The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in Plenary and composed of the following judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Mr. Tudor Pantiru

Ms. Valerija Galić

Mr. Miodrag Simović

Ms. Seada Palavrić

Mr. Giovanni Grasso

Having deliberated on the request filed by **County Court in Banja Luka (Judge Milan Blagojević),** in the case no. **U 1/18**, at its session held on 15 February 2018 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request filed by **County Court in Banja Luka (Judge Milan Blagojevic)** for review of the compatibility of Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby dismissed.

It is hereby established that Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code (*Official Gazette of the Republika Srpska,* 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) are compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 29 December 2017, the County Court in Banja Luka (Judge Milan Blagojević; "the applicant") filed the request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for review of the compatibility of Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code (*Official Gazette of the Republika Srpska*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13) ("the CPC") with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). The request was registered with the Constitutional Court under number *U 1/18*.
2. On 5 January 2018, the applicant lodged the request with the Constitutional Court for review of the compatibility of Article 433(1) of the CPC with Articles II(3)(e), II(3)(h) and II(4) of the

Constitution of Bosnia and Herzegovina and Articles 6, 10 and 14 of the European Convention. The mentioned request was registered with the Constitutional Court under number *U 3/18*.

II. Procedure before the Constitutional Court

3. Pursuant to Article 32(1) of the Rules of the Constitutional Court, the Constitutional Court decided to merge the mentioned requests and to conduct one set of proceedings and to adopt a single decision under number U 1/18.

4. Pursuant to Article 23 of the Rules of the Constitutional Court, the National Assembly of the Republika Srpska ("the National Assembly") was requested on 5 and 12 January 2018 to submit its response to the request.

5. The National Assembly failed to do so within the given time limit.

III. Request

a) Allegations in the request

6. The applicant holds that the provisions of Articles 182(1), 208(2) and 433(1) of the CPC ("the impugned provisions") are incompatible with Articles II(3)(e), II(3)(h) and II(4) of the Constitution of Bosnia and Herzegovina and Articles 6, 10 and 14 of the European Convention (right to a fair trial, right to freedom of expression and non-discrimination).

7. As regards the provision of Article 182(1) of the CPC, the applicant points out that the introduction of a legal mechanism of default judgement the essence of which is that if a defendant, who has been duly served with a complaint where the plaintiff requested the issuing of a default judgement, fails to submit a written response to the complaint within the prescribed time limit, the court will render a judgement granting the claim (default judgement), unless the claim is *manifestly* unfounded.

8. The applicant further emphasizes that the impugned provision as well as the whole mechanism of default judgement are unconstitutional, as they are contrary to Article II(3)(h) and, consequently, to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Articles 6, 10 and 14 of the European Convention. In this respect, the applicant points out that Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention provide the right to freedom of expression, but also the right of an individual not to express his/her thoughts and that he/she must not suffer any legal consequences whatsoever for such behaviour. The applicant holds that silence of a party to the proceedings (the same refers to witnesses and experts in the judicial proceedings) must not be legally sanctioned, and that is exactly what has been done by

Article 182 of the CPC in violation of the right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. Namely, it clearly follows, in the view of the applicant, that Article 182(1) of the CPC imposes an obligation on the defendant that he/she must submit a written response to the complaint within the prescribed time limit, and if he/she fails to do so, he/she will be legally sanctioned in such a manner that the court will render a default judgement. Therefore, in the applicant's opinion, it clearly follows that, contrary to Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, the State coerces an individual to express his/her thoughts (in a written form), otherwise, he/she would be subject to the aforementioned legal sanction.

9. In addition, as regards the provision of Article 228(2) of the Civil Procedure Code, the applicant indicates that the relevant provision prescribes that a default judgement cannot be contested for erroneously or incompletely established facts. In the applicant's opinion, the aforementioned is unconstitutional and, in practical terms, the legislator introduced a ban on a party to the proceedings to express his/her thoughts on legally relevant facts and even if the party does so in an appeal against the default judgement, the court, in view of the said legal ban, cannot review that judgement in respect of the state of facts. The applicant holds that it amounts to a violation of the freedom of expression referred to in Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. Furthermore, the impugned provision, according to the applicant, is in violation of the right to a fair trial, which is inherent in all stages of legal proceedings, including appellate proceedings, as guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. In addition, the applicant holds that the mentioned provision is also in violation of Article 14 of the European Convention. In that context, the applicant points out that, based on the relevant legal provision, the legislator, unconstitutionally and without reasons that may be justified by the public interest, discriminates against those parties to legal proceedings where a default judgement is rendered when compared to all those parties to civil proceedings where such a judgement is not rendered.

10. As to Article 433(1) of the CPC, the applicant indicates that, by this provision, the legislator unconstitutionally imposed the ban so that the judgment or ruling concluding small claim court proceedings cannot be challenged in appellate proceedings for erroneously or incompletely established facts. The applicant points out that this ban cannot be justified by the public interest given that all parties, including the plaintiff in the particular case, are unlawfully discriminated against with respect to all other parties involved in disputes which are not small claims disputes (where the value of claims exceeds BAM 5,000) and in which the judicial decisions may also be

challenged for erroneously or incompletely established facts. In addition to the aforementioned, the applicant is of the opinion that the legislator, by the impugned provision, prescribed the ban on a party to the proceedings to express his/her thoughts in appellate proceedings on legally relevant facts in terms of Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. The applicant points out that there is no appropriate application of substantive law without correctly and completely established facts and in the absence of the appropriate application of substantive law there is no fair trial in any judicial proceedings, including small claims court proceedings.

11. The applicant points out that, objectively speaking, in the present society small claims disputes in which the value of claims is between BAM 3,000 and 4,000 are very important for the majority of people where their property is concerned. Therefore, in the applicant's opinion, the parties to small claims disputes are discriminated against by the impugned provision when compared to the parties involved in disputes which are not small claims disputes (BAM 5,000) and who are allowed to challenge such judgements also on the ground of erroneously and incompletely established facts.

12. In connection with the aforementioned, the applicant refers to the recent decision of the Constitutional Court in case number *U 7/17* (paragraph 33), where it is pointed out that where appellate courts do exist, the requirements of Article 6 of the European Convention must be complied with, so as for instance to guarantee to litigants an effective right of access to a court for the determination of their civil rights and obligations. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. When this position is consistently applied, in the applicant's opinion, that means that there is no effective right of access to an appellate court if the legislator unconstitutionally provides for the mechanism of a default judgement by Article 182 of the CPC nor is there such an effective right if the legislator, also unconstitutionally, provides for bans as stipulated by Articles 208(2) and 433(1) of the CPC.

b) Facts of the case in respect of which the request is lodged

13. The applicant states that the Basic Court in Gradiška issued default judgement no. 72 0 P 056561 P of 6 December 2016 since the defendant failed to submit a response to the complaint. The defendant lodged an appeal against the first instance judgement for erroneously and incompletely established facts. In addition, the applicant underlines that the value of the dispute in the relevant litigation is BAM 500 and, therefore, the defendant in that case is banned from contesting the relevant default judgement on the ground of erroneously and incompletely established facts not only

because of the ban under Article 208(2) of the CPC but also because of the ban under Article 433(1) of the CPC and the appellate court, in considering the relevant appeal, is faced with the same ban.

14. Furthermore, the applicant states that in its judgement no. 71 0 Mal 043497 17 Mal 2 of 8 August 2017, which is challenged by the plaintiff's appeal, the Basic Court in Banja Luka, in its instructions of legal remedy, stated that the first instance judgement may be challenged only for violations of provisions of civil procedure or for misapplication of substantive law. The case against which the appeal has been failed relates to the issue of debt payment for a loan in the amount of BAM 396.80. In his appeal, the plaintiff indicates the erroneous evaluation of evidence by the first instance court.

