

**HUMAN RIGHTS COMPLIANT CRIMINAL  
JUSTICE SYSTEM IN UKRAINE**

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**PROVIDING EFFECTIVE REMEDIES TO SECURE CRIMINAL PROCEEDINGS  
WITHIN A REASONABLE TIME: A COMPARATIVE STUDY**

**the present study is prepared  
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*“Human Rights Compliant Criminal Justice System in Ukraine”***

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## **A. INTRODUCTION**

1. This Study is concerned with the possibilities that should be available for persons who are the object of criminal proceedings either to prevent the time being taken for their determination becoming excessive or to provide them with some form of reparation where this has already occurred.
2. In particular, it seeks to clarify the scope of the right to an effective remedy in Article 13 of the European Convention on Human Rights (“the European Convention”) and the lessons that can be drawn from the experience of several member States of the Council of Europe in their efforts to provide fulfil their obligation in respect of this right.
3. The requirement for criminal proceedings to be determined within a reasonable time is a key element of the right to a fair trial in Article 6 of the European Convention. The fulfilment of this right, in the sense of no unjustified delays occurring, has implications for many aspects of the organisation of the criminal justice system, notably as regards the procedures to be followed, the powers available, the institutional arrangements made, the technologies used and the resources provided. However, even where these aspects are all generally satisfactory, there is always a possibility of the conduct of particular criminal proceedings being afflicted by unjustified delay. The right to an effective remedy should thus be available either as a means of prevention or of reparation.
4. The Study thus first examines the general nature of the right in Article 13. It then considers what this entails for the purpose of precluding or remedying violations of the requirement under Article 6(1) that criminal proceedings be determined within a reasonable time. It does so in the light of the case law of the European Court of Human Rights (“the European Court”) and the decisions and resolutions of the Committee of Ministers of the Council of Europe in the performance of its responsibility – under Article 46 of the European Convention - for supervising the execution of the European Court’s judgments.
5. Thereafter, the Study examines the reforms adopted by several member States in respect of which the European Court has found violations of Article 13 on account of the absence or inadequacy of remedies for excessive length of criminal proceedings and the extent to which these have proved effective in practice. The member States examined are Bulgaria, Lithuania, Poland, Romania and Slovenia. These have adopted remedies that provide for the possibility of obtaining some form of compensation for delay and many of them have also provided means whereby a suspect can seek the acceleration of proceedings following a charge.
6. The length of time that has elapsed since the adoption of the final resolution by the Committee of Ministers in respect of the cases against these member States is such that there is some scope for assessing the real impact of the relevant reforms, as well as factors that might affect their efficacy. Moreover, the position in certain of these member States is also of interest in that, in at least some instances, their initial proposals for reform were not considered adequate.

7. The Study concludes by drawing from these case studies lessons as to what does or does not work well, as well as both the identification of the considerations that may have led to either outcome and the determination of whether a specific remedy in one criminal justice system can be successfully transposed to another one. Such a synthesis should thus assist efforts in other jurisdictions to take appropriate steps to fulfil the obligations arising from Article 13 in conjunction with Article 6(1) of the European Convention.
8. The Study has been prepared by Jeremy McBride<sup>1</sup> within the framework of the Council of Europe Project “Human Rights Compliant Criminal Justice System in Ukraine”.

## **B. THE RIGHT TO AN EFFECTIVE REMEDY**

9. The right to an effective remedy in Article 13 of the European Convention is, as the European Court indicated in *Kudla v. Poland*,<sup>2</sup> a complement to the requirement in Article 35(1) to exhaust domestic remedies before submitting an application to it, which also provides a basis for evaluating measures adopted within member States.
10. Thus, it observed that:

The object of Article 13, as emerges from the *travaux préparatoires* (see the *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.<sup>3</sup>

Article 13 is not, therefore, directed to achieving any systemic reform or overhaul but requires a focus on what the system offers the individual concerned about the violation of his or her rights and freedoms.

11. The right in Article 13 is not dependent upon rights and freedoms guaranteed by the European Convention actually having been violated. It is sufficient that the person invoking Article 13 has an “arguable claim” in this respect.
12. Thus, as the European Court observed of Article 13 in *Klass v. Germany*

This provision, read literally, seems to say that a person is entitled to a national remedy only if a “violation” has occurred. However, a person cannot establish a “violation” before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated. In the Court’s view, Article 13 (art. 13) requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order

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<sup>2</sup> [GC], no. 30210/96, 26 October 2000.

<sup>3</sup> *Ibid.*, at para. 152.

both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 (art. 13) must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated.<sup>4</sup>

13. Whether a claim is to be regarded as “arguable” is a matter that will be determined by reference to the particular facts of the case<sup>5</sup> and the issues that these raise with respect to the interpretation and application of the relevant right or freedom being invoked<sup>6</sup>.
14. Furthermore, the need for an effective remedy arises not only where a person has an arguable claim that there has been a violation of a right or freedom but also where one is going to occur or would continue to do so.
15. As the European Court has observed:

The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint; the “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. At the same time, the remedy required by Article 13 must be “effective” in practice as well as in law in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred.<sup>7</sup>

16. Thus, the assumption underlying the right to an effective remedy in Article 13 is that violations of the other rights and freedoms guaranteed by the European Convention will occur. As a result, this provision requires that someone who can arguably claim to have experienced them, is continuing to be doing so or will do so should be provided with the means of remedying the shortcomings concerned.
17. Moreover, a remedy will only be considered effective if it is capable of directly remedying the violation claimed to have occurred, to be occurring or to be on the point of occurring.
18. As has already been noted, where the violations are either continuing ones or ones that will occur, such a remedy must necessarily be one that is preventive in the sense of stopping its continuation or preventing its occurrence.<sup>8</sup>

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<sup>4</sup> [P], no. 5029/71, at para. 64.

<sup>5</sup> See, e.g., *Sukachov v. Ukraine*, no. 14057/17, 30 January 2020, in which the European Court stated that it: “is mindful of the number of times the applicant had to remain in poorly ventilated or unventilated cells in the vans and the court, and accepts that this circumstance may have caused a certain degree of inconvenience to him. However, it also notes that he did not provide any submissions regarding the nature and extent to which he had allegedly suffered from that inconvenience and to show whether that inconvenience alone reached the threshold of severity bringing the matter within the ambit of Article 3 of the Convention. In such circumstances, the Court finds that the applicant has not made out an arguable claim concerning the conditions of his transfer in prison vans and of his detention in the court’s cells on hearing days” (para. 105).

<sup>6</sup> See, e.g., *Ali Rıza and Others v. Turkey*, no. 30226/10, 28 January 2020 in which the European Court held that “Having regard to its findings concerning the incompatibility *ratione materiae* of the applicants’ complaints under Article 1 of Protocol No. 1, the Court considers that the applicants have not presented an “arguable claim” for that grievance which would have required a remedy under Article 13 of the Convention” (para. 235).

<sup>7</sup> *Lashmankin and Others v. Russia*, no. 57818/09, 7 February 2017, para. 344. In this case, the European Court found that the applicants did not have at their disposal an effective remedy which would allow an enforceable judicial decision to be obtained on the authorities’ refusal to approve the location, time or manner of conduct of a public event before its planned date.

<sup>8</sup> This may not be limited to desisting from certain acts but also entail some positive action, such as carrying out an investigation into alleged violations of the right to life or the prohibition of torture and inhuman or degrading treatment or punishment; see, e.g., *Kaya v. Turkey*, no. 22729/93, 19 February 1998.

19. In the case of violations that have already occurred, the necessary remedy will in most instances be compensatory in character. However, for some violations a remedy can only be effected by annulling, withdrawing or changing in some way the act or measure that constituted them.<sup>9</sup>
20. In all cases, it is essential that the remedy invoked be a substantive one, both in terms of its recognition of the act or omission claimed to constitute the violation and of the response that is provided to it.
21. The former element will not be met if there is a failure either completely or in part to examine the issues that go to the merits of the complaint about observance of the particular right or freedom guaranteed by the European Convention.<sup>10</sup> Similarly, the latter element will not be satisfied if the redress provided is insufficient in either compensatory or preventive terms.<sup>11</sup>

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<sup>9</sup> See, e.g., *Petkov and Others v. Bulgaria*, no. 77568/01, 11 June 2009; “In cases where – as here – the authorities, through deliberate actions and omissions, prevent a parliamentary candidate from running, the breach of Article 3 of Protocol No. 1 cannot be remedied exclusively through such an award [of compensation]. If States were able to confine their response to such incidents to the mere payment of compensation, without putting in place effective procedures ensuring the proper unfolding of the democratic process, it would be possible in some cases for the authorities to arbitrarily deprive candidates of their electoral rights ... and even to rig elections. Were that to be the case, the right to stand for Parliament, which along with the other rights guaranteed by Article 3 of Protocol No. 1 is crucial to establishing and preserving the foundations of a meaningful democracy ... would be ineffective in practice. Having thus found that the violation of Article 3 of Protocol No. 1 could not be made good through the mere payment of compensation, and noting that as a result of the authorities’ actions and the considerable time constraints in the run-up to the elections, the breach could not be remedied prior to the elections (see paragraph 66 above), the Court concludes that the situation could be rectified solely by means of a post-election remedy. Therefore, in the specific circumstances of the case, the requirements of Article 13 could be fulfilled only by a procedure by which the candidates could seek vindication of their right to stand for Parliament before a body capable of examining the effect which the alleged breach of their electoral rights had on the unfolding and outcome of the elections. If that body deemed the breach serious enough to have prejudiced the outcome, it should have had the power to annul the election result, wholly or in part. While this option should undoubtedly have been reserved for the most serious cases, the competent authority should have been able to resort to it if necessary” (paras. 79-80).

<sup>10</sup> See, e.g., *Smith and Grady v. United Kingdom*, no. 33985/96, 27 September 1999 (in which the effective remedy required was one where the domestic authority examining the case had to consider the substance of the Convention complaint, meaning an examination of whether the interferences with the applicants’ rights had answered a pressing social need and had been proportionate to the legitimate aims pursued) and *Hasan and Chaush v. Bulgaria*, no. 30985/96, 26 October 2000 (in which the Supreme Court had refused to study the substantive issues, considering that the Council of Ministers enjoyed full discretion whether or not to register the statute and leadership of a religious denomination, and had only ruled on the formal question whether its decree had been issued by the competent body).

<sup>11</sup> See, e.g., *Wainwright v. United Kingdom*, no. 12350/04, 26 September 2006 (in which it was not accepted that the amount of compensation awarded by the domestic courts was so derisory as to raise issues of the effectiveness of the redress provided) and *Ananyev v. Russia*, no. 42525/07, 10 January 2012 (in which the European Court observed that “An important safeguard for the prevention of violations resulting from inadequate conditions of detention is an efficient system of detainees’ complaints to the domestic authorities ... To be efficient, the system must ensure a prompt and diligent handling of prisoners’ complaints, secure their effective participation in the examination of grievances, and provide a wide range of legal tools for the purpose of eradicating the identified breach of Convention requirements” (para. 214).

22. In addition, access to the remedy must not be subject to excessively restrictive requirements<sup>12</sup>, it must be available to the person actually affected by the violation<sup>13</sup> and it should be sufficiently prompt<sup>14</sup>.
23. Furthermore, a remedy must be “effective” in practice as well as in law. This means, in particular, that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities.<sup>15</sup>
24. Moreover, a remedy will not be seen as effective where the minimum conditions enabling the person concerned to challenge a decision that restricts his or her right or freedom under the European Convention are not provided.<sup>16</sup>
25. It is possible for an effective remedy to be provided by a body that is either judicial or non-judicial. However, a non-judicial body must be independent of the entity responsible for the violation concerned<sup>17</sup> and afford sufficient procedural safeguards to the person seeking redress<sup>18</sup>. All bodies must be able to issue a decision with binding effect on the entity concerned.<sup>19</sup>
26. Also, there should be no uncertainty as to the availability of the remedy either in terms of the legal basis on which it can be obtained<sup>20</sup> or of the court having jurisdiction over the matter<sup>21</sup>.

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<sup>12</sup> See, e.g., *Camenzind v. Switzerland*, no. 21353/93, 16 December 1997, in which a complaint about a search was dismissed because that measure had ceased and the complainant was thus seen as no longer affected by it.

<sup>13</sup> See, e.g., *Petkov and Others v. Bulgaria*, no. 77568/01, 11 June 2009, in which parliamentary candidates could only challenge elections before the constitutional court though a limited category of persons or bodies who were entitled to refer a matter to it.

<sup>14</sup> See, e.g., *Kadikis v. Latvia (No. 2)*, no. 62393/00, 4 May 2006, in which the authority competent to respond to a complaint about conditions of detention by a person imprisoned for 15 days had a period of 15 or 30 days in which to do so, with the possibility of those time-limits being extended.

<sup>15</sup> See, e.g., *İlhan v. Turkey* [GC], no. 22277/93, 27 June 2000, in which it found that a public prosecutor had taken no independent investigative step in relation to the applicant’s injuries despite being aware that they had been sustained and were life-threatening.

<sup>16</sup> See, e.g., *Csüllög v. Hungary*, no. 30042/08, 7 June 2011, in which the deprivation of crucial information meant that the applicant had not benefited from the equality of arms in challenging a decision of the prison authorities’ that amounted to a violation of Article 3.

<sup>17</sup> See, e.g., *Khan v. United Kingdom*, no. 35394/97, 12 May 2000 (in which complaints against police officers could be determined by the police force to which they belonged and oversight of this process was by a body over which a minister had a role regarding appointment of its members and power to influence its proceedings).

<sup>18</sup> See, e.g., *Chahal v. United Kingdom* [GC], no. 22414/93, 15 November 1996, in which a person subject to deportation case had no entitlement to legal representation and was only given an outline of the grounds for the notice of intention to deport him.

<sup>19</sup> See, e.g., *Segerstedt-Wiberg v. Sweden*, no. 62332/00, 6 June 2006; although the Parliamentary Ombudsperson and the Chancellor of Justice had competence to receive individual complaints and had a duty to investigate them in order to ensure that the relevant laws had been properly applied, these officials lacked the power to render a legally binding decisions.

<sup>20</sup> See, e.g., *Martins Castro and Alves Correia de Castro v. Portugal*, no. 33729/06, 10 June 2008, in which an action to establish non-contractual State liability could not be regarded as an “effective” remedy so long as the case law emanating from the Supreme Administrative Court had not been consolidated in the Portuguese legal system, through a harmonisation of the divergences in the case law that existed at the time of the judgment.

<sup>21</sup> See, e.g., *Mosendz v. Ukraine*, no. 52013/08, 17 January 2013, in which the Court noted that: “following the conviction of sergeant K., the applicant brought a civil claim against the Ministry of the Interior seeking compensation for damage in respect of the ill-treatment and death of her son during his mandatory military service in the Internal Troops. Pursuant to the instructions of the Pechersky Court, which refused to institute civil proceedings, she resubmitted her claim under the rules of administrative procedure. While the first-instance court

27. It is possible for an aggregate of remedies to amount to the effective remedy required under Article 13, even though each of them taken individually would be insufficient for this purpose.<sup>22</sup>
28. It is essential that remedies, once granted, are then enforced.<sup>23</sup>

### C. EFFECTIVE REMEDIES FOR LENGTHY CRIMINAL PROCEEDINGS

29. The European Court had not initially applied Article 13 in respect of applications complaining about the length of either civil or criminal proceedings, taking the view either that Article 6(1) was the *lex specialis* in respect of the former provision or that this was unnecessary in view of its prior finding of a breach of the “reasonable time” requirement.
30. However, in *Kudla v. Poland*<sup>24</sup> the European Court came to the conclusion that the correct interpretation of Article 13 was that this provision guaranteed an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time.
31. The readiness to reconsider its previous approach was influenced by its recognition of  
“the important danger” that exists for the rule of law within national legal orders when “excessive delays in the administration of justice” occur “in respect of which litigants have no domestic remedy”<sup>25</sup>
32. However, its conclusion that Article 13 was applicable where breaches of the reasonable time requirement in Article 6(1) were alleged was based on its view that objections to the inappropriateness of so doing were unfounded. Thus, it stated that:

154. ... A remedy for complaining about unreasonable length of proceedings does not as such involve an appeal against the “determination” of any criminal charge or of civil rights and obligations. In any event, subject to compliance with the requirements of the Convention, the Contracting States – as the Court has held on many previous occasions – are afforded some discretion as to the manner in which they provide the relief required by Article 13 and conform to

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allowed her claim, the appellate court quashed that judgment on procedural grounds, holding that the case fell under the jurisdiction of the civil rather than the administrative courts, with this decision being upheld by the highest court more than five years after the applicant had lodged her claim ... As a result, the applicant’s claim for damages remained without examination and she was denied an effective domestic remedy in respect of her complaints under Articles 2 and 3 of the Convention” (paras. 122-123).

<sup>22</sup> As in *Leander v. Sweden*, no. 9248/81, 26 March 1987, in which the aggregate of appeal to the government from refusal to appoint to a post, request to the National Police Board for access to its secret register, with appeal to the courts in the event of refusal, complaint to the Chancellor of Justice and complaint to the Ombudsman were considered to afford an effective remedy for the violations of the right to respect for private life and freedom of expression said to result from the applicant being prevented from obtaining a permanent employment and being dismissed from a provisional employment on account of certain secret information which allegedly made him a security risk.

<sup>23</sup> See, e.g., *Kenedi v. Hungary*, no. 31475/05, 26 May 2009 in which a ministry had adamantly resisted the applicant’s lawful attempts to secure the enforcement of his right to have access to certain documents, as granted by the domestic courts.

<sup>24</sup> [GC] 30210/96, 26 October 2000.

<sup>25</sup> *Ibid*, at para. 148.



their Convention obligation under that provision (see, for example, the *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

As to the suggestion that requiring yet a further remedy would result in domestic proceedings being made even more cumbersome, the Court would observe that even though at present there is no prevailing pattern in the legal orders of the Contracting States in respect of remedies for excessive length of proceedings, there are examples emerging from the Court's own case-law on the rule on exhaustion of domestic remedies which demonstrate that it is not impossible to create such remedies and operate them effectively (see, for instance, *Gonzalez Marin v. Spain* (dec.), no. [39521/98](#), ECHR 1999-VII, and *Tomé Mota v. Portugal* (dec.), no. [32082/96](#), ECHR 1999-IX).

155. If Article 13 is, as the Government argued, to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6 § 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened.

33. In this particular case, which concerned criminal proceedings which had lasted for a period of seven years and some five months since Poland's declaration recognising the right of individual petition for the purposes of former Article 25 of the European Convention had taken effect,<sup>26</sup> the European Court found a violation of Article 13. In so doing, it stated that:

the Government did not claim that there was any specific legal avenue whereby the applicant could complain of the length of the proceedings but submitted that the aggregate of several remedies satisfied the Article 13 requirements. They did not, however, indicate whether and, if so, how the applicant could obtain relief – either preventive or compensatory – by having recourse to those remedies ... It was not suggested that any of the single remedies referred to, or a combination of them, could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred. Nor did the Government supply any example from domestic practice showing that, by using the means in question, it was possible for the applicant to obtain such a relief.

That would in itself demonstrate that the means referred to do not meet the standard of "effectiveness" for the purposes of Article 13 because, as the Court has already said ..., the required remedy must be effective both in law and in practice.<sup>27</sup>

34. Since this judgment, the European Court has dealt with numerous applications complaining about the excessive length of proceedings. This has given it the opportunity to clarify what is entailed by the two possibilities for an effective remedy that it identified, namely, expedition of the processing of a case and provision of redress for delays that have already occurred. The first of these being preventive and the second compensatory.<sup>28</sup>

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<sup>26</sup> They had, in fact, lasted for more than nine years but, in finding a violation of Article 6(1), the European Court took into account the stage reached in the proceedings when the Article 25 declaration took effect.

<sup>27</sup> Paragraph 159. The Government was of the opinion that in the criminal proceedings against him the applicant could have raised the issue of their length in his appeals against decisions to prolong his detention or in the applications for release he made. In addition, it considered that he could also have lodged a complaint with the president of the court dealing with his case or with the Minister of Justice, which would have resulted in those persons' putting his case under their administrative supervision. Furthermore, the administrative supervision might, in principle, have resulted in disciplinary sanctions being imposed on the judge if he or she had failed to conduct the trial effectively and expeditiously.

<sup>28</sup> Some of the cases considering the effectiveness of remedies have been in the context of determining whether domestic remedies have been exhausted. However, the European Court considers that the concept of effectiveness was the same for both Articles 13 and 35(1); *Mifsud v. France* [GC], (dec.), no. 57220/00, 11 September 2002, at para. 17.

35. The different elements involved are extensive.<sup>29</sup>

*i. Preventive remedies may be the better solution*

36. Firstly, where possible, a preventive remedy is seen by the European Court as the better solution to lengthy proceedings. As it observed in *Sürmeli v. Germany*:

Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy.<sup>30</sup>

*ii. Combining remedies commended*

37. Secondly, the European Court has commended the practice of some States that have combined the two types of remedy, one designed to expedite the proceedings and the other to afford compensation.<sup>31</sup>

*iii. Freedom to choose the remedies provided*

38. Thirdly, notwithstanding that a preventive remedy may be preferable in the case of proceedings that have not yet been completed, it is clear that States can choose between providing a remedy that is preventive and one that is compensatory so long as the one chosen meets all the requirements to be effective.

39. This was made clear by the European Court in *Mifsud v. France* when it stated that

it has held that remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are “effective”, within the meaning of Article 13 of the Convention if they “[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred” (*Kudla v. Poland* [GC], no. [30210/96](#), § 158, 26 October 2000). Article 13 therefore offers an alternative: a remedy is “effective” if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see the *Kudla* judgment cited above, § 159).<sup>32</sup>

40. A State may thus choose to introduce only a compensatory remedy without that remedy being regarded as ineffective.<sup>33</sup>

*iv. Particular requirements for preventive remedies*

41. Fourthly, a preventive remedy will not be afforded where: (a) its provision is subject to a discretion of the body concerned as to the examination of a request<sup>34</sup>; (b) the appeal which could lead to the proceedings being expedited is not open to the party affected

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<sup>29</sup> See Annex 1 for the elements involved in providing effective remedies for excessive length of criminal proceedings in the form of a checklist.

<sup>30</sup> [GC], no. 75529/01, 8 June 2006, at para. 100.

<sup>31</sup> *Ibid.*

<sup>32</sup> [GC], (dec.), no. 57220/00, 11 September 2002, at para. 17.

<sup>33</sup> *Scordino v. Italy* [GC], no. 36813/97, 29 March 2006, at para. 187

<sup>34</sup> See, e.g., *Horvat v. Croatia*, no. 51585/99, 26 July 2001; “In the instant case, the Court notes that proceedings pursuant to section 59(4) of the Constitutional Court Act are considered as being instituted only if the Constitutional Court, after a preliminary examination of the complaint, decides to admit it. Thus, although the person concerned can lodge a complaint directly with the Constitutional Court, the formal institution of proceedings depends on the latter’s discretion”; (para. 41).

by the delay<sup>35</sup>; (c) there is uncertainty as to the admissibility criteria applicable<sup>36</sup>; (d) the possibility of complaining about length of proceedings cannot be demonstrated to lead to them being expedited<sup>37</sup>; (e) its applicability to the specific circumstances is not established<sup>38</sup>; and (f) there is uncertainty as to its availability in practical terms<sup>39</sup>.

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<sup>35</sup> See, e.g., *Horvat v. Croatia*, no. 51585/99, 26 July 2001; “It is also to be noted that the other remedies cited by the Government, that is a request to the President of the Zagreb Municipal Court or the Ministry of Justice to speed up the proceedings, represent a hierarchical appeal that is, in fact, no more than information submitted to the supervisory organ with the suggestion to make use of its powers if it sees fit to do so. If such an appeal is made, the supervisory organ might or might not take up the matter with the official against whom the hierarchical appeal is directed if it considers that the appeal is not manifestly ill-founded. Otherwise, it will take no action whatsoever. If proceedings are taken, they take place exclusively between the supervisory organ and the officials concerned. The applicant would not be a party to such proceedings and might be informed only of the way in which the supervisory organ has dealt with her appeal ...” (para. 47).

<sup>36</sup> *Ibid*, at para. 110; “The Court notes that the special remedy of a complaint alleging inaction has no statutory basis in domestic law. Although a considerable number of courts of appeal have accepted it in principle, the admissibility criteria for it are variable and depend on the circumstances of the particular case. The Federal Court of Justice has yet to give a ruling on the admissibility of such a remedy”. There were also doubts about the effectiveness of such orders on account of the lack of details as to their content and their effect on the proceedings in issue.

<sup>37</sup> See, e.g., *Sürmeli v. Germany* [GC], no. 75529/01, 8 June 2006: “While accepting that the proceedings may well be conducted more quickly where the court in question complies immediately with the Federal Constitutional Court’s order, the Court notes that the Government have not provided any indication of the potential or actual impact of the Federal Constitutional Court’s decisions on the processing of cases in which there have been delays. It observes that in a case against Germany currently pending before it, in which such an order had been given by the Federal Constitutional Court, the proceedings complained of ended sixteen months later in the court in question and two years and nine months later in the Court of Appeal ... In another case dealt with by the Court, in which the Federal Constitutional Court had ordered the proceedings to be expedited while not finding their length to be unconstitutional, the lower court took a further period of more than ten months to complete its examination, and the proceedings as a whole ended two and a half years after the Federal Constitutional Court’s order ... In that case, concerning proceedings that had lasted nine years and eight months, the Court, moreover, found a violation of Article 6 § 1 of the Convention, whereas the Federal Constitutional Court had declared the constitutional complaint inadmissible, finding that the length of the proceedings (almost nine years by that stage) had not yet reached an intolerable level ... Lastly, as regards the public pressure referred to by the Government, the Court is not persuaded that this is a factor likely to expedite proceedings in an individual case” (paras. 106-107)

<sup>38</sup> See, e.g., *Ugilt Hansen v. Denmark* (dec.), no. 11968/04, 26 June 2006; “In the Government’s view these decisions show that section 840 of the Administration of Justice Act can be used to induce the court to set down the case for trial and that this is accordingly an effective remedy to bring the criminal proceedings to an end. The Court need not rule in general whether section 840 of the Administration of Justice Act as claimed by the Government is a remedy, which depending on the circumstances of a case, should be exhausted, for example where a court refuses to terminate the pre-trial proceedings although the case according to the applicant is ready for trial, or fix court hearings with shorter intervals in order to speed up the trial. Moreover, in the present case the length of the proceedings was primarily caused by the various adjournments awaiting the outcome of the so-called test-cases whose outcome most likely would have had significant influence on the charges against the applicant, and maybe to the extent that they should have been acquitted ... In the Court’s opinion, the Government have not shown that section 840 of the Administration of Justice Act would, in such circumstances, have been an effective remedy, which the applicant should have exhausted for the purposes of Article 35 § 1 of the Convention.

<sup>39</sup> See, