manner as for a lawyer.

**122. In order to reduce the costs, the legislator or judicial practice may set limits to the amount of legal costs that would be reimbursable for the winning party.** Denmark sets detailed rules in this regard. There, the preparatory phase of the proceedings is expected to be very limited in nature; therefore, a lawyer may only take part in the main hearing. While parties may be assisted by a lawyer also in other parts of the proceedings, such legal costs are not reimbursed. As a result, the maximum recoverable cost under the small claims procedure amounts to approximately 30% of the maximum recoverable cost under the general civil procedure for a claim of the same value (because a case with a value below the threshold would not necessarily be examined under the small claims procedure). After the dispute has arisen, the parties may agree that the rules regarding recovery amounts do not apply. However, in the absence of such agreement, a winning party who has chosen to use a lawyer will rarely get full compensation for actual costs incurred during the proceedings under the small claims procedure.

**123. The significant limitations on the recovery of legal costs is among the main reasons that the fast-track procedure in Denmark is criticized.** Since the introduction of these rules, there has been a significant reduction in the government's expenses for legal aid. One of the reasons for the reduction seems to be the introduction of the fast-track procedure, where, in most cases, legal aid only covers the time for the main hearing, rather than the actual time spent by a lawyer working on the case. While it is expected that parties who do not have legal representation will receive guidance from the judge and court staff, such guidance is not always sufficient. At the same time, it may be difficult for parties to obtain guidance from a lawyer because of the limitations on recoverable costs. Thus, the limitations on recoverable costs may at times create tension and adversely affect the affordability and efficacy of the procedure.

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<sup>47</sup> In general civil procedure, contractual representatives in court may be: an attorney-at-law; another person who has acquired at least a state-recognized Master's Degree in the field of law or a corresponding qualification under the Education Act or a corresponding foreign qualification; a procurator in all court proceedings related to the economic activities of a participant in a proceeding; one plaintiff based on the authorization of the co-plaintiffs or one defendant based on the authorization of the co-defendants; an ascendant, descendant or spouse of a participant in a proceeding; another person whose right to act as a contractual representative is provided by law. (Article 218 of the Code of Civil Procedure, Estonia).

**124. Other countries restrict the recovery of legal costs in small claims procedures based on the general rules of procedure.** In Estonia, the court may exercise discretion in the approval of legal expenses while ensuring that the total expenses for the case do not exceed its value. In Latvia, the court may reduce the amount of reimbursable expenses for legal assistance considering the principle of justice and proportionality and assessing the objective circumstances related to a case, particularly, the level of complexity, the number of court hearings and the court instance. Therefore, if a case is simple and no court hearing has been held, the judge may significantly decrease recoverable legal expenses. Unlike Denmark, which has guidelines as to the admissible levels of recoverable legal costs, in Latvia court practice in this area is discordant. Thus, in some cases the court approves the recovery of only a portion of these costs with the argument that the case was simple and no hearing was held. In other cases, the court approves the requested amounts in full without any discussion of the complexity of the matter.<sup>48</sup> This situation creates an impression of arbitrariness and breeds legal uncertainty.

**125. Regulation (EC) No 861/2007 also introduces a possibility to limit costs for legal representation.** The Regulation stipulates that the unsuccessful party shall bear the costs of the proceedings but the court shall not award costs to the successful party to the extent that they were incurred unnecessarily or are disproportionate to the claim. This rule seems to be very moderate in its approach compared to the ones discussed above.

**126. Overall, if limitations are imposed on the admissible recovery of costs in low-value cases and they differ from the general civil procedure, this may create a perception of injustice** and limit access to justice for parties with lesser financial means, who should be the principal beneficiaries of such procedures. Therefore, it is a risky and controversial measure. This report does not recommend changes to the current rules regarding legal representation and recovery of costs in small value disputes in Serbia.

## 15. Statistics

### ***Findings:***

- Serbian court statistics do not disaggregate civil and commercial cases based on the value of the claim.

### ***Recommendation:***

- The case management system of Serbian courts could be adjusted to allow for the measurement of small claims both in terms of volume and duration of the procedure.

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<sup>48</sup> Some of the cases that have been examined in this regard are: judgment in a general civil procedure case C24123316 of 03.05.2018; judgment in a general civil procedure case C33493817 of 24.05.2018; judgment in a general civil procedure case C19039417 of 14.05.2018; judgment in a general civil procedure case C33800416 of 30.08.2017; judgment in a general procedure case C30559113 of 23.01.2017; judgment in a general procedure case C30575010 of 22.02.2012; judgment in a small claims case C33581616 of 26.01.2017; judgment in a small claims case C32250516 of 20.02.2017; judgment in a small claims case C12255916 of 14.11.2016.

**127. This study notes one common deficiency across systems; in almost all comparator jurisdictions, including Serbia, statistics on small claims are very poor.** The case management systems of these jurisdictions do not differentiate between small claims and general civil (and in the case of Serbia and Slovenia also general commercial) cases. Therefore, it is impossible to tell what share of the overall caseload represents small claims, what their average processing time is, what the dynamic of these cases is over time,<sup>49</sup> as well as how various changes in the procedure affect caseload and/or processing times. This is unfortunate because it prevents rigorous analysis of small claims procedures, which could inform policy decisions.

**128. One exception to the overall lack of statistical information on small claims procedures is Denmark, where data confirms that the resolution of small claims is quicker than general ones.** Danish fast-track procedures have been measured both by national statistics and in a 2013 report developed by Deloitte.<sup>50</sup> According to official statistics, small claims represent almost 50% of all civil (including commercial) cases in the country. The Deloitte report estimates that the average duration of a fast-track procedure is 117 days. When looking only at fast-track cases where a main hearing was conducted (i.e. where the case was not dropped before the main hearing), the average duration is 298 days. By way of comparison, a general civil case has an average duration of 347 days, i.e. three times longer than the average duration of the small claims one. For general civil procedure cases where a main hearing was conducted (i.e. where the case was not dropped before the main hearing), the average duration is 570 days. The Deloitte report also shows that court staff spend an average of 720 minutes on a regular civil case and an average of 353 minutes on fast-track cases.<sup>51</sup> Statistics show that Danish small claims procedures are faster and cheaper than the general cases, which means that the simplified rules are meeting their goal.

**129. In other countries, it is not possible to make such an assessment with certainty. It is recommended that Serbia address this gap and adjust its case management system** to enable the measurement of both the volume and duration of low-value cases. This data could serve as a basis for policy decisions on the future development of the procedure.

## 16. Conclusion

**130. Serbia has introduced numerous simplifications to its small claims procedure which are in line with international practices but there are several aspects where the country's policy choices are in stark contrast to international practices.** These are the areas that Serbia should consider reforming.

**131. The first area is the extremely broad scope of the procedure due to the unusually high threshold, especially for commercial claims.** This means that the simplified rules affect a massive volume of cases, some of which have a relatively high value. The broad scope of the procedure is coupled with a lack of judicial discretion. Judges cannot choose whether to

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<sup>49</sup> For example, whether the number of such cases increases or decreases over the years and/or whether they are resolved more quickly or more slowly.

<sup>50</sup> Deloitte, report developed on assignment by the Danish Ministries of Justice and Finance, *Analyse af civile sager. Analysens sammenfatning*, 9 September 2013 Rapport, at <http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2013/Bilag%204%20del%201.pdf>.

<sup>51</sup> Ibid.

apply the simplified procedure or not regardless of the complexity of the case. Together, the high threshold and the lack of discretion may lead to undesirable outcomes. One of the consequences could be the need to decide a complex case with a relatively high value (which still falls under the threshold) using the simplified rules thus not giving the case sufficient attention. Another consequence could be that further simplifications to the procedure would be very hard to accept, given the broad category of cases that would be affected. For these reasons, this report recommends a reduction of the commercial cases threshold. Alternatively, Serbia could keep the current threshold with the current simplifications and introduce an additional, lower threshold to which more significant simplifications could be applicable. It is also advisable to give judges discretion to choose which simplifications to apply to each particular case.

**132. The second area in which Serbia's rules deviate significantly from international practice is the preparatory phase of the case, which for small claims is drastically shortened.** In every other comparator jurisdiction, the written part of the pre-trial phase is preserved and is used to clarify the issues under dispute and evidentiary matters. Importantly, this phase is used to determine whether an oral hearing is necessary to solve the case or if it can be decided based only on the written procedure. This report recommends that Serbia introduce a well-structured written pre-trial phase with strict timelines and a rule that parties shall be precluded from presenting/requesting at a later stage evidence that was available to them during the written pre-trial stage.

**133. Thirdly, Serbia could improve its small claims procedure by limiting the number of hearings.** The scheduling and conducting of hearings tend to be the most time-consuming part of a civil process; therefore, most jurisdictions try to avoid hearings to the extent possible. They do so by allowing for written-only small claims procedures, clarification of some matters over the phone, accepting written statements from witnesses and court experts as opposed to hearing them in person, etc. The process can be conducted only in writing unless one of the parties requests an oral hearing. In order to evaluate whether a hearing is necessary and to minimize the number of hearings in a case, it is important to have a written pre-trial stage. According to the caselaw of ECtHR, a court can conduct the process only in writing even if one of the parties has requested a hearing; however, the refusal to grant the request must be well reasoned. Alternatively, it is admissible to schedule a virtual hearing using the options provided by modern information technologies.

**134. Fourthly, Serbia's court fee structure appears to encourage frivolous litigation, charge commercial entities excessively and increase the administrative burden on courts and enforcement authorities.** Court fees in Serbia are quite low for claims with very low value but rank the highest among comparator jurisdictions for commercial claims with a value of EUR 1,000 and above. Furthermore, unlike other comparator jurisdictions where a single fee is due for the case within one court instance, in Serbia, three fees are due – for filing the claim, for the defendant's response and for the judgment. This "payment in installments" decreases the claimant's financial burden at the time of filing the claim and can encourage the decision to litigate for minimal amounts to be taken too lightly. Another factor that may contribute to frivolous or vexatious litigation is the fact that Serbian courts examine the case even if the fee has not been paid whereas in other jurisdictions, the case is discontinued in the absence of payment. Combined, the payment of several fees per court instance and the examination of the case even if the fee has not been paid have the additional downside of burdening courts

and enforcement authorities with repeated notifications to litigants and collection of overdue payments. The report recommends that Serbia reform its fee system by requiring the payment of a single fee per court instance as a pre-condition for commencing litigation.

**135. The most important findings and recommendations of this analysis are the ones outlined above. A full overview of the report's findings and recommendations is provided in the table below.** Only the findings that are accompanied by recommendations are listed.

**136. The full implementation of this report's recommendations requires legislative amendments.** However, it is recognized that in the interest of the stability of the legal system, legislative amendments cannot be undertaken too frequently or too lightly. Therefore, the actions recommended in the table below are subdivided into two types: non-legislative actions and legislative actions. For each recommendation, an activity that does not entail legislative amendments is proposed as a means to assess whether a legislative action would indeed be necessary and what its substance would be.

**137. The non-legislative actions proposed below can be grouped in two broad types of activities: case-monitoring and roundtable discussion/s.** The principal goal of the case-monitoring activities is to collect reliable information on the actual profile of small value cases compared to the general ones in terms of volume, timelines, average number of hearings, use of expert assessments, etc. Currently, information on these aspects of the small claims caseload is derived from perception and anecdotal evidence and it is difficult to base a policy decision on such uncertain data. A well-designed and rigorous case-monitoring activity could fill this gap. The principal goal of the proposed roundtable discussions is to assess whether some of the recommendations could be implemented based on the current procedural rules or if legislative amendments would be needed, as well as to evaluate attitudes towards the proposed changes, their expected outcomes and any potential risks. Ideally, such roundtable discussions would follow the implementation of the case monitoring activity in order to build on the information derived therefrom.

	Key Findings	Recommendations	Actions
1	The payment of many fees per court instance is contrary to the international practice and burdensome for courts. The fact that Serbia's fees for cases with a very small value are among the lowest in comparator jurisdictions coupled with the payment of a fraction of the total fee at the time of filing the claim may encourage frivolous litigation.	Introduce a single fee per court instance payable at the outset of the procedure.	<p><b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and commercial small claims across Serbia to determine the time and effort invested by the court and by the parties ensuing from the payment of several fees per court instance, including the preparation of related notifications and service of those notifications. Conduct roundtable discussion/s with judges and attorneys to assess attitudes to and risks associated with the introduction of a single fee per court instance.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether a change in the court fees structure should be introduced.</p>
2	Fees for small commercial claims with	Equalize the fees for civil and for	<b>Non-legislative action:</b> Conduct roundtable discussion/s with legal and business community

	a high value in Serbia are the highest among comparator jurisdictions while fees for claims with minimal value are among the lowest. The fees for commercial cases are higher than the fees for civil cases of the same value.	commercial cases of the same value possibly by reducing the latter.	<p>representatives and further examine comparative examples to determine whether the stark difference in court fees for civil and commercial cases is justified and what its effect is on business in Serbia.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether a change in the court fee rates would be advisable.</p>
3	In most jurisdictions, a case is not examined if the fee is not paid. The ECtHR found that the discontinuation of a civil procedure in case of non-payment of the fee does not constitute a denial of justice, as long as there are appropriate mechanisms in place to ensure that the amount of the fee is proportionate to the financial situation of the parties.	Allow the court to discontinue the case if the fee is not paid, unless a fee waiver has been approved.	<p><b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and commercial small claims across Serbia to determine the approximate percentage of cases in which parties do not pay fees in advance. Assess follow-up collection activities by state authorities to determine the extent to which unpaid court fees are collected through compulsory execution and the costs and benefits of such collection activities. Conduct roundtable discussions with judges and attorneys to assess attitudes to and risks associated with the discontinuation of a court case in case of non-payment of the fee.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether the court could be empowered to discontinue the proceedings if fees are not paid.</p>
4	Systems with high thresholds for small claims are conducive to fewer procedural simplifications. In Serbia, the thresholds are very high, especially for commercial claims.	Consider reducing the commercial cases threshold in parallel with the introduction of more significant procedural simplifications as recommended in this report. Alternatively, keep the current threshold with the current simplifications, while introducing an additional, lower threshold with more significant simplifications.	<p><b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and commercial cases across Serbia to determine the approximate ratios of small claims among civil and commercial cases, as well as the ratios of small claims of different value ranges.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether the threshold could be reduced or a second threshold could be introduced and if so, what the value of these thresholds could be.</p>
5	Unlike in comparator jurisdictions, judges in Serbia do not have the discretion to choose whether to apply the small claims rules or not. If the	In case the threshold remains high but additional simplifications are added to the procedure, judges could be given	<b>Non-legislative action:</b> Conduct roundtable discussion/s with judges and attorneys to examine the possible implications of introducing judicial discretion into the application of small claims rules.

	simplifications become more significant while the thresholds remain high, complex small value cases might not receive due attention.	discretion not to apply some, or all, of the simplifications if they consider that a particular case is too complex to be examined under the small claims procedure.	<b>Legislative action:</b> Based on the above activity, determine whether judicial discretion in the application of small rules could be introduced.
6	Under international best practices, small claims are filed using forms that structure the claim and facilitate judges and parties. In Serbia there are no such forms.	In the short term, introduce mandatory forms both for the claimant's action and for the defendant's response in small claims. These forms should be available in electronic format.	<p><b>Non-legislative action:</b> Develop non-mandatory forms for filing small claims and promote their use. After the forms have been in use for a certain time period, conduct a roundtable discussion with judges and attorneys to assess their effect and whether improvements could be recommended.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether mandatory forms for small claims could be introduced.</p>
7	Under international best practices, claims are filed electronically through a single judicial portal. In Serbia this is not possible.	In the long term, make it possible to file all claims via an electronic portal.	E-filing should be introduced in due course for all civil and commercial claims. Therefore, it is not a small claims-specific activity and it would follow the overall development of the technical infrastructure of Serbia's judiciary.
8	Unlike comparator jurisdictions, Serbia has no stricter relevance assessment in small claims and no criteria on rejecting evidence.	Provide that in small claims judges apply a stricter relevance assessment than in general litigation and only admit evidence which is necessary and not excessively costly.	<p><b>Non-legislative action:</b> Conduct roundtable discussion/s with judges and attorneys to assess the extent to which the current judicial discretion to reject evidence is utilized, with particular emphasis on small claims and whether court practice could be further developed in this regard, including criteria for conducting the relevance assessment.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to encourage more extensive use of judicial discretion in assessing the relevance of evidence in small claims.</p>
9	Unlike most comparator jurisdictions, in Serbia the requirements on the form of evidence in small claims are no different than those in the general procedure.	Provide that in small claims witness statements be, as a rule, submitted in writing and the oral hearing of witnesses only be allowed as an exception.	<p><b>Non-legislative action:</b> Conduct roundtable discussion/s with judges and attorneys to assess the extent to which judicial discretion is used to simplify the form of evidence in small claims and whether court practice could be further developed in this regard.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to introduce further simplifications in the form of evidence in small claims.</p>
10	Expert assessments are expensive and time-	Provide that expert assessments be	<b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and



	consuming but judges in Serbia are not able to forego such assessments even in cases with very small value.	approved in small claims only in exceptional circumstances and considering the value of the claim relative to the cost of the assessment.	commercial small claims across Serbia to determine the average number of expert assessments per small value case; relationship between the values of cases and costs of assessments; the type of expert assessments that are used most frequently and whether they could have been avoided. Conduct roundtable discussion/s to assess whether the use of expert assessments could be limited based on the value of the case and other criteria.  <b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to limit the use of expert assessments in small claims.
11	Some initiative by the judge in guiding the collection of evidence or instructing the parties on their rights and obligations is not considered contrary to the adversarial principle.	If Serbia seeks to give a more active role to judges in small claims, the appropriate place to start is to allow for more discretion and initiative in the collection of evidence.	<b>Non-legislative action:</b> Conduct roundtable discussion/s with judges and attorneys to assess the extent to which judges could exercise more discretion and initiative in the collection of evidence, including providing guidance to parties, especially non-represented ones, in small claims cases.  <b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to encourage judges to show more initiative in optimizing the small claims procedure, especially with regards to the collection of evidence.
12	Drastically shortening the preparatory phase of the case, as Serbia has done, may necessitate a larger number of court hearings in order to clarify issues and collect evidence that could have been clarified and collected more quickly and inexpensively within a well-structured preparatory phase conducted in writing.	Introduce a well-structured preparatory written phase in small value cases with short timelines and an obligation that parties should present/request all evidence available to them during that phase. The written phase could be used to determine whether a hearing should be conducted at all or if the case should be resolved through a written-only procedure.	<b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and commercial small claims across Serbia to determine the extent to which parties and judges have used the preparatory phase of the case. Conduct roundtable discussion/s with judges and attorneys to assess the effect of the drastically shortened preparatory phase in small claims.  <b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to introduce a well-structured preparatory written phase in small claims.
13	Unlike other comparator jurisdictions, Serbia does not provide for rules that limit court hearings in small value cases.	Provide that small claims shall, as a rule, develop only in writing unless one of the parties has specifically requested a hearing.	<b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and commercial cases across Serbia to compare the average number of hearings in small claims and in general cases. Conduct roundtable discussion/s with judges and attorneys to discuss how the number of hearings could be minimized

