The Right to a Fair Trial: effective remedy for excessively lengthy proceedings
(Articles 6 and 13 ECHR)

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1. Introductory comments

Every year hundreds of applicants complain before the European Court of Human Rights that judicial proceedings before their domestic courts have taken too much time and thereby violate Article 6 of the Convention, 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 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 (failed) asylum seekers. Deterrence of 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 a speedy determination of their innocence. Much more can be said about the underlying interests that Article 6 of the Convention seeks to protect, but that is not the aim of this presentation.

Instead, this presentation will focus 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 presentation 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 presentation focuses on a related issue: what kind of remedies should be available on the domestic level in order to avoid those Strasbourg complaints. Attention will be paid to the Court’s case-law under the heading of Article 13 of the Convention, but also to the work of 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

Let me first take you back in time. The ‘reasonable time’ requirement laid down in Article 6 of the Convention did not receive much attention in the Strasbourg case-law in the early years of the Strasbourg mechanism which is not to say that there was no case-law at all\(^1\). Cases concerning excessively lengthy proceedings would become 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 of 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 broadcasting 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, 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. Problematic, however, was that the Commission was not competent to adopt a final decision contrary to judgments of the European Court of Human Rights. 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 compensations 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 25\% of the total workload), the Committee of Ministers changed its policy and started to issue binding decisions. 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 the 11\(^{th}\) Protocol. With the entry into force of that Protocol, the Commission ceased to exist and the Court became a full time institution which 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.\(^3\) One has to admit, the Court has a sense of humour… 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 challenges 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 Court. New legal issues were brought before the Court concerning the amount of compensation offered domestically and the fact that the

\(^1\) See for example ECtHR 27 June 1968, Neumeister v. Austria (appl. no. 1936/63), §§ 20-21; ECtHR 16 July 1971, Ringeisen v. Austria (appl. no. 2614/65), § 110 and ECtHR 28 June 1978, König v. Germany (appl. no. 6232/73), § 99.

\(^2\) See R.A. Lawson & H.G. Schermers, Leading Cases of the European Court of Human Rights, Ars Aequi Libri, p. XXX.

\(^3\) ECHR [GC] 28 July 1999, Ferrari a.o. v. Italy (appl. no. 33440/96).
compensation proceedings in themselves were taking too long. More importantly, the length of proceedings cases are not exclusively directed against Italy. If one looks at the 2012 Annual Report of the Court (Table of violations by Article and by country; to be found on the court’s website www.echr.coe.int) one sees that most judgments are now against Turkey (51) followed by Greece (35), Ukraine (31), Bulgaria (17), Portugal (17), Russia (16) and Italy (16). Another important conclusion looking at those statistics is that 25% 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 would be to determine the period to be taken into consideration, while the second step would subsequently be to determine whether that period can be qualified as ‘reasonable’.

3.1 Period to be taken into consideration

Dies a quo
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 from which moment the person was ‘charged’. 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.

The time to be taken into consideration starts running with the institution of proceedings in civil and administrative cases. However, there is a trend in the case-law to move the dies a quo forward.

The Court will examine the length of proceedings from the date on which a Contracting State ratified the Convention but will take into account the state and progress of the case at that date.

Dies ad quem
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, i.e. subsequent

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4 ECtHR 15 July 1982, Eckle v. Germany (Series A-51), § 73 and ECtHR 10 December 1982, Foti v. Italy (Series A-56), § 52.
5 ECtHR 9 December 1994, Schouten & Meldrum v. The Netherlands (appl. nos. 19005/91 & 19006/91), in which the Court took the date the person applied for an administrative decision in order to start judicial proceedings as the dies a quo. See also ECtHR 26 April 1994, Vallée v. France (appl. no. 22121/93), in which the date that a person submitted a request for financial compensation to the administrative authority was considered the dies a quo.
proceedings for the execution of that judgment. Likewise, proceedings before a constitutional court may be included in the period to be taken into account. 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.

3.2 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.

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. However, even in very complex cases unreasonable delays can occur.

Conduct of the applicant

The Court will examine to what extent the applicant himself is responsible for certain periods of delay. However, an applicant can not be blamed for using all procedural avenues that are available to him. An applicant is not required to co-operate actively in expediting the proceedings which might lead to his/her own conviction. The Court stated in Unión Alimentaria Sanders SA v. Spain 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”.

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 of Human Rights expects a more pro-active attitude of the trial judge. 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

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7 ECHR 10 July 1984, Guincho v. Portugal (Series A-81).
8 ECHR 16 September 1996, Sißmann v. Germany (appl. no. 20024/92).
10 See for example ECHR 12 October 1992, Boddaert v. Belgium (appl. no. 12919/87) 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.
11 ECHR 7 August 1996, Ferantelli and Santangelo v. Italy (appl. no. 19874/92) concerning a murder trial that took sixteen years.
12 Judgment of 7 July 1989, appl. no. 11681/85, § 35.
13 Cf. the Court in the Cuscani judgment: “the trial judge is the ultimate guardian of fairness” (ECtHR 24 September 2002, Cuscani v. the United Kingdom (appl. no. 32771/96)).
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. On the basis of the Court’s case-law one could say that a period of inactivity of 9 – 10 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.

Reasons for special diligence
This last criterion was first introduced by the Court in the case of X. v. France. The case concerned an applicant who was a haemophiliac who had been infected by the HIV virus through blood transfusions. Having developed AIDS, 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. With ‘similar cases’ the Court means “means 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”.

The Court has given 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.

15 ECtHR 26 February 1993, Salesi v. Italy (Series A-257-E), § 24.
16 ECtHR 31 March 1992, X. v. France (Series A-234-C), § 47.
17 ECtHR 29 March 2006, Scordino v. Italy (appl. no. 36813/97), § 176.
18 Ibid, § 267.
19 ECtHR 10 November 2004, Pizzati v. Italy (appl. no. 62361/00). 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. The Grand Chamber judgment did not reiterate the above cited considerations of the Chamber.
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 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.”

5. The principle of subsidiarity: solving the problem on the domestic level

5.1 Article 13 of the Convention: providing an ‘effective’ remedy

Article 13 of the Convention states that “Everyone 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. Domestic authorities of the High Contracting Parties to the Convention have the primary duty to guarantee Convention rights and freedoms. The European Court of Human Rights serves as a subsequent ‘safety net’. Article 13 of the Convention guarantees the availability at 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 Convention and to grant appropriate relief.

In early case-law of the Convention bodies, Article 13 of the Convention did not receive a lot of attention. The Court would very often find a violation under a separate provision of the Convention (for example, Article 6) and subsequently rule that it was not necessary to also examine the applicant’s case under Article 13 of the Convention. The more autonomous role of Article 13 of the Convention was highlighted by the Court in its 2000 judgment in the case of Kudla v. Poland. 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

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20 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 EComHR, Fifty-seven inhabitants of Louvain v. Belgium, appl. no. 1994/63, in the Yearbook of the ECHR 1964, p. 252). The ‘margin of appreciation’ doctrine would be another manifestation of the subsidiary nature of the Convention mechanism (see M. de Salvia, “Contrôle européen et principe de subsidiarité: faut-il encore (et toujours) émarger à la marge d’appréciation?”, in: P. Mahoney, F. Matscher, H. Petzold & L. Wildhaber (eds.), Protecting Human Rights: The European Perspective – Studies in memory of Rolv Ryssdal, Köln: Carl Heymanns Verlag, 2000, pp. 373-386).

21 ECtHR 26 October 2000, Kudla v. Poland (appl. no. 30210/96).
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 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”. 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”. The growing importance of effective domestic remedies was underlined as well by the Heads of State and Government at the Third Summit of the Council of Europe (Warsaw, 16-17 May 2005) in its Action Plan.

The Court demands a domestic remedy to deal with the substance of an ‘arguable complaint’ under the Convention and to grant appropriate relief. The latter condition is to say that the ‘authority’ needs to be competent to take binding decisions (which means that an Ombudsman would not meet the required standards) and that it 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 Convention and whose effects are potentially irreversible. The remedy required by Article 13 needs to be effective in practice as well as in law. 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’.

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 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”.

The Court has reiterated that position in its recent Grand Chamber judgment in the case of 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”.

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22 ECtHR 29 March 2006, Scordino v. Italy (No. 1) (appl. no. 36813/97), §§ 174-175.
23 ECtHR 5 February 2002, Čonka v. Belgium (appl. no. 51564/99), § 79.
24 ECtHR 29 March 2006, Scordino v. Italy (No. 1) (appl. no. 36813/97), §§ 186-188.
25 ECtHR 10 September 2010, McFarlane v. Ireland (appl. no. 31333/06), § 108.
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 how such a preventive remedy could look like. I will therefore examine other sources, such as a report by the Venice Commission and reports by the Steering Committee for Human Rights (CDDH), in the following paragraphs. 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 of the Convention, there should be a finding of such a violation by the domestic authority which is binding;
- that remedy needs to be ‘effective, adequate and accessible’, i.e. excessive delays in an action for compensation will affect whether the remedy can be considered ‘adequate’ (see Scordino, § 195). Likewise, the ‘accessibility’ of the remedy could be affected by the rules regarding legal costs (see Scordino, § 201);
- there should be ‘appropriate and sufficient’ redress, which means inter alia that the compensation should be paid without undue delay (i.e. six months from the date on which the decision awarding compensation became enforceable – see Scordino, § 198)\(^{26}\). 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 (see Scordino, § 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 (see Scordino, § 204);
- basic principles of ‘fairness’ guaranteed by Article 6 of the Convention should be respected by the domestic authority in the compensatory proceedings (see Scordino, § 200).

5.2 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.\(^{27}\) What is remarkable is that the Venice Commission went a step further with regard to the preventive mechanism (i.e. the possibility to prevent exceeding the reasonable time requirement by expediting the judicial proceedings) than the Court did in its case-law: “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”.\(^{28}\) 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.

\(^{26}\) Certain countries, such as Slovakia and Croatia, have stipulated a time-limit in which payment should be made, namely two and three months respectively.

\(^{27}\) CDL-AD(2006)036rev. The report can be found on internet, but was also reproduced in: Can excessive length of proceedings be remedied?. Science and Technique of Democracy Collection No. 44, CE Publishing, 2007.

\(^{28}\) Ibid, §§ 237-239.
5.3 Recommendations by the Steering Committee for Human Rights (CDDH)

The principal role of the Steering Committee for Human Rights (CDDH) in the Council of Europe is to set up – 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 European Convention on Human Rights. In effect, it is the main forum where the work of the Committee of Ministers in the field of human rights is prepared on the level of senior civil servants.\(^\text{29}\)

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 on effective remedies. This eventually led to the adoption by the Committee of Ministers in May 2004 of Recommendation (2004) 6 on the improvement of domestic remedies. In particular, the Recommendation called upon member states to (a) review, following Court judgements 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 (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 years has been the reform of the Convention mechanism to guarantee its long term future. From that perspective, the CDDH is interested in the improvement of 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.\(^\text{30}\) 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”.\(^\text{31}\) 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. However, to date a concrete follow up to this work has not yet been realised which 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, I would like to draw the attention to 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


\(^{30}\) See doc. CM(2006)203 (15 November 2006); in particular the analysis at paragraphs 87-93.

to the above mentioned Recommendation (2004) 6. Some of the examples mentioned in paragraph 5.5 below are taken from these country reports.

5.4 European Commission for the Efficiency of Justice (CEPEJ)

The aim of the Council of Europe’s CEPEJ is the 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 to this end. It is clear that the work of CEPEJ is highly relevant for the present topic. CEPEJ designed tools which could be used in the daily administration of justice, such as a time management checklist\(^{32}\), guidelines for judicial time management, a compendium of good practices, and a centre for judicial time management (Saturn Centre). The SATURN Centre (Study and Analysis of judicial Time Use Research Network) was set up in 2007 and collects information necessary for 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 for a fair trial within a reasonable time protected by Article 6 of the European Convention on Human Rights.

5.5 State practice in various European countries \(^{33}\)

In general, state practice in various European countries distinguishes between remedies in criminal proceedings and remedies in civil and administrative proceedings. Certain of those remedies have been developed in domestic case-law, some were introduced by legislative measures. Most remedies are compensatory in nature, but there are some that can be considered more preventive.

As for the 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 making it possible for domestic courts to be asked to perform a specific procedural act, with any refusal subject to appeal, and introducing 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 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. In Romania, legislative reforms and provisions in the new criminal and civil procedure codes were introduced in 2010, with measures to ensure 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.

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.\(^{34}\) The court assesses \textit{ex proprio motu} whether the right to be heard within a reasonable time has

\(^{32}\) CEPEJ (2005) 12 REV.

\(^{33}\) This paragraph is partly based on GT-GDR-A(2012)R2 Addendum I, §§ 112 and 116, which in turn is based on questionnaires sent to member States by the Chairmanship of the Committee of Ministers (see esp. doc. GT-GDR-A(2012)008REV_1).

\(^{34}\) Supreme Court 3 October 2000 (LJN AA7309) and Supreme Court 17 June 2008 (LJN BD2578).
been violated. If a breach is found, it is compensated for by means of a reduction in the penalty that would otherwise have been imposed. 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.

However, most compensatory remedies offer financial compensation. Some of those remedies have been developed in domestic case-law. In Dutch administrative proceedings, for example, the Administrative Jurisdiction Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State) and the Central Appeals Tribunal (Centrale Raad van Beroep) developed over the last few years a detailed case-law on time limits in administrative proceedings, including on financial compensation in case of excessive length of proceedings. This case-law is based on the guidelines developed in the case-law of the Court.

In other European countries, legislative reforms are underway. In Bulgaria, for example, it has been noted that the scope of the State and Municipality Responsibility for Damage Act needs broadening to include right for compensation for excessively lengthy proceedings. Draft legislative reforms are expected to be prepared by Ministry of Justice working group during 2012 and adopted by the National Assembly thereafter. Interestingly, in the Czech Republic a compensatory remedy with retrospective effect was introduced in 2006 to “repatriate” applications already made to the Strasbourg Court. A similar initiative was taken in Slovenia. In Germany, the general constitutional remedy had been found by the Strasbourg Court to be deficient with respect to excessive length of proceedings. 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. A similar process has taken place in Portugal.

In civil proceedings, compensation proceedings may on occasion be based on the general provisions concerning tort.35

Lastly, I would like to draw attention to the potential role of a Council for the Judiciary in respect of claims for compensation as a result of excessively lengthy proceedings. In the Netherlands, the Raad voor de Rechtspraak assumes a growing role in this respect.

6. Concluding remarks

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 easiest to realise. The case-law of the European Court is fairly detailed and it is clear to domestic authorities what needs to be done. Let me just reiterate some earlier remarks. 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.

35 According to established case law of the Dutch Supreme Court (HR 3 December 1971, NJ 1972, 137; HR 8 January 1993, NJ 1993, 558; HR 29 April 1994, NJ 1995, 727) 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.
With regard to the preventative mechanism there is a lot more uncertainty. To my mind, development of various types of preventative mechanisms needs to be proceeded by a good 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. To my mind, 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, I can roughly discern two types of preventative mechanisms: (a) greater use of set time limits for various procedural steps in judicial proceedings, and (b) mechanisms which 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 I am convinced that judiciaries throughout Europe (like other branches in public service and professions in a commercial setting) are faced with daunting challenges in this regard. However, I am convinced that 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 (e.g. small claims) the appeal could be excluded, or a leave to appeal system could be introduced.36

Judicial attitude 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.37 This has already led various national authorities to make greater use of disciplinary sanctions in case the excessively lengthy proceedings are due to the personal conduct of the judge handling the case. In my opinion, one should be extremely cautious using these disciplinary measures although I do not share the opinion of those who have principled objections against the use of disciplinary sanctions from a viewpoint of judicial independence. I do not believe that judicial independence implies a lack of accountability. My hesitations are much more 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 in my opinion.

37 See ECtHR 24 September 2002, Cuscani v. the United Kingdom (appl. no. 32771/96).
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 need to act with a greater sense of urgency.