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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY DRAFT REPORT ON NATIONAL REMEDIES IN RESPECT OF EXCESSIVE LENGTH OF PROCEEDINGS[1]

[1] The national replies to the questionnaire (CDL(2004)124) are contained in the appendix to this document (CDL(2005)092app).

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I. *Introduction*

1. Following a request by the Romanian authorities during the Conference on "The European Convention on Human Rights: from integrating standards to shaping solutions" (Bucharest, 8-9 July 2004), the Venice Commission decided to carry out a comparative study on national remedies with respect to allegations of excessive length of administrative, civil and criminal proceedings, with a view to proposing possible improvements in their availability and effectiveness.

2. The scope of this study is limited to the "reparation" aspects of the issue of the excessive length of proceedings; it follows that the questions set out in the questionnaire prepared by the Venice Commission Secretariat in co-operation with Romania (CDL(2004)124) did not address the possible causes of procedural delays. The "preventive" aspects of this matter are the object of the work of the European Commission for the Efficiency of Justice (CEPEJ). The CEPEJ was established by the Council of Europe Committee of Ministers in 2002 with the aim to address the major problems of the judicial systems of member States and define ways to improve their efficiency and functioning.[2] In 2004, the CEPEJ set out the Framework Programme entitled "A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe",[3] which recommended lines of action aimed at realising this objective. The Task Force on timeframes of proceedings was charged with the task of translating these lines of action into concrete measures enabling them to improve procedure timeframes in the member States.[4]

3. The present report was prepared mainly on the basis of the information provided by the Venice Commission members in reply to the questionnaire. In preparing this report, the Secretariat ensured the co-ordination between its own work and the work done by other Council of Europe services in this field, in particular, the Secretariat of the DH-PR, the Secretariat of the CEPEJ, the Registry of the European Court of Human Rights as well as the Department for the execution of judgments of the Court.

II. The right to an effective remedy before a national authority in respect of an allegedly unreasonable length of proceedings: international legal framework

A. European Convention on Human Rights and the case-law of the European Court of Human Rights

4. *Ubi jus ibi remedium*. When there is a right there should be a remedy. The effectiveness of human rights depends on the effectiveness of remedies provided for their violation. Remedies for violations of rights, which entail recourse to an independent authority competent to ensure respect for those rights, exist within most if not all legal systems. The right to a remedy for an

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[2] See the Committee of Ministers Resolution Res (2002) 12.

[3] See CEPEJ (2004) 19 Rev.

[4] See «Terms of reference of the Working Group on evaluation of judicial systems (CEPEJ-GT-EVAL)", adopted by the CEPEJ-GT-2004.

arguable claim of a violation of a fundamental right or freedom is also a right expressly guaranteed by almost all international human rights instruments.[5]

5. The *international* guarantee of a remedy implies that a State has the primary duty to protect human rights and freedoms first within its own legal system. Article 1 of the European Convention on Human Rights (hereinafter: the “Convention”) requires the Contracting States to “secure” the rights and freedoms under the Convention. The European Court on Human Rights (hereinafter: “the Court”) exerts its supervisory role subject to the principle of subsidiarity,[6] i.e. only after domestic remedies have been exhausted or when domestic remedies fail consistently or are systematically unavailable. The right to an effective remedy established in Article 13 of the Convention stems directly from this principle.

6. Pursuant to Article 13 of the Convention, “Everyone whose rights and freedoms as set forth in this Convention are violated should have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity”.

7. Although it appears to present a fairly straightforward legal concept, the wording of Article 13 has caused many problems of interpretation for the Convention organs. In fact, both the former European Commission for Human Rights and the Court, were somehow inconsistent in their analysis of issues raised under Article 13. Nevertheless, the scope and the contents of this important article are today clearly established.

a) The requirements of Article 13 and standard of effectiveness

8. Notwithstanding the terms of Article 13 read literally, the existence of an actual breach of another (“substantive”) provision of the Convention is not a prerequisite for its application.[7] According to the case-law of the Court, Article 13 requires that when a claim of a violation under the Convention is an “*arguable*” one, a remedy both to have it decided and when determined, to obtain appropriate relief must be available.[8] The “national authority” competent for providing the remedy must not necessarily be a *judicial* authority.[9] On the other hand, the powers and procedural guarantees of an authority will be relevant when

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[5] See for example, Article 8 of the Universal Declaration on Human Rights and Freedoms, Article 2.3 of the International Covenant on Civil and Political Rights, Article 6 of the Convention on the Elimination of Racial Discrimination, or Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, and Article 13 of the European Convention on Human Rights.

[6] See *Z. and Others v. the UK*, judgment of 10/5/2001, ECHR 2001-V, § 103.

[7] See *Klass and Others v. Federal Republic of Germany,* judgment of 6/09/1978, Series A no. 28, p. 29, § 64.

[8] See among others, *Klass and Others*, *cit*., § 64; *Kaya v. Turkey*, judgment of 19/02/1998, Reports 1998-I, pp. 329-30, § 106. However, Article 13 cannot be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be (*Boyle and Rice v. UK*, judgment of 27/04/1988, Series A no. 131, § 52; *Powell and Rayner v. UK*, judgment of 21/02/1990, Series A no. 172, §§ 31-33).

[9] See for example, *Golder v. UK*, judgment of 21/02/1975, Series A no. 18, § 33, *Laender v. Sweden*, judgment of 26/03/1987.

determining whether a particular remedy is effective.[10] Any such remedy must be effective in practice as well as in law.[11]

9. The effectiveness of a national remedy within the meaning of Article 13 does not depend on the certainty of a favorable outcome.[12] Effectiveness should be assessed in terms of the alleged violation of the right guaranteed by the Convention in relation to assessing the cumulation of remedies available in the domestic law. Indeed, even when none of the remedies available to an individual would satisfy the requirements of Article 13 taken alone, the *aggregate of remedies* provided for under domestic law may be considered as "effective" in terms of this article.[13] In other terms, there is no particular form of remedy required, the Contracting States being afforded a margin of discretion in conforming to their obligations under this provision.[14]

10. To be considered effective and thus conform to Article 13, a domestic remedy must allow the competent national authority both to deal with the substance of the relevant Convention complaint and to grant "appropriate relief."[15] This can entail for example, terminating the continuation of an action, its modification or non-application, its annulation or obtaining reparation of damages resulting from the violation.