			<p>and whether a fully written process could be feasible in small claims.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to limit the number of hearings in small claims and/or allow for a fully written process.</p>
14	<p>Shorter timelines bring more discipline to the movement of small claims. Serbia has shortened very few timelines. Most of them are applicable once the first instance judgment has been pronounced and do not affect the overall speed of the procedure.</p>	<p>Introduce shorter timelines for small claims similar to the ones in the EU cross-border procedure.</p>	<p><b>Non-legislative action:</b> Conduct a case-monitoring activity with a sample of civil and commercial cases across Serbia to compare the average timelines in small value and in general cases. Conduct roundtable discussion/s with judges and attorneys to discuss how and which timelines in small claims could be shortened.</p> <p><b>Legislative action:</b> Based on the above activity, determine whether a legislative change is needed to shorten timelines in small claims procedures.</p>
15	<p>The second instance procedure for small claims in Serbia is only minimally different from the general one.</p>	<p>Have second instance small claims be examined by a single judge as opposed to a panel of three.</p>	<p><b>Non-legislative action:</b> Conduct roundtable discussion/s with judges and attorneys to discuss whether the second instance procedure for small value cases could be optimized, including whether/in what situations such cases could be examined by a single judge at the second instance.</p> <p><b>Legislative action:</b> Based on the above, determine whether a legislative change is needed to optimize the second instance procedure in small value cases and authorize their examination by a single judge.</p>

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- Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

## Annex 2. Historical review of the development of small claims

**The origins of small claims courts can be traced back to the common law tradition.**<sup>52</sup> Complex and legalistic litigation in common law countries was perceived to be out of reach to the ordinary man. Therefore, as early as the 18<sup>th</sup> century, Northern Ireland, England and Wales began establishing courts and tribunals that would dispense cheap, informal justice. Very often the decision-makers were not judges but lawyers or even laymen who were expected to adjudicate based on their general notion of what was fair and equitable.

**In the United States, the first small claims courts were established in the early 20<sup>th</sup> century.** The US model featured five major components: (1) court costs were minimized; (2) pleadings were greatly simplified; (3) trial procedure was left to the discretion of the judge and formal rules of evidence were eliminated; (4) judges and court clerks were expected to assist litigants during trial preparation and at trial so that legal representation would be rendered unnecessary; and (5) judges were given the power to allow payment of the adjudicated amount in installments.<sup>53</sup> Additionally, court fees were extremely low.

**In the 1960s and 1970s, the consumer protection movement fueled renewed interest in small claims courts throughout the United States, Canada, Australia and New Zealand.** A concern was raised, especially in the United States, that these courts had been overwhelmed by debt-collection companies and large businesses, which overshadowed the courts' initial purpose to serve wage earners and small businessmen. Discussions abounded, both in the United States and in other jurisdictions with small claims courts, as to whether it would be wise to prohibit legal representation altogether thus levelling the playing field for all litigants and/or to limit these courts' jurisdiction to only consumer claims thus shutting the door to large plaintiffs and re-directing them to the general civil procedure. Some jurisdictions indeed made such steps.<sup>54</sup> Quebec prohibited legal representation in small claims courts. Australia limited the jurisdiction of small claims tribunals to consumer claims and permitted legal representation only in those cases where all parties had consented. New Zealand, too, excluded advocates from the procedure and required claimants to prove that the matter for

<sup>52</sup> This historical examination is largely informed by Whelan, Christopher (ed.). 1990. *Small Claims Courts - A Comparative Study*, Clarendon Press: Oxford.

<sup>53</sup> See Weller, Ruhnka and Martin, *American Small Claims Courts*, p. 5, *ibid*.

<sup>54</sup> Many of the discussed common law jurisdictions have a federal structure or otherwise hosted a variety of small claims courts, each with its own specifics. Therefore, while some commonalities and trends are discussed herein, it should be kept in mind that there were wide variations of rules and features of small claims courts, even within one and the same country.

which adjudication was sought was indeed under dispute in order to prevent the use of small claims tribunals as a cheap forum for debt collection.

**Another prominent feature of small claims courts was the emphasis placed on conciliation.**

Thus, in Australia, the tribunal would be charged with the duty to use its best endeavors to bring the parties to an acceptable settlement. Only after that could a matter be adjudicated.<sup>55</sup> Similarly, in New Zealand, the primary function of the tribunal was to attempt to bring the parties to an agreed settlement.<sup>56</sup>