IV. Relevant Law

15. The **Civil Procedure Code of RS** (*Official Gazette of RS*, 58/03, 85/03, 74/05, 63/07, 49/09 and 61/13), as relevant, reads:

Article 1

This law shall define rules of procedure based on which the basic courts, county courts, county commercial courts, higher commercial courts and the Supreme Court of Republika Srpska shall hear and decide on civil disputes unless otherwise stipulated by a separate law.

Article 4

Unless otherwise provided, the court shall decide on claims on the basis of an oral, direct and public hearing.

Article 69

The complaint with attachments shall be served on the defendant within thirty (30) days after the day of receipt of a correct and complete complaint by the court.

Article 70

After receipt of the complaint with attachments, the defendant shall be obliged to give a written response to the complaint within thirty (30) days.

When serving the defendant with the complaint, the court shall inform the defendant about his/her obligation referred to in paragraph 1 of this Article, the required contents of the response and the consequences of not responding to the complaint within the set time limit.

Article 182

1) If a defendant, who was duly served with a complaint, fails to submit a written response to the complaint within the prescribed time limit, where the plaintiff requested the issuing of a default judgement the court shall render a judgement accepting the claim ("Default Judgement"), unless the claim is obviously unfounded.

2) A statement of claim is obviously unfounded when:

1. the statement of claim is in obvious contradiction with the facts stated in the complaint;

2. the facts on which the statement of claim is based are in obvious contradiction with the evidence submitted by the plaintiff or the generally known facts.

3) If the claim is obviously unfounded, the court shall render a judgement refusing the claim.

4) Default judgement shall not be rendered on the claim or a part of the claim which may not be disposed of.

Article 208 (1) and (2)

1) A judgement can be appealed on the following grounds:

1. Violation of the provisions of the civil procedure law

2. Erroneously or incompletely determined state of facts;

3. Misapplication of the substantive law.

2) A default judgement cannot be contested for erroneously or incompletely determined state of facts.

Article 429

For the purposes of this Law, small claim disputes are those where the monetary claim does not exceed 5,000 KM.

Small claim disputes shall also include disputes which are not of pecuniary nature but for which the plaintiff has stated in the complaint that s/he will accept certain monetary sum that does not exceed the amount referred to in paragraph 1 of this Article in lieu of the obligation disclosed in the complaint. (Article 321(1))

Small claim disputes shall also include those disputes in which the main subject matter is not of pecuniary nature but the transfer of a moveable asset with value, as stated in the complaint by the plaintiff, that does not exceed the amount referred to under paragraph 1 of this Article (Article 321(2))

Article 433

The judgment or the decision concluding the small claims proceedings may be contested only due to the procedural errors and to the misapplication of substantive law.

The court shall be obliged to state reasons due to which the appeal may be lodged in the judgment or decision mentioned in the paragraph 1 of this Article.

Parties may lodge the appeal against the first instance judgment or decision mentioned in paragraph 1 of this Article within fifteen (15) days.

In small claims proceedings, the time limit referred to in Article 179, paragraph 2 and Article 192, paragraph 1 of this Law shall be fifteen (15) days.

V. Admissibility

16. In examining the admissibility of the request, the Constitutional Court invokes the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

Article VI(3)(c) of the Constitution of Bosnia and Herzegovina reads:

(c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

17. The request for review of the constitutionality was submitted by the County Court of Banja Luka (Judge Milan Blagojević), meaning that the request was filed by an authorised person pursuant to Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see, Constitutional Court, Decision on the Admissibility and Merits no. *U 5/10* of 26 November 2010, paragraphs 7 through 14, published in the *Official Gazette of Bosnia and Herzegovina* no. 37/11). Bearing in

mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible, as it was submitted by an authorised person and because there is no single reason under Article 19(1) of the Constitutional Court's Rules rendering this request inadmissible.

VI. Merits

18. The applicant requested that the Constitutional Court decide whether the challenged provisions are compatible with Articles II(3)(e), II(3)(h) and II(4) of the Constitution of Bosnia and Herzegovina and with Articles 6, 10 and 14 of the European Convention.