11. Article 13 however, does not go as far as to guarantee a remedy allowing a domestic law as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms.[16] It does not require incorporation of the Convention into the domestic law of States Parties either. Nevertheless, the test applied by the domestic courts in relevant applications should coincide or reflect the Court's own approach under the article of the Convention whose violation is alleged.[17] In other words, the national courts must, wherever possible, interpret and apply domestic law in accordance with the Convention.[18]

b) The scope of application of the right to an effective remedy

12. Regarding its scope of application, Article 13 does not contain a general guarantee of legal protection ; it exclusively refers to those cases in which the alleged violation concerns one of the rights and freedoms guaranteed by the Convention. It cannot be invoked independently but only

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[10] Thus for example, the possibility of applying to the judge responsible for the execution of sentences cannot be regarded as an effective remedy for the purposes of Article 13, as he or she is required to reconsider the merits of his own decision, taken moreover without any adversarial proceedings (see *Domenichini v. Italy*, judgment of 15/11/1996, Reports 1996-V, § 42) In the same sense, see also: *Calogero v. Italy*, judgment of 15/11/1996, Reports 1996-V, § 41.

[11] See among others, *Ilhan v. Turkey*, judgment of 27/06/2000, Reports 2000-VII, §§ 61-62.

[12] See for example, *Vilvarajah v. UK*, judgment of 30 October 1991, Series A no. 215, § 122.

[13] See among many others, *Silver and Others v. UK*, judgment of 25/03/1983, Series A no. 61, § 113 and *Chahal v. UK,* judgment of 15/11/1996, Reports 1996-V, pp. 1869-70, §145.

[14] See *Chahal v. UK, cit.*

[15] See for example, *Smith and Grady v. UK,* judgment of 27/09/1999*,* Reports 1999-VI, § 135; *Aksoy v. Turkey,* judgment of 18/12/1996, Reports 1996-VI, § 95.

[16] See among others, *James and Others v. UK*, judgment of 21/02/1986, Series A no 98, § 85.

[17] *Smith and Grady v. UK*, *cit*, § 138.

[18] See *Scordino v. Italy*, decision of 17/03/2003, ECHR 2003-IV, pp. 14 – 15.

in conjunction with one or more articles of the Convention or of one of its Protocols. Naturally, the scope of the obligation under Article 13 will vary depending on the nature of the applicant's complaint under the Convention.[19]

c) The relationship between Article 13 and Article 6.1 of the Convention

13. Until fairly recently, the Convention organs considered that, the requirements of Article 6.1 being stricter than those of Article 13, in case of a violation of Article 6.1, it was unnecessary to determine whether there had also been a breach of Article 13, the requirements of the latter being entirely "absorbed" by those of the former.[20] This was the case when the claim concerned the absence, within the national legal system, of a body competent to examine the claim, that the length of proceedings was excessive,[21] or of any means to shorten or terminate the excessive length of procedure.[22]

14 Such reasoning was not without critics even within the Court itself. Judges Matscher and Pinheiro Farinha, in their separate opinion in *Malone v. UK,* while recognizing the "obscure" nature of Article 13, contested the inadequacy of the arguments put forward by the Court to justify a non examination of the allegation of a breach of this Article.[23] They, however, noted that the "absorption argument" may be correct in so far as the procedural guarantees of Article 6 of the Convention are concerned. In fact, the national laws generally do provide for specific procedural remedies which are "stronger" than that of Article 13 in respect of procedural guarantees of Article 6, whereas to a wide extent this is not the case regarding the excessive length of proceedings. It is with respect to this specific part that Article 13 has its "*raison d'être*".

15. The change in reasoning with regard to the right to effective remedy in respect of the excessive length of proceedings came in 2000, with *Kudla v. Poland*.[24]

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19 See for example, *Chahal v. UK, cit.,* §§ 151-152.

20 See *Airey v. Ireland*, judgment of 9/10/1979, Series A no 32, § 35. Another obstacle to the applicability of Article 13 to the issue of the excessive length of proceedings, put forward by the former European Commission on Human Rights was its non application in cases where the alleged violation took place in the context of *judicial* proceedings (Report on *Bartolomeo Pizzetti v. Italy*, of 10/12/1991, volume 257-C, Series A).

21 See for example, *Giuseppe Tripodi v. Italy*, judgment of 25/01/2000, § 15.

22 See for example, *Bouilli v. France*, judgment of 7/12/1999, § 27.

23 "…..We recognise that Article 13 (art. 13) constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation. This is probably the reason why, for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons. It is only in the last few years that the Court, aware of its function of interpreting and ensuring the application of all the Articles of the Convention whenever called on to do so by the parties or the Commission, has also embarked upon the interpretation of Article 13). We refer in particular to the judgments in the cases of Klass and Others (Series A no. 28, paras. 61 et seq.), Sporrong and Lönnroth (Series A no. 52, para. 88), Silver and Others (Series A no. 61, paras. 109 et seq.) and, most recently, Campbell and Fell (Series A no. 80, paras. 124 et seq.), where the Court has laid the foundation for a coherent interpretation of this provision. Having regard to this welcome development, we cannot, to our regret, concur with the opinion of the majority of the Court who felt able to forego examining the allegation of a breach of Article 13). In so doing, the majority, without offering the slightest justification, has departed from the line taken inter alia in the Silver and Others judgment, which was concerned with legal issues very similar to those forming the object of the present case. Indeed, applying the approach followed in the Silver and Others judgment the Court ought, in the present case, and to the same extent, to have arrived at a finding of a violation of Article 13", *Malone v. UK*, judgment of 2/08/1984, Series A no. 82.

24 Judgment of 26/10/2000, Reports 2000-XI.

16. In this judgement, the Court considered "in the light of the continuing accumulation of applications before it concerning the alleged violation of the right to a hearing within reasonable time" that "the time has come to review its case-law" according to which, in case of a violation of that right (Article 6.1),[25] there would be no separate examination of an alleged breach of the right to an effective remedy (Article 13). In support of this review the Court noted the "important danger that exists for the rule of law within national legal orders when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy", that it had already pointed out in its previous case-law related to this matter.[26] It also underlined the subsidiary character of the machinery of complaint to the Court recalling that by virtue of Article 1 of the Convention, "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities."[27] This subsidiary character of the Strasbourg system of complaint is articulated precisely in Articles 13 and 35.1 of the Convention.

17. The purpose of Article 35.1 of the Convention, which sets out the rule of exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them *before* those allegations are submitted to the Court[28]. This rule is based on the assumption, reflected in Article 13, that there is an effective domestic remedy available in respect of the alleged breach of an individual right guaranteed by the Convention. In the light of these arguments, the right of an individual to be tried within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim *first to a national authority.* The requirements of Article 13 are to be seen as *reinforcing* those of Article 6.1, rather then being absorbed by them.[29]

18. As to the contents of Article 13 in respect of Article 6.1, starting from the *Kudla* judgment, the Court has developed a number of criteria more particularly relevant with respect to a domestic remedy for breach of the right to a hearing within reasonable time (see *infra*, paras. 43– 55).

B. The supervision of the implementation of judgments finding an unreasonable length of domestic proceedings[30]

a) In general

19. In pursuance of Article 46 § 2 of the Convention, the task of controlling the execution of the judgements issued by the Court lies with the Committee of Ministers. It has a general duty to

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25 To determine whether or not the time is «reasonable» within the meaning of Article 6.1 of the Convention, the court has laid down four main criteria: the complexity of the case, the applicant's conduct, the conduct of the relevant authorities (including the courts), and what is at stake for the applicant. It considers each case individually in the light of these criteria, which explains why the Court's decisions cannot be used to extrapolate standard times for different categories of case.

26 *Ibidem*, § 148. (See for example, *Bottazzi v. Italy*, judgment of 28/07/1999, ECHR 1999-V, § 22).

27 *Ibidem*, § 152.

28 *Ibidem*, § 152; See also *Selmouni v. France*, judgment of 28/07/1999, ECHR 1999-V, § 74.

29 *Kudla v. Poland*, *cit*., § 152 (*emphasis added*).

30 In this respect, see also the Venice Commission's opinion on the implementation of the judgments of the European Court of Human Rights (CDL-AD (2002) 34, §§ 28-33 and §§ 41-42.

scrutinize all measures taken by the State concerned to abide by the final judgement of the Court.

20. Like the State's obligation to execute, the power of supervision of the Committee of Ministers extends to measures pertaining to the individual case,[31] general measures[32] and the award of just satisfaction. The Committee of Ministers issues a final resolution when it deems to have discharged its functions under Article 46.2.

21. When controlling execution of judgments finding a breach of the reasonable time requirement, the Committee of Ministers most often requires the acceleration of pending proceedings in order to help remedy the consequences of excessively long proceedings. Whether proceedings are effectively speeded up will, however, be supervised only in certain circumstances, e.g. when exception diligence is required (such as cases regarding compensation to AIDS victims) and when the unreasonably long proceedings are constituent parts of other ongoing violations of other Convention rights (such as the right to respect for family life, the right to property etc.), or when the breach concerns the execution of a domestic court decision.

22. When a State refuses to execute a judgement of the Court, the Committee of Ministers may decide to open a procedure of monitoring in respect of commitments. In 2000, the Committee thus set up a special annual monitoring procedure concerning the reform of justice aimed at solving the problem of the excessive length of proceedings in Italy.[33] In its Interim Resolution, by recalling that "excessive delays in the administration of justice constitutes an important danger, in particular for the respect of the rule of law", the Committee underlined the importance of taking "general measures preventing new violations of the Convention similar to those already found".[34]

b) The Committee of Ministers' Recommendation on the improvement of domestic remedies

23. In the late nineties, the Committee of Ministers undertook a series of activities aimed at improving the compliance with commitments accepted by member States, in particular through better functioning of the judicial system.[35] In 2000, the Ministers' Deputies thus decided to start monitoring the effectiveness of national judicial remedies with respect to the length of proceedings (judicial control of deprivation of liberty and trial within reasonable time), and to the execution of judicial decisions.[36]

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[31] Such as measures necessary to ensure that the applicant is put, insofar as possible, in the same situation as he or she enjoyed prior to the violation of the Convention. These may entail, for instance, the need to put an end, if possible retroactively, to an unlawful situation.

[32] Such as legislative amendments, in order to prevent further violations of a similar nature. See Interim Resolutions DH (99) 436 and DH (99) 437 concerning excessive length of proceedings before the administrative courts and civil courts, respectively, in Italy, where the Committee of Ministers decided to resume its examination "*of the question as to whether the announced measures will effectively prevent new violations of the Convention*".

[33] Interim Resolution DH (2000) 135 on Excessive length of judicial proceedings in Italy. General measures. Adopted by the Committee of Ministers on 25 October 2000.

[34] *Ibidem*, para. 2 – 3.

[35] See document on "Compliance with member States' commitments", CM/Monitor (2001)14 of 15 November 2001, Part I. General comments.

[36] *Ibidem*. In 2001, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to "examine ways and means of assisting member States with a view to a better implementation of the Convention in

24. Pushed by an ever-increasing number of applications in connection to unreasonably long proceedings before the Court indicating that the effectiveness of existing national remedies could be further improved, in May 2004, the Committee adopted its Recommendation on the improvement of domestic remedies (hereinafter: "the Recommendation").[37] The Recommendation recalled that in addition to the obligation of ascertaining the existence of effective national remedies in the light of the case-law of the Court, member States have the general obligation to *solve the problems underlying violations found* (emphasis added). The member states are thus called to, in particular:

- "review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court; and

- pay particular attention /…/ to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings".

25. Further to this Recommendation, the Steering Committee for Human Rights (CDDH)[38] decided to resume the study started in 2001, on means of assisting member States in implementation of the Convention in domestic law and practice, in the aim of producing a report on the existing national practices in the field of effective remedies[39]. The preparation of the report is in progress[40].

III. Existing domestic remedies in respect of allegedly lengthy proceedings in the Council of Europe member States: a comparative analysis

26. The right to a hearing within reasonable time is today enshrined in the constitutions and/or legislation of almost all Council of Europe member States[41]. The same is increasingly becoming

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their domestic law and practice, including the provision on effective remedies".[36] The CDDH, in turn, entrusted the work of following up this decision to its Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR). See the Report of the 51st meeting of the CDDH (27 February – 2 March 2001), document CDDH (2001) 15, § 11. In September 2002, the Secretariat of the CDDH prepared a memorandum containing a comparative overview of national practice with respect to effective remedies and mechanisms for reparation in cases of violation of the Convention by national authorities. This document shows that in various member States, legislative activities or discussions on this matter were in progress (See document "Implementation of the European Convention on Human Rights– Effective remedies at national level", DH-PR (2002) 001rev, 10 September 2002).

[37] CM Rec (2004)6, adopted on 12 May 2004, at the 144th session of the Committee of Ministers (12-13 May 2004).

[38] Through its Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR).

[39] See document: «Improvement of domestic remedies. Follow-up to the implementation of the Recommendation Rec (2004)6 – Information received by the Secretariat», DH-PR (2004) 012, 6 October 2004.

[40] The information transmitted by the Secretariat of the DH-PR in this respect has been used to fill-in questionnaires with respect to the following countries : Austria, Czech Republic, Malta, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

[41] Either as a specific constitutional guarantee or through the direct application of the ECHR in the national legal systems.

true for the right to a remedy, which is a primary guarantee underpinning the exercise of the right to a hearing within reasonable time, as well as of all the other rights and freedoms.

