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The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings

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1. Introduction

Every year hundreds of applicants complain before the European Court of Human Rights (hereinafter the 'Court') that judicial proceedings before their domestic courts have taken too much time and thereby violate Article 6 of the ECHR, which states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. This single issue still accounts for more judgments of the Court than any other. It is clear why speedy judicial proceedings are deemed essential from a human rights perspective. '*Justice delayed is justice denied*' is a maxim that is often used in this regard. If society sees that judicial settlement of disputes functions too slow, it will lose its confidence in the judicial institutions. Even more importantly, slow administration of justice will undermine the confidence society has in the *peaceful* settlement of disputes. In corporate litigation, parties to proceedings need to receive legal certainty within a reasonable period of time or it will affect economic

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activities and the willingness of corporations to make financial investments. In civil litigation, such as custody issues, there is a great personal interest to have a speedy outcome of the proceedings, also because lapse of time may strengthen *de facto* situations which may not be in conformity with *de jure* entitlements. In administrative law, one may refer to the undesirability of prolonged uncertainty for asylum seekers. The deterrence provided by the criminal law will only be effective if society sees that perpetrators are sentenced within a reasonable time, whereas innocent suspects undeniably have a huge interest in the speedy determination of their innocence. Much more can be said about the underlying interests that Article 6 seeks to protect, but that is not the aim of this article.

This article focuses on the Council of Europe's activities in its fight against this phenomenon. First, the historical background of this part of the Strasbourg case-law will be sketched. The article will then briefly look at the substantive case-law of the European Court of Human Rights under the heading of Article 6 of the Convention: when is the duration of domestic proceedings deemed unreasonably long and what kind of compensation will be afforded by the Strasbourg Court? The second part of this article focuses on a related issue: what kind of remedies should be available at the domestic level in order to avoid such complaints? Attention will be paid to the Court's case-law under the heading of Article 13 of the ECHR (the right to an effective remedy), but also to the work of the European Commission for the Efficiency of Justice (CEPEJ), the Council of Europe's Venice Commission and the reports of the Steering Committee for Human Rights (CDDH). Lastly, inspiration will be drawn from state practice in various European countries.

2. The Historical Origin of the Court's Case Law Concerning the 'Reasonable Time' Requirement

The 'reasonable time' requirement laid down in Article 6 of the ECHR did not receive much attention in the early years of the Strasbourg mechanism, but the few early cases established some fundamental principles.[1] Cases concerning excessively lengthy proceedings became much more common in the 1990s. On 30 April 1993, a television programme was shown on Italian television which informed the public about several deficiencies in the Italian administration of justice, including the lengthy duration of judicial proceedings. The journalists also informed the public that financial compensation could be obtained in Strasbourg when cases had taken too long. The broadcast

1 See, for example, *Neumeister v Austria* A 8 (1968); 1 EHRR 91 at paras 20–21; *Ringeisen v Austria* A 13 (1971); 1 EHRR 455 at para 110; and *König v Germany* A 27 (1978); 2 EHRR 170 at para 99.

triggered a very substantial inflow of complaints to the then European Commission of Human Rights. The complaints were so numerous that the Commission created a special sub-chamber for handling these cases.[2] Initially, only a relatively small number of cases relating to the length of proceedings was brought before the Court. Once the Court had established appropriate principles in its case-law, most cases were factually dealt with by the Commission. However, the Commission was not competent to adopt a *final* decision (only judgments of the Court being binding). The Commission could merely adopt a so-called 'Article 31 report' and transmit its opinion on the merits of the case to the Committee of Ministers. The Commission would not use its power to transmit the case to the Court since the legal issues under Convention law were pretty straightforward. In practice, the Committee of Ministers would ask the Commission to make a concrete proposal as to the appropriate amount of compensation, and adopt the Commission's proposal as its own. Originally, this was done by a 'recommendation' to the State by the Committee of Ministers. However, the Italian Minister of Finance then declared that he did not consider himself competent to pay such compensation on the basis of non-binding recommendations. This in turn led to a referral of all these cases to the Court. As the Court was inundated with 'Italian length of proceedings' cases (at one stage, the Italian length of proceedings cases were responsible for twenty-five per cent of the total workload of the Court), the Committee of Ministers changed its policy and started to issue binding decisions in cases coming to it from the Commission. Following that decision, the Commission resumed its old routine and dealt with the overwhelming majority of these cases itself until the Convention mechanism was changed in 1998 following the entry into force of Protocol No 11.

With the entry into force of that Protocol, the Commission ceased to exist and the Court became a full time institution that now had to deal with all the Italian cases itself. The new Court took a revolutionary step; it held that the systemic delays in the Italian judicial system constituted an administrative practice that was incompatible with the Convention. This systemic tardiness was pronounced in a case called *Ferrari*.[3] The consequence of this finding was that the burden of proof was reversed: the Court would work on the assumption that the Convention had been breached unless the State in a given case challenged that presumption. The Italians introduced a new law that would enable victims of these violations of the Convention to obtain compensation domestically for undue length of proceedings. Unfortunately, this did not mean the end of the Italian cases before the

2 See Lawson and Schermers, *Leading Cases of the European Court of Human Rights*, 2nd edn (Nijmegen: Ars Aequi Libri, 1997).

3 *Ferrari a.o. v Italy* Application No 33440/96, Merits, 28 July 1999, at para 6.

Court. New legal issues were brought before the Court concerning the amount of compensation offered domestically and the fact that the compensation proceedings themselves were taking too long.

Looking at the 2012 Annual Report of the Court, however, it is clear that length of proceedings cases are not solely an Italian problem.[4] In 2012 most judgments on this issue were against Turkey (51) followed by Greece (35), Ukraine (31), Bulgaria (17), Portugal (17), Russia (16) and Italy (16). Another notable statistic is that twenty-five per cent of the total number of Court judgment still relate to length of proceedings cases.

3. The Substantive Case Law of the Court under Article 6 of the Convention: When Does the Length of Domestic Proceedings Violate the Convention?

The case law under Article 6 of the Convention is rather straightforward. The first step is to determine the period to be taken into consideration, while the second step is to determine whether that period can be qualified as 'reasonable'.

A. The Period to Be Taken into Consideration

In criminal matters, in order to assess whether the 'reasonable time' requirement contained in Article 6 has been complied with, one must begin by ascertaining the moment a person was 'charged'.[5] This may have occurred on a date prior to the case coming before the trial court, such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when the preliminary investigations were opened. Whilst 'charge', for the purposes of Article 6, may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect. In civil and administrative cases the time to be taken into consideration starts running with the institution of proceedings. However, there is a trend in the case law to move the dies a quo forward.[6] The Court will examine the length of proceedings only from the date that the Contracting State

4 Table of violations by Article and by country, is to be found on the Court's website at: www.echr.coe.int [last accessed 16 September 2013].

5 *Eckle v Germany* A-51 (1982) at para 73; and *Foti and Others v Italy* A 56 (1982) at para 52.

6 *Schouten and Meldrum v The Netherlands* A 304 (1994); 19 EHRR 432, in which the Court took the date the person applied for an administrative decision in order to start judicial

ratified the Convention but also takes into account the state and progress of the case at that date.[7]

Time ceases to run when the proceedings have been concluded at the highest possible instance, when the determination becomes final and the judgment has been executed. In civil cases the period may therefore continue after the final judgment of a court, that is, during subsequent proceedings for the execution of that judgment.[8] Likewise, proceedings before a constitutional court may be included in the period to be taken into account.[9] However, the stay in domestic proceedings as a result of a request for a preliminary ruling of the Court of Justice of the European Union is not taken into consideration by the Court when determining the duration of the domestic proceedings.[10]

B. Reasonableness of the Length of the Proceedings

The next step is to determine whether the given length of the domestic proceedings may be qualified as 'reasonable'. No set time limits have been laid down in the Court's case law. Instead, the Court focuses on several criteria: (i) the complexity of the case; (ii) the behaviour of the applicant; (iii) the behaviour of the national (judicial) authorities; and (iv) whether there is a reason for special diligence.

(i) Complexity of the case

All aspects of the case are relevant in assessing whether it is complex. The complexity may concern questions of fact as well as legal issues. In the Court's case law 'complexity' can be (among other factors) due to: (i) the nature of the facts that are to be established, (ii) the number of accused persons and witnesses, (iii) international elements, (iv) the joinder of the case to other cases, (v) the intervention of other persons in the procedure. A more complex case may justify longer proceedings.[11] However, even in very complex cases unreasonable delays can occur.[12]

proceedings as the dies a quo; see also *Vallée v France* Application No 22121/93, Merits, 26 April 1994, in which the date that a person submitted a request for financial compensation to the administrative authority was considered the dies a quo.

7 *Proszak v Poland* 1997-VIII at paras 30–31.

8 *Guincho v Portugal* A 81(1984).