**In continental Europe, the interest in small claims was limited and generally emerged later in time.** One notable exception is Austria-Hungary, which introduced a special procedure for small claims as early as 1873. Its provisions were largely taken over in the Civil Procedure Code of 1895. These early small claims provisions were limited in the simplifications they introduced as compared to the common law jurisdictions. They regulated the content of the simplified protocol of the main hearing and further required that as a rule such cases should be decided in just one hearing. The judgment would normally be pronounced orally, within the same hearing. If both parties were present, a written copy of the judgment would be delivered only at the request of a party. If a party was not present at the hearing, a written copy of the judgment had to be delivered to both. Appeal of the judgment was restricted. The successful implementation of an electronic order for payment system in Austria in the early 1980s reduced the need of the small claim procedure dramatically. After several restrictions on the original content of the procedure, the legislature finally annulled the special rules in 1983. The justification was that the maintenance of the small claims procedure would be superfluous in light of the existing restrictions on appeals. Nevertheless, Austria currently has several simplified rules that apply to claims under various thresholds and they have been examined in this comparative analysis.

**SFRY's legal system was strongly influenced by the Austrian legal tradition.** Therefore, SFRY was one of the pioneers in the introduction of small claims procedures in continental Europe. It did so in 1972. The provisions were applicable to claims with a value of less than 800 dinars and were very similar to the early Austrian provisions. They also regulated in much detail the content of the protocol of the main hearing and stipulated that the court judgment needed to be pronounced at the end of the main hearing. Grounds for appeal were again limited. Interestingly, SFRY small claims provisions differed from the Austrian ones in that they provided for a compulsory initial conciliation session in some types of small value disputes.

**Most European jurisdictions that found it useful to create a special fast-track for small claims did so without setting up special courts but by simplifying some aspects of the civil procedure at the courts of general jurisdiction.** Furthermore, while the primary objective of common law countries appears to have been ensuring access to justice, especially for underprivileged groups, consumers and small businesses, in continental Europe the primary purpose of such reforms appears to have been to achieve efficiency. Access to justice was seen as an added benefit, but small claims procedures were usually introduced in order to

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<sup>55</sup> See Yin and Cranston, *Small Claims Tribunals in Australia*, 1990. *Small Claims Courts - A Comparative Study*, Clarendon Press: Oxford. p. 59.

<sup>56</sup> See Frame, *Claims Tribunal System in New Zealand*, 1990. *Small Claims Courts - A Comparative Study*, Clarendon Press: Oxford. p. 75.

help courts allocate their limited resources in an efficient manner by making sure that no undue amount of effort would be spent on minor cases.

## Annex 3: Approaches to regulating small claims

**Different jurisdictions have taken different approaches to regulating small claims.** They range from very detailed dedicated chapters in the civil procedure law, in which every possible simplification of the procedure is listed, through non-exhaustive lists of admissible simplifications, to very laconic, general rules that give judges ample discretion and leave it to jurisprudence to shape out the ultimate scope of possible simplifications. Unlike Serbia, most examined jurisdictions do not distinguish between civil and commercial small claims. Slovenia is the only other examined country to make such distinction.

**In Slovenia<sup>57</sup>, Latvia<sup>58</sup> and Denmark<sup>59</sup>, the small claims procedure is also regulated in dedicated chapters of the procedural laws.** In Estonia, the rules are listed in a single article<sup>60</sup> and some of their aspects are further developed in a few other provisions. The Estonian provision on small claims comprises a non-exhaustive list of manners in which the procedure could be simplified. The court is free to choose which simplifications to apply. In 2006, when this procedure was first introduced, it permitted judges to ease the procedure without specifying which aspects of the process could be simplified. This broad discretion made judges hesitant of whether and how to use the procedure. A legislative amendment of 2009 introduced the current open catalogue of simplifications, which made the procedure operational. Even though the list is non-exhaustive, practitioners report that judges stick to the specified simplifications and do not use additional ones.

### **Section 405, Civil Procedure Code, Estonia**

#### **§ 405. Simplified proceeding**

(1) The court adjudicates an action by way of simplified proceeding at the discretion of the court, taking account of only the general procedural principles provided by this Code if the action concerns a proprietary claim and the value of the action does not exceed an amount which corresponds to 2,000 euros on the main claim and to 4,000 euros together with collateral claims. Among other, upon conducting proceedings in such action, it is permitted:

- 1) to enter procedural acts in the minutes only to the extent the court deems it necessary, and preclude the right to file any objections to the minutes;
- 2) to set a term which differs from the term provided by law;
- 3) [repealed - RT I, 21.05.2014, 1 - entry into force 01.01.2015]
- 4) to recognize persons not specified by law as contractual representatives of participants in the proceeding;
- 5) to deviate from the provisions of law concerning the formal requirements for provision and taking of evidence and to recognize as evidence also the means of proof not provided by law, including a statement of a participant in the proceeding which is not given under oath;

<sup>57</sup> Chapter 30, Civil Procedure Law, Slovenia.

<sup>58</sup> Chapter 30.3, Civil Procedure Law, Latvia.

<sup>59</sup> Chapter 39, Civil Procedure Code, Denmark.

<sup>60</sup> Section 405, Civil Procedure Code, Estonia.



6) to deviate from the provisions of law concerning the formal requirements for serving procedural documents and for documents to be presented to the participants in the proceeding, except for serving an action on the defendant;

7) to waive written pre-trial proceedings or a court session;

8) to take evidence at its own initiative;

9) to make a judgment in a matter without the descriptive part and statement of reasons;

10) to declare a decision made in a matter to be immediately enforceable also in other cases than those specified by law or without a security prescribed by law.

(2) In the case specified in subsection (1) of this section, the court guarantees that the fundamental rights and freedoms and the essential procedural rights of the participants in the proceeding are observed and that a participant in the proceeding is heard if he or she so requests. A court session need not be held for this purpose.

(3) The court may conduct proceedings in a matter in the manner specified in subsection (1) of this section without a need to make a separate ruling thereon. The participants in the proceeding shall still be notified by the court of their right to be heard by the court.

**The most laconic provisions on small claims are available in Germany and Austria.** Thus, In Germany, a single short text in its Civil Procedure Code gives the courts discretion in implementing the general rules in cases with a value of up to EUR 600. An additional text limits severely appeal for claims below the same threshold.

#### **Civil Procedure Code, Germany**

Section 495a

Proceedings performed at the court's equitably exercised discretion

The court may decide at its equitably exercised discretion on how to implement its proceedings if the value of the claim does not exceed the amount of 600 euros. Upon corresponding application being made, the matter must be dealt with in oral argument.

**In Austria, there are different monetary thresholds that are tied to different simplifications.** This is not a small claims procedure in the classical sense of the term. Still, it is instructive to explore it because of the close links between the Austrian legal tradition and the legal systems of countries that formed part of SFRY. It is also useful to note that there are systems in which different thresholds can unlock different types of procedural simplifications.

## Annex 4: Stakeholders consulted

### Judges:

- Ms. Danijela Peric Smiljanic - First Basic Court in Belgrade
- Ms. Snezana Marjanovic – First Basic Court in Belgrade
- Ms. Jovana Stanic – First Basic Court in Belgrade
- Ms. Jelena Zivanovic Jacovic - First Basic Court in Belgrade
- Ms. Milanka Pjevovic - First Basic Court in Belgrade
- Mr. Aco Rajkovic - First Basic Court in Belgrade
- Mr. Velibor Barovic - First Basic Court in Belgrade
- Ms. Milena Vasic - First Basic Court in Belgrade
- Ms. Sanja Ivankovic - First Basic Court in Belgrade
- Ms. Jasmina Vukovljak Jovanovic – Second Basic Court in Belgrade
- Ms. Vesna Damjanovic – Higher Court in Belgrade
- Ms. Sanja Agatonovic - Higher Court in Belgrade
- Ms. Snezana Maric – Commercial Appellate Court

### Lawyers:

- Ms. Ivana Ruzicic – PR Legal
- Mr. Momir M. Radic – Lawyer's Office Radic
- Ms. Dusica Jovanovic - Lawyer's Office
- Mr. Nedeljko Velisavljevic – Lawyer's Office CMS
- Mr. Nemaža Kuzovic - Lawyer's Office
- Mr. Vukašin Petković, General Counsel, Koncern Bambi a.d. Požarevac