27. Generally speaking, in the majority of the Council of Europe member states there is a remedy allowing an applicant to complain about the excessive length of proceedings. It often takes then form of a general guarantee including, in some cases, a general remedy at the constitutional level. A number of countries faced with the limits of the ordinary legal remedies and pushed by the relevant case-law of the European Court of Human Rights, have recently introduced a specific remedy to deal with unreasonable length of proceedings.[42]

28. The application in practice of the right to a remedy with respect to allegations of excessive length of proceedings in particular, its scope of application and its specific procedural modalities vary greatly in the different legal systems; they will therefore not be dealt with in this study. The analysis will be limited to a general overview of the domestic remedies which currently exist in Europe with respect to allegations of unreasonable delay in administrative, civil and criminal proceedings,[43] on the basis of the information available (see Appendix), and to the assessment of their effectiveness with reference to the case-law of the Court and their pertinence in respect of ensuring hearing within reasonable time.

A. State of the art

a) Remedies available for pending proceedings

29. According to the information available, domestic remedies with respect to allegations of excessive length of procedures available for *pending* proceedings can be divided - according to the available forms of redress - into four main categories. In most countries, these different forms of redress for the violation of the right to a hearing within reasonable time co-exist and may be applied cumulatively.

i. Remedies allowing to speed up lengthy proceedings

30. In most Council of Europe member States, it is possible for an applicant in judicial and administrative proceedings to *request the speeding-up of the proceeding* in question through the fixing of an appropriate time-limit for the taking of necessary measures.[44] Such measures may

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[42] *Croatia, Czech Republic, France, Italy, Poland, Portugal, and Slovakia.* In addition to these, a number of other countries is at present preparing legislation aiming at introducing a specific remedy for unreasonable delays of judicial proceedings; thus, *Hungary* (see document CM/Del/OJ/DH (2005) 922, Vol. I, p. 18), *Greece* (*ibidem.*), and *Italy* (information provided by Mr Francesco Crisafulli, Government Agent of Italy during the Workshop on the improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, held at the initiative of the Polish Chairmanship of the Council of Europe on 28 April 2005).

[43] The enforcement proceedings do not fall within its scope and shall not be treated here.

[44] A request for the speeding-up of proceedings may be submitted in the form of a legal claim to a superior authority/court (*Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Malta, Poland Portugal, Russian Federation, Slovakia, Switzerland, Sweden and Ukraine) or* to the chairperson of the dilatory court (*Denmark, Lithuania, Norway, Slovakia, Spain, Serbia and Montenegro).* In certain cases, a complaint against lengthy proceedings must be submitted to the court in question, which will then transmit it to the competent court / authority (*Austria*, *Czech Republic and Poland).* In a number of countries, a remedy allowing to accelerate lengthy proceedings can also take form of a constitutional complaint. This is the case in *Albania, Bosnia and Herzegovina, Croatia, Czech Republic, Cyprus* (before the Supreme Court), *Germany, Malta, Slovakia, Slovenia and Spain).* The introduction of a general remedy at the constitutional level for violation of fundamental rights and freedoms, including the right to a hearing within a reasonable time, is also planned in Moldova.

consist in: a) taking a particular procedural step (holding a hearing, obtaining an expert's report, issuing another necessary order or taking an act which the concerned authority has failed to take)[45] b) deciding on the merits of the case or terminating the proceedings,[46] c) transferring jurisdiction to decide on the merits of the case to a different court or superior authority,[47] and d) continuing the proceedings and taking a decision instead of the dilatory judge.[48]

31. In certain cases, the remedy allowing to accelerate the lengthy proceedings can be coupled with the *right to compensation for non-pecuniary damage*. Such compensation can be ordered either by the authority which decides on the lengthy complaint[49] or in separate proceedings.[50] In other cases, a decision on the infringement of the reasonable time requirement taken by the higher court / authority may be followed by *a disciplinary action against the dilatory judge*.[51]

32. When assessing the reasonableness of the duration of judicial proceedings, the competent national authorities often refer to the criteria applied by the European Court of Human Rights in respect of Article 6 § 1 of the Convention[52].

ii. Remedies allowing discontinuing of proceedings or mitigation of sentence

33. The right to a trial within reasonable time is of particular importance in criminal proceedings. Indeed, many criminal jurisdictions in member States do take into account the duration of the proceedings in issue when deciding a criminal case. However, they do not all react in the same manner when the violation of the reasonable time requirement is found.[53] A violation of the reasonable time requirement may thus lead to a) the stay of the proceedings,[54] b) the inadmissibility of the prosecution,[55] c) the reduction/mitigation of sentence,[56] d) the

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45 Austria, Cyprus, Czech Republic, Denmark, Estonia, Lithuania, Malta, Poland, Portugal, Slovakia and Switzerland.

46 Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Portugal, Slovakia.

47 This possibility exists in *Austria*, where the party to administrative proceedings may ask transfer of jurisdiction to a superiour authority, which must then decide itself within a statutory time-limit, and in *Cyprus*, where the Supreme Court can order a retrial by a different court.

48 This may be the case in *Austria* (see note 48) and in *Belgium*, further to a complaint to the Higher criminal chamber in respect of lengthy criminal investigation proceedings.

49 *Bosnia and Herzegovina*, *Croatia, Cyprus, Denmark, Estonia, Malta, Slovakia, Slovenia*

50 *Poland, and Spain* (only when the main proceedings have been terminated).

51 *Bulgaria, Serbia and Montenegro.*

52 The following countries left this question undetermined in their reply to the questionnaire or in providing information to the DH-PR : Armenia, Austria, Bulgaria, Czech Republic, Estonia, Finland, Gerogia, Germany, Greece, Hungary, Luxembourg, Slovakia, Sweden and Ukraine.

53 In some cases, a determination of a violation of the reasonable time requirement will also influence the course of the civil or administrative proceedings (when a punitive sanction is at issue).

54 *Belgium, Czech Republic, Estonia, Finland, Germany, Lithuania, Malta, Netherlands, Switzerland and the UK.* This possibility has also been introduced recently in Austrian Criminal Procedure Code (March 2004), but is not yet applicable in practice. This measure will enter into force only on 1 January 2008, due to a necessary time needed to bring about the necessary changes in the judicial system.

