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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**

**ON THE EFFECTIVENESS OF NATIONAL REMEDIES  
IN RESPECT OF  
EXCESSIVE LENGTH OF PROCEEDINGS**

**Adopted by the Venice Commission  
at its 69<sup>th</sup> Plenary Session  
(Venice, 15-16 December 2006)**

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## TABLE OF CONTENTS

<b>I. Introduction</b> .....	3
<b>II. The scope and aims of the present study</b> .....	4
<b>III. The right to an effective remedy before a national authority in respect of the unreasonable duration of proceedings : the international guarantee</b> .....	5
A. The right to a hearing within a reasonable time: what is at stake .....	5
B. The reasonableness requirement in Article 6 of the Convention : an outline .....	7
C. The right to an effective remedy before a national authority under Article 13: an outline .....	9
D. The relationship between Article 6 § 1 and Article 13 of the Convention .....	11
<b>IV. The supervision by the Committee of Ministers of the Council of Europe in respect of the implementation of length-of-proceedings cases</b> .....	12
<b>V. Existing domestic remedies in respect of allegedly lengthy proceedings in the Council of Europe member States: a comparative survey</b> .....	15
A. In general .....	15
B. State of Art .....	18
1. Remedies available for civil/administrative proceedings .....	18
2. Remedies available for criminal proceedings .....	20
<b>VI. The assessment of the existing national remedies by the European Court of Human Rights</b> .....	22
A. In general .....	22
B. Remedies available for civil/administrative proceedings .....	23
C. Remedies available for criminal proceedings .....	27
<b>VII. The requirements of Article 13 of the Convention in respect of unreasonably lengthy proceedings according to the case-law of the European Court of Human Rights</b> .....	30
A. As regards the kind of remedy .....	30
B. As regards the legal basis for the remedy and its clarity/accessibility .....	33
C. As regards the general characteristics of the remedial procedure .....	34
<b>VIII. The Venice Commission's proposals concerning the effectiveness of domestic remedies in respect of excessive length of proceedings</b> .....	36
A. As concerns the kind of remedy .....	36
B. As concerns whether or not the compensatory remedies for the excessive length of proceedings should be specific .....	38
C. As concerns the form of the remedies .....	39
1. Civil and administrative proceedings .....	39
2. Criminal proceedings .....	43
<b>IX. Main Conclusions</b> .....	45

## I. Introduction

1. In December 2002, in its opinion on the implementation of the judgments of the European Court of Human Rights<sup>1</sup> (hereinafter “the Court” or “the Strasbourg Court”), the Venice Commission expressed the view that it would be useful if the Committee of Ministers of the Council of Europe would develop guidelines on what measures are to be taken by the respondent States following the finding by the Court of a breach of a particular provision of the European Convention on Human Rights (hereinafter “the European Convention” or “the Convention”), so that member States may know in advance what consequences they may face. These guidelines, which should be inspired by both the practice of the Committee of Ministers and a more explicit case-law of the Court in this respect would, in the Commission’s opinion, allow for a stricter approach by the Committee of Ministers to the supervision of the execution of the Court’s judgments.

2. 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 existing national remedies with respect to allegations of excessive length of proceedings, with a view to proposing possible improvements in their availability and effectiveness.

3. The Secretariat subsequently prepared a questionnaire on the kind, nature and characteristics of national remedies which currently exist in Council of Europe member States (CDL(2004)124). Replies to this questionnaire in respect of 45 European countries (CDL(2006)026) were provided by Venice Commission members or were obtained through the valuable assistance of the Registry of the European Court of Human Rights, as well as of the Department of Execution of judgments of the European Court of Human Rights and of the Secretariat of the Committee of Experts for the improvement of procedures of the protection of human rights (DH-PR), Directorate General II of the Council of Europe.

4. The Venice Commission also worked in close co-operation with the European Commission for the Efficiency of Justice (CEPEJ), a body established on 18 September 2002 by Resolution Res(2002)12 of the Committee of Ministers of the Council of Europe,<sup>2</sup> with the aims “(a) to improve the efficiency and the functioning of the justice system of member states, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system and (b) to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice”.

5. A conference, co-organised by the Venice Commission and the Ministry of Foreign Affairs of Romania within the framework of the Romanian Chairmanship of the Committee of Ministers of the Council of Europe, was held in Bucharest on 3 April 2006 on “Remedies for unduly lengthy proceedings: a new approach to the obligations of Council of Europe member states”. On this occasion, representatives of the Venice Commission, the Strasbourg Court, the Directorate General II of the Council of Europe, CEPEJ, Government Agents and representatives of the Romanian authorities discussed about possible guiding principles in the identification of effective remedies for unreasonably lengthy proceedings. The results of these discussions are fed into this study.

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<sup>1</sup> Opinion on the implementation of the judgments of the European Court of Human Rights, CDL-AD(2002)34, § 102.

<sup>2</sup> [www.coe.int/cepej](http://www.coe.int/cepej).

6. *The present study is based on contributions by Messrs. Bogdan Aurescu (substitute member, Romania); Pieter Van Dijk (member, the Netherlands); Elsa Garcia Maltras de Blas (expert, Spain); Franz Matscher (expert, Austria) and Giorgio Malinverni (member, Switzerland). It was drafted by the Constitutional Co-operation Division of the Secretariat, and discussed and adopted by the Venice Commission at its 69<sup>th</sup> Plenary Session (Venice, 15-16 December 2006).*

## II. The scope and aims of the present study

7. It is important at the outset to clarify what is the scope of the present study. The length of the proceedings is a very complex problem which many European States experience with different degrees of gravity: for some of them it is a generalised problem, a “systemic” one”, whereas for others it must rather be seen as an occasional dysfunction of an otherwise effective system of administration of justice.

8. The identification of the causes of excessive delays is a complex exercise. It is certainly not the ambition of the Venice Commission to proceed with such identification. Other bodies are better equipped and more specialised, *in primis* the European Commission for the Efficiency of Justice (CEPEJ), whose tasks are, amongst others, to analyse the results of the judicial systems, to identify the difficulties they meet and to define concrete ways to improve, on the one hand, the evaluation of their results, and, on the other hand, the functioning of these systems.

9. Indeed, CEPEJ has looked into the causes for the excessive duration of proceedings<sup>3</sup> and has identified them through the analysis of the case-law of the European Court of Human Rights.<sup>4</sup> CEPEJ has also prepared a “Compendium of “best practices” on time-management of judicial proceedings.”<sup>5</sup> The Venice Commission refers to the CEPEJ analyses, and reiterates to be neither equipped nor tasked with these analyses. Issues relating to the functioning of justice and the concrete management of court procedures are outside of the scope of competence of the Venice Commission.

10. The Venice Commission stresses however that members States of the Council of Europe have obligations in respect of the length of proceedings stemming not only from Article 6 § 1 but also from Article 13 of the European Convention on Human Rights. As the European Court of Human Rights put it, “by becoming a High Contracting Party to the European Convention on Human Rights the respondent State assumed the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 of the Convention. In fact, the States have a general obligation to solve the problems that have led to the Court finding a violation of the Convention. This should therefore be the primary goal of the respondent State. Should violations of the Convention rights still occur, the respondent States must provide mechanisms within their respective legal systems for the effective redress of violations of the Convention rights”.<sup>6</sup> As the Committee of Ministers pointed out,<sup>7</sup> “in addition to the obligation of ascertaining the existence of [...] effective remedies in the light of the case-law of the European Court of

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<sup>3</sup> See the following documents: Length of court proceedings in the member States of the Council of Europe based on the case-law of the European Court of Human Rights, CEPEJ(2006)15; Length of court proceedings in the member States of the Council of Europe based on the case-law of the European Court of Human Rights - Summary, CEPEJ(2006)15; Reducing judicial times in the countries of Northern Europe, CEPEJ(2006)14.

<sup>4</sup> CEPEJ(2006)15, pp. 27-43.

<sup>5</sup> CEPEJ(2006)13.

<sup>6</sup> ECtHR, Lukenda v. Slovenia judgment of 6 October 2005, §§ 94 and 95.

<sup>7</sup> CM Rec (2004)6, adopted on 12 May 2004, at the 144<sup>th</sup> session of the Committee of Ministers (12-13 May 2004).

Human Rights [...], States have the general obligation to solve the problems underlying violations found”.<sup>8</sup>

11. The obligations under Article 13 of the Convention, i.e. the provision of effective remedies in respect of breaches of the reasonable time requirement, are not the direct object of the work of CEPEJ. They are dealt with by the Committee of Ministers with the assistance of the Department of the Execution of judgments of the Directorate General II of the Council of Europe.

12. The Commission intends to deal with the obligations of Council of Europe member States to provide effective remedies against the excessive length of proceedings within the meaning of Article 13 of the Convention. Inevitably, acceleratory remedies will concern the management and functioning of national courts: in this respect, the Venice Commission will of course again refer to the work of CEPEJ.

13. The present study aims at assisting the Committee of Ministers and the Directorate General II, as well as the Council of Europe member States, in addressing this problem in a global manner, with a view to identifying solutions based on the national experiences, the case-law of the European Court of Human Rights and the know-how of the Council of Europe.

14. The Commission expresses the hope that its study may also assist the Parliamentary Assembly of the Council of Europe, which has endeavoured to contribute to the speedy and effective implementation of the judgments of the European Court of Human Rights. In particular, the Assembly's Committee of Legal Affairs and Human Rights is currently examining cases relating to five countries in which, due to major structural problems, unacceptable delays of implementation have arisen.<sup>9</sup>

### **III. The right to an effective remedy before a national authority in respect of the unreasonable duration of proceedings : the international guarantee**

#### **A. The right to a hearing within a reasonable time: what is at stake**

15. Article 6 § 1 of the European Convention on Human Rights provides as follows:

*“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.”*

16. In requiring cases to be heard within a “reasonable time”, the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility.<sup>10</sup> Excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law.<sup>11</sup>

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<sup>8</sup> See also Interim Resolution ResDH(2005)114 concerning the judgments of the European Court of Human Rights and decisions by the Committee of Ministers in 2183 cases against Italy relating to the excessive length of judicial proceedings.

<sup>9</sup> See PACE, Implementation of judgments of the European Court of Human Rights, Report of the Committee on Legal Affairs and Human Rights, 18 September 2006, Doc. 11020.

<sup>10</sup> ECtHR, *Katte Klitsche de la Grange v. Italy* judgment of 27 October 1994, § 61.

<sup>11</sup> Committee of Ministers of the Council of Europe, Res DH(97)336, Length of civil proceedings in Italy: supplementary measures of a general character, 27 May 1997.

17. The Convention requires proceedings to be conducted “within a *reasonable* time”. The notion of reasonableness must reflect the necessary balance between *expeditious* proceedings and *fair* proceedings.<sup>12</sup> A careful balance needs to be struck between procedural safeguards, which necessarily entail the existence of lengths that cannot be reduced, and a concern for prompt justice.<sup>13</sup>

18. Celerity of proceedings responds to the need for legal certainty, for both citizens and the State, and to the need to further, and restore as soon as possible, the peaceful coexistence of individuals (*Rechtsfrieden*). Indeed, the economic life too suffers from contested situations which remain unsettled for too long. Long-lasting disputes disturb such peaceful coexistence: judicial proceedings may not be pursued *ad infinitum*, not even when this prolongation may eventually lead to substantive justice. Decisions must at some foreseeable point become final.

19. The duration of judicial proceedings certainly affects the interests of at least one of the parties to such proceedings: indeed, overstepping the reasonable time requirement of Article 6 of the Convention may result in (procedural) breaches of other important Convention provisions, such as Article 3 (in the case of unreasonably slow investigations into allegations of ill-treatment, for example<sup>14</sup>), Article 5 (in the case of lack of a speedy decision by a court on a *habeas corpus* action, or Article 8 (in the case of undue delays in custody proceedings which may result in the de facto determination of the issue submitted to the court before it has held its hearing<sup>15</sup>).

20. *Justice delayed is justice denied*. The undue postponement of judicial decisions may result in a denial of justice for the parties to the proceedings (although it may happen that parties delay the proceedings on purpose). In more general terms and in the longer run, it risks to affect the confidence which the general public places in the capacity of the State to dispense justice, to decide disputes, and, very importantly, to punish crimes as well as to prevent and deter future crimes. This may cause or even incite the recourse by individuals to alternative means of dispute settlement or dispensation of punishment. The deleterious effects on the rule of law of such a situation are evident.

21. The public interest in the proper functioning and use of justice, including in its cost-effective management, is another important element.

22. Celerity, however, must not be sought to the detriment of the good administration of justice.<sup>16</sup> Due consideration must always be given in the first place to the need to ensure the fairness of the proceedings: the other guarantees implied in Article 6 of the Convention, notably the right of access to a court, the equality of arms, the adversarial principle, and the right to dispose of adequate time and facilities for the preparation of one’s defence, must not be undermined or affected by a rushed conduct of the procedure.

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<sup>12</sup> ECtHR, *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, § 30; *mutatis mutandis*, *Acquaviva v. France* judgment of 21 November 1995, Series A no. 333-A, p. 17, § 66.

<sup>13</sup> CEPEJ(2004)19rev2, *A new objective for Judicial Systems: the processing of each case within an optimum and foreseeable timeframe*, available at [www.coe.int/cepej](http://www.coe.int/cepej), p. 7.

<sup>14</sup> ECtHR, *Labita v. Italy* judgment of 6 April 2000, §§ 133, 136.

<sup>15</sup> ECtHR, *W. v. United Kingdom* judgment of 8 July 1987, § 65.

<sup>16</sup> ECtHR, *Gast and Popp* judgment of 25 February 2005, § 75.

23. The quality of the legal reasoning and the extent to which judgments are motivated and made transparent to the parties and to the public, are also extremely important and need to be given due consideration. As CEPEJ pointed out, “meticulously drafting a decision, weighing up the reasons for it, and making it clear and comprehensible are all operations that take time”, which may prompt a decision to “lighten the requirements for providing reasons for a decision”. However, “a decision with clearly stated reasons allows the parties to accept it more easily. Good decisions at first instance have the effect of reducing appeals”.<sup>17</sup> The Strasbourg Court has stated in this respect that: “since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system.”<sup>18</sup>

24. The requirement of celerity must not impinge on the need to preserve the independence of the judiciary in organising its own procedures without undue internal and external control.

25. In conclusion, each case must be processed within an *optimum* time-frame. The CEPEJ places great importance on the *foreseeability* of such time-frame. It notes in fact that “one of the most awkward problems for court users is that they are unable to predict when proceedings will end. (...) Users need foreseeable proceedings (from the outset) as much as an optimum time. However, it must be noted that a foreseeable time-limit is not *per se* an acceptable time-limit.”<sup>19</sup>

26. The assessment of the reasonableness of the duration of any set of proceedings must never be mechanical. It necessarily depends on the specific circumstances of the case and must reflect the concern of ensuring the right balance amongst all the different guarantees set out by Article 6 of the Convention.<sup>20</sup>

#### B. The reasonableness requirement in Article 6 of the Convention : an outline

27. The requirement that proceedings must be conducted within a reasonable time applies to the determination of both criminal charges and civil rights and obligations.<sup>21</sup> Article 6 applies to criminal and civil, but also to certain disciplinary<sup>22</sup> and administrative proceedings, which are qualified as “civil” or as “criminal” by the case-law of the ECtHR.<sup>23</sup>

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<sup>17</sup> CEPEJ (2004)19rev2, pp. 8, 9.

<sup>18</sup> ECtHR, *Silc v. Slovenia* judgment of 29 June 2006, § 32; *Wierciszewska v. Poland* judgment of 25 November 2003, § 46.

<sup>19</sup> CEPEJ (2004)19rev2.

<sup>20</sup> See F. Tulkens, « Le droit d’être jugé dans un délai raisonnable : les maux et le remède », CDL(2006)34, p. 4.

<sup>21</sup> Numerous issues have arisen before the Court as regards the scope of Article 6. They are far too complex to be addressed in this study, for which they are of no direct relevance.

<sup>22</sup> ECtHR, *Engel and others v. the Netherlands* judgment of 8 June 1976, § 83; *Öztürk v. Germany* judgment of 21 February 1984, § 56.

<sup>23</sup> With the notable exception, *inter alia*, of the disputes “which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities”: ECtHR, *Pellegrin v. France* judgment of 8 December 1999, § 66. For procedures concerning the admission and expulsion of aliens, see ECtHR, *Maaouia*, judgment of 5 October 2000, and for taxation cases, see ECtHR, *Ferrazzini*, judgment of 12 July 2001.

28. As regards the period to be taken into consideration, in civil cases it normally starts when the case is brought before the competent judicial authority, or even before, if a preliminary claim before an administrative authority is necessary.<sup>24</sup> In criminal cases, it starts when the person is “accused”, that is when he or she is informed of criminal proceedings having been instituted against him or her<sup>25</sup> or suffers important repercussions on account of such proceedings.<sup>26</sup>

29. The final point is normally the date when the judgment becomes final (it is either filed with the court’s registry or notified, or the deadline for appealing it has expired etc., depending on the applicable domestic rules).<sup>27</sup>

30. In the assessment of the reasonableness of the length of a set of proceedings, regard must be had to the circumstances of the case and the criteria laid down in the Court’s case-law, in particular the complexity of the case, the applicant’s conduct and that of the competent authorities, and the importance of what was at stake for the applicant (the parties) in the dispute.<sup>28</sup>

31. Special diligence is required on the part of the competent authorities, for instance, in cases when parties to the proceedings are affected by illnesses, or in labour disputes, child-care cases<sup>29</sup> and claims of compensation for health damage allegedly resulting from medical malpractice.<sup>30</sup> It is also generally required in criminal cases, in particular when the accused is detained on remand.<sup>31</sup>

32. Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet the requirements of this provision.<sup>32</sup> Accordingly, the Court does not accept backlogs or administrative difficulties as justification for procedural delays.<sup>33</sup> However, exceptional political or social situations in the country concerned may be taken into consideration for a transitory period.<sup>34</sup>

33. The obligation to organise its judicial system in a manner that complies with the requirements of Article 6 § 1 of the Convention also applies to a Constitutional Court. However, “when so applied it cannot be construed in the same way as for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a Constitutional Court sometimes to take into account other considerations than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and

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<sup>24</sup> ECtHR, *Jorg Nina Jorg and others v. Portugal* judgment of 19 February 2004, § 30.

<sup>25</sup> ECtHR, *Deweere v. Belgium* judgment of 27 February 1980, Series A no. 35, p. 24, § 46; *Wemhoff v. Germany* judgment of 27 June 1968, Series A no 7, p. 26, § 19; *Ringeisen v. Austria* judgment of 16 July 1971, Series A no 13, p. 45, § 100;

<sup>26</sup> ECtHR, *Foti and others v. Italy* judgment of 10 December 1982, Series A no. 56, p. 18, § 52; *Lavents v. Latvia* judgment of 28 November 2002, § 85.

<sup>27</sup> ECtHR, *Barattelli v. Italy* judgment of 4 July 2002, § 15; *Mattoccia v. Italy* judgment of 25 July 2000, § 75.

<sup>28</sup> ECtHR, *Scordino v. Italy* judgment of 29 March 2006 [GC], § 177.

<sup>29</sup> See, amongst others, ECtHR, *H. v. UK*, Series A no. 120-B, § 83; *Olsson no. 2 v. Sweden*, Series A no. 250, § 103; *Hokkanen v. Finland*, Series A no. 299-A, § 72; *Ruotolo v. Italy* Series A no. 230-D, § 17.

<sup>30</sup> ECtHR, *Marchenko v. Russia* judgment of 5 October 2006, § 40.

<sup>31</sup> ECtHR, *Debboub v. France* judgment of 9 November 1999, § 46.

<sup>32</sup> ECtHR, *Bottazzi v. Italy* judgment of 28 July 1999, § 22.

<sup>33</sup> ECtHR, *Kolb and others v. Austria* judgment of 17 April 2003, § 54.

<sup>34</sup> ECtHR, *Milasi v. Italy* judgment of 25 June 1987, §§ 17-20; ECtHR *Maltzan and Others v. Germany* decision of 2 March 2005 (GC).



social terms. Furthermore, while Article 6 requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice”.<sup>35</sup>

C. The right to an effective remedy before a national authority under Article 13: an outline

34. *Ubi jus ibi remedium*. When there is a right, there should be a remedy. 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”.*

35. The effectiveness of human rights largely depends on the effectiveness of the remedies which are provided to redress their violation. The right to a remedy in respect of an arguable claim of a violation of a fundamental right or freedom is expressly guaranteed by almost all international human rights instruments.<sup>36</sup>

36. 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 Convention requires the Contracting States to “secure” the rights and freedoms under the Convention. The European Court exerts its supervisory role subject to the principle of subsidiarity,<sup>37</sup> i.e. only after domestic remedies have been exhausted or when domestic remedies are unavailable or ineffective. The right to an effective remedy established in Article 13 of the Convention stems directly from this principle.

37. Although the principle of the rule of law, which is contained in the Preamble and in Article 3 of the Statute of the Council of Europe, of which it constitutes one of the three pillars (together with democracy and respect for human rights), would justify the right of an effective remedy as an autonomous one, Article 13 does not contain a general guarantee of effective 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 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.<sup>38</sup>

38. Notwithstanding the literal wording of Article 13, the existence of an actual breach of another (“substantive”) provision of the Convention is not a prerequisite for its application.<sup>39</sup> 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 allowing both to have such claim decided

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<sup>35</sup> ECtHR, *Gast and Popp v. Germany* judgment, cit. § 75.

<sup>36</sup> See for example, in addition to Article 13, 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, and Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>37</sup> ECtHR, *Z. and Others v. UK* judgment of 10 May 2001, § 103.

<sup>38</sup> See for example, *Chahal v. UK*, cit., §§ 151-152.

<sup>39</sup> See *Klass and Others v. Federal Republic of Germany*, judgment of 6 September 1978, § 64.

and subsequently to obtain appropriate relief, must be available.<sup>40</sup> The arguability test requires that a claim “only needs to raise a Convention issue which merits further examination.”<sup>41</sup>

39. The “national authority” competent for providing the remedy must not necessarily be a *judicial* authority.<sup>42</sup> On the other hand, the powers and procedural guarantees of an authority will be relevant when determining whether a particular remedy is effective.<sup>43</sup> Any such remedy must be effective in practice as well as in law.<sup>44</sup>

40. The effectiveness of a national remedy within the meaning of Article 13 does not depend on the certainty of a *favorable* outcome.<sup>45</sup> Effectiveness is to be assessed in respect of the possibility of redressing the alleged violation of the right guaranteed by the Convention, possibly by cumulating available remedies. 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.<sup>46</sup> 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.<sup>47</sup>

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<sup>40</sup> See among others, *Klass and Others, cit.*, § 64; *Kaya v. Turkey*, judgment of 19 February 1998, 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 April 1988, § 52; *Powell and Rayner v. UK*, judgment of 21 February 1990, §§ 31-33).

<sup>41</sup> See European Commission of Human Rights before the Court in *Boyle and Rice v. United Kingdom*, § 53. Non-arguable is not the same as manifestly ill-founded in the sense of Article 35(3) of the Convention. However, although originally the Court seemed to leave open the possibility that a complaint that is declared manifestly ill-founded may still be deemed to have been arguable (*Boyle and Rice v. UK*, § 53), it conceded that “it is difficult to conceive how a claim that is “manifestly ill-founded” can nevertheless be “arguable” and vice versa” (*ibidem*, § 54). And in *Powell and Rayner* the Court held in so many words that the “dual [i.e. domestic and European] system of enforcement is at risk of being undermined if Article 13 (...) is interpreted as requiring national law to make available an ‘effective remedy’ for a grievance classified under Article 27 §2 [the present Article 35 § 3] (...) as being so weak as not to warrant examination on its merits at international level” (ECtHR, *Powell and Rayner v UK*, § 33). It is now standing case-law that if a complaint under a substantive right is declared manifestly ill-founded, the arguability of that same complaint under Article 13 is denied on the basis of the same reasoning (e.g. ECtHR, *Igor Vrabec v. Slovakia* judgment of 5 October 2004). At the admissibility stage, if a complaint about access to court or the reasonable time requirement under Article 6(1) is declared admissible, the Court will adopt the same position with respect to any claim under Article 13 without a separate examination (ECtHR, *Jonasson v. Sweden* judgment of 30 March 2004). At the phase of the merits, the Court will usually find concurrent breaches of the reasonable time requirement under Article 6(1) and the requirement of an effective remedy under Article 13 (ECtHR, *Rachevi v. Bulgaria* judgment of 23 September 2004, §§ 60-68 and §§ 96-104). In some cases, however, the Court finds reason to thoroughly examine the existence of an effective remedy after it has found a breach of the reasonable time requirement. And, indeed, in certain cases the Court treated the complaint concerning Article 6(1) as being absorbed into the examination of the more general obligation under Article 13 (ECtHR, *Kaya v. Turkey* judgment of 19 February 1998, § 105).

<sup>42</sup> See for example, *Golder v. UK*, judgment of 21 February 1975, § 33, *Leander v. Sweden*, judgment of 26 March 1987.

<sup>43</sup> 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 is required to reconsider the merits of his own decision, taken moreover without any adversarial proceedings (see *Domenichini v. Italy*, judgment of 15 November 1996, § 42) In the same sense, see also: *Calogero v. Italy*, judgment of 15 November 1996, § 41.

<sup>44</sup> See among others, *Ilhan v. Turkey* judgment of 27 June 2000, §§ 61-62.

<sup>45</sup> See for example, *Vilvarajah v. UK*, judgment of 30 October 1991, § 122.

<sup>46</sup> See among many others, *Silver and Others v. UK*, judgment of 25 March 1983, § 113 and *Chahal v. UK*, judgment of 15 November 1996, § 145.

<sup>47</sup> See *Chahal v. UK, cit.*

41. 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”.<sup>48</sup> This can entail, for example, the ending, modification, non-application or annulment of the challenged action, or obtaining reparation of damages resulting from the violation. The principle of effectiveness also implies that the procedure of obtaining domestic remedies must not be unjustifiably hindered by acts or omissions of the authorities of the State concerned.<sup>49</sup>

D. The relationship between Article 6 § 1 and Article 13 of the Convention

42. Until fairly recently, the Convention organs considered that, since the requirements of Article 6.1 are stricter than those of Article 13, in case a violation of Article 6 §1 was found, 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.<sup>50</sup> 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,<sup>51</sup> or of any means to shorten or terminate the excessive length of procedure.<sup>52</sup>

43 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 adequacy of the arguments put forward by the Court to justify a non-examination of the allegation of a breach of this Article.<sup>53</sup> 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, national law generally does 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*”.

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<sup>48</sup> See for example, *Smith and Grady v. UK* judgment of 27 September 1999, § 135; *Aksoy v. Turkey*, judgment of 18 December 1996, § 95.

<sup>49</sup> ECtHR, *Altun v. Turkey* judgment of 1 June 2004, § 70

<sup>50</sup> See *Airey v. Ireland*, judgment of 9 October 1979, § 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 December 1991).

<sup>51</sup> See for example, *Giuseppe Tripodi v. Italy*, judgment of 25 January 2000, § 15.

<sup>52</sup> See for example, *Bouilly v. France*, judgment of 7 December 1999, § 27.

<sup>53</sup> “... 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 August 1984, Series A no. 82.

44. The change in reasoning with regard to the right to an effective remedy in respect of the excessive length of proceedings came in 2000, with *Kudla v. Poland*.<sup>54</sup>

45. In this judgment, 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), 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.<sup>55</sup>

46. According to the Court, the requirements of Article 13 should be considered as “reinforcing” those of Article 6 §1, rather than being absorbed by the obligation to prohibit inordinate delays in legal proceedings under Article 6 §1.<sup>56</sup>

47. The Court 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.”<sup>57</sup> This subsidiary character of the Strasbourg system of complaint is articulated precisely in Articles 13 and 35 § 1 of the Convention. Article 13 establishes an additional guarantee.<sup>58</sup> According to the *travaux préparatoires*, Article 13 aims at according a means whereby individuals may obtain relief at national level for violations of their Convention rights before having recourse – if they are of the opinion that no (satisfactory) relief has been given – to the Strasbourg Court.<sup>59</sup>

#### **IV. The supervision by the Committee of Ministers of the Council of Europe in respect of the implementation of length-of-proceedings cases<sup>60</sup>**

48. In pursuance of Article 46 § 2 of the Convention, the task of supervising the execution of the judgments issued by the Court lies with the Committee of Ministers. It has a general duty to scrutinize all measures taken by the State concerned to abide by the final judgement of the Court.

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<sup>54</sup> ECtHR, *Kudla v. Poland judgment* of 26 October 2000. The Court’s change of position must have also been inspired by concerns of judicial economy, as a “radical effort” to find an antidote to its ever-increasing backlog. See J-F Flauss, *Le droit à un recours effectif au secours de la règle du délai raisonnable: un revirement de jurisprudence historique*, in : *Revue trimestrielle des Droits de l’Homme*, 2002, pp. 179-201. See also L. Burgogue-Larsen, *De l’art de changer de cap*, in : *Libertés, justice, tolérance : mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Vol 1), Bruxelles, Bruylant, 2004, pp. 343-347 ; J. Andriansimbazovina, *Délai raisonnable du procès, recours effectif ou déni de justice ?*, in : *Revue française de droit administratif*, 2003(I), pp. 85-98.

<sup>55</sup> *Ibidem*, § 148. See also *Bottazzi v. Italy*, judgment of 28 July 1999, § 22.

<sup>56</sup> ECtHR, *Kudla v. Poland, cit.*, § 152.

<sup>57</sup> *Ibidem*, § 152.

<sup>58</sup> ECtHR 28 July 1998, *Selmouni v. France*, § 74; ECtHR *Kudla v. Poland judgment* of 26 October 2000, § 152.

<sup>59</sup> Collected Editions of the *Travaux Préparatoires*, vol. II, pp. 485 and 490, and vol. III, p. 651.

<sup>60</sup> 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.

49. Like the obligation of the States under Article 46(1) to abide by the judgments of the Court in any case to which they are parties, the power of supervision of the Committee of Ministers under Article 46(2) extends to measures pertaining to the individual case,<sup>61</sup> general measures<sup>62</sup> 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.

50. When supervising the implementation of judgments finding a breach of the reasonable time requirement, the Committee of Ministers most often requires, as an individual measure, the acceleration of the proceedings in question if these are still pending. Such speeding up, which may be seen as a form of *restitutio in integrum*, will often be the result of a judgment by the Strasbourg Court, even in the absence of a specific remedy under domestic law.

51. The Committee of Ministers insists on the fast-tracking of proceedings in particular in those cases in which the Strasbourg Court imposes a “special diligence” (see para. 31 above) or when the breach concerns the failure to enforce a domestic court’s decision or concerns the continuing breach of a substantive Convention provision (the right of property, for example).<sup>63</sup>

52. In case the proceedings complained about have ended in the meanwhile, in addition to possible damages the taking of general measures to prevent similar violations in the future with respect to the applicant and in other cases will be the main means of implementation of the Court’s judgment.

53. When a State refuses to execute a judgment of the Court, the Committee of Ministers may decide to open a procedure of monitoring in respect of that State’s commitments.

54. 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.<sup>64</sup> 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.<sup>65</sup> In particular, in 2002 the Committee of Ministers set up the European Commission for the Efficiency of Justice (CEPEJ) with the aim to address the major problems of the judicial systems of member States and define ways to improve their efficiency

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<sup>61</sup> 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.

<sup>62</sup> 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”.

<sup>63</sup> See M. Lobov, « L’exécution des arrêts relatifs à la durée excessive de procédures judiciaires : l’expérience du Comité des ministres », CDL(2006)035, p. 3.

<sup>64</sup> See document on “Compliance with member States’ commitments”, CM/Monitor (2001)14 of 15 November 2001, Part I. General comments.

<sup>65</sup> *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 their domestic law and practice, including the provision on effective remedies”.<sup>65</sup> 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).

and functioning.<sup>66</sup> In 2004, CEPEJ set out a Framework Programme entitled “A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe”,<sup>67</sup> 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. In 2006, CEPEJ decided in particular to act as a Centre for judicial time management (SATURN Centre) aimed at collecting specific information necessary to the knowledge of judicial timeframes in the member States and detailed enough to enable member states to implement policies aiming to prevent violations of the right to fair trial within a reasonable time protected by Article 6 of the European Convention on Human Rights.<sup>68</sup>

55. The ever-increasing number of applications to the European Court of Human Rights in connection with unreasonably long proceedings cast doubts as to the effectiveness of the existing national remedies. In May 2004, the Committee of Ministers adopted its Recommendation on the improvement of domestic remedies (hereinafter: “the Recommendation”).<sup>69</sup> 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”.

56. Further to this Recommendation, the Steering Committee for Human Rights (CDDH)<sup>70</sup> decided to resume the study started in 2001, on means of assisting member States in the implementation of the Convention in domestic law and practice, with the aim of producing a report on the existing national practices in the field of effective remedies.<sup>71</sup> The preparation of the report is in progress.<sup>72</sup>

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<sup>66</sup> See para. 4 above.

<sup>67</sup> See CEPEJ (2004) 19 Rev2.

<sup>68</sup> See “Terms of reference of the Working Group on evaluation of judicial systems (CEPEJ-TF-DEL)” adopted by the CEPEJ; See also “Terms of reference of the Groupe de pilotage of the SATURN Centre for judicial time management”, CEPEJ(2006)9, Appendix II.

<sup>69</sup> See footnote 7.

<sup>70</sup> Through its Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR).

<sup>71</sup> 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.

<sup>72</sup> The information transmitted by the Secretariat of the DH-PR has been used to fill in questionnaires with respect to several countries.

**V. Existing domestic remedies in respect of allegedly lengthy proceedings in the Council of Europe member States: a comparative survey**

**A. In general**

57. The right to a hearing within a reasonable time is today enshrined in the constitutions<sup>73</sup> and/or legislation<sup>74</sup> of almost all Council of Europe member States. It may also be provided for through the direct application of the European Convention on Human Rights in domestic legal systems.<sup>75</sup> However, even without specific provisions in domestic law, it is a general principle of procedure to speed up the procedures, and the activities of the courts in this respect are under the supervision of the Ministry of Justice (annual reports of the courts, periodical controls etc.).

58. In a number of countries there is no general requirement with respect to the reasonableness of the length of judicial proceedings, but provision is nonetheless made for a maximum time-limit for examining and deciding a case.<sup>76</sup>

59. Generally speaking, in the majority of the Council of Europe member States there exists a procedural venue allowing an individual to complain about the excessive length of proceedings.<sup>77</sup>

60. The remedy may be constituted by a *general action*<sup>78</sup>, in the form, for example, of an action for breach of a constitutional or conventional right, or a civil action for tort against the State.

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<sup>73</sup> Albania, Andorra, Croatia, the Czech Republic (the Charter of Fundamental Rights and Freedoms), Germany, Iceland, Italy, Malta, Poland, Portugal, Romania, Slovakia, San Marino (the Declaration of the rights of the citizens and of the fundamental principles of the San Marino legal order), Slovenia, Spain, Switzerland, Turkey (the right is provided only for persons under detention).

<sup>74</sup> Hungary, Iceland, Italy, Latvia, Lithuania, Moldova, Netherlands, Romania, Serbia and Montenegro, San Marino, Sweden, the Former Yugoslav Republic of Macedonia, United Kingdom.

<sup>75</sup> Countries recognizing the supremacy of international treaties over conflicting national law: Romania, Albania, Andorra, Armenia, Azerbaijan (although international treaties do not take precedence over conflicting constitutional provisions and acts accepted by way of referendum), Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia (although Estonia may not conclude international treaties which are in conflict with its constitution), France, Georgia (as long as the international treaties do not contradict the constitution), Greece, Moldova, the Netherlands, Poland, the Russian Federation, San Marino and the Former Yugoslav Republic of Macedonia. Countries prioritizing generally recognized principles of international law: Austria, Portugal. Constitutions of some countries provide that their national legislation shall comply with generally accepted principles of international law: Georgia, Hungary, Italy and Slovenia. The Constitution of the Swiss Confederation provides that the Confederation and the Cantons shall respect international law. The Belgian Constitution provides that federal authorities may temporarily substitute themselves for councils and communities "in order to ensure respect of international and supranational obligations". The Latvian Constitution provides that the State shall "recognize and protect fundamental human rights in accordance with the constitution, laws and international agreements binding upon Latvia".

<sup>76</sup> For example in Armenia (the Code of Civil Procedure provides for a fixed timeline for examining and making decision on cases), Azerbaijan (a fixed timeline for examination of cases is established), Georgia (the Code of Criminal Procedure provides for terms of detention on remand, the Code of Civil Procedure provides that the procedural action shall be exercised within a term established by law. In case a procedural term is not established by law, it shall be determined by a court), Norway, Ukraine (the Code of Criminal Procedure provides for terms of pre-trial investigation).

<sup>77</sup> Save for Armenia, Azerbaijan, Greece, Latvia, Romania, Turkey. The effectiveness of the existing procedural venues within the meaning of Article 13 ECHR may however be questionable.

<sup>78</sup> Albania, Luxembourg, Malta, San Marino, Spain.

61. Numerous States provide a *specific remedy* for the breach of the reasonable time requirement,<sup>79</sup> in the form for instance of a request to accelerate the proceedings in question or an action against the State for the damage caused by non-compliance with the obligation to give a decision within a reasonable delay. Some countries have established specific remedies after having been faced with the limits of the ordinary legal remedies and having been urged by the findings of the European Court of Human Rights.<sup>80</sup> Some additional countries are currently preparing legislation aimed at introducing a specific remedy or improving the existing ones.<sup>81</sup>

62. In a number of countries, both general and specific remedies are available.<sup>82</sup>

63. Remedies for excessive length, be they general or specific, are often contained in legislation<sup>83</sup>; they can be foreseen in the Constitution, when they take the form of an individual complaint before the Constitutional Court;<sup>84</sup> or they can be praetorian.<sup>85</sup>

64. The precise scope of application and the specific procedural modalities of the different remedies in question vary greatly from one country to the other. They will therefore not be dealt with in detail in this study. The analysis will be limited to a general overview of the domestic remedies currently existing in the Council of Europe member States with respect to allegations of unreasonable delay in administrative, civil and criminal proceedings,<sup>86</sup> on the basis of the information available,<sup>87</sup> with a view to identifying the main kinds of remedies available and their main features.

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<sup>79</sup> Bulgaria, Croatia, Cyprus, Estonia (only in case of delays in administrative proceedings), Finland, Georgia (a disciplinary action may be initiated in case of an unreasonable delay of examination of a case), Italy, Norway, the Former Yugoslav Republic of Macedonia.

<sup>80</sup> Croatia, the Czech republic, France (by means of case law), Italy (by means of legislation), Poland, Portugal, Slovakia, Slovenia.

<sup>81</sup> For example the Czech Republic (The draft law modifying the Law No. 82/1998 has been submitted to the Parliament. The draft law provides an adequate compensation for the applicants suffering from undue delays during the proceedings. The draft law will be applied retroactively: if the applicant has his length of proceedings case pending before the European Court, he has the possibility of asking for compensation within one year from the entry into force of the draft law), Greece (see document CM/Del/OJ/DH (2005) 922, Vol. I, p. 18), Ukraine. According to the information provided by Mr Francesco Crisafulli, Government Co-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, Italy is also working on the improvement of the existing remedies.

<sup>82</sup> Austria, Andorra, Bosnia and Herzegovina, Belgium, the Czech Republic, France (a specific remedy is provided for administrative proceedings), Ireland, Denmark, Germany (a specific remedy was developed by the case-law), Lithuania, Liechtenstein, Moldova, the Netherlands, Poland, Portugal, Russian Federation, Serbia, Montenegro (like in Serbia, the specific remedy is a measure of internal control and has an administrative character), Slovakia, Slovenia, Sweden, Switzerland, Ukraine, United Kingdom.

<sup>83</sup> Andorra, Austria, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Finland, Estonia, France, Georgia, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Norway, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, Sweden, Spain, Switzerland, the Former Yugoslav Republic of Macedonia, Ukraine.

<sup>84</sup> Albania, Andorra, Austria, Bosnia and Herzegovina, Croatia, the Czech Republic, Cyprus, Germany, Liechtenstein, Malta, Slovakia, Slovenia and Spain.

<sup>85</sup> In France, the remedy envisaged in Article L.781-1 of the Code of Judicial Organisation was considered as being effective only as a result of the developments in the national case law. In Iceland, the possibility of reducing a sentence in light of the excessive duration of the proceedings is not provided for in the General Criminal Code, but has been developed by judicial practice.

<sup>86</sup> Enforcement proceedings will not be treated.

<sup>87</sup> The Secretariat has relied on the information submitted by Venice Commission members in reply to the questionnaire (CDL(2004) 124), on the information provided by the Department for the Execution of Judgments of the European Court of Human Rights of Directorate General II of the Council of Europe, by the Registry of the European Court of Human Rights and by the Secretariat of the DH-PR, and on the information it has itself obtained from direct sources or from Permanent Representations.



65. Several kinds of categorisation of the remedies available for allegations of excessive length of proceedings are possible.

- *Preventive or acceleratory* remedies are designed to expedite the proceedings in order to prevent them from becoming excessively lengthy, while *compensatory* remedies provide the individual with redress for delays that have already occurred (regardless of whether or not the proceedings have ended).
- *Pecuniary* remedies provide a financial reparation for the damage incurred (material or non-material, or both). *Non-pecuniary* remedies provide a moral reparation (for example, the acknowledgment of the violation or the mitigation of a sentence).
- Certain remedies are *available for both pending and terminated proceedings*, and others are *only available for pending proceedings*. Indeed, when the proceedings are over, acceleratory remedies are clearly of no use, and the remedy may only consist in compensation for the damage resulting from the allegedly excessive duration of proceedings<sup>88</sup> or in a disciplinary action against the dilatory authority.<sup>89</sup>
- Certain remedies may be *applicable to any kind of proceedings (civil, administrative or criminal)*, while others are *applicable only to criminal proceedings*.

66. These categories, however, are not clear-cut. It is difficult to say, for example, whether a disciplinary action against a dilatory judge is only a preventive remedy or if it is also compensatory (as the applicant may see it).<sup>90</sup> Further, these categories often overlap with each other.

67. It should be noted indeed that in most countries different forms of redress coexist and may be applied cumulatively.<sup>91</sup>

68. For the sake of simplicity, and in the light of the practical approach which is sought, in the present study the existing national remedies will be presented according to the kind of proceedings (civil/administrative and criminal) to which they are applicable. Due to what has been explained above, some repetitions and inaccuracies will be inevitable.

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<sup>88</sup> In *Croatia* the compensation for damage resulting from excessive duration of proceedings can be claimed for pending proceedings.

<sup>89</sup> In *Bulgaria* a disciplinary action against a dilatory authority may be initiated only during pending proceedings.

<sup>90</sup> While a disciplinary sanction will only concern the personal position of the responsible judge, there being no direct and immediate consequence for the proceedings which have given rise to the complaint, 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. At the same time, the risk of an ensuing disciplinary action may have a certain (although indirect) effect of speeding-up the proceedings in question as well as a general preventive effect.

<sup>91</sup> Almost all countries providing, in case of an excessive delay, for a remedy in the form of an acknowledgment of the violation, foresee this as a general form of redress for all types of proceedings. Both acceleratory and compensatory remedies are always preceded by an ascertainment that the reasonable time requirement has been violated.

## B. State of Art

### 1. Remedies available for civil/administrative proceedings

69. In most of the Council of Europe member States, preventive remedies are available for administrative and civil proceedings in the form of the possibility for the party/ies to lodge a *request for the acceleration of the proceedings*.

70. Such requests for acceleration may be lodged:

- With a superior authority/court, either directly<sup>92</sup> or through the court dealing with the proceedings. In the latter case the court concerned will transmit it to the competent court/authority;<sup>93</sup> or
- with the dilatory court.<sup>94</sup>

71. The measures taken in response to the above requests may consist in:

- a) fixing an appropriate time-limit for the relevant authority to
  - i. take 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),<sup>95</sup> or/and
  - ii. decide on the merits of the case or terminate the proceedings,<sup>96</sup> or
- b) transferring jurisdiction to a different court or a superior authority.<sup>97</sup>

72. In most countries, acceleratory remedies co-exist with compensatory ones.<sup>98</sup> In a few countries, however, pecuniary compensation for damage remains - thus far - the *only* possible remedy an applicant can claim in respect of delay of proceedings.<sup>99</sup>

73. Compensation can be sought:

- a) from the same authority which decides on the reasonableness of the length of the proceedings,<sup>100</sup>

<sup>92</sup> Bulgaria, Estonia, Switzerland.

<sup>93</sup> Austria (if the dilatory court takes all the procedural steps specified in the request within four weeks of receipt, and informs the party concerned, the request is deemed withdrawn unless the party declares within two weeks after service of the notification that it wishes to maintain its request), the Czech Republic, Poland, Slovenia (a motion for deadline).

<sup>94</sup> Denmark, Lithuania, Netherlands, Norway, Slovenia (a supervisory appeal), Spain, Serbia and Montenegro.

<sup>95</sup> Austria, Cyprus, the Czech Republic, Denmark, Estonia (administrative proceedings), Lithuania, Malta, Poland, Slovakia, Slovenia.

<sup>96</sup> Austria, Bosnia and Herzegovina, Croatia, Cyprus, Slovakia.

<sup>97</sup> This possibility exists in Austria, where a party to administrative proceedings may request that the case be remitted to a superior authority, in the last resort to the Administrative Court, 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.

<sup>98</sup> Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France (acceleratory remedies are available for administrative proceedings), Germany, Hungary, Ireland, Liechtenstein, Lithuania, Netherlands (to a limited extent only), Poland, Portugal (acceleratory measures are used only in criminal proceedings), Serbia, Montenegro, Slovakia, Slovenia, Spain.

<sup>99</sup> Italy.

b) or in separate proceedings.<sup>101</sup>

74. Reparation may be granted on account of:

- a fault of a judge or another officer of the court,<sup>102</sup>
- the heavy workload of the tribunals,<sup>103</sup>
- 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,<sup>104</sup>
- an unlawful act or omission committed in the course of proceedings,<sup>105</sup>

or, more in general, on account of:

- a malfunctioning of justice or denial of justice,<sup>106</sup> or
- a violation of the right to a hearing within a reasonable time.<sup>107</sup>

75. 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.<sup>108</sup>

76. As regards the *kind of compensation*, it may take different forms: pecuniary compensation (of material or non-material damage or both); assumption of a decision in the applicant’s favour; disciplinary sanction to the dilatory judge; exemption from legal costs;<sup>109</sup> lowering of an administrative sanction.<sup>110</sup>

77. As for pecuniary compensation, in a number of States, it is only awarded for *non-material* damage, in particular in cases where the proceedings are still pending.<sup>111</sup>

78. 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

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<sup>100</sup> Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Italy, Malta, Netherlands (in administrative proceedings where a punitive sanction is at issue; there the sanction may be lowered as a means of compensation); Poland, Slovakia,

<sup>101</sup> Netherlands (tort action); Poland, Spain (the compensation claim may be lodged with the Ministry of Justice after the termination of the main proceedings).

<sup>102</sup> Lithuania, Netherlands.

<sup>103</sup> Belgium.

<sup>104</sup> The Czech Republic and Slovakia.

<sup>105</sup> Netherlands, Poland, Portugal, Sweden.

<sup>106</sup> France, Spain.

<sup>107</sup> Croatia, Italy, Lithuania, Switzerland.

<sup>108</sup> Belgium, The Czech Republic, France, Portugal, Poland, Sweden.

<sup>109</sup> Denmark. In Iceland, an award to legal costs to the other party may be ruled, if the unnecessary delay has been caused by that party intentionally or by negligence.

<sup>110</sup> Netherlands.

<sup>111</sup> In Croatia, Poland and Slovakia. When proceedings are terminated and it can be established that the applicant has been delayed in the enjoyment of certain rights, pecuniary damages may be also given in France, Italy, Poland.

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.<sup>112</sup> In fact, only a few replies to the questionnaire specifically indicate that in determining the amount of compensation, the competent authority refers to/relies on the amounts of pecuniary compensation granted by the Court.<sup>113</sup>

79. In certain countries, in relation to administrative proceedings, in the event that a public authority fails to take a decision within the prescribed time-limit, it shall be deemed to have made a decision to the applicant's favour.<sup>114</sup>

80. Finally, the possibility for a party in judicial proceedings to bring a disciplinary action against a dilatory authority is mentioned by a number of States as a remedy in respect of excessive delays in the proceedings.<sup>115</sup>

## 2. Remedies available for criminal proceedings

81. In most cases, the above-mentioned remedies described for civil and administrative proceedings are not exclusive of these jurisdictions, but may also be applicable in criminal proceedings<sup>116</sup>. Therefore, general constitutional or legal actions aiming at the acceleration of the proceedings, the reparation of damages or a disciplinary action against the judge may also derive from an alleged breach of the reasonable length of proceedings in a criminal case.<sup>117</sup>

82. As for preventive remedies, a characteristic of criminal proceedings is that, in general, the trial phase is preceded by an investigative phase. Depending on the different systems, the investigation might be entrusted to a court or body<sup>118</sup> other than the one which must decide on the merits of the case. In this sense, some countries provide for specific preventive remedies which aim at speeding up investigative or pre-trial proceedings by allowing for complaints or requests for acceleration to be lodged with the superior prosecuting or judicial authority.<sup>119</sup>

83. Measures taken in response to the above mentioned requests range from a dismissal of the application if the delays are unjustifiable, an investigation into the causes of the alleged delays or a request for follow-up reports, to the fixing of a time-limit to conclude the investigative phase, hierarchical instructions between Prosecutors including on how to handle the case, or

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<sup>112</sup> ECtHR, *Scordino v. Italy* judgment, cit.

<sup>113</sup> Denmark, Lithuania, Poland, Slovakia. In Italy, the level of compensation granted by the national courts for breaches of the reasonable time requirement was problematic to the extent that it was not sufficiently related to that granted by the European Court. (see the Pinto law).

<sup>114</sup> Belgium, Italy, Sweden.

<sup>115</sup> Bosnia and Herzegovina, Bulgaria, Finland, Georgia, Italy, Lithuania, Portugal, Russian Federation, Serbia and Montenegro, Slovakia, Sweden, the Former Yugoslav Republic of Macedonia and Ukraine.

<sup>116</sup> Unless it results otherwise from the specific scope or nature of the concrete remedy, for example the effect of positive silence is exclusive to administrative proceedings.

<sup>117</sup> Therefore the fact that specific information regarding criminal proceedings was only provided for 13 countries - Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Netherlands, Portugal, Sweden, Switzerland and the United Kingdom - does not imply that generic remedies are not applicable in such cases. For example, in late 2005 the Swedish Supreme Court ruled that pecuniary and non-pecuniary damages are available in unduly prolonged criminal cases.

<sup>118</sup> For example investigative judges, prosecution services, police.

<sup>119</sup> For example Belgium (where the request can be lodged not only by the defendant but also by the Attorney General), Bulgaria, Denmark and Portugal (where any party can request that the proceedings before the Prosecution Services or those taking place in a court or before a judge be expedited when the time-limits provided by law for any procedural step are exceeded).

the adoption of disciplinary measures.<sup>120</sup> Specific preventive remedies related to the trial phase appear to be less common.<sup>121</sup>

84. As to compensatory remedies, in criminal proceedings there is a specific form of redress by means of which the excessive delays incurred during the proceedings are taken into account, ex officio or at the request of a party, in the assessment of the appropriate punishment. In some countries this remedy has been incorporated into legislation<sup>122</sup> whereas in others it appears to have been set out or developed through case-law.<sup>123</sup>

85. A remedy of this kind is always of a compensatory character, for its effects necessarily derive from the acknowledgement that a delay has already occurred, even if in some countries such effects can be anticipated by discontinuing the proceedings on the grounds of delays before the case is brought to the court that decides on its merits.<sup>124</sup>

86. In the majority of cases, however, the court will consider the issue of the length of proceedings together with the decision on the merits. If a violation of the reasonable time requirement is found to have occurred, the court may decide to give redress, namely by means of:

- a reduction or mitigation of the sentence,<sup>125</sup>
- a mere declaration of guilt,<sup>126</sup>
- an acquittal;<sup>127</sup> or
- a decision to stay the prosecution or discontinue the proceedings.<sup>128</sup>

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<sup>120</sup> Disciplinary measures have been referred to in this context as preventive remedies, whereas they may also be considered to be compensatory.

<sup>121</sup> Only Denmark has referred to the possibility of asking the court dealing with the case to schedule it for trial. Belgium expressly refers to the lack of such a legal speeding mechanism.

<sup>122</sup> For example Belgium, (Article 21ter Preliminary Title of the Criminal Procedure Code), Finland (Criminal Code Chapter 6, Article 7), or Sweden (Chapter 29 Section 5 and Chapter 30 section 4 of the Penal Code) According to the latter, "Courts in criminal cases shall both in their choice of sanction and in their determination of the appropriate punishment, take into account whether an unnaturally long time has elapsed since the commission of the offence".

<sup>123</sup> For example, the Estonian Supreme Court or the German Constitutional Court. In the Netherlands, the Supreme Court has developed general guidelines for criminal cases in this respect. In Switzerland the Federal Court has determined the possible consequences of a breach in the reasonable length of proceedings in criminal matters, and specified that the judge must explicitly mention the violation of this principle in his judgment and state what account was taken of it.

<sup>124</sup> For example Belgium, where this decision can be taken by the "Chambre du Conseil" or the "Chambre de Mises en Accusation" before the investigate phase is concluded and the case is passed on to the Court that shall take a decision on the merits. Specific mention must be made to the Statutory rules in England and Scotland which impose time-limits on the institution of proceedings, particularly when individuals charged with crimes are held in custody, and may lead to the barring of prosecution or the discontinuance of proceedings. Notwithstanding their effectiveness, such rules seem more related to the question of statute of limitations and the expiry of overall or specific procedural time-limits (for example, for remand on custody or commencement of the trial) than to the issue of the reasonable length of proceedings. The same comment applies to Switzerland, where the "violation of the "reasonable time" principle may give rise to the release of the defendant when the time-limit for legal action has run out".

<sup>125</sup> This appears to be the most common effect. See for example Denmark, Estonia, Finland, Germany, Iceland, the Netherlands or the United Kingdom. Belgian law specifies what the reduction of sentence will consist of: a penalty lower than the minimum set by the law will be imposed.

<sup>126</sup> For example Belgium, Denmark (where penalties imposed might be suspended), or Switzerland (where exemption from punishment may be granted even if the defendant is found guilty).

<sup>127</sup> Case-law seems to favour a restrictive interpretation in the sense that acquittal does not automatically derive from the acknowledgement of a delay in criminal proceedings (see for example Estonia and Finland).

<sup>128</sup> These remedies are only used "in exceptional cases" (Netherlands, Switzerland, Germany). In the United Kingdom it is usually necessary for the prosecutor to have been at fault in causing the delay and, even then, the trial will be stayed only if the defendant can show that because of the delay a fair trial will not be possible and that he will therefore be prejudiced. The trial would not be stayed if the effects of unfairness could be dealt with in the course of

87. Finally, this remedy of individual redress may also be applied in administrative proceedings where a punitive sanction is at stake so that the recognition of an excessive duration of proceedings may result in its mitigation.<sup>129</sup>

## VI. The assessment of the existing national remedies by the European Court of Human Rights

### A. In general

88. Since the requirement of Article 13 constitutes an obligation of result, the Contracting States have some discretion as to *the manner in which they provide the relief* required<sup>130</sup>. “Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment”.

89. Until recently, the Court, respecting the margin of appreciation given to the Contracting States, refrained from indicating 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 nevertheless assessed the remedies available in the Contracting States in the light of the generally established “effectiveness” criteria.<sup>131</sup>

90. It should be noted in this respect that, although States often refer to particular types of domestic remedies as being available for allegations of the excessive length of proceedings, according to the Court’s assessments a significant number of these remedies can not be considered as effective in practice.

91. The Court has recently adopted a more directive approach to what remedy is to be considered as effective within the meaning of Article 13 of the Convention. Indeed, it has given explicit indications as to the characteristics which an effective domestic remedy in length-of-proceedings cases should have.<sup>132</sup>

92. In addition, the Court is increasingly assessing the States’ obligations under Article 46 of the Convention. In doing so, it examines draft legislation or intended measures and states whether it finds that these represent “reassuring improvements”,<sup>133</sup> failing which it could “indicate [...] general measures at national level that could be called for in the execution of [...] a judgment.”<sup>134</sup>

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the trial. Similarly, in Belgium to take this decision (which seems to entail the impossibility to rule on the civil action) the delay must have affected the administration of evidence or the defence rights.

<sup>129</sup> For example Austria, the Netherlands.

<sup>130</sup> See for example, *Kaya v. Turkey*, judgment of 19/02/1998, ECHR 1998-I, § 106, *Chahal v. the UK*, *cit.*, §145.

<sup>131</sup> The present chapter does not include the Court’s relevant case-law with respect to all member States. In order to provide a general overview of the effectiveness of particular types of existing domestic remedies, it merely invokes several country examples with pertinent illustrations of assessments made by the Court. 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).

<sup>132</sup> ECtHR, *Scordino v. Italy* judgment, *cit.*, § 183.

<sup>133</sup> ECtHR, *Lukenda v. Slovenia* judgment, *cit.*, § 98.

<sup>134</sup> ECtHR, *Sürmeli v. Germany* judgment, *cit.* § 139.

93. The Court has expressly encouraged certain respondent States to proceed speedily with a prospected legislative initiative,<sup>135</sup> or to amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right, following the indications as to the characteristics of an effective remedy given by the Court itself in the judgments.<sup>136</sup>

B. Remedies available for civil/administrative proceedings

a) Remedies found to be effective :

i. Austria

94. The Austrian legal system provides for several acceleratory remedies. In this respect, the Court held that the transfer of jurisdiction to the superior authority in case of a delay by the competent authority in making a decision (as provided for in Section 73 of the General Administrative Procedure Act) constituted an effective remedy to be used for the alleged breach of a reasonable time requirement with respect to administrative proceedings,<sup>137</sup> although not in every case.<sup>138</sup>

95. In the case of *Holzinger v. Austria*, the Court found that a request for the superior court to impose an appropriate time-limit for the competent court to take particular procedural steps (under Section 91 of the Austrian Courts Act) could, in principle, constitute an effective and sufficient remedy which had to be used in respect of complaints about the length of court proceedings.<sup>139</sup>

ii. France

96. The Court found, in the case of *Giummarra and others v. France*, that national case law indicated the existence of an adequate remedy in respect of completed civil proceedings. Thus Article L.781-1 of the Code of Judicial Organisation as interpreted in the case-law was considered an effective remedy for the purposes of Article 35 § 1.<sup>140</sup>

iii. Italy

97. In its decision *Brusco v. Italy*,<sup>141</sup> the Court considered that the remedy provided by the "Pinto Act", which had been introduced in Italy to provide a remedy for the excessive length of proceedings following numerous findings by the ECtHR of breaches (and even a pattern) of Article 6 § 1 of the Convention, was an effective remedy for the purposes of Articles 13 and 35.

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<sup>135</sup> ECtHR, *Sürmeli v. Germany*, cit., § 139.

<sup>136</sup> ECtHR, *Lukenda*, cit. § 98.

<sup>137</sup> *Egger v. Austria* (dec.), no. 74159/01, 9 October 2003.

<sup>138</sup> *Kern v. Austria*, judgment of 24/02/2005.

<sup>139</sup> *Holzinger v. Austria* judgment of 30/01/2001, §§ 24-25. On the same date, the Court held in *Holzinger v. Austria* (No. 2), that this remedy was not effective where there was already a substantial delay by the time the legislation took effect.

<sup>140</sup> *Giummarra v. France*, decision of 12/06/2001; *Broca Texier-Micault v. France* judgment of 21 October 2003 (with respect to administrative proceedings).

<sup>141</sup> ECtHR, *Brusco v. Italy*, decision of 6/09/2001.

98. The level of damages awarded by the Italian courts proved however, in some later cases, to be inadequate, which led the Court to consider this remedy as ineffective.<sup>142</sup> This problem was corrected by the Italian Court of Cassation in a judgment of January 2004, as noted by the Court in its *Di Sante v. Italy* decision.<sup>143</sup>

99. The Grand Chamber delivered nine judgments against Italy concerning the effectiveness of the Pinto Law.<sup>144</sup> The Court (in particular in the pilot judgment of *Scordino*) outlined the principles which it intended to apply in assessing the effectiveness of domestic remedies. The Court found that the proceedings under the Pinto law were not entirely sufficient and therefore did not deprive the applicants of their victim status for the purpose of bringing a case to Strasbourg.

100. The victim status of the applicants was based principally on the manifestly unreasonable nature of the amounts awarded by the Italian authorities (including sums as low as 8% of what the Court itself would have awarded). In addition, in all these cases, save for *Scordino*, the Court found it unacceptable that the applicants had waited more than six months to receive the compensation awarded by the national courts.

#### iv. Poland

101. The Court considered a number of cases concerning the effectiveness of the Polish Law of 17 June 2004 ("the 2004 Act", according to which, if the superior court finds a violation of Article 6 of the Convention, it instructs the lower court to take measures to accelerate the proceedings and/or awards the complainant compensation), which Poland introduced as a remedy for excessive length of proceedings cases in response to judgments of the ECtHR. In the leading decisions of *Michalak v. Poland*<sup>145</sup> and *Charzynski v. Poland*,<sup>146</sup> the Court held that the applicants were required to exhaust this remedy before bringing their case to Strasbourg. This applied even to applications registered with the Court before the entry into force of the 2004 Act, given that the latter explicitly allowed complaints to be lodged by those who had already brought a case to Strasbourg, provided that the Court had not already adopted a decision on the admissibility of the case. The Court further stated that the 2004 Act was capable of preventing alleged violations of the right to a hearing within a reasonable time and of providing adequate redress for any violation that had already occurred.

#### v. Portugal

102. In its decision in the case of *Paulino Tomás v. Portugal*,<sup>147</sup> the Court ruled that an action in tort against the State for excessive length of civil proceedings, based on Legislative Decree 48051 of 21 November 1967, could be said to constitute an effective remedy within the meaning of Article 35 of the Convention only after the publication of the judgment in the *Pires Nino* case in which the administrative court held that the excessive length of proceedings could constitute grounds for State responsibility.

<sup>142</sup> ECtHR, *Scordino and ors. (no. 1) v. Italy*, decision of 27/03/2003.

<sup>143</sup> ECtHR, *Di Sante v. Italy* decision of 24/06/2004. The Court took the view that this new development in national law became widely known to the public should by 26 July 2004: applications lodged after this date would therefore be barred for non-exhaustion of domestic remedies.