9 *Süßmann v Germany* Application No 20024/92, Merits, 16 September 1996.

10 *Pafitis v Greece* Application No 20323/92, Merits, 26 February 1998.

11 See, for example, *Boddaert v Belgium* A 235-D(1992); 2 EHRR 242, in which a period of six years and three months was not considered unreasonable by the Court since it concerned a difficult murder enquiry and the parallel progression of two cases.

12 *Ferantelli and Santangelo v Italy* 1996-III; 23 EHRR 288 (concerning a murder trial that took 16 years).

(ii) Conduct of the applicant

The Court will examine to what extent the applicant himself is responsible for certain periods of delay. However, an applicant cannot be blamed for using all the procedural avenues that are available to him. An applicant is not required to co-operate actively in expediting the proceedings that might lead to his/her own conviction. The Court stated in *Unión Alimentaria Sanders SA v Spain*[13] that the applicant's duty is only to 'show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings'.

(iii) Conduct of the domestic (judicial) authorities

There rests a special duty upon the domestic court to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay. In that sense, the European Court expects a proactive attitude from the judge.[14] Looking at the Court's case law, delays that have been attributed to the State include, in civil cases, the adjournment of proceedings pending the outcome of another case, delay in the conduct of the hearing by the court or in the presentation or production of evidence by the State, or delays by the court registry or other administrative authorities. In criminal cases, they include the transfer of cases between courts, the hearing of cases against two or more accused together, the communication of judgment to the accused and the making and hearing of appeals.[15] On the basis of the Court's case law one could say that a period of inactivity of nine to ten months will be held inexcusable. The Court has rejected governmental arguments that the national courts cannot deal with their workload because of inadequate staffing or insufficient number of courts. The State is obliged to organise their legal system so as to ensure compliance with the requirements of the Convention, though allowance is made for temporary problems that occur unexpectedly.[16]

(iv) Reasons for special diligence

This last criterion was first introduced by the Court in the case of *X v France*.[17] The case concerned an applicant who was a haemophiliac who had been infected by the HIV virus through blood transfusions. Having developed AIDS,

13 A 157 (1989); 12 EHRR 24 at para 35.
14 Cf. *Cuscani v United Kingdom* 36 EHRR 11 stated: 'the trial judge is the ultimate guardian of fairness'.
15 Mole and Harby, *The Right to a Fair Trial* (Strasbourg: Council of Europe, 2006) at 27–8.
16 *Salesi v Italy* A 257-E (1993) at para 24.
17 A 234-C (1992) at para 47.

he sought compensation from the French Ministry of Health but died before the conclusion of the domestic proceedings. The Court weighed heavily that 'what was at stake in the contested proceedings was of crucial importance for the applicant'. As the life expectancy of the applicant was short, special diligence on the part of the domestic courts had been called for. Similar considerations could apply to applicants who are held in pre-trial detention, and to proceedings concerning child care measures, employment disputes or personal injury cases.

4. What Compensation is Offered by the European Court of Human Rights under Article 41 of the Convention?

Given the fact that the Court has had to deliver so many judgments concerning the reasonable time requirement, the Court had to resolve to standardise its judgments and decisions. This is equally true with regard to the level of compensation offered under Article 41. The Court established scales on equitable principles for awards in respect of non-pecuniary damage under Article 41, in order to arrive at equivalent results in 'similar cases'.[18] 'Similar cases' has been taken to mean 'any two sets of proceedings that have lasted for the same number of years, for an identical number of levels of jurisdiction, with stakes of equivalent importance, much the same conduct on the part of the applicant and in respect of the same country'.[19]

The Court gave more specific indications in its Chamber judgment in the case of *Pizzati v Italy* in 2004:

> As regards an equitable assessment of the non-pecuniary damage sustained as a result of the length of proceedings, the Court considers that a sum varying between EUR 1,000 and 1,500 per year's duration of the proceedings (and not per year's delay) is a base figure for the relevant calculation. The outcome of the domestic proceedings (whether the applicant loses, wins or ultimately reaches a friendly settlement) is immaterial to the non-pecuniary damage sustained on account of the length of the proceedings.
>
> The aggregate amount will be increased by EUR 2,000 if the stakes involved in the dispute are considerable, such as in cases concerning labour law, civil status and capacity, pensions, or particularly serious proceedings relating to a person's health or life.
>
> The basic award will be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant – particularly the number of months or years due to unjustified adjournments for which the applicant is

18 *Scordino v Italy (No 1)* 2006-V at para 176.
19 Ibid. at para 267.

> responsible – to the stakes involved in the dispute – for example where the financial stakes are of little importance for the applicant – and on the basis of the standard of living in the country concerned. A reduction may also be envisaged where the applicant has been only briefly involved in the proceedings, having continued them in his or her capacity as heir. The amount may also be reduced where the applicant has already obtained a finding of a violation in domestic proceedings and a sum of money by using a domestic remedy. Apart from the fact that the existence of a domestic remedy is in full keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster, and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration.[20]

5. The Principle of Subsidiarity: Solving the Problem at the Domestic Level

Following the pilot-judgment procedure, the Court held in the case of *Ümmühan Kaplan*[21] that Turkey faced a structural problem on account of the excessive length of judicial proceedings and the lack of an effective remedy by which to complain of that length. The Court noted at the time that over 2,700 applications stemming from the same issue had been pending before the Court. Against that background, the Court held that Turkey had to put in place, within a year, an effective remedy affording adequate and sufficient redress in cases where judicial proceedings exceeded a reasonable time. The Turkish authorities responded by the enactment of Law No 6384 covering all criminal-law, private-law and administrative-law cases that had exceeded a 'reasonable time'. Following the introduction of that Law, the Court held[22] that applicants were required – in accordance with Article 35(1) of the Convention – to apply to the Compensation Board set up by Law No 6384 in so far as this was apparently an accessible remedy capable of offering them a reasonable chance of redress for their complaints, even if their applications had been lodged before Law No 6384 had come into force.

20 Application No 62361/00, Merits, 10 November 2004. This Chamber judgment never became final since the case was referred to the Grand Chamber, which delivered judgment in the case on 29 March 2006. Even though the Grand Chamber judgment did not reiterate the above cited considerations of the Chamber, it may be assumed that the considerations of the Chamber give a fair insight in the rough calculation methods used by the Court. It is rumoured that there is discussion within the Court to what extent it should be transparent about these calculation methods. Some judges apparently fear these indicative figures could become too restrictive.

21 Application No 24240/07, Merits, 20 March 2012.

22 *Turgut a.o. v Turkey* Application No 4860/09, Admissibility, 26 March 2013.

Complaints to the Court would be declared inadmissible for failure to exhaust domestic remedies.

The Turkish example clearly demonstrates the importance for the Strasbourg institutions that effective domestic remedies are put in place. This paragraph examines the standards developed within the Council of Europe concerning such domestic remedies.

A. Article 13 of the Convention: Providing an 'Effective' Remedy

Article 13 of the Convention provides that '[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. Article 13 is the embodiment of the principle of subsidiarity, which is one of the underlying foundations of the Convention mechanism.[23] Domestic authorities of the High Contracting Parties to the ECHR have the primary duty to guarantee Convention rights and freedoms, whilst the Court serves as a 'safety net'. Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the ECHR and to grant appropriate relief.

In early case law of the Convention bodies, Article 13 did not receive a lot of attention. The Court would very often find a violation under a separate provision of the ECHR (for example, Article 6) and subsequently rule that it was not necessary to also examine the applicant's case under Article 13. The Court changed its approach in its 2000 judgment in the case of *Kudla v Poland*.[24] The Court announced that 'the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1'. The Court then proceeded to stress the autonomous importance of Article 13 of the Convention:

> The question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from

23 Applicants need to exhaust all available (and effective) domestic remedies before being able to bring a case to the European Court (Article 35 of the Convention) because the respondent State 'must first have an opportunity to redress the situation complained of by its own means and within the framework of its own domestic legal system' (see *Fifty-seven inhabitants of Louvain v Belgium* (1964) *Yearbook* at 252). The 'margin of appreciation' doctrine would be another manifestation of the subsidiary nature of the Convention mechanism.

24 2000-XI; 35 EHRR 198.

> that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground. . . . [T]he Court now perceives the need to examine the applicant's complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 § 1 for failure to try him within a reasonable time.[25]

The 'upgrading' of Article 13 was therefore a direct result of the quantity of 'length of proceedings' cases before the Court. Or, as the Court phrased it in the *Scordino* judgment, 'the reason [the Court] has been led to rule on so many length-of-proceedings cases is because certain Contracting Parties have for years failed to comply with the 'reasonable time' requirement under Article 6(1) and have not provided a domestic remedy for this type of complaint'.[26] The growing importance of effective domestic remedies was underlined as well by the Heads of State and Government in their Action Plan from the Third Summit of the Council of Europe, which was held in May 2005.[27]

The Court demands that a domestic remedy deal with the substance of an 'arguable complaint' under the ECHR and that an appropriate authority grant appropriate relief. The authority needs to be competent to take binding decisions (which means that an Ombudsman would not meet the required standards). The authority does not necessarily need to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy may be considered 'effective'. The authority should be competent to order *restitutio in integrum* or award damages. Likewise, the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the ECHR and whose effects are potentially irreversible.[28] The remedy required by Article 13 needs to be effective in practice as well as in law.

So, what does this mean in the context of exceeding the reasonable time requirement? In the abovementioned *Scordino* judgment, the Court gave some guidance:

> Different types of remedy may redress the violation appropriately. The Court has already affirmed this in respect of criminal proceedings, where it was satisfied that the length of proceedings had been taken into account when reducing the sentence in an express and measurable manner. Moreover, some States, such as Austria, Croatia, Spain, Poland and Slovakia, have understood the situation perfectly by choosing to

25 Ibid. at paras 147–9.
26 Supra n 18 at paras 174–5.
27 CM(2005)80 final, at 1, available at: www.coe.int/t/der/docs/WarsawActionPlan2005.en.pdf [last accessed 16 September 2013].
28 *Čonka v Belgium* 2002-I; 34 EHRR 34 EHRR 1298, at para 79.

> combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation. However, States can also choose to introduce only a compensatory remedy, as Italy has done, without that remedy being regarded as ineffective. . . . [T]he Contracting States are afforded some 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.[29]

The Court reiterated that position in the later Grand Chamber judgment in *McFarlane v Ireland*:

> Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy post factum in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist.[30]

We should therefore look at two types of remedies: the 'preventive' remedy and the 'compensatory' remedy. Prevention is – as always – the best solution. Preferably, there should be a remedy in place designed to expedite the proceedings in order to prevent them from being excessively lengthy. However, there is very little in the Court's case law to shed light on what such a preventive remedy could look like. As for the compensatory remedy, the Court's case law can be summarised as follows:

- If there has been a violation of the reasonable time requirement as set out in Article 6, there should be a finding of such a violation by the domestic authority which is binding;
- The remedy needs to be 'effective, adequate and accessible', that is, excessive delays in an action for compensation will affect whether the remedy can be considered 'adequate'.[31] Likewise, the 'accessibility' of the remedy could be affected by the rules regarding legal costs.[32]
- There should be 'appropriate and sufficient' redress, which means *inter alia* that the compensation should be paid without undue delay (that is, six months from the date on which the decision awarding compensation became enforceable).[33] In addition, the amount of compensation paid by the domestic authority should not vary too much from the standards concerning financial compensation developed by the European Court.[34]

29 Supra n 18 at paras 186–189.
30 Application No 31333/06, Merits, 10 September 2010, at para 108.
31 See *Scordino*, supra n 18 at para 195.
32 Ibid. at para 201.
33 Ibid. at para 198. Certain countries, such as Slovakia and Croatia, have stipulated a time limit in which payment should be made, namely two and three months, respectively.
34 See *Scordino*, supra n 18 para 206.

However, in some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all. The domestic courts will then have to justify their decision by giving sufficient reasons.[35]

- Basic principles of 'fairness' guaranteed by Article 6 of the ECHR should be respected by the domestic authority in the compensatory proceedings.[36]

B. Recommendations by the Venice Commission

Established in May 1990, the European Commission for Democracy through Law – better known as the 'Venice Commission' – acts as the Council of Europe's advisory body on constitutional matters. In December 2006, the Venice Commission published a report on the effectiveness of national remedies in respect of excessive length of proceedings.[37] The Venice Commission went a step further than the Court with regard to a preventive remedy (that is, the possibility to prevent exceeding the reasonable time requirement by expediting the judicial proceedings). The Commission stated: '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 Articles 6 and 13 of the Convention'.[38] The Venice Commission considered that member States should provide *in the first place* adequate means of ensuring that cases are processed by courts observing the reasonable time requirement.

C. Recommendations by the CDDH

The principal role of the CDDH in the Council of Europe is to establish – under the auspices of the Committee of Ministers – standards commonly accepted by the 47 member states, with the aim of developing and promoting human rights in Europe and improving the effectiveness of the control mechanism established by the ECHR. In effect, it is the main forum where the work of the

35 Ibid. at para 204.
36 Ibid. at para 200.
37 CDL-AD(2006)036rev., available at: www.venice.coe.int/webforms/documents/CDL-AD(2006)036rev.aspx [last accessed 16 September 2013], but was also reproduced in: *Can excessive length of proceedings be remedied? Science and Technique of Democracy Collection No 44* (Strasbourg: CE Publishing, 2007).
38 Ibid. at paras 237–239.

Committee of Ministers in the field of human rights is prepared at the level of senior civil servants.[39]

In 2000, the Ministers' Deputies decided to start monitoring the effectiveness of national judicial remedies with respect to the length of proceedings. In January 2001, the Committee of Ministers instructed the 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 of effective remedies.[40] This eventually led to the adoption by the Committee of Ministers in May 2004 of Recommendation (2004)6 on the improvement of domestic remedies.[41] In particular, the Recommendation called upon member states to (a) review, following Court judgments that point to structural or general deficiencies in national law or practice, the effectiveness of existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court; and (b) pay particular attention to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings.

One of the main activities of the CDDH over the last few years has been the reform of the Convention mechanism to guarantee its long term future. From that perspective, the CDDH is interested in improving domestic remedies to alleviate the Court's workload. The report of the so-called 'Group of Wise Persons' highlighted improvement of domestic remedies for excessive length of judicial proceedings as one of the most important measures that could be taken to alleviate the Court's caseload.[42] Following a high-level Colloquy in Stockholm, the CDDH was invited by the Committee of Ministers 'to give priority attention to the following matters identified at the Stockholm Colloquy . . . :- the possibility of drawing up more specific non-binding instruments on effective domestic remedies regarding in particular excessive length of domestic proceedings, including practical steps to prevent violations'.[43]

39 There is surprisingly little academic literature on the CDDH. However, in Dutch see Böcker and Egmond, 'Het Stuurcomité Mensenrechten: Turbodiesel van de Raad van Europa', in Loof and Lawson (eds), *60 Jaar Europees Verdrag voor de Rechten van de Mens – een lichtend voorbeeld?* (Leiden: NJCM, 2010) at 905–18.

40 See, para 9 in particular: wcd.coe.int/ViewDoc.jsp?id=179065&Site=CM [last accessed 16 September 2013].

41 Available at wcd.coe.int/ViewDoc.jsp?id=743317 [last accessed 16 September 2013].

42 See the Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, 15 November 2006, in particular the analysis at paragraphs 87–93, available at: https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM [last accessed 16 September 2013].

43 See 'Colloquy: "Towards stronger implementation of the European Convention on Human Rights at national level" – Follow-up', CM/Del/Dec(2008)1039/4.6, Stockholm, 9–10 June 2008, available at: wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2008)1039/4.6&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864 [last accessed 16 September 2013]. See also the earlier Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted on 12 May 2004. The 2004 Recommendation was much more of a procedural nature. It called for 'constant review' in the light of the case law of the Court that effective domestic remedies existed.

In January 2009, the Secretariat assisting the CDDH Reflection Group prepared a document containing various elements for a possible recommendation of the Committee of Ministers on domestic remedies with respect to excessive length of judicial proceedings.[44] However, to date, concrete follow up to this work has not yet been realised. This may be due to the fact that the CDDH has had an extremely full agenda dealing with other issues concerning the reform of the Convention mechanism. Having said that, very useful national reports that were drawn up in 2012 (within a working group called GDR-A) which contain a wealth of information, *inter alia*, on how member states have given follow up to the above mentioned Recommendation (2004) 6. Some of the examples mentioned in Section 6 below are taken from these country reports.

D. CEPEJ

The aim of the Council of Europe's CEPEJ is improvement of the efficiency and functioning of justice in the member States, and the development of the implementation of the instruments adopted by the Council of Europe for this purpose. It is clear that the work of CEPEJ is highly relevant for the present topic. CEPEJ has designed tools which could be used in the daily administration of justice, such as a time management checklist,[45] guidelines for judicial time management, a compendium of good practices, and a centre for judicial time management: the Study and Analysis of Judicial Time Use Research Network (SATURN Centre). The SATURN Centre was set up in 2007 and collects information necessary for the knowledge of judicial timeframes in the member States. Its primary aim is to enable member states to implement policies aimed at preventing violations of the right for a fair trial within a reasonable time protected by Article 6 of the ECHR.

6. State Practice in Various European Countries

In general, state practice in various European countries distinguishes between remedies in criminal proceedings and remedies in civil and administrative proceedings.[46] Certain of those remedies have been developed

44 DH-RE(2009)001, available at: www.coe.int/t/dghl/standardsetting/cddh/DH.RE/DH-RE.1st.pdf [last accessed 16 September 2013].

45 CEPEJ (2005) 12 REV.

46 This section is partly based on the CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations (see GT-GDR-A(2012)R2 Addendum I, which in turn is based on questionnaires sent to member States by the Chairmanship of the Committee of Ministers (see especially GT-GDR-A(2012)008REV.1), available at: www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT.GDR.A/R2%20ADDIe.pdf [last accessed 16 September 2013].

in domestic case law, whilst some were introduced by legislative measures. Most remedies are compensatory in nature, but there are some that can be considered more preventive.

Regarding preventive remedies, one may refer to Estonia, where a 2011 amendment to the Code on Criminal Procedure and other procedural acts established new preventive remedies against excessive length of proceedings.[47] These legislative measures made it possible for domestic courts to be asked to perform a specific procedural act, with any refusal subject to appeal, and introduced new time limits for guaranteeing an accused's fundamental rights. In Lithuania, a 2010 reform of the Code of Criminal Procedure fixed the maximum period for pre-trial investigation[48] and a 2011 reform of the Code of Civil Procedure allows applications to the Court of Appeals to fix the time within which a lower court must take certain procedural actions.[49] In Romania, legislative reforms and provisions in the new criminal and civil procedure codes were introduced in 2010, with measures to ensure a trial within a reasonable time and to expedite delayed proceedings. In addition, the Superior Judicial Council has sought to sanction disciplinary faults contributing to delays.[50]

As for compensatory remedies, it should be noted from the outset that the compensation does not necessarily need to be financial. In Dutch criminal proceedings, the Supreme Court gave two standard judgments in 2000 and 2008 providing guidelines for time limits in criminal proceedings and for the consequences of breaching the reasonable time requirement.[51] The courts are to assess *ex proprio motu* whether the right to be heard within a reasonable time has been violated. If a breach is found, the individual is compensated by means of a reduction in the penalty that would otherwise have been imposed.[52] The degree to which the penalty is reduced depends on the degree to which the reasonable time limit has been overrun and the severity of the penalty imposed.

Interestingly, in the Czech Republic a compensatory remedy with retrospective effect was introduced in 2006 to 'repatriate' applications already

47 GT-GDR-A(2012)R2 Addendum I, at 30; see also the introductory statement to the UN Committee Against Torture by Mr Margus Sarapuu, Secretary General of the Ministry of Justice of the Republic of Estonia.

48 As a rule the investigating authority needs to perform its duties within six months. In particularly complex or voluminous cases, this period may be extended to eighteen months (twelve months for juveniles); see also the website of the Lithuanian Human Rights Monitoring Institute at: www.hrmi/lt/en [last accessed 16 September 2013].

49 GT-GDR-A(2012)R2 Addendum I, at 30–1.

50 GT-GDR-A(2012)R2 Addendum I, at 31.

51 Supreme Court 3 October 2000 (LJN AA7309) and Supreme Court 17 June 2008 (LJN BD2578).

52 If criminal proceedings have breached the reasonable time requirement and a defendant is acquitted, he or she may request financial compensation.

made to the Strasbourg Court.[53] In Germany, the general constitutional remedy had been found by the Strasbourg Court to be deficient with respect to excessive length of proceedings.[54] In response, the Act on Legal Protection in the Event of Excessive Length of Court Proceedings and Criminal Investigative Proceedings entered into force in December 2011, allowing for a compensation claim in relation to proceedings before any domestic court up to and including the Constitutional Court.[55]

In civil proceedings, compensation proceedings may on occasion be based on the general provisions concerning tort. For instance, according to established case law of the Dutch Supreme Court[56] a judicial decision may be qualified as unlawful under certain circumstances, notably when fundamental legal principles have been disregarded to the extent that the process has not been fair and impartial and no remedy against the decision is or was available.

Lastly, attention can be drawn to the potential role of a Council for the Judiciary in respect of claims for compensation as a result of excessively lengthy proceedings. For example, in the Netherlands, the *Raad voor de Rechtspraak* assumes a growing role in this respect. The Council has been mandated by the Minister of Security and Justice to decide on claims for damages due to exceeding the reasonable time requirement by Dutch courts.[57]

7. Concluding Comments

The development of compensatory mechanisms, either as a result of legislative amendments or as a result of judicial interpretation, has evolved in many European countries satisfactorily. In a sense, the compensatory mechanism is also the most easiest to realise. The caselaw of the European Court is fairly detailed and it is clear to domestic authorities what needs to be done. First, it should be remembered that 'compensation' does not necessarily mean 'financial compensation'. Second, in the absence of a specific legislative remedy, judicial authorities could make greater use of more general provisions such as tort. Third, domestic authorities could examine whether Councils for the Judiciary could not play a greater role in this field.

53 GT-GDR-A(2012)R2 Addendum I, at 31.
54 *Case of Wimmer v Germany* Application No 60534/00, Merits and Just Satisfaction, 24 February 2005.
55 GT-GDR-A(2012)R2 Addendum I, at 32.
56 HR 3 December 1971, NJ 1972, 137; HR 8 January 1993, NJ 1993, 558; HR 29 April 1994, NJ 1995, 727.
57 See the 'Regeling mandaat, volmacht en machtiging Raad voor de rechtspraak (verzoeken tot schadevergoeding i.v.m. rechtspraak waarvoor de Staat aansprakelijk kan worden gehouden)' of 26 January 2012, available at: wetten.overheid.nl/BWBR0031203/geldigheidsdatum_19-08-2013 [last accessed 16 September 2013]

With regard to the preventative mechanism there is a lot more uncertainty. The development of various types of preventive mechanisms needs to be proceeded by a sound analysis of the problem. In various countries, reliable statistical data is not always available which makes it difficult to analyse in what stages of judicial proceedings delays occur and what the reasons for those delays are. Greater use could be made of the very useful work of CEPEJ and the SATURN Centre. Without a proper analysis of this kind of data, it is largely impossible to develop effective mechanisms. To date, it is possible to discern roughly two types of preventative mechanisms: (a) greater use of set time limits for various procedural steps in judicial proceedings; and (b) mechanisms that allow a party to the judicial proceedings to request a higher court to order the lower trial court to take a particular procedural step or to set a time limit.

What is clear from the foregoing is that solving the issue of excessively lengthy proceedings is not merely a question of allocating increased budgetary resources to the judiciary, although judiciaries throughout Europe (like other branches in public service and professions in a commercial setting) are faced with daunting challenges in this regard. However, even in the absence of additional budgetary resources many efficiency measures can still be taken. Legislators need to eliminate procedural rules that unnecessarily delay the proceedings or provide for overly complex procedures. Furthermore, greater flexibility in case assignment mechanisms could help courts to better adapt to unforeseen changes in the caseload. Likewise, greater use could be made of IT facilities to streamline judicial proceedings or improved assistance by appropriate court personnel (clerks). Equally, rules with regard to the observance of time-limits by experts could be reviewed. Some countries have introduced a system whereby the delivery of an expert opinion is accompanied by strict time limits. If the expert fails to observe the time-limit, his/her fee is reduced or he/she could be removed from the list of experts. With regard to appellate proceedings, mention could be made of the Swedish practice to video record first instance proceedings to avoid the need to hear all witnesses again. Likewise, CEPEJ has noted that appeal options can be limited. In certain cases (for example, small claims) the appeal could be excluded, or a leave to appeal system could be introduced.[58]

Judicial attitudes will be equally important. Judges have the right to actively monitor that judicial proceedings before them comply with the reasonable time requirement. One could even say on the basis of the Strasbourg case law that they have a *duty* to do so.[59] This has already led various national authorities to make greater use of disciplinary sanctions in case the excessively

58 See the SATURN guidelines, CEPEJ (2008) 8 Rev, for judicial time management adopted by CEPEJ in December 2008.

59 See *Cuscani v United Kingdom*, supra n 14.

lengthy proceedings are due to the personal conduct of the judge handling the case. Although one should be extremely cautious using these disciplinary measures, it is submitted that there are no principled objections against the use of disciplinary sanctions from a viewpoint of judicial independence. Judicial independence does not imply a lack of accountability. However, there are risks of a practical nature: they could easily be abused. Only if disciplinary sanctions are surrounded by adequate procedural safeguards (such as the imposition by a judicial body) and if the delay is indeed the result of the personal behaviour of a judge (and not due to more systemic problems in the judiciary), could they be justified.

Despite the fact that many European countries have by now acknowledged the seriousness of the phenomenon and have taken (legislative) measures in recent years, the problems surrounding excessively lengthy proceedings have not been resolved. Statistics show that one in four cases before the European Court still relate to length of proceedings cases. In light of the principle of subsidiarity and the demands of Article 13 of the Convention, domestic (legislative and judicial) authorities clearly need to act with a greater sense of urgency.