55 *Belgium, Czech Republic and Germany*.

exemption of punishment if the defendant is found guilty[57] or his or her acquittal.[58] In certain cases, in the event that a public authority fails to take a decision within a prescribed time-limit, it shall be deemed to have made a decision to the applicant's favour.[59]

34. A decision on discontinuing of the proceedings, reduction of sentence or exemption of punishment due to a violation of the reasonable time requirement can be accompanied by the right to compensation for non-pecuniary damage.[60]

35. It should be noted, in respect of this form of redress for breach of the reasonable time requirement, that in many of the countries concerned a possible decision by the competent authority to take the duration of the proceedings into account in its final decision is *of a purely praetorian nature* and is not based on any specific constitutional or legal provision.

iii. Reparation of the damage caused by the excessive duration of proceedings

36. In an number of countries, the possibility of obtaining reparation of the pecuniary and/or non-pecuniary damage suffered in connection with an excessive duration of judicial proceedings co-exists with other means of legal action allowing to complain about the length of proceedings.[61]

37. In other countries, instead, the reparation of damage remains - thus far - the *only* possible remedy an applicant can claim in respect of delay of proceedings.[62]

38. As to the ground for granting reparation, it may be

- a fault of a judge or another officer of the court,[63]
- a heavy workload of the tribunals,[64]
- an irregularity in the conduct of proceedings, including non-compliance with the obligation to perform an act or give a decision within the statutory time-limit,[65]
- unlawful act or omission done within the course of proceedings,[66]
- malfunctioning of justice or denial of justice,[67] and

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56 *Austria, Czech Republic, Denmark, Estonia, Finland, Germany, Luxembourg, Moldova, Netherlands, Norway Sweden, Switzerland, and the UK.* It is interesting to note that a reduction of the sentence has also been chosen by the Court of Justice of the European Communities as an appropriate remedy for the violation of the reasonable time principle (see *Baustahlgewebe v. Commission* case, C-185/95 P).

57 *Belgium, Cyrpus, Estonia and Switzerland.*

58 *Belgium, Denmark and Estonia.*

59 *Belgium and Sweden.*

60 *Cyprus, Denmark, Malta, Norway, the UK.*

61 *Belgium, Cyprus, Czech Republic, Finland, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland.*

62 *France, Hungary (in theory), Italy and the Netherlands.*

63 *Belgium, Lithuania.*

64 *Belgium.*

65 *Czeck Republic and Slovakia.*

66 *Portugal, Poland, Sweden.*

67 *France, Spain.*

- a violation of the right to a hearing within a reasonable time.[68]

39. Though a violation of the right to a hearing within a reasonable time *in re ipsa* gives rise to State liability for damage in a few countries only, several high and supreme jurisdictions of member states have expressly declared that a violation of the reasonable time requirement as guaranteed by Article 6 § 1 of the Convention is to be treated as a "fault", an "unlawful act", a "malfunctioning of administration of justice", a "denial of justice", or an "irregularity in the conduct of proceedings" that engages the responsibility of the State and obliges it to repair the ensuing damage.[69]

40. As to the amount of pecuniary compensation to which a victim of the excessive length of proceedings may be entitled, its determination generally remains within the discretion of the jurisdiction concerned. Taking into account the fact that when assessing the reasonableness of the duration of proceedings in a case before them, the competent authorities of the member States generally refer to criteria applied by the Court with respect to Article 6 §1 of the Convention, it might be assumed that this will also be the case when they are called to determine the amount of compensation. Yet, such assumption is not certain.[70] In fact, only a few rapporteurs specifically declared that in determining the amount of compensation, a competent authority refers to/relies on criteria used by the Court.[71]

41. Finally, in most States, damages awarded on the ground of lengthy proceedings are only of a non-pecuniary character, in particular in cases where the proceedings are still pending.[72]

iv. Disciplinary responsibility of the judge for undue delay of proceedings

42. The possibility for a party in judicial proceedings to bring a disciplinary action against a judge is mentioned by a number of States as a remedy in respect of excessive delays in the proceedings.[73] However, the effect of any such decision will only concern the personal position of the responsible judge, and there seems not to be any direct and immediate consequence for the proceedings which have given rise to the complaint. On the other hand, a disciplinary action will most often be preceded by a complaint to a supervisory organ, which can give (generally non binding) instructions to a dilatory judge. The possibility that a disciplinary action may follow could thus have a certain (although indirect) effect of speeding-up the proceedings in question.

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[68] *Croatia, Italy, Lithuania, Russian Federation, Switzerland.*

[69] *Belgium, Czech Republic, France, Portugal, Poland*. Though such a jurisprudential evolution is with no doubts to be praised, a revision of the concerned legislation in this matter is to be commended in order to ensure that this interpretation is followed in practice by each jurisdiction faced to this kind of a case. It is also worth noting that in one country (*Finland*), a mere delay of proceedings cannot constitute a ground for compensation (see *Eskelinen v. Finland*, decision of 3/02/2004).

[70] See *Scordino v. Italy, cit.*

[71] *Denmark, Lithuania and Slovakia*.

[72] In Croatia, Poland and Slovakia, pecuniary damages resulting from suffering due to excessively lengthy proceedings can also be awarded. When proceedings are terminated and it can be established that the applicant has been delayed in the enjoyment of certain rights, also pecuniary damages may be given (France, Italy).

[73] Bulgaria, *Georgia, Hungary, Island, Latvia, Lithuania, Sweden, Serbia and Montenegro, Slovenia and Ukraine.*

b) Remedies available for completed proceedings

43. When the allegedly excessively lengthy proceedings have been terminated, the only available remedy is a request pecuniary compensation for damage resulting from allegedly excessive duration of proceedings.

In practice of most countries examined,[74] a remedy allowing reparation of damage caused by the excessive length of proceedings can be used by an applicant also with respect to terminated proceedings.

B. Evaluation

a) The effectiveness of available domestic remedies in the light of the case-law of the Court

44. In terms of the Court's case-law, it is an *obligation of result* that is required by Article 13 (see *supra*, para. 9). The Contracting States have some discretion as to t*he manner in which they provide the relief* required.[75] The Court, respecting the margin of appreciation given to the Contracting States, has restrained from determining a specific form or type of an "effective remedy" with respect to an alleged violation of the right to a hearing within a reasonable time. It has nevertheless established the criteria a domestic remedy must fulfil in order to be considered "effective" for the purposes of Article 13.

45. Three of the four categories of remedies mentioned above (see *supra*, paras. 29-43) have already obtained the "effectiveness patent" by the Court, provided they fulfil the criteria developed by it.[76]

46. Whatever measure may be ordered by a competent authority,[77] a domestic remedy in respect of unreasonable delays will conform to the requirements of the Convention only when it has

[74] Except for *Bulgaria* and *Croatia* where compensation for damage resulting from excessive duration of proceedings can only be claimed for pending proceedings.

[75] See for example, *Kaya v. Turkey*, judgment of 19/02/1998, ECHR 1998-I, §106, *Chalal v. the UK*, *cit.*, §145.

[76] Austria (for example, *Holzinger v. Austria (No 1)*, judgment of 30/01/2001, Reports 2001-I; Croatia (for example, *Slavicek v. Croatia*, decision of 4/07/2002, Reports 2002-VII); Denmark (*Byrn v. Denmark*, Commission report (30) of 16/02/1993), Germany (for example, *Eckle v. Germany*, judgment of 15/07/1982, Series A no. 51), Norway (*Beck v. Norway*, judgment of 26/09/2001, ECHR 404), France (among others, *Giummarra v. France*, 12/06/2001), Italy (among others, *Brusco v. Italy*, decision of 6/09/2001, Reports 2001-IX; *Di Sante v. Italy,* decision of 24/06/2004), Poland (see *Krasinski v. Poland*, judgment of 14/06/2005), Portugal (for example, *Tomé-Mota v. Portugal*, decision of 2/12/1999, Reports 1999-IX), Slovakia (*Andrasik v. Slovakia*, decision of 22/10/2002, ECHR 2002-IX), Spain (for example, *Fernandez-Molina Gonzales v. Spain*, decision of 8/10/2002, Reports 2002-IX), Switzerland (for example, *Boxer Asbestos SA v. Switzerland*, decision of 9/03/2000). It is to be noted though that in certain cases, the effectiveness patent is only partial as the concerned remedies can only be used for some types or categories of proceedings (for example, only criminal proceedings in case of Portugal and Spain), for pending proceedings only (for example, in Croatia and Poland), or only with respect to proceedings before lower courts (for example, in Austria, France and Italy).

[77] Be it taking a particular procedural step within a fixed time-limit resulting in speeding-up of proceedings or their termination or granting adequate reparation (in kind or pecuniary one).

acquired a sufficient legal certainty, in theory and in practice, to enable an applicant to use it at the date on which an application is lodged with the Court.[78]

47. A possibility to apply to a higher authority for speeding-up proceedings and imposing an appropriate time-limit for the taking of necessary procedural steps (a *preventive* remedy) will thus not be considered effective in the absence of a specific procedure, when the result of such application depends on the *discretion* of the authority concerned and where the applicant is not given the right to compel the State to exercise its supervisory powers.[79]

48. Equally, an application to an administrative court against the administration's failure to decide cannot be regarded as "effective" with respect to the alleged unreasonable duration of the proceedings if "it can give rise neither to any finding as regards the length of proceedings as a whole nor to adequate redress when an unreasonable delay has already occurred."[80]. A simple acknowledgment (even though in a sufficiently clear manner) of the failure to observe the reasonable time requirement cannot be considered sufficient either. An adequate redress for the declared breach must be given to the concerned applicant. Equally, the favourable outcome of the proceedings as such will not be considered adequate redress for their length.[81]

49. In other words, a national "complaint about delays" must not be merely theoretical: there must exist sufficient case-law proving that the application can actually result in the acceleration of a procedure or in adequate redress.[82]

50. In the absence of national case-law relating to a "complaint about delays" in question, such a specific remedy could nevertheless be considered "effective" when the wording of the legislation in question clearly indicates that it is specifically designed to address the issue of the excessive length of proceedings before the domestic authorities.[83]

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[78] See, among many others, the *Giummarra and Others v. France* judgment (*cit.*), where the Court has held that having regard to the developments in the case-law, the possibility to request reparation of damages resulting from breach of the reasonable time requirement was an effective remedy for the purposes of Article 34§1, *only for those applications that are lodged with the Court before 20 September 1999* (emphasis added)*)*. The reference to the date on which the application was lodged is subject to exceptions which may be justified by the particular circumstances of each case (see *Baumann v. France*, judgment of 22/05/2001, Reports 2001-V, §47) or when a specific remedy was clearly designed to address, *inter alia*, the problem of the unreasonable delay of proceedings, as was the case in Croatia, Italy and Slovakia (see, for example, *Giacometti and Others v. Italy*, decision of 8/11/2001, Reports 2001/XII; *Nogolica v. Croatia*, decision of 5/09/2002 and *Andrasik v. Slovakia*, cit.).

[79] See, *Djangozov v. Bulgaria,* decision of 8/10/2004*; Horvat v. Croatia*, judgment of 26/07/2001, Reports 2002-VIII, § 47, *Hartman v. the Czech Republic,* judgment of 10 July 2003, Reports 2003-VIII, § 82**.**

[80] See for example, *Belinger v. Slovenia*, decision of 2/10/2001; *Doran v. Ireland*, judgment of 31/07/2003, ECHR 2003-X However, the Convention organs hold that in case of doubt as to the effectiveness of a remedy, it has to be used (see *Raif v. Greece*, application no. 21782/93, Commission decision of 26 June 1995, Decisions and Reports 82-A, p. 5, and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 68).

[81] See *Byrn v. Denmark*, *cit*., § 21; *Kuzin v. Russian Federation*, judgment of 9/06/2005, para. 45.

[82] See for example, *Doran v. Ireland*, *cit.* ; *Timar v. Hungary,* decision of 19 March 2002); *Horvat v. Croatia*, *cit*., §§ 37-39.

[83] See *Slavicek v. Croatia*, *cit*., p.3. For the argument *a contrario*, see *Ohlen v. Denmark*, decision of 6/03/2003, where the Court considered that «*the wording of the invoked sections of the Act does not provide lucidity as to speculation on the effectiveness of such an action in a case like the present one*», p. 8.

51. A remedy allowing an applicant to obtain adequate redress for delays that have already occurred (a *compensatory* remedy) is also capable of proving suitable for the purposes of Article 13, and this notwithstanding the particular form such redress may happen to take in domestic legal system: compensation in kind or pecuniary compensation.

52. Thus, a discontinuance of the prosecution[84] and mitigation of sentence[85] can both constitute an appropriate reparation for the violation of the reasonable time requirement and an "effective remedy" in the sense of Article 13. The same is true for the inadmissibility or the discontinuance of the prosecution[86] and the decision of acquittal.[87] What counts more than a specific form of redress given to an applicant is the motivation underlying a decision of the national court. In other words, the national jurisdiction must clearly acknowledge that a specific measure has been taken with the aim of repairing the over-stepping of the "reasonable time" in the meaning of Article 6 § 1 of the Convention.[88]

53. In addition, a redress given for the breach of a reasonable time requirement must be adequate with respect to the (extent of the) declared breach.[89]

54. As to a purely pecuniary compensation remedy, while a first lecture of the *Kudla v. Poland* judgment seemed to suggest that both elements should be present and complete each other (remedy for accelerating lengthy proceedings *and* remedy for reparation of damage when a substantive delay has already occurred), the subsequent case-law of the Court clearly established that Article 13 offers an *alternative*.[90]

55. In this respect, it may be interesting to note that the UN Committee on Human Rights took the view that all stages of judicial proceedings must take place without undue delay and that, to make this right effective, a procedure must be available to ensure that this applies in all instances. Furthermore, the mere possibility of obtaining compensation after, and independently of, a trial that was unduly prolonged does not constitute an effective remedy for the purposes of the International Covenant on Political and Civil Rights.[91]

56. In the view of the Court, the fact that a purely compensatory remedy will have no influence whatsoever on the duration of proceedings which are under way does not affect its effectiveness

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84 See for example, *Eckle v. Germany*, §66.

85 *Ibidem*. See also, *Van Laak v. Netherlands*, decision of 31/03/1993, D.R., 74 ; *Hezée v. Netherlands*, judgment of 22/05/1998, § 54, *Beck v. Norway*, , §§ 27-28 ; *Ohlen v. Denmark*, *cit*.

86 See *Conrad v. Germany*, decision of 13/04/1988, D.R., 56, p. 264 ; *G. v. Germany*, decision of 6/07/1983, D.R., 33, p.5.

87 See *Byrn v. Denmark, cit*., p.5.

88 See for example, *Eckle v. Germany*, *cit*., § 94, *Beck v. Norway, cit.,* § 27.

89 See for example, *H... v. Germany*, decision 13/12/1984, D.R. 41, p. 252 ; Conrad v. Germany, cit., p. 264 ; *Van Laak v. Netherlands*, *cit*., p. 156.

90 See among many others, *Mifsud v. France*, decision of 11/09/2001, Reports 2002-VIII, § 17, *Djangozov v. Bulgaria*, *cit*., § 47, *Paulino Tomas v. Portugal*, Decision of 22/05/2003, Reports 2003-VIII, p. 9.

91 See the UN Committee on Human Rights' General Comment 13 (Article 14), 21 session 1984 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994). This view was confirmed in its conclusions of 31 October 2002, on the application no. 864/1999, *Alfonso Ruiz Agudo v. Spain*, § 9.1.

as long as it remains itself an effective, sufficient and accessible means.[92] In other words, a procedure before the authority competent to deal with a "complaint for delay" must itself respect the reasonable time requirement, as excessive delays in this regard may affect the effectiveness of an action for reparation. Furthermore, such a compensatory remedy should equally apply to cases where the proceedings in question are pending and those where proceedings have already ended at domestic level.[93]

57. Similar to the remedy allowing mitigation of penalty in criminal proceedings, the sufficiency of the remedy allowing the reparation of damages may depend on <u>the level of compensation.</u> The amount of a given pecuniary compensation should be adequate and sufficient having regard to just satisfaction as provided for under Article 41 of the Convention.

58. In one of its recent decisions related to the length of proceedings in Italy, the Court questioned the effectiveness of the claim for compensation available in the Italian legal system[94] on this basis. While recognizing that there is no formal obligation on Contracting States to incorporate the Convention in their domestic legal system, the Court stressed that it follows from the principle of subsidiarity that the national courts must, where possible, interpret and apply domestic law in accordance with the Convention. The amounts awarded to the applicants by the Italian courts were significantly lower than the amounts given in similar cases by the Court itself: this difference in the level of compensation awarded rendered the remedy ineffective.[95] A direct consequence of this decision of the European Court was a new wave of applications with respect to alleged violation of Article 13 on the ground of inadequate compensation before the European Court.[96]

59. A compensation granted that is lower than the amount usually awarded for comparable delays by the Court itself may nevertheless be considered "adequate" in the light of the specific circumstances of the case, the standard of living in the State concerned, the promptness of the finding and award by the national court as well as the promptness of the payment within the national legal system.[97]

60. While the Court praises the determination of the domestic courts of its member States to apply the Convention standards directly and to integrate the Court's case-law into their respective legal systems, a recourse based solely on the direct applicability of the Convention

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[92] See *Paulino Tomas v. Portugal*, *cit*. p. 9.

[93] See among others, *Mifsud v. France*, *cit* , § 17, *Soc v. Croatia*, judgment of 9/05/2003, no 47863/99, § 93.

[94] It may be useful to recall that in 2001, further to the growing number of applications concerning the excessive length of procedures, the Italian authorities adopted the so-called «Pinto Act», which established a specific domestic remedy allowing applicants to obtain an appropriate relief in the form of financial compensation before the Italian Court of Appeal. Starting from the *Brusco v. Italy* case (), the Court considered this claim as an effective remedy for the purposes of Articles 13 and 35.

[95] *Scordino v. Italy*, decision of 17/03/2003, ECHR 2003-IV, pp. 14-15.

[96] In that connection, in a group of judgments delivered in November 2004, the Court set out a number of criteria for the calculation of just satisfaction, which would enable the Italian courts to align their approach to that of the Court in determining the appropriate level of compensation (see *Riccardi Pizzati v. Italy* (no. 1), *Musci v. Italy, Giuseppe Mostacciuolo v. Italy, Cocchiarella v. Italy, Apicella v. Italy, Ernestina Zullo v. Italy, Giuseppe Mostacciuolo v. Italy* (no.2), judgments of 10 November 2004.

[97] See *Bako v. Slovakia*, decision of 15/03/2005.

in national legal system cannot be regarded with a sufficient degree of certainty as an effective remedy.[98]

61. The same goes true for the disciplinary responsibility of the dilatory judge, as such kind of action cannot presumably result neither in speeding-up of lengthy proceedings, nor in an adequate redress for the delay occurred.[99]

62. Finally, it is worth noting that although the present analysis indicates that a domestic remedy for complaint about the excessive length of proceedings do exist in most European States, it results from the recent Court's judgments relating to several member states that many of them are *not effective in practice.*[100]

b) The pertinence of the available remedies with respect to ensuring that a hearing takes place within a reasonable time

63. Although a purely compensatory remedy (be it in pecuniary form or in kind) may be considered effective, provided that certain conditions have been met, a ***preventive remedy*** aiming at speeding-up or terminating lengthy proceedings presents a number of significant advantages.

64. The first and foremost advantage of this kind of domestic remedy is its <u>result</u>: preventing the violation or putting a term to its continuation. It is in fact, the only legal means allowing to stop the procrastination, in time, of proceedings. This is of course only true, provided that the competent authority has the necessary power to ensure the respect of its decision in respect of lengthy proceedings.

65. A further advantage of this kind of remedy is its <u>accessibility</u>: it can often be raised in the course of pending, directly before the court / public authority in question. In certain cases, though, it is necessary for an applicant to initiate separate proceedings whose admissibility may depend on the discretion of the competent court.[101]

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98 See *Rachevi v. Bulgaria*, *cit*. § 64.

99 See *Kormacheva v. Russian Federation*, judgment of 29/01/2004, para. 64.

100 Thus in Bulgaria: *Djangozov v. Bulgaria, cit., Dimitrov v. Bulgaria*, 23 September 2004 and *Rachevi v. Bulgaria, cit.* (concerning civil proceedings) and *Osmanov and Yuseinov v. Bulgaria*, judgment of 23/09/2004 and *Mitev v. Bulgaria*, judgment of 22/12/2004 (concerning criminal proceedings); the Czech Republic: *Dostal v. Czech Republic*, judgment of 25/05/2004, *Bartl v. the Czech Republic*, judgment of 22/06/2004, and *Konečny v. the Czech Republic*, judgment of 26/10/2004 (concerning civil proceedings), *Hartman v. the Czech Republic*, *cit*., and *Hradecky v. the Czech Republic*, judgment of 5/10/2004; Finland: *Kangasluoma v. Finland, cit., Eskelinen v. Finland*, *cit*. (concerning criminal proceedings), Greece: *Lalousi-Kotsovos v. Greece*, judgment of 19/05/2004, *Nastos v. Greece, Theodoropoulos and Others v. Greece*, judgment of 2/12/2004 (concerning administrative proceedings), and also *Konti-Arvaniti v. Greece*, judgment of 10/04/2003; Hungary (Erdos v. Hungary, decision of 3/05/2001, Timar v. Hungary, decision of 19/03/2002 and Simko v. Hungary, decision of 3/12/2002), Ireland: *Doran v. Ireland, cit., O'Reilly and Others v. Ireland*, judgment of 29/06/2004 (concerning judicial review proceedings); the Netherlands: *Göcer v. the Netherlands*, judgment of 3/10/2002; Russian Federation: *Kormacheva v. Russian Federation, cit., Plaksin v. Russian Federation, cit., Yemanakova v. Russian Federation*, judgment of 23/09/2003 (concerning civil proceedings), and *Klyakhin v. Russian Federation*, judgment 30/11/2004 (concerning criminal proceedings), Slovenia: *Belinger v. Slovenia*, decision of 2/10/2001) and Ukraine: *Merit v. Ukraine*, judgment of 30/10/2004 (concerning criminal proceedings).

101 Germany.

66. There is, of course, a risk that the use of an additional remedy does in itself contribute to the length of proceedings, particularly where there is a possibility of appeal against the decision of the first competent authority. A few examples from domestic practice prove this has not been the case, mainly thanks to strict time-limits within which the competent authority has to decide upon a request to speed-up the proceedings.[102]

67. The ***compensation in kind*** (abandonment of prosecution, mitigation of sentence etc.) due to excessively long proceedings will have an immediate impact on the proceedings.

68. This solution may however raise certain legal questions. A court's decision in criminal proceedings should be determined on the basis of the gravity of the crime committed (and not on a procedural basis). On the other hand, a decision of the judge in criminal proceedings to redress a violation of the reasonable time requirement through this kind of compensation may be justified by the time spent in detention during trial, and by the necessity to ensure the rights of the defence.[103] In this latter respect, it would be appropriate that the decision taken by the competent authority should clearly state that the time elapsed since the committal of the crime in question has frustrated the exercise of the defence rights.

69. Obtaining a ***pecuniary compensation*** for damage suffered due to an unreasonable delay in the proceedings may be beneficial for litigants in some specific cases. A request for pecuniary damages in pending proceedings may have the advantage of indirectly motivating the judge or authority in question to deal more expeditiously with the proceedings. In theory, such remedy could even be used several times during one set of proceedings, for each stage of proceedings or level of jurisdiction.

70. On the other hand, a remedy allowing reparation of damages may be difficult to use (except for those member States where this kind of remedy has been established as a specific remedy for lengthy proceedings), as the liability of the State for damages resulting from the unreasonable duration of proceedings must then be incurred in respect of the fault of a judge, resulting e.g. in denial or malfunctioning of justice. Though many States indicated that the excessive length of proceedings is to be assimilated to a fault of a judge or malfunctioning of justice, such development is a result of the case-law and cannot be considered as certain in each and every case in which an excessive duration is found.

71. The compensation procedures are generally subject to ordinary rules of procedure; an applicant will be obliged to initiate separate proceedings, in certain cases only after the proceedings in question have terminated, and may also have to go through three levels of jurisdiction - first instance, appeal and cassation. With a few exceptions, there are generally no specific deadlines within which a competent authority is due to issue a decision in this matter.

72. Furthermore, the amount of the compensation obtained might not be adequate to a damage suffered (see *supra*, paras.57-59).

73. Finally, even when it can be used already during pending procedures, the remedy allowing for reparation of prejudice resulting from excessive length of procedure will remain without any concrete and immediate influence on the course of proceedings in question.

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102 Thus in *Austria, Lithuania and Portugal.*

103 Finding and calling witnesses, presenting evidence etc.

74. When the proceedings have been concluded, a reparation for damages remains the only possible remedy for the alleged violation of the right to a hearing within reasonable time, and has the undeniable advantage of providing an applicant with the possibility to obtain pecuniary compensation for the damage suffered. However, besides the risk that the amount of the compensation obtained might not be adequate, this kind of legal action will not provide a victim of lengthy proceedings with a truly effective remedy allowing it to exercise its fundamental right to a hearing within reasonable time.

75. Whatever form of redress a specific domestic remedy is able to provide (with the exception of termination of procedures/mitigation of sentence), a procedure on lengthy complaint should not in itself last excessively long and should not cause the lengthening of other proceedings in course before the same jurisdiction.[104]

[104] As is already the case in Italy and in Croatia. According to the available information, from 2001 to early 2004, the Italian Courts of Appeal have decided on some 7000 compensation claims. In its latest interim resolution on Italy, the CM recalled that in spite of the efforts deployed by the Italian authorities, the problem of the excessive length of judicial proceedings persisted and that it was necessary to reopen its supervision of the question of the general and individual measures required to remedy the violations found and to prevent similar violations. It thus called the Italian authorities to provide for *inter alia*, «*the acceleration of compensation procedures through the creation of a domestic remedy in cases of length of proceedings* » (see the Committee of Ministers' Interim Resolution ResDH (2005) 114, adopted on 30 November 2005.) As regards Croatia, in the period from 2000 to February 2005, the Croatian Constitutional Court filed 2274 cases pertaining to the violation of the reasonable time requirement. This Court has therefore recently presented a report to the Parliament indicating a continuing influx of cases that is « *seriously threatening the potential of the Constitutional Court to fulfill its competence in an appropriate manner and in a reasonable time* » (The Constitutional Court's Report, no. U-X-835/2005, §3).