<sup>144</sup> ECtHR, *Scordino v. Italy*, cit., *Cocchiarella v. Italy* judgment, cit.; *Riccardi Pizzati v. Italy* judgment, cit.; *Musci v. Italy* judgment; *Giuseppe Mustacciuolo v. Italy (no. 1)* judgment, cit.; *Procaccini v. Italy* judgment, cit.; *Zullo Ernestina v. Italy* judgment, cit.; *Apicella v. Italy* judgment, cit.; *Giuseppe Mustacciuolo v. Italy (no. 2)* judgment, cit..

<sup>145</sup> ECtHR, *Michalak v. Poland*, decision of 1/03/2005.

<sup>146</sup> ECtHR, *Charzynski v. Poland*, decision of 1 /03/2005.

<sup>147</sup> ECtHR, *Tomás v. Portugal*, no. 58698/00, decision of 27/03/2003.



b) Remedies found to be non effective

i. Bulgaria

103. The Court considered that a complaint based on the direct applicability of the Convention in Bulgarian law was not an effective remedy within the meaning of Article 13 of the Convention.<sup>148</sup> A remedy a “complaint about delays” was introduced in July 1999 with the adoption of new Article 217a of the Code of Civil Procedure of Bulgaria, according to which a litigant is entitled to apply to the chairperson of the higher court when the examination of the case, the delivery of judgment or the transmitting of an appeal against the judgment has been unduly delayed, and the chairperson has the power to issue binding instructions to the court examining the case. In a recent case, the Court found that this remedy might be considered *prima facie* effective, although in the present case it had not proved so. The Court stressed however the absence in Bulgarian law of any possibility of seeking pecuniary compensation for the excessive length.)<sup>149</sup>

104. As regards the possibility to make informal complaints to the Supreme Administrative Court and to the Ministry of Justice, the Court held that these could not be described as a remedy. “The possibility to appeal to various authorities in the absence of a specific procedure cannot be regarded as an effective remedy, because such appeals aim to urge the authorities to utilise their discretion and do not give litigants a personal right to compel the State to exercise its supervisory powers”.<sup>150</sup>

ii. The Czech Republic

105. The Court assessed the effectiveness of a constitutional appeal, as well as of an action for damages against the State under Law no. 82/1998. According to the Czech legislation, the Constitutional Court, in case of finding that proceedings which have led to a constitutional appeal have been held up by delays imputable to a particular court, can order the latter to put an end to the delays and continue the proceedings. In the Court’s view, while such an order may speed up the proceedings in question if it is acted upon immediately, the Czech legislation does not envisage any sanction for failure to comply, thus depriving the Constitutional Court of the possibility to take practical steps to expedite the proceedings. Neither can the Constitutional Court award any compensation for delays that have already occurred.

106. As for the possibility of bringing an action for damages against the State under Law no. 82/1998, the applicant can not be awarded compensation for non-pecuniary damage. Therefore it can not provide adequate redress for violation.<sup>151</sup>

107. Neither can appeals to a higher authority be regarded as an effective remedy since they do not give litigants a personal right to compel the State to exercise its supervisory powers.<sup>152</sup>

108. The remedies provided for in the Czech legislation are therefore assessed by the Court as being non-effective, since they do not make it possible to compel the court to expedite proceedings or to provide compensations for damages.<sup>153</sup>

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<sup>148</sup> ECtHR, *Rachevi v. Bulgaria*, judgment of 23/12/2004, § 100.

<sup>149</sup> ECtHR, *Stefanova v. Bulgaria*, judgment of 11 January 2007, §§ 64-74.

<sup>150</sup> ECtHR, *Dimitrov v. Bulgaria*, judgment of 23/09/2006, § 80.

<sup>151</sup> ECtHR, *Hartman v. the Czech Republic*, judgment of 03/12/2003, §§ 67-68.

<sup>152</sup> *Idem.* § 66.

<sup>153</sup> *Idem.* §§ 81-84. *Bartl v. the Czech Republic*, judgment of 22/06/2004, *Idem.* § 58, *Konečný v. the Czech Republic*, judgment of 26/10/2004, § 85.

iii. Germany

109. In a recent case, the Court examined the effectiveness of four remedies which existed in German law against the undue length of civil proceedings. In respect of the constitutional complaint, the Court observed that the right to expeditious proceedings was guaranteed by the German Basic Law and that a violation of that right could be alleged before the Federal Constitutional Court. Where that court found that proceedings had taken an excessive time, it declared their length unconstitutional and requested the court concerned to expedite or conclude them. However, the Federal Court was not empowered to set deadlines for the lower court or to order other measures to speed up the proceedings in issue; nor was it able to award compensation. Under these circumstances, the Court found that a constitutional complaint had not been proved to be capable of affording redress for the excessive length of pending civil proceedings.

110. As regards an appeal to a higher authority, the Court noted that the Government had not advanced any relevant reasons to warrant the conclusion that that remedy, provided for in the German Judiciary Act, would have been capable of expediting the proceedings in question.

111. As regards a special complaint alleging inaction, this remedy had no statutory basis in German law. Although a considerable number of courts of appeal had accepted it in principle, the admissibility criteria for it were variable and depended on the circumstances of the case. The Federal Court of Justice, for its part, had yet to give a ruling on the admissibility of such a remedy. Having regard to the uncertainty about the admissibility criteria for this remedy and to its practical effect on the proceedings in question, the Court considered that no particular relevance should be attached to the fact that the Court of Appeal had not ruled out such a remedy in principle. Moreover, the Federal Constitutional Court had not declared the applicant's constitutional complaints inadmissible for failure to exhaust domestic remedies. Accordingly, the Court concluded that a special complaint alleging inaction could not be regarded as an effective remedy in the applicant's case.

112. Finally, as concerns an action for damages, the Court noted that a single judicial decision, such as the one relied upon by the Government, was not a sufficient indication that there had been an effective remedy available in theory and in practice. In any event, the Court noted that even if the courts before which an action for damages was brought were to conclude that there had been a breach of judicial duties on account of excessively lengthy proceedings, they would not be able to make an award in respect of non-pecuniary damage, whereas in cases concerning the length of civil proceedings the applicants above all sustained damage under that head. The Court therefore considered that none of the four remedies advocated by the Government could be considered effective within the meaning of Article 13. Nor could the aggregate of these remedies be so considered.

iv. Russia

113. In *Kormacheva v. Russia*, the Court determined that the recourse to the higher judicial and other authorities could not be regarded as effective remedy since it could neither expedite the determination of the case nor provide the applicant for the adequate redress for delays already occurred. In the Court's view, the disciplinary action concerned the personal position of the responsible judges, but did not result in any direct and immediate consequence for the proceedings. The Court therefore concluded that the applicant had no domestic remedy whereby she could enforce her right to a "hearing within a reasonable time" as guaranteed by Article 6 § 1 of the Convention.<sup>154</sup>

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<sup>154</sup> ECtHR, *Kormacheva v. Russia*, judgment of 14/07/2004, §§ 61-64.

v. Slovenia

114. The Slovenian legal system sets out a number of remedies that may be used in respect of delays in court proceedings. In *Lukenda v. Slovenia* the Court had to determine whether an administrative action,<sup>155</sup> a claim for damages in civil proceedings, a request for supervision and a constitutional appeal, taken individually or in aggregate, could be considered effective legal remedies within the meaning of Article 35 of the Convention.

115. According to the Court, the Government failed to show clearly that the judgments and decisions of the administrative courts could speed up unduly protracted proceedings or award reparation for violations that had already occurred. The absence of specific measures (i.e. to decide a case or take specific procedural measures within a fixed time-limit) to expedite the procedures was also stressed by the Court in *Belinger v. Slovenia*.<sup>156</sup>

116. As for the claim for tort the Court considered that it could only provide redress when the main proceedings had already been ended. Even in this cases the Government failed to show that compensation for non-pecuniary damage could be awarded.

117. As regards the remedy under section 72 of the Judicature Act, the Court held that the request for supervision was a measure in the framework of judicial administration and not within the judicial system.<sup>157</sup> The remedy did not provide for a guarantee to accelerate procedures, or provide redress in the form of compensation. At the same time the measure did not have any legally binding effect on the court concerned.<sup>158</sup> Moreover no right of appeal was provided by the legislation.

118. Finally, in respect of the constitutional complaint the Court stressed that a constitutional appeal, in principle, could only be lodged after domestic remedies (an administrative action or a claim for tort) had been exhausted. In the *Belinger* case the Court found that the efficiency of the constitutional appeal was already problematic in view of the probable length of the combined proceedings. The opinion was confirmed in *Lukenda v. Slovenia*.

C. Remedies available for criminal proceedings

a) Remedies found to be effective

i. Austria

119. The remedy mentioned in paragraph 95 above are applicable also to criminal proceedings.

ii. Denmark

120. In *Ohlen v. Denmark*,<sup>159</sup> the Court found that the redress afforded at domestic level (reduction of sentence) for the violation of the applicant's right to trial within reasonable time was adequate and sufficient.

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<sup>155</sup> However in *Sirc v. Slovenia* case (decision of 16/05/2002) where the court dealt with the length of proceedings before administrative organs, the Court found that in the event of lack of reply from the administrative authority, the applicant can and should seek a decision directly from the Administrative Court. This remedy was therefore found effective for proceedings before administrative authorities.

<sup>156</sup> ECtHR, *Belinger v. Slovenia*, decision of 2/10/2001.

<sup>157</sup> *Idem*.

<sup>158</sup> *Idem*.

<sup>159</sup> ECtHR, *Ohlen v. Denmark*, judgment of 24/05/2005.

ii. Germany

121. The mechanism established in the German case-law, whereby redress is given by taking the breach of the reasonable time requirement into account when determining the sentence, was considered as being “capable of proving suitable”. However, the Court also noted that the national jurisdiction must clearly acknowledge that a specific measure of redress that has been taken, is directly linked with the over-stepping of the “reasonable time” in the meaning of Article 6 § 1 of the Convention.<sup>160</sup>

iii. Norway

122. The Court held that “the mitigation of a sentence on the ground of the excessive length of proceedings does not in principle deprive the individual concerned of his status as a victim within the meaning of Article 34 of the Convention. However this general rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and measurable manner”.<sup>161</sup> Thus, the delay element being a direct factor for making a decision on mitigation of the sentence, the Court considered the remedy to be effective.

iv. Portugal

123. In its judgment *Tomé Mota v. Portugal*<sup>162</sup> the Court held that an interlocutory application by which the Judicial Service Commission or the Attorney-General is requested to fix a time-limit for taking a procedural measure which the competent court or public prosecutor have failed to take, as envisaged in Articles 108 and 109 of the Portuguese Code of Criminal procedure, constituted an effective remedy to be exhausted by an applicant.

b) Remedies found to be non effective

i. Bulgaria

124. After having examined the effectiveness of the remedies in respect of the unreasonable length of criminal proceedings in Bulgaria,<sup>163</sup> the Court concluded that the possibility of an appeal to the various levels of the prosecution authorities (such as the District Prosecutor’s Office, the Regional Prosecutor’s Office, or the Chief Prosecutor’s Office) could not be regarded as an effective remedy since such hierarchical appeals aimed to urge the authorities to utilise their discretion and do not give litigants a personal right to compel the State to exercise its supervisory powers.

ii. Finland

125. In *Kangasluoma v. Finland*<sup>164</sup> the Court had to determine whether the remedies set in the Finnish legislation could meet the “effectiveness” criteria. The Court found that the remedies referred to by the government such as a complaint to the Chancellor of Justice or the Parliamentary Ombudsman, as well as submission of a request to accelerate

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<sup>160</sup> ECtHR, *Eckle v. Germany*, judgment of 15/07/1982, § 94.

<sup>161</sup> ECtHR, *Beck v. Norway*, judgment of 26/09/2001.

<sup>162</sup> ECtHR, *Tomé Mota v. Portugal*, decision of 2/12/1999.

<sup>163</sup> ECtHR, *Djangozov v. Bulgaria*, judgment of 8/07/2004.

<sup>164</sup> ECtHR, *Kangasluoma v. Finland*, judgment of 14 /06/2004.

proceedings to the court considering the case could not be regarded as being effective both in law and in practice. As for a possibility of an action in tort, it could not be considered as effective within the meaning of Article 13, since a mere delay, where no erroneous or negligent act had been committed and where the delay had not resulted in any damage, was not as such a ground for compensation.

iii. Ireland

126. In its judgment *Barry v. Ireland*<sup>165</sup> the Court held that the judicial review proceedings were not capable of expediting the decision by the criminal courts. The aim of the judicial review proceedings was to stay future criminal proceedings, not to expedite them. Moreover the judicial review proceedings themselves were not sufficiently swift to be preventative of future delay.<sup>166</sup> They were neither capable of providing adequate redress for delays that had already occurred.

127. Furthermore according to the Court “the judgment of the Supreme Court made clear that, in determining the applicant’s judicial review proceedings (based on, inter alia, delay), the domestic courts would not take into account delays caused by any national authorities other than the D.P.P. Given that the judicial authorities (both the judiciary and the authorities responsible for listing cases) were responsible for a considerable part of the delay in this case, this is a further reason for concluding that the remedy of judicial review cannot be considered an effective one.”<sup>167</sup>

iv. Ukraine

128. The Court surveyed the existing remedies available in the Ukrainian legal system and found there were no effective and accessible remedies which could be used to obtain redress for the excessive length of the criminal proceedings.<sup>168</sup>

129. In respect of the possibility to file complaints with the superior prosecutor provided by the Ukrainian legislation, the Court observed that the latter could not be considered effective and accessible since the status of the prosecutor in the domestic law and his participation in the criminal proceedings against the applicant did not offer adequate safeguards for an independent and impartial review of the applicant’s complaints.

130. The Court noted that, although since the amendment of 21 June 2001 (with effect as from 29 June 2001), Article 234 of the Code of Criminal Procedure of Ukraine provided for the possibility to complain to the courts about the resolutions of an investigating officer/prosecutor in the course of the administrative hearing or in the course of the consideration of the case on the merits, this remedy did not satisfy the criteria of accessibility, as it suggested that complaints against the length of the investigation of the case could be made after the investigation had finished, but left no possibility of appeal in the course of the investigation. As to the amendments to Article 234 of the Code of Criminal procedure, allowing for complaints to be lodged in the course of the investigation, the Court held that the Government failed to show what its practical implications were. The law did not specifically state whether Article 234 was a remedy for the length of proceedings in a

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<sup>165</sup> ECtHR, *Barry v. Ireland*, judgment of 15/03/2006.

<sup>166</sup> ECtHR, *Doran v. Ireland*, judgment of 31/10/2003, §§ 57 and 65.

<sup>167</sup> ECtHR, *Barry v. Ireland, cit.*, § 55.

<sup>168</sup> ECtHR, *Merit v. Ukraine*, judgment of 30 October 2004.

criminal case and what kind of redress could be provided to an applicant in the event of a finding that the length of the investigation breached the requirement of “reasonableness”.<sup>169</sup>

## VII. The requirements of Article 13 of the Convention in respect of unreasonably lengthy proceedings according to the case-law of the European Court of Human Rights

131. The Strasbourg Court, in assessing the effectiveness of various domestic remedies in respect of the excessive length of proceedings, has elaborated several criteria and principles. Recently, the Court has even given certain explicit indications as to the characteristics which an effective domestic remedy in length-of-proceedings cases should have. It did so “in so far as the parties appear to link the issue of victim status to the more general question of effectiveness of the remedy and seek guidelines on affording the most effective domestic remedies possible”.<sup>170</sup>

132. The Venice Commission welcomes the Court’s willingness to provide such explicit indications. It recalls that, in its opinion on the implementation of judgments of the European Court of Human Rights, it had expressed the view that it would be appropriate for the Court “to address the question of whether and to what extent concrete reparation is possible, prior to examining whether and to what extent it is appropriate to award, instead or in addition, just satisfaction.” And that “the Court would need to give indications as to what would constitute adequate reparation in the type of case under consideration, in order to express its view as to whether such reparation would be possible, wholly or in part, under the applicable national legislation.”<sup>171</sup>

133. Guidance by the Court will certainly assist States in providing for an “incontestably” effective remedy in their domestic legal system.<sup>172</sup>

134. Below is an outline of the principles which can be derived to-date from the case-law of the Strasbourg Court.

### A. As regards the kind of remedy

135. As was previously underlined, in terms of the Court’s case-law, it is an *obligation of result* that is required by Article 13. Even when none of the remedies available to an individual, taken alone, would satisfy the requirements of Article 13, the *aggregate of remedies* provided for under domestic law may be considered as “effective” in terms of this article.<sup>173</sup>

136. The Court has indicated in the first place that “the best solution [to the problem of excessive length of proceedings] in absolute terms is indisputably, as in many spheres, prevention.”<sup>174</sup>

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<sup>169</sup> *Idem*, § 65.

<sup>170</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 182.

<sup>171</sup> CDL-AD(2002)34, §§ 64-71.

<sup>172</sup> ECtHR, *Cocchiarella v. Italy* judgment [GC] of 29 March 2006, § 60.

<sup>173</sup> See para. 9 above.

<sup>174</sup> ECtHR, *Scordino v. Italy* judgment, cit., §183; *Sürmeli v. Germany* judgment, cit., § 100.

137. Where the judicial system of a State is deficient in terms of ensuring compliance with the reasonable time requirement, “a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation, since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy [...]”<sup>175</sup>

138. While stating expressly that such acceleratory remedy would be “the most effective solution”, the Court has refrained from indicating that the provision of such a remedy is *required* by Article 13 of the Convention. This reluctance is, no doubt, in conformity with the general principles of international law and motivated by the need to afford the Contracting States a certain discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their Convention obligation under that provision.<sup>176</sup>

139. The Court does, however, express a clear preference for an acceleratory remedy over a mere compensatory remedy, at least within legal systems which have consistently proven unable to secure the right to a trial within a reasonable time. In this respect, it may be taken that the Court’s position has somewhat shifted from that previously expressed<sup>177</sup> that Article 13 offers an alternative between a remedy which can be used to expedite a decision by the courts dealing with the case, and a remedy which can provide the litigant with adequate redress for delays that have already occurred. The latter, in fact, only offer an *a posteriori* remedy and are unable to prevent successive violations.

140. The same preference for an acceleratory remedy has been expressed by the United Nations Human Rights Committee, which has stated 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, according to the Committee, “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.<sup>178</sup>

141. Where “the proceedings have clearly already been excessively long”, mere prevention may not be adequate.<sup>179</sup> In this case, compensatory remedies may be appropriate instead.

142. Indeed, the Court indicates that a combination of two types of remedy, one designed to expedite the proceedings and the other to afford compensation, may appear as the best solution.<sup>180</sup>

143. A compensatory remedy may take the form of financial reparation of the damage (pecuniary and non-pecuniary) suffered.

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<sup>175</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 183.

<sup>176</sup> ECtHR, *Kaya v. Turkey*, judgment of 19/02/1998, ECHR 1998-I, §106, *Chalal v. the UK*, cit., §145; *Kudla v. Poland*, cit., § 154.

<sup>177</sup> ECtHR, *Kudla v. Poland*, cit. § 158; *Mifsud v. France*, decision of 11 September 2002, Reports 2002-VIII, § 17, *Djangozov v. Bulgaria*, cit., § 47, *Paulino Tomas v. Portugal*, Decision of 22 May 2003, Reports 2003-VIII, p. 9.

<sup>178</sup> See the UN Committee on Human Rights’ General Comment 13 (Article 14), § 10, 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.

<sup>179</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 185.

<sup>180</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 186.

144. Other kinds of “compensatory” remedy may constitute an appropriate redress for the violation of the reasonable time requirement and an “effective remedy” in the sense of Article 13. This is true, for example, for a discontinuance of the prosecution,<sup>181</sup> a mitigation of sentence,<sup>182</sup> an exemption from paying legal costs,<sup>183</sup> an acquittal,<sup>184</sup> the suspension of the sentence, the lowering of a fine and the non-deprivation of civil and political rights<sup>185</sup> (possibly more than one form of redress being applied at the same time). These measures must be taken in an express and measurable manner.<sup>186</sup>

145. The quashing of a ruling on a procedural issue (including the non respect of the relevant time-limit) following complaints by the applicant does not amount to an appropriate redress to the extent that it is irrelevant for and incapable of expediting the proceedings or providing the applicant with redress for the delays occurred.<sup>187</sup>

146. The favourable outcome of the proceedings as such cannot be considered to constitute adequate redress for their length.<sup>188</sup>

147. A disciplinary action against the dilatory judge may amount to an effective remedy against the length of the proceedings in terms of Article 13 of the Convention only if it has a “direct and immediate consequence for the proceedings which have given rise to the complaint”. This entails that the disciplinary action must present certain specific features. There must be an obligation for the supervisory organ to take up the matter with the dilatory judge, if a complaint is lodged. The applicant must be a party to the proceedings. The effect of any decision taken must not merely concern the personal position of the responsible judge.<sup>189</sup>

148. Whatever form the redress takes, it must be coupled with the acknowledgement of the occurred violation. Indeed, the national jurisdiction must acknowledge that the reasonable-time requirement has not been met and a specific measure has to be taken with the aim of repairing the over-stepping of the “reasonable time” in the meaning of Article 6 § 1 of the Convention.<sup>190</sup> This acknowledgement needs to be made “in substance at least”.<sup>191</sup>

149. Such acknowledgement is an indispensable, though not a sufficient,<sup>192</sup> component of any effective remedy set up under Articles 6 and 13 of the Convention.<sup>193</sup>

<sup>181</sup> ECtHR, *Eckle v. Germany* judgment of 15 July 1982, Series A no. 51, §§ 66-67 and 94; European Commission on Human Rights, *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.

<sup>182</sup> ECtHR, *Eckle v. Germany*, cit., § 66-67. See also, *Van Laak v. Netherlands*, decision of 31 March 1993, D.R., 74 p. 156; *Hozee v. Netherlands*, judgment of 22 May 1998, § 54; *Beck v. Norway*, judgment of 26 September 2001, ECHR 404, § 27; *Ohlen v. Denmark* judgment of 24 February 2005, § 27.

<sup>183</sup> ECtHR, *Ohlen v. Denmark* judgment, § 28.

<sup>184</sup> Eur. Commission on Human Rights, *Byrn v. Denmark*, report of 16 February 1993, § 21.

<sup>185</sup> ECtHR, *Morby v. Luxembourg* (dec.), 13 November 2003.

<sup>186</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 186.

<sup>187</sup> ECtHR, *Kuzin v. Russian Federation* judgment of 9 June 2005, § 45.

<sup>188</sup> ECtHR, *Kuzin v. Russian Federation* judgment, cit. § 45 ; *mutatis mutandis* Eur. Comm. H.R., *Byrn v. Denmark*, decision of 1 July 1992, DR 74, p. 5.

<sup>189</sup> ECtHR, *Kormacheva v. Russia* judgment of 29 January 2004, § 62.

<sup>190</sup> ECtHR, *Eckle v. Germany*, cit., § 94, *Beck v. Norway*, cit., § 27.

<sup>191</sup> ECtHR, *Cocchiarella v. Italy* judgment of 29 March 2006, §§ 84-85.

<sup>192</sup> ECtHR, *Eckle v. Germany*, cit., § 70; *Ohlen v. Denmark*, cit., § 30.

<sup>193</sup> ECtHR, *Ohlen v. Denmark*, cit., § 27; *Eckle v. Germany* judgment of 15 July 1982, Series A no. 51, § 66; *Beck v. Norway* judgment 26 June 2001, § 27; *Graaskov Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X and *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; *Morby v. Luxembourg* (dec.), cit..



150. In conclusion, according to the Strasbourg Court, States have to:

- organise their legal system so as to prevent unreasonable procedural delays from taking place;
- if excessive delays occur, acknowledge the violation of Article 6 of the Convention and provide adequate redress;
- when their legal system is deficient in terms of reasonableness of the length of proceedings, provide an acceleratory remedy;
- if they chose not to do this, and also in cases when excessive delays have indeed already taken place, provide a compensatory remedy, in the form of either financial compensation or other forms such as mitigation of the sentence and discontinuance of the prosecution.

B. As regards the legal basis for the remedy and its clarity/accessibility

151. Article 13 does not require the provision of a *specific* remedy in respect of the excessive length of proceedings;<sup>194</sup> a general constitutional or legal action, such as an action to establish non-contractual liability on the part of the State, may be sufficient. Such action, however, must be effective both in law and in practice.

152. In the absence of a specific legal basis, the availability of a remedy and its scope of application must be clearly set out and confirmed or complemented by the practice of the competent organs and/or through appropriate case-law.<sup>195</sup>

153. Whatever measure may be ordered by a competent authority, a domestic remedy in respect of unreasonable delays will conform to the requirements of the Convention only when it has acquired a sufficient legal certainty, in theory and in practice, enabling the applicant to have used it at the date on which an application is lodged with the Court.<sup>196</sup>

154. If the remedy is set up through legislation, it will acquire “a sufficient level of certainty” on the date of entry into force of that legislation, independently of the existence of any case-law confirming its applicability, provided that the wording of the legal text in question is clear and indicates that it is specifically designed to address the issue of the excessive length of proceedings before the domestic authorities.<sup>197</sup> Mere doubts as to the effective functioning of a newly created statutory remedy does not dispense the applicant from having recourse to it.<sup>198</sup>

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<sup>194</sup> ECtHR, *A.M. Paulino Tomas v. Portugal*, decision of 22 May 2003; *Broca and Texier-Micault v. France* judgment of 21 October 2003, § 18.

<sup>195</sup> See, for example, ECtHR, *Soc v. Croatia* judgment of 9 May 2003, § 94.

<sup>196</sup> See, among many others, the *Giummarra and Others v. France* decision (*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 May 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 November 2001, Reports 2001/XII; *Nogolica v. Croatia*, decision of 5 September 2002 and *Andrasik v. Slovakia*, *cit.*).

<sup>197</sup> ECtHR, *Slavicek v. Croatia*, dec., 4 July 2002.

<sup>198</sup> ECtHR, *Krasuski v. Poland* judgment of 14 June 2005, § 71.

155. If the effectiveness of a general remedy in respect of claims of unreasonable duration of proceedings is acquired or proved after its entry into force through specific case-law, a certain lapse of time after the judgment concerned may be necessary before a sufficient level of certainty is acquired. Such length of time may vary.<sup>199</sup>

156. In respect of a remedy consisting in providing financial compensation for the excessive length of proceedings, the legal basis for the State's liability to pay damages and the criteria of how such damages would be calculated or what amount of damages could be expected must be clear.<sup>200</sup>

C. As regards the general characteristics of the remedial procedure

157. A remedy in respect of the excessive length of judicial proceedings must be effective, sufficient and accessible.<sup>201</sup>

158. 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.<sup>202</sup>

159. In the absence of specific case-law, a remedy may 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.<sup>203</sup>

160. The possibility to apply to a higher authority for speeding-up proceedings (imposing an appropriate time-limit for the taking of necessary procedural steps or putting forward a hearing) will 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.<sup>204</sup>

161. The efficiency and sufficiency requirements entail in particular that the duration of the remedial procedure needs to be reasonably short, and indeed requires "special attention" on the part of the competent authorities in order to avoid infringements of Article 6 in this respect (this applies to the remedial procedure).<sup>205</sup> An unreasonable duration of the remedial procedure may amount to a disproportionate hurdle to the effective exercise by an applicant of the right to

<sup>199</sup> The Strasbourg Court held that six months had been sufficient for the first judgment of the French Conseil d'Etat holding the State responsible for a breach of the reasonable time requirement to become legally certain (ECtHR, *Broca and Texier-Micault v. France*, cit.); six months were equally sufficient for a judgment of the Italian Court of Cassation bringing the fixing of the level of reparation for breach of the reasonable time requirement into line with European case-law to become known to the general public (ECtHR, *Scordino v. Italy* judgment, cit., § 147). An action to establish non-contractual liability on the part of the State in Portugal acquired, in the view of the Strasbourg Court, a sufficient degree of legal certainty one year after the judgment of the Supreme Administrative Court accepting for the first time that the State could be held liable under Article 6 of the Convention for the length of judicial proceedings, was rendered (ECtHR, *Paulino Tomas v. Portugal*, cit.).

<sup>200</sup> ECtHR, *Doran v. Ireland*, cit. §§ 65-66.

<sup>201</sup> ECtHR, *Paulino Tomas v. Portugal*, cit. ; see also *Belinger v. Slovenia*, decision of 2/10/2001.

<sup>202</sup> ECtHR, *Doran v. Ireland*, cit. ; *Timar v. Hungary*, decision of 19 March 2002; *Horvat v. Croatia*, cit., §§ 37-39.

<sup>203</sup> ECtHR, *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.

<sup>204</sup> ECtHR *Djanzozov v. Bulgaria*, decision of 8 October 2004; *Horvat v. Croatia*, cit., § 47; *Hartman v. the Czech Republic*, judgment of 10 July 2003, § 82; *Nuvoli v. Italy* judgment of 16 May 2002, § 35.

<sup>205</sup> ECtHR, *Paulino Tomas v. Portugal*, cit.; *Gouveia da Siva Torrado v. Portugal* (dec.), 22 May 2003.

individual application within the meaning of Article 34 of the Convention and exempt an individual from the obligation to exhaust it.<sup>206</sup>

162. The duration of the phase of enforcement of decisions on the reasonable time requirement is crucial: the payment of the awarded compensation must be made within six months from the date when the relevant domestic decision becomes enforceable.<sup>207</sup> Indeed, in order to be effective, a compensatory remedy must be accompanied by an adequate budgetary provision so that effect can be given to decisions of the court awarding compensation within six months of their being deposited with the registry (or from the date when they become enforceable).<sup>208</sup>

163. With regard to the requirement that a remedy affording compensation complies with the reasonable-time requirement, it may well be that the procedural rules are not exactly the same as for ordinary applications for damages. It is for each State to determine, on the basis of the rules applicable in its judicial system, which procedure will best meet the requirement of “effectiveness”, provided that the procedure conforms to the principles of fairness guaranteed by Article 6 of the Convention.<sup>209</sup>

164. Special rules concerning legal costs (particularly fixed expenses such as the fees of registration of judicial decisions) in the remedial procedure would be appropriate (lower than in ordinary proceedings) in order to avoid that excessive costs may constitute an unreasonable restriction on the right to lodge such claims.<sup>210</sup>

165. Reparation refers to both pecuniary and non-pecuniary damage. The existence and quantum of the pecuniary damage are to be determined by the domestic courts. As for the non-pecuniary damage, there is a strong but rebuttable assumption that such damage will be occasioned by excessively lengthy proceedings. It may however be minimal or even non-existent; domestic courts have to provide sufficient reasons to prove such to be the case.<sup>211</sup>

<sup>206</sup> ECtHR, *Vaney v. France* judgment of 30 November 2004, p. 9 (the remedial procedure had lasted more than ten years. A number of applications directed against Italy and raising the issue of the unreasonable duration of the remedial procedure under the Pinto law have been declared inadmissible: ECtHR, *Scordino v. Italy* judgment, cit., § 208 (four months); *Pelli v. Italy*, dec., 13 November 2003 (eighteen months); *Cataldo v. Italy*, dec., 3 June 2004 (two years and five months including the enforcement phase); *Tomaselli v. Italy*, dec., 18 March 2004 (one year and four months).

<sup>207</sup> ECtHR, *Scordino v. Italy*, cit., § 198. The Court underlined that under the Pinto law such decisions are immediately enforceable. In a series of Italian cases, the Court found the duration of the phase of enforcement of the decisions finding a breach of the reasonable time requirement to be unacceptable and considered was found by the Strasbourg Court to be unacceptable; this factor, coupled with the excessive legal fees and the insufficient level of compensation, led the Court to consider that the redress afforded in domestic law was insufficient and the applicants had not lost their victim status (ECtHR, *Cocchiarella v. Italy* judgment, cit., §§ 99-100 (seven months plus more than three years to obtain enforcement); *Riccardi Pizzati v. Italy* judgment, cit., §§ 98-99 (fourteen months plus 22 months to obtain enforcement); *Musci v. Italy* judgment, cit., §§ 100-101 (eight months plus 23 to obtain enforcement); *Giuseppe Mustacciolo v. Italy* (no. 1) judgment, cit., §§ 98-99 (eight months plus fifteen to obtain enforcement); *Procaccini v. Italy* judgment, cit., §§ 97-98 (eight months plus more than three years to obtain compensation); *Zullo Ernestina v. Italy* judgment, cit., §§ 101-102 (seven months plus 23 Months to obtain enforcement) *Apicella v. Italy* judgment, cit., §§ 97-98 (seven months plus eleven to obtain enforcement); *Giuseppe Mustacciolo v. Italy* (no. 2) judgment, cit., §§ 97-98 (nine months plus fourteen months to obtain enforcement).

<sup>208</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 209.

<sup>209</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 200.

<sup>210</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 201. The Court pointed out that in Poland applicants are reimbursed the court fee payable on lodging a complaint if their complaint is considered justified (see *Charzyński v. Poland* (dec.), no. 15212/03, to be published in ECHR 2005).

<sup>211</sup> ECtHR, *Scordino v. Italy* judgment, cit., § 204.

166. The sufficiency of the remedy may depend on the level of compensation. The determination of non-pecuniary damage for excessive length of proceedings “must be done in a legally defined framework since reference has to be made to the amounts awarded, in similar cases, by the Strasbourg Court. Some divergence is permissible, within reason”.<sup>212</sup>

167. A compensation 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, such as 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.<sup>213</sup> A lower level of compensation awarded by a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, is acceptable, provided that it is not unreasonable and that the relevant decisions are consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly.<sup>214</sup>

168. The remedy must be available both for proceedings that have already ended and for those that are still pending.<sup>215</sup>

## **VIII. The Venice Commission’s proposals concerning the effectiveness of domestic remedies in respect of excessive length of proceedings**

### **A. As concerns the kind of remedy**

169. The Venice Commission has previously expressed its view that, in general, in case of breach of one of the rights laid down in the European Convention on Human Rights, concrete reparation (*restitutio in integrum*) is preferable to the award of pecuniary compensation.<sup>216</sup>

170. In the case of excessive length of proceedings, if the proceedings have ended or if they are still pending but a breach of the reasonable time requirement has occurred, reparation (pecuniary or non-pecuniary) is certainly acceptable, essential even, *in relation to that breach*.

171. However, the right to a trial within a reasonable time is, by its very nature, a *continuous* one, as much as its violation is; it develops with the development of the proceedings themselves: undue delays can occur at all times until the proceedings are over. New breaches of Article 6 of the Convention are therefore always possible as long as the proceedings are pending<sup>217</sup>. The grant of pecuniary compensation for an undue delay which has already occurred does not exclude that another undue delay will occur. It thus does not close the issue of reparation, including preventive and acceleratory remedies.

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<sup>212</sup> ECtHR, *Scordino v. Italy* judgment, cit. § 146; *Ohlen v. Denmark* judgment of 24 February 2005, §§ 30-31.

<sup>213</sup> ECtHR, *Bako v. Slovakia*, decision of 15 March 2005.

<sup>214</sup> ECtHR, *Scordino v. Italy* judgment, cit. § 206; *Dubjakova v. Slovakia*, decision of 10 October 2004.

<sup>215</sup> ECtHR, *Soc v. Croatia* judgment of 9 August 2003, § 94; *Paulino Tomas*, dec. cit.; *Mifsud v. France*, cit., § 17.

<sup>216</sup> See Venice Commission’s Opinion on the implementation of judgments of the European Court of Human Rights, CDL-AD(2002)034, § 64.

<sup>217</sup> See ECtHR, *Apicella v. Italy* [GC], 29 March 2006, § 113; *Rotondi v. Italy*, judgment of 27 April 2000, §§ 14-16, and *S.A.GE.MA S.N.C. v. Italy*, judgment of 27 April 2000, §§ 12-14. See also *Tengerakis v. Cyprus*, judgment of 9 November 2006, § 68.

172. Preventing and putting an end to undue delays is therefore of the utmost importance, and continues to be essential *even after* the past proceedings have already been excessively long. Speeding-up the proceedings is the only means of ensuring compliance with Article 6 ECHR in relation to the future conduct of that set of proceedings.

173. The Commission is thus of the view that each State-party to the European Convention on Human Rights should provide, in the first place, acceleratory remedies. *In addition* to – and not as an alternative to – these acceleratory remedies, States must provide compensatory remedies for breaches of the reasonable time requirement *which may have already occurred*.

174. If there exists an effective national remedy capable of speeding up the proceedings, no further question of reparation would arise after this remedy has been successfully used. If no such remedy exists, the procedure for an effective remedy granting pecuniary reparation for undue delays may have to be used after each undue delay. In a country with systemic problems, undue delays would be likely to continue to occur; the burden of a great number of pecuniary reparations might be assumed to constitute an incentive to introduce an effective acceleratory remedy, but that does not appear to be always the case .

175. CEPEJ states that “the mechanisms which are limited to compensation are too weak and do not adequately incite the States to modify their operational process and provide only one element *a posteriori* in the event of violation proven instead of trying to find a solution for the fundamental problem of excessive delays.”<sup>218</sup>

176. The Committee of Ministers, within the framework of its supervision of the execution of the judgments of the Strasbourg Court, mostly recommends to States, as general measures, those which allow not only for the compensation for the delays already occurred in the past, but also for the acceleration of pending proceedings.<sup>219</sup>

177. The Court itself, while leaving the choice between compensatory and acceleratory remedies to the member States, expresses its preference for the latter and indeed seems to encourage States to adopt them, by granting certain “privileges”, for example by according that lower damages may be awarded by those States which have introduced “a number of remedies, one of which is designed to expedite proceedings and one to afford compensation”.

178. The Venice Commission wishes in addition to underline the following: acceleratory remedies in the form of a request to take the procedural step to avoid unreasonable delay are to be seen as *preventive*, not compensatory. They do not amount to a *restitutio in integrum*. When an undue delay has taken place in a certain phase of the proceedings, the possibility of putting an end to such delay to avoid an unreasonably delayed trial as a whole does not represent a reparation in kind. The individual’s entitlement not to suffer from an excessive delay derives from Article 6 § 1 as such, not from the finding of a breach of that provision.

179. If an undue delay has taken place in the proceedings as a whole, *restitutio in integrum* will be possible in the following forms:

- If the proceedings are still pending: (a) If the proceedings are criminal, by way of mitigation of the sentence or similar remedies (see para. 84 above). If the proceedings are civil, administrative or criminal, by way of *fast-tracking the case* to the extent possible. This means that the threshold of reasonableness in the remainder of the proceedings will be reduced, the case will be dealt with more quickly than an ordinary

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<sup>218</sup> CEPEJ(2004)19rev2, A new objective for Judicial Systems: the processing of each case within an optimum and foreseeable timeframe, available at [www.coe.int/cepej](http://www.coe.int/cepej), p. 3.

<sup>219</sup> See M. Lobov, CDL(2006)035, p. 7.

one: in this manner, the undue delay will be caught up (of course not arithmetically) and the global length of the proceedings will be “reasonable” within the meaning of Article 6 § 1. In this case, no pecuniary reparation will be necessary.

- If the proceedings are terminated, the only possibility will of course be pecuniary reparation.

180. The Venice Commission also underlines that the Strasbourg Court has stressed the importance of the subsidiarity principle: individuals should not be systematically forced to refer to the Court in Strasbourg complaints that could otherwise, and in the Court’s opinion more appropriately, have been addressed in the first place within the national legal system.

181. The Commission notes that individuals who complain about the excessive length of still pending proceedings before the Strasbourg Court may obtain not only pecuniary reparation in application of Article 41 of the Convention, but also the acceleration of pending proceedings as a “natural” individual measure urged by the Committee of Ministers within the framework of the supervisory procedure. It follows that by going to Strasbourg, an individual may obtain, if applicable, both kinds of redress, compensatory and acceleratory.

182. In cases where the national legal system does not provide for acceleratory remedies (which is the case for most domestic legal systems), the individual is not afforded before his own authorities an equivalent redress to that which he may obtain in Strasbourg; there, the subsidiarity principle is deficient. Under these circumstances, the individual may argue not to have lost his status of victim even after obtaining (mere) pecuniary compensation in a domestic procedure and may challenge his need to exhaust the domestic remedy in question.

183. In conclusion, the Venice Commission considers that, in order to comply fully with the requirements of Article 13 of the Convention in relation to the reasonable time requirement laid down in Article 6 §1 of the Convention, Council of Europe member States should provide in the first place *acceleratory remedies* designed to prevent any (further) undue delays from taking place at any time until the proceedings are terminated.

184. In addition, they should provide *compensatory remedies* for any breach of the reasonable time requirement which may have already occurred in the proceedings (prior to the introduction of the effective acceleratory remedies).

B. As concerns whether or not the compensatory remedies for the excessive length of proceedings should be specific

185. The Venice Commission observes that, particularly in respect of compensatory pecuniary remedies, some States provide *generic* remedies, such as an action for damages against the State.

186. The possibility of such remedies in connection with excessive delays in the proceedings must be unequivocal, for example on the basis of established case-law. Otherwise, their effectiveness is questionable.

187. In doubtful cases, it would be appropriate that either the accessibility of the generic remedy for length complaints be duly clarified at the national level, or that a specific remedy be adopted.

C. As concerns the form of the remedies

188. The question of whether or not the remedy/ies for the excessive length of proceedings should be contained in specific legislation needs to be addressed at this stage.

189. The replies to the questionnaire show that not many States do have such legislation. Those States however which have been faced, or are expecting to be faced, with a significant number of applications before the Strasbourg Court on account of the excessive length of proceedings have introduced remedies for this problem through specific laws, which supplement or amend the relevant codes of procedure, or equivalent legislation.

190. Specific laws present the matter of reparation in a detailed manner, and therefore have the advantage of clarity and comprehensiveness. They (are deemed to) address the root cause of the length-of-proceedings problem, regulate in detail all matters, and contain the necessary explicit references to the case-law of the Strasbourg Court (notably as concerns pecuniary reparation). They may be more easily accessible to the public (and, in some cases, even to the courts) as well as to the instances of the Council of Europe.

191. Specific laws are not, however, indispensable and are not required in those countries which already dispose of effective remedies for excessive length, which are known by the authorities, the courts and the public.

D. As concerns the various remedies

1. *Civil and administrative proceedings*

a. In general

192. The acceleratory remedies concerning civil and administrative proceedings are: measures designed to put an end to the undue delay (such as requests to hold a hearing, obtain an expert's report, issue another necessary order or taking an act which the concerned authority had failed to take), disciplinary actions against the dilatory judge by means of a complaint to a supervisory authority (in the limited sense explained above), the possibility for a higher court to establish a time limit for the dilatory judge to deliver a solution or/and give instructions to the dilatory judge (this measures might be joined by the decision of the higher court to transfer the case to another judge).

193. The available compensatory remedies are: awarding compensation for the damages that occur as a result of lengthy proceedings (this remedy can either be the only one, or it can be coupled with the above-mentioned remedies that allow the speeding up of the proceedings in question), and the possibility of fast-tracking the case.

194. In civil proceedings, private parties often have different, even opposite interests, including as far as the length of these proceedings is concerned. The public interest however cannot be but a fair solution of the litigation, within a reasonable time frame (the fact that a party of a specific civil procedure has the interest of delaying the trial and acts to this purpose is generally considered, in many national legislations, as a procedural abuse, if certain limits are crossed).

195. Regarding administrative proceedings, it is clear that the public interest is both to ensure prompt and efficient decision making, and to enable individuals who apply to administrative authorities or to administrative courts to receive fair and equitable treatment. Further to the measures described above, the efficiency of the administrative proceedings could be improved by the preventive measure of providing the so-called positive silent procedure, within a prescribed time limit, for certain administrative acts (such as authorizations, licences etc) to be

issued or renewed (if a public authority fails to take a decision in the prescribed time limit, it shall be deemed to have made a decision in favour of the applicant). However, the public interest involved as well as any interests of third parties will have to be given due consideration.

b. Acceleratory remedies

196. Providing acceleratory remedies is, in the Commission's opinion, the most effective manner of securing the right to a trial within a reasonable time and the right to an effective remedy for breaches of the said right. All States should therefore provide, in the first place, acceleratory remedies, and in particular for those cases in which the Strasbourg Court imposes a special diligence on the part of the authorities (see para. 31 above).

197. The Commission wishes to draw attention to the Checklist of indicators for the analysis of lengths of proceedings in the justice system, prepared by CEPEJ.<sup>220</sup>

198. Indicator FIVE (Means to promptly diagnose delays and mitigate their consequences) reads, inter alia, as follows:

*"While monitoring the duration of proceedings, the judicial system needs to have established mechanisms for prompt identification of excessive duration (delays) and should instantly alarm responsible persons and offices with a view to remedying the situation and preventing further dysfunctions.*

*Clear responsibility for prevention and suppression of delays*

*7. Can responsibility for the identification and avoidance of undue delays be clearly determined?*

*a. Is there a person or office that is in charge of monitoring the regular course of particular proceedings and locating delays with a view to reducing them, irrespective of the stage of the proceedings (first instance, appeal)?*

*b. Does a responsible person or office have a duty to report to the court, authority or office undue delays? Can the responsible person take steps to resolve current delays or prevent future ones and speed up the proceedings? Are appropriate measures available against the responsible person if steps are not undertaken or results achieved?*

*c. Is there an office being responsible for appropriate length of judicial proceedings at the national level? Has it authority to take action where delays have been observed? (...)"*

199. In the Commission's view, it would be highly appropriate not only to provide for the monitoring structure suggested by CEPEJ, but also *to regard it as a means of preventing undue delays within the meaning of Articles 35 and 13 of the Convention.*

200. The powers, scope of action and right of initiative of the monitoring body should be coordinated with the relevant domestic rules on the already existing measures for accelerating the proceedings.

201. A duty should be imposed on the monitoring person or office to monitor and promptly intervene ex officio.

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CEPEJ(2005)12.



202. In addition, the possibility to seek the intervention of such monitoring authority should be given to parties to proceedings through their lawyer. The consequence of the failure by a party, through its own fault, to have recourse to it should entail the forfeiture of the right to reparation for the undue delay that may have occurred as a consequence of such failure.

203. As regards the concrete application of acceleratory remedies, it obviously impacts on the management of the courts and the conduct of the proceedings, a domain which falls outside the competence of the Venice Commission and instead should be looked into by CEPEJ. In this respect, the Venice Commission notes that in many States, when a procedure has already exceeded a reasonable time, the superior court may impart deadlines to the dilatory court for the termination of the procedure. The Venice Commission wishes to underline the importance of linking such deadlines to the effective management of the court : otherwise, this peremptory deadlines might affect the order of treatment of cases which may be more urgent in absolute terms. For this reason, the Venice Commission considers that the possibility of imparting deadlines should be left to national courts with a direct knowledge of the situation of the dilatory court and should even be exercised in coordination with the authority that is in charge of the court management.

c. Compensatory remedies

204. As concerns reparation of damages, the replies to the questionnaire show that the grounds for obtaining damages vary from the heavy workload of the courts, the malfunctioning or the denial of justice, the fault of a judge or of another authority, or a violation of the right to a hearing within a reasonable time.

205. The Venice Commission, in the light of the case-law of the Strasbourg Court, considers that it would be appropriate to award damages on the objective ground of the “unreasonable” length of the procedure, without referring to personal fault or malfunctioning and without taking into consideration practical circumstances such as a heavy workload, changes in personnel etcetera. It is of evidence that in appreciating the excessive character of the length the three criteria established by the ECtHR are to be taking into consideration, namely the complexity of the case, the behaviour of the applicant and the conduct of the authorities, including the court. A subsequent regress action could be introduced, if the fault of an authority is under question. But for the scope of the remedy, it should be based on the objective responsibility of the State.

206. It is very important that the amount of pecuniary compensation for the victim be adequate and sufficient, be awarded in conformity with the European Court of Human Rights’ case-law on the matter and by taking into account the specific circumstances (the standard of living) in the respective State, and not be left to the total discretion of a jurisdiction. Otherwise, an inaccurate amount of the damages would not have the significance of a true reparation of the violation.

207. In this respect, the Venice Commission considers that the most appropriate solution would be that the criteria for granting pecuniary reparation of moral damage, as well as the general criteria for the award of pecuniary reparation of material damage, should be spelled out clearly and in as great detail as possible at the national level.

208. At least with reference to the countries which face “systemic” length-of-proceedings problems, these criteria should be submitted to the Committee of Ministers through the Department of Execution of Judgments of the Directorate General II in order for their compatibility with the Council of Europe’s requirements to be assessed (ideally with a participation of the European Court of Human Rights) prior to their enactment.

209. As concerns the features of the remedial procedures, it is essential for any compensatory remedy in respect of excessive length of proceedings to be conducted in the swiftest possible manner. Compensatory procedures should follow simplified rules, possibly not be subject to three levels of jurisdiction, and be governed by strict time-limits.

210. Normally, the quantification of the damage, at least the moral one, should be made by the same authority which rules on the existence of a violation of Article 6 § 1 by reference to the criteria developed by the Strasbourg Court. In case of a complex determination of pecuniary damage, it should instead be possible to refer the decision to more competent bodies: but the duration of the relevant procedure should be carefully monitored (it might even be appropriate to prioritise this kind of cases). It might be appropriate to allow for the choice, to be made by the individual, between ordinary proceedings of determination of pecuniary damage, possibly with three levels of jurisdiction, and an abridged, simplified but clearly fast-tracked procedure, with only a limited possibility of appeal.

211. The decisions awarding damages should be immediately enforceable, and provision should be made for their enforcement within a maximum of six months (which entails adequate budgetary provisions).

212. Legal costs in the remedial proceeding should be kept to a minimum, and indeed be charged on the State, at least when the application is successful. No fixed expenses should be imposed in this kind of procedures.

213. Exemption from legal costs could indeed be seen as a compensatory remedy (which is done in certain member States, such as Denmark), which would present the advantage of providing the applicant with a tangible, prompt, often significant form of pecuniary measure which would not necessitate to issue proceedings. The matter of what State budget would be affected by this exemption will of course deserve consideration at the national level.

214. As regards disciplinary proceedings, only to a certain extent may they be considered an actual "remedy" as regards undue delays, unless the disciplinary action may be initiated pending proceedings and lead to instructions to or "removal" of the dilatory judge. On the whole, this measure may become closer to a preventive remedy as to the future behaviour of the judge concerned and with a more general, educational effect.. As the Court has pointed out, this measure may only be regarded as effective if it has a direct impact on the proceedings at issue (see para. 147 above).

215. Disciplinary measures during pending proceedings could however, on the other hand, raise the issue of judicial independence as well as the danger of abuse by parties in the proceedings and by the judicial hierarchy.

216. In any case, this compensatory remedy of disciplinary measures or instructions should not be limited to judges only, as the cause of delay may reside in any other professional that participate in criminal (or other) proceedings. It should be made sure that responsibility can reach all of them (ie. prosecutors, police, clerks, experts, etc).

217. In civil proceedings, the remedies for excessive length should be adapted in consequence. For example, if the length of proceedings is due to the dilatory manoeuvres of one party (left unsanctioned by the judge), the other party(ies) should be entitled to ask for the measures described above. And if the length of proceedings is due to the lack of diligence from the part of the applicant, the domestic legislation should provide the possibility for the judge to suspend the procedure and even pronounce it obsolete. This is, beside a sanction for the lack of diligence, also a method for assuring that a procedure once started will not continue *sine die*.

## 2. *Criminal proceedings*

### a. In general

218. The replies to the questionnaire indicate that, with few exceptions, almost all existing remedies are *compensatory* (after the breach of reasonable time has happened).

219. The Commission recalls that procedural delays acquire special relevance in criminal proceedings, because these proceedings affect basic individual rights (together with the right to a fair trial, other guarantees linked to the right to defence and to personal freedom can be violated). Compensatory remedies, capable of operating only *a posteriori*, do not appear fully satisfactory, and preventive remedies should be developed.

220. This can only be achieved if member States systematically collect information about their systems so that they can identify where delays occur and how efficient the existing remedies are as to their prevention or redress. At the same time the lawyer of the defendant should be vigilant from the very beginning to challenge unnecessary delays, and should be given the possibilities to effectively do so and to react adequately.

### b. Acceleratory remedies

221. Very few countries appear to have remedies that allow to speed up proceedings before an unreasonable delay actually occurs. In countries which have acceleratory systems that are applicable to both civil and criminal proceedings it would have to be clarified whether the investigative phase of the criminal procedure is also covered. In other words, accelerating criminal proceedings must imply the possibility of accelerating not only the hearing or trial itself but also the investigative or pre-trial phase. Undue delays may happen in both. Procedural law must allow to obtain a remedy from the authority (ie. judge or prosecutor) that is actually dealing with the proceedings, as criminal proceedings sometimes go through different stages and different authorities.

222. For example, the interlocutory system described by Portugal (see para 123 above) seems very effective: it can be addressed both to the prosecutors and to the judges depending on where the case is pending. It sets up a simple procedure, with time-limits to decide and the explicit possibility of adopting acceleratory measures. It can be initiated by any party in the proceedings and from the moment a legal time-limit has been exceeded. In fact, this last characteristic is not an element of the reasonable time requirement; it would suffice for a similar mechanism to be efficient if it could allow to raise the alarm about a stalling in the proceedings that could become unjustifiable and to take measures therein. It appears important that legitimacy to lodge such complaints would be as wide as possible and not only reduced to the defendant, but also to the public or private prosecutor, as the case may be, and any civil parties, who also have a legitimate interest.

223. In this sense it could also be appropriate to give public prosecutors the possibility or the obligation to be kept informed of pending proceedings and the powers to either request the investigative judge to close proceedings if the prosecutor has sufficient elements to bring charges, or take acceleratory measures, and inversely the same could be applied to judges when the case is in the hands of the prosecutors (for example an order to decide on bringing charges), so that both institutions could in a sense act as watchdogs on the length of proceedings. It could be useful to provide certain time-limits after which an obligation to inform of the progress of the proceedings could arise. It could also be useful if the possibility to adopt management measures related to the handling of the case was specifically provided.

224. Finally, almost no information has been provided on remedies to accelerate proceedings as regards the trial phase. These could include the possibility to ask for the conclusion of the investigative phase and/or the setting of a date for the hearing, and powers to speed up this scheduling in specific cases (dangers of undue delay considering the time it took to close investigations, defendant held in custody, etc). Once again the question of expediting proceedings depends on all the participants in the proceedings and therefore, to the appropriate extent, remedies should be applicable to all. For example in the phase of the hearing, the possibilities should be investigated to introduce measures such as the power of the judge to take coercive or preventive measures such as setting time-limits for experts to provide their input, to decide on fines or disciplinary sanctions if lawyers, experts or witnesses do not appear before the court when so requested; to suspend the hearing only in exceptional cases, etc.

c. Compensatory remedies specific to criminal proceedings

225. As regards the possibility to adopt the decision of discontinuing the case before it is brought before the court, this solution has the obvious advantage of anticipating the effects without the need of going through the trial and waiting for a decision on the merits of the case.

226. However, due to the seriousness (substantive character) of the effects and in view of the public and other interests which are at stake in criminal proceedings, it can also be argued that such a decision should be taken cautiously, after a proper hearing and by means of a motivated decision on the merits.

227. A balanced approach could be to welcome, on the one hand, that countries provide for a remedy that can anticipate these effects to the “pre-trial” phase of the proceedings but at the same time considering (as it happens now) that it should be reserved only for very exceptional cases. Moreover, “anticipating” the procedure might pose a problem of legal basis in countries that follow the legality principle (mandatory prosecution) in which a specific legal basis would have to be provided to allow for the discontinuance of proceedings before the final ruling.

228. In itself, the principle of taking into account the delays in the assessment of the punishment must be considered to be an appropriate form of redress in criminal proceedings, in particular as regards the mitigation of the sentence and a mere declaration of guilt.

229. It is true that these forms of redress may contradict other exigencies of justice and notably they may cause a lack of “substantive justice”, when a delay in the justice system makes it impossible to punish the offender or to punish him at the level that is common for the crime concerned, or they may lead to an outcome of criminal proceedings on the basis of procedural reasons, and not on the basis of the gravity of the alleged crime. On the other hand, they may be seen as the consequence of the fundamental guarantee of a trial within a reasonable time.

230. Even though the purposes of criminal law and the ultimate aim of the punishment are retribution and justice from the point of view of society, (re-)education and atonement on the part of the perpetrator, and satisfaction for the victim(s), the perspectives of a meaningful fulfilment of each of these purposes and aims after a considerable lapse of time have to be weighted against the public interest of a fair and speedy trial and the interest of the person concerned not to be subjected to a long period of uncertainty about the outcome of the prosecution instituted against him alone and not a mere application of the private justice principle “eye for an eye”. Consequently, taking into consideration serious delays in the trial in the assessment of the punishment would appear accurate as the social scope of the punishment can no longer be achieved and the society is no longer interested in punishing a crime committed a long time ago. Only the retributive scope of the punishment can still be reached by continuing the criminal procedure.

231. As regards more specifically the acquittal and the discontinuance of proceedings, they present other problems and once again raise the need to set up real preventive methods that avoid these extreme solutions. They should in any case be applied in exceptional cases as they may raise issues in connection with the possibility of declaring civil responsibility “ex-delicto” (in countries that have this system) to which Belgium seems to refer. This might imply in the best of cases that the victim would not be able to get compensation at least in the criminal proceeding and would have to initiate an independent civil proceeding. In the worse of cases, this could even imply that the victim will not get any compensation at all because the offender has been found “not guilty” or the existence of the crime has not been determined as there has not been a decision on the merits.

232. The motivation used by the judge when assessing the punishment against the length of the proceedings is of great importance. The decision must indicate if and to what extent the defence rights or the establishment of the truth were affected by the length of the proceedings. The link between the assessment of the punishment and the breach of the reasonable time requirement must equally be made explicit. It would also seem appropriate to indicate what sentence would have been applied in the absence of “compensation” due to the excessive length.

d. General compensatory remedies also applicable to criminal proceedings

233. As regards reparation of damages (pecuniary or non-pecuniary) that occur as a result of lengthy proceedings, it may constitute some, although indirect, motivation for the reasonable time requirement to be observed in criminal cases. The effectiveness of this remedy also depends on whose budget it is charged.

234. In some countries, reparation of damages appears to be only possible in case of discontinuance or acquittal, and it seems that courts are usually reluctant to provide it cumulatively, even when that is formally possible (see UK). This could be unfair for it is also possible that a defendant who would have been acquitted in any case, in addition suffers from delayed proceedings to have his case solved. The procedural situation of a defendant in criminal proceedings pending a decision on his case is especially “sensitive” and might have for example repercussions in social/professional life. In case of undue delays it seems important that compensatory remedies include pecuniary redress of these possible consequences. Another general suggestion is to simplify the procedure to lodge and decide upon these claims as they derive from the previous acknowledgement of undue delay.

235. The possibility of introducing a claim for damages pending the allegedly lengthy proceedings may raise concerns as to the effect of the pressure exercised in this way upon the prosecutor or judge, thus possibly leading to rendering decisions too quickly and, as a consequence, to a superficial solution of the case.

## **IX. Main Conclusions**

236. The Venice Commission is of the opinion that the right to a trial within a reasonable time, guaranteed by Article 6 § 1 of the European Convention on Human Rights, must be secured as such by Council of Europe member States, and cannot be systematically replaced by the payment of pecuniary compensation.

237. While the payment of pecuniary compensation must be granted in cases where undue delays have occurred pending the possibly necessary reforms and improvements of the judicial systems and practices, it should not be regarded or accepted as a form of fulfilment of the obligations stemming from Article 6 and from Article 13 of the Convention.

238. The Venice Commission considers therefore that Council of Europe member States should provide in the first place adequate procedural means of ensuring that cases are processed by courts in a foreseeable and optimum manner. These procedural means respond in the first place to the obligation of securing the reasonable time requirement. To the extent that they can be used also in cases when a delay has occurred, they can also be seen as *acceleratory remedies*. However, the possibility of obtaining that the delayed procedural step be taken upon application to a higher body, for example, should not be seen as *restitutio in integrum*, their effect being merely to obtain one's right under Article 6 § 1 of the Convention, and not reparation under Article 13.

239. States should provide in addition *compensatory remedies* for any breach of the reasonable time requirement which may have already occurred in the proceedings (prior to the introduction of the effective acceleratory remedies).

240. In criminal cases, there exist specific forms of compensatory remedies which are to be considered as forms of *restitutio in integrum*: the discontinuance of the prosecution, the mitigation or reduction of the sentence; an acquittal; the low-fixing of a fine; the non deprivation of civil and political rights. They may cause however, in some cases, a lack of substantive justice. Acquittal and discontinuance of the proceedings should be only applied in exceptional cases. In the motivation used by the judge when assessing the length of the proceedings, the link between the latter and the assessment of the punishment should be made explicit, and it would seem appropriate to indicate what sentence would have been imposed if the duration had been reasonable.

241. In civil and administrative proceedings (and also, residually, in criminal ones) the ideal compensatory remedy would seem to be the fast tracking of the - until then delayed - procedure. If the case is dealt with faster than the ordinary ones, the previous undue delay will be caught up, and the global length of the proceedings will be "reasonable". No need for pecuniary reparation will exist in such a case. In criminal cases, it should be possible to accelerate the investigative or pre-trial phase too.

242. Pecuniary reparation should be granted in cases when the delays are irreparable, that is when the proceedings are over.

243. Pending possibly necessary national reforms, pecuniary compensation will remain essential for breaches which have already occurred.

244. In order not only to monitor, but also to intervene in the proceedings when they are being unduly delayed, the structure suggested by CEPEJ in Indicator FIVE of its checklist of indicators for the analysis of length of proceedings in the justice system should be set up and also used and regarded as a remedy within the meaning of Articles 13 and 35 of the Convention.

245. Pecuniary compensation should be awarded in an amount compatible with the case-law of the European Court. The criteria for awarding moral damage and the general criteria for calculating material damage should be set out clearly and in detail, preferably in the law itself. In respect of countries which face systemic problems of length of proceedings, these criteria should be previously assessed by the Committee of Ministers, ideally with the participation of the Strasbourg Court.

246. The remedial proceedings should be conducted as swiftly as possible, and possibly with fewer levels of jurisdiction. Complex determination of material damage should either follow the ordinary way, or be carried out by the authority competent to assess the reasonableness of the proceedings through a simplified but clearly fast-tracked procedure, the choice between the two being left to the applicant.

247. The adoption by Council of Europe member States of specific laws on length-of-proceedings remedies does not appear indispensable and is not required in those countries which already dispose of effective remedies for excessive length, which are known by the authorities, the courts and the public. However, the Venice Commission underlines that specific laws present the matter of reparation in an abstract and general manner, and therefore have the advantage of clarity and comprehensiveness. They may be thus more easily accessible to the public (and, in some cases, even to the courts) as well as to the instances of the Council of Europe.

248. The Venice Commission stands ready to assist any country which should wish to proceed with the elaboration of a specific piece of legislation setting out or improving the national remedies in respect of excessive length of proceedings, as well as the Committee of Ministers and the Directorate General II in their assessment of the general measures taken by States pursuant to Article 46 of the Convention.