19. The challenged provisions of Articles 182(1), 208(2) and 433(1) of the Civil Procedure Code read as follows:

> **Article 182(1) of** the Civil Procedure Code
> *If a defendant, who was duly served with a complaint, fails to submit a written response to the complaint within the prescribed time limit, where the plaintiff requested the issuing of a default judgement the court shall render a judgement accepting the claim ("Default Judgement"), unless the claim is manifestly ill-founded.*
>
> **Article 208(2) of the Civil Procedure Code**
> *A default judgement cannot be contested for erroneously or incompletely determined state of facts.*
>
> **Article 433(1)**
> *A judgment or a ruling concluding the small claims proceedings may be contested only for to the violation of the civil procedure provisions and for misapplication of substantial law.*

Right to a fair trial

20. Article II(3)(e) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

> *All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*
>
> *e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

21. Article 6(1) of the European Convention, as relevant part, reads:

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)*

22. The Constitutional Court first recalls that its task within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina is to answer to the applicant's question whether the challenged provisions on whose validity its decision depends is compatible with the Constitution of Bosnia and Herzegovina and the European Convention. In view of the aforementioned, in the present decision, the Constitutional Court will not give any opinion or instruction to the ordinary court as regards a resolution of the relevant case in respect of which the request was filed, given that the issue of application and interpretation of the substantive law falls under the competence of ordinary courts (see, *mutatis mutandis,* Constitutional Court, Decision on Admissibility and Merits, *U 5/13* of 5 July 2013, paragraph 30, available at www.ustavnisud.ba)

23. The applicant challenges the mentioned provisions and holds that they are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the parties to the proceedings, in the determination of their civil rights and obligations, are barred from having effective access to a court. Thus, it follows that the issue of violation of the constitutional right of access to a court, as a segment of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, is raised by the request in question. Therefore, the Constitutional Court will examine that aspect of the request.

24. In this connection, the Constitutional Court recalls that "the right to a court" is a constituent element of Article 6(1) of the European Convention and it also includes the right of access, *i.e.* the right to file a civil claim. However, according to the case-law of the European Court of Human Rights, that right is not absolute but may be subject to limitations. In that context, the European Court of Human Rights, in the case of *Lončar v. Bosnia and Herzegovina*, indicated that the right of access to a court secured by Article 6(1) is not absolute but may be subject to limitations; these are permitted by implication, since the right of access by its very nature calls for regulation by the State, which may vary in time and in place according to the needs and resources of the community and of individuals. Therefore, in the view of the European Court of Human Rights, in laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision

as to observance of the Convention's requirements rests with the Court. Limitations on the right to a court are compatible with Article 6 only if they do not restrict or reduce the access left to the litigant in such a way or to such an extent that the very essence of the right is impaired. Lastly, such limitations will not be compatible with Article 6(1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In addition, the European Court of Human Rights indicates in the cited Decision that it is not the Court's task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention. This applies in particular to the interpretation by courts of rules of a procedural nature, such as time limits governing the submission of documents or lodging of appeals (see, European Court of Human Rights, *Lončar v. Bosnia and Herzegovina*, Judgment of 25 February 2014, paragraphs 37 and 38).

25. Bringing the aforementioned into connection with the relevant request, the Constitutional Court notes that the applicant considers that the default judgment is a type of sanction imposed on the defendant, since Article 182(1) of the Civil Procedure Code first imposes the obligation on the defendant to submit a written response to the complaint, which the defendant must do within the prescribed time limit, otherwise he will be subject to a legal sanction as the court will render a default judgment. According to the applicant, such a negative consequence for the defendant could follow only after the hearing at which the plaintiff would present the facts and evidence in support of the facts, where the defendant would have the same right to deny the allegations presented by the plaintiff.

26. In this connection, the Constitutional Court observes that the European Court noted in the *Gankin and Others v. Russia* judgment that Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6(1) of the Convention leaves to the State a free choice of the means to be used in guaranteeing litigants these rights. Thus, the questions of personal presence, the form of the proceedings – oral or written – and legal representation are interlinked and must be analysed in the broader context of the "fair trial" guarantee of Article 6 of the Convention. The Court should establish whether the applicant, a party to the civil proceedings, had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case

under conditions that did not place him at a substantial disadvantage *vis-à-vis* his opponent. Finally, the Court reiterates that, in determining issues of fairness of proceedings for the purposes of Article 6 of the Convention, it must consider the proceedings as a whole, including the decision of the appellate court (see, ECtHR, *Gankin and Others v. Russia,* judgment of 31 May 2016, paragraph 25).

27. Furthermore, as regards the form of proceedings, the right to a "public hearing" under Article 6(1) of the European Convention has been interpreted in the Court's established case-law to include an entitlement to an "oral hearing". Nevertheless, the obligation under this Article to hold a hearing is not an absolute one. An oral hearing may not be necessary due to the exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations. Article 6 of the European Convention allows States to organise their legal systems in a manner which facilitates expeditious and efficient judicial proceedings, including the possibility of issuing a default judgment. However, this may not be done at the expense of other procedural guarantees. Also, provided that an oral hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 of the Convention, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (*ibid.* para 26).

28. The Constitutional Court observes that a default judgment is a novelty in civil procedural law, which is incorporated in the 2003 Civil Procedure Code. In order for the court to render a default judgment wherein a complaint is admitted under Article 182 of the Civil Procedure Code, it is necessary cumulatively to satisfy very strict requirements. The first requirement is that the plaintiff proposed that a default judgment be rendered. The second requirement is that the court informed the defendant of consequences of a failure to submit a response to the complaint within the prescribed time limit. The third requirement is that the complaint was duly filed, and the fourth requirement is that the complaint is not manifestly ill-founded.

29. In view of the aforementioned, the Constitutional Court notes that the first three requirements are of a technical nature and a court establishes them by examining certain documents, as follows: a copy of the complaint that must contain the plaintiff's proposal for rendering a default judgment, a copy of the court's summons attached to the complaint, which is to be submitted to the

defendant and in which the defendant is instructed so as to know what does a response to the plaintiff's complaint must contain and what consequences he/she will bear in case of the failure to submit the response to the complaint within the time limit prescribed by the law (Article 70(2) of the Civil Procedure Code), and the internal delivery book or acknowledgment of service slip proving that the complaint was duly served on the defendant. The fourth requirement constitutes a legal assessment of the court based on the complaint and submitted evidence, proving that the claim is not manifestly ill-founded. Furthermore, the Constitutional Court notes that paragraph 2 of Article 182 of the Civil Procedure Code explicitly stipulates that a claim is manifestly ill-founded when it is manifestly contrary to the facts alleged in the complaint or if the facts being the basis of the complaint are in manifest contradiction to the pieces of evidence proposed by the plaintiff himself/herself or to the generally known facts. In that case, the law prescribes rendering a judgment to dismiss the complaint.

30. Taking into account the aforesaid, the Constitutional Court observes that the prescribed procedural guarantees (meaning that the complaint together with the documents attached thereto was indubitably served on the defendant, including the instructions as to the consequences which he/she could bear in case of the failure to submit a response to the complaint within the prescribed time limit of 30 days) give a reasonable opportunity to the defendant to be informed and to respond to the submissions and evidence proposed by the opposing party to the proceedings and to present his/her case before the court under the conditions which do not place him/her in a less favourable position *vis-à-vis* the opposing party to the proceedings. The Constitutional Court further observes that in the case that the defendant fails to submit a response to the complaint, the court takes as a starting point the presumption that the defendant admits the facts and evidence alleged in the complaint, since the complaint, including all evidence and allegations, has been served on him and he has been given the opportunity to respond within the prescribed time limit (30 days), *i.e.* he has the procedural opportunity to prevent a default judgment from being rendered. According to the Constitutional Court, the aforementioned does not appear unreasonable in any way whatsoever nor does it place an excessive burden on the defendant who is given the opportunity to respond to the allegations in the complaint, *i.e.* to the allegations of the opposing party to the proceedings. Thus, it follows that the challenged provision did not place the defendant in an unequal position *vis-à-vis* the plaintiff. Therefore, the principle of equality of arms in civil proceedings has been met.

31. In addition to the aforesaid, the Constitutional Court observes that the legislator prescribed a default judgment with the aim of ensuring expeditious and efficient civil proceedings and, finally, a

trial within the reasonable time. Furthermore, the Constitutional Court observes that the European Court of Human Rights noted that Article 6(1) of the European Convention allows that contracting states, within their margin of appreciation, organize their legal systems in a manner which facilitates expeditious and efficient civil proceedings, including a regulation making it possible to render a default judgment.

32. In view of the above, the Constitutional Court considers that the introduction of the legal mechanism of a default judgement into the civil procedural law through the impugned provision of Article 182(1) of the Civil Procedure Code pursues the legitimate aim of ensuring efficient and cost effective civil proceedings. Namely, based on the procedural guarantees prescribed in respect of a default judgement, a proportional relationship between the need to pursue a legitimate aim in the public interest and the defendant's interest to have his right of effective access to a court secured in civil proceedings is achieved. In addition, the impugned provision in no way puts a defendant in civil proceedings in an unequal position against a plaintiff. Furthermore, the Constitutional Court considers that the very essence of the right to a fair trial and the right of access to a court, as an element of the mentioned right, is not impaired, taking into account the legal requirements which must be satisfied in respect of the defendant in order for a court to pass a default judgement. Consequently, the Constitutional Court concludes that the provision of Article 182(1) of the Civil Procedure Code is compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

33. Next, the Constitutional Court will examine the allegations of the applicant in respect of the issue of compatibility of Article 208(2) (appeal against a default judgment) and Article 433(1) (appeal in small claims disputes) of the Civil Procedure Code. With regard to the aforementioned provisions, the applicant raises the issue in respect of the scope *i.e.* the boundaries of the right to file an appeal, as the applicant considers that there is a violation of the right to a fair trial and the right of access to a court, as an element of the aforementioned right, since there is no possibility to challenge a default judgment on the ground of erroneously or incompletely established facts.

34. In this connection, the Constitutional Court points out that Article 6(1) of the European Convention does not compel contracting states to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 of the European Convention (see, European Court of Human Rights, *Delcourt v. Belgium*, Judgment of 17 January 1970, Series A no. 11, p.14, paragraph 25). In addition, according to the case-law of the

European Court of Human Rights, any courts of appeal or courts of cassation must provide the fundamental guarantees of Article 6(1) of the European Convention and it does not follow that the first instance courts do not have to provide the required guarantees (see, European Court of Human Rights, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A, no. 86, paragraph 32). Namely, according to the case-law of the European Court of Human Rights, Article 6(1) of the European Convention concerns primarily courts of first instance and it does not require the existence of courts of further instance. It is indicated that it is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up (see the above cited *Delcourt* judgment, Series A no. 11, p. 14, and the *Sutter v. Switzerland* judgment of 22 February 1984, Series A no. 74, p. 13, paragraph 28). Nevertheless, according to the case-law of the European Court of Human Rights, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.

35. Bringing the aforementioned into connection with the relevant request, the Constitutional Court notes that the impugned provisions (Article 208(2) and Article 433(1) of the Civil Procedure Code) stipulate that a default judgement cannot be contested for erroneously and incompletely established facts, *i.e.* that the judgment or ruling concluding the small claims proceedings may be challenged only for violations of the provisions of civil procedure and misapplication of substantive law. According to the aforementioned, no appeal for erroneously and incompletely established facts can be filed in either case.

36. As already stated, according to the case-law of the European Court of Human Rights, a State is not required to ensure the right to file an appeal in its legal system. However, in the event that the State sets up courts of appeal and foresees the right to file an appeal, the aforementioned implies that the parties to civil proceedings before courts enjoy fundamental procedural guarantees afforded by Article 6(1) of the European Convention (independent and impartial tribunal, “equality of arms”, reasonable length of proceedings, *etc.*). However, the aforementioned does not mean that the guarantees of the right to a fair trial relate to the scope *i.e.* the boundaries of the right to file an appeal. In the opinion of the Constitutional Court, the aforementioned is actually at the discretion of each State, and a failure to regulate the right to file an appeal in no way does mean that it is in violation of the right of access to a court or any other fundamental guarantee of the right to a fair trial. Therefore, in the event that a State sets up courts of appeal, the State enjoys a certain margin

of appreciation to regulate this sphere according to the requirements and needs of its legal system and to determine the scope *i.e.* the boundaries of the right to file an appeal.

37. The aforementioned limitations do not deny the right of the parties to civil proceedings to file an appeal but they just limit the scope of that appeal so that it cannot be lodged on the grounds of erroneously or incompletely established state of facts. Therefore, taking into account the case-law of the European Court of Human Rights, followed by the Constitutional Court where deciding the cases falling within its jurisdiction under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, this Court is of the opinion that such a limitation does not appear to be unreasonable or excessive, as it is essentially consistent with the efficiency of civil proceedings as well as with the legal nature of disputes. Therefore, it follows that the legal arrangements foreseen by the impugned provisions, in the view of the Constitutional Court, do not impair the very essence of the right of access to a court and do not impose an excessive burden on the parties to civil proceedings.

38. Namely, as to an appeal related to a default judgment, the Constitutional Court notes that the legislator, in the provisions of Articles 69 and 70 of the Civil Procedure Code, prescribes an obligation that the complaint must be served on the defendant and that the defendant is obligated to give a written response to the complaint. Therefore, the legislator has ensured that a defendant, in his/her written response, can give his/her answer also about the facts of the statement of claim filed by the plaintiff. Therefore, if the defendant fails to respond within the legal time limit to the allegations stated in the complaint, including his/her response to the factual part thereof, the court, upon a motion of the plaintiff and upon the fulfilment of legal requirements, will render a default judgment. The Constitutional Court notes that it is a type of sanction for a defendant and his/her failure to give the response to the complaint. However, since the facts are established in the course of first instance proceedings, which is not the case with a default judgment, it would therefore be contradictory in such a situation to allow the right to file an appeal on the grounds of erroneously or incompletely established state of facts, which should be examined for the first time from that aspect by the court of appeal. In addition to the aforementioned, as already pointed out, such a legal arrangement is neither unreasonable nor does it impair the very essence of the right of access to a court, given that the parties to civil proceedings, *per se*, must take an active part in availing themselves of all available legal actions, including the response to the complaint, in order for the parties to civil proceedings to realize other rights in the subsequent stages of the proceedings, as stipulated by the Civil Procedure Code. A failure to comply with the aforementioned means that such parties to civil proceedings cannot be protected subsequently in appellate proceedings.

Furthermore, the mentioned limitation set forth by the impugned provision is a result of circumstance that the default judgment is based on the assumption that the defendant, who failed to give a response to the complaint within the specific time limit, admits that the plaintiff's statement of facts given in the complaint is true. Accordingly, it follows that the court, rendering the default judgment, is bound by that assumption and its possibilities to review the correctness of the assumption are limited.

39. Furthermore, as to the right to file an appeal in small claims disputes, the Constitutional Court notes that the legislator, in the provision of Article 429(1) of the Civil Procedure Code, prescribes the type of disputes covering small claims. Therefore, the legislator determined within its margin of appreciation what disputes include small claim disputes, taking into account the importance and nature of certain cases as well as the efficiency of civil proceedings. Moreover, it follows that, in small claims disputes, an active role of the parties to civil proceedings before a first instance court, where the parties enjoy all the guarantees of the right to a fair trial without limitations, is of large importance. Hence, in small claims disputes, the parties to civil proceedings are obligated fully to discuss the state of facts by proposing all evidence based on which they prove the grounds of their allegations as well as to deny another party's allegations. The aforementioned, in the view of the Constitutional Court, is neither excessive nor unreasonable in relation to the parties to civil proceedings in small claims disputes.

40. In view of the above, one comes to the conclusion that the parties to civil proceedings are not denied the right of access to a court or any other fundamental guarantee of the right to a fair trial for the impossibility of filing an appeal for erroneously or incompletely established state of facts in respect of default judgments or small claims disputes. The aforementioned legal arrangements just impose limitations on the right of access to a court to an appropriate extent and, in view of the standards of the European Convention, it is allowed since it is at the discretion of each State to regulate the right to file an appeal. However, as already pointed out, such limitations established by the impugned provision are not unreasonable, *i.e.* they do not impose an excessive burden on the parties to these proceedings in such a way that the parties are prevented from exercising the very essence of the right of access to a court. In view of the above, the Constitutional Court holds that the legislator, by the impugned provisions, in no way denies the fundamental procedural guarantees of parties to civil proceedings under Article 6(1) of the European Convention, which also must be adhered to by courts of appeal, and those limitations established by the impugned provision have a

reasonable justification that is not contrary to the right of access to a court, as the applicant considers.

41. In view of the above, the Constitutional Court concludes that the impugned provisions are compatible with the provision of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention.

Other allegations

42. As to the applicant's allegations about the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, the Constitutional Court notes that these allegations, although not explicitly stated, are brought into connection with the right to a fair trial. In this connection, the Constitutional Court also recalls that discrimination exists if it results in a differential treatment of individuals in similar situations and such treatment has no objective or reasonable justification. To be justified, the treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved have to exist (see, European Court of Human Rights, *Marckx v. Belgium*, paragraph 33). Taking into account the aforementioned, the Constitutional Court notes that the applicant, apart from his allegations that the impugned provisions (Article 208(2) and Article 433(1) of the Civil Procedure Code) are in violation of the said right, failed to offer any argument that would lead to a clear conclusion that the parties to civil proceedings are discriminated against based on the impugned provisions. Therefore, the Constitutional Court considers that the applicant's allegations are ill-founded as regards the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to a fair trial.

43. As to the applicant's allegations about a violation of the right to freedom of expression under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, the Constitutional Court points out that the freedom of expression, within the meaning of the mentioned provisions, cannot be associated with the right to express thoughts in civil proceedings, within the meaning of the Civil Procedure Code, in a way asserted by the applicant. As already stated, the impugned provisions impose procedural discipline with a view to satisfying certain principles, such as the efficiency of proceedings and reasonable length of proceedings, while the sanction for non-compliance with the mentioned principles does not fall within the scope of protection guaranteed by Article 10 of the European Convention. Therefore, it follows that the

impugned provisions in no way raise an issue under Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention. Consequently, the applicant's allegations in this part are ill-founded, too.

VII. Conclusion

44. The Constitutional Court concludes that the provisions of Article 182, Article 208(2) and Article 433(1) of the Civil Procedure Code are compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as the impugned provisions are not in contravention of the fundamental procedural guarantees afforded by the right to a fair trial and, in particular, by the right of access to a court, as an element of the right to a fair trial, since the limitations imposed on the parties to civil proceedings by those provisions are neither unreasonable nor excessive.

45. In addition, the Constitutional Court concludes that the provisions of Article 182, Article 208(2) and Article 433(1) of the Civil Procedure Code are compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in connection with the right to a fair trial, as the applicant, apart from his allegations, failed to offer any argument that would lead to a clear conclusion that the parties to civil proceedings are discriminated against based on the impugned provisions.

46. Finally, the Constitutional Court concludes that the provisions of Article 182, Article 208(2) and Article 433(1) of the Civil Procedure Code are compatible with Article II(3)(h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention, given the fact that the freedom of expression and the protection afforded by Article 10 of the European Convention cannot be associated with the specific procedural requirements contained in the Civil Procedure Code, which are prescribed with a view to satisfying certain principles, such as the efficiency of proceedings and reasonable length of proceedings.

47. Having regard to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

48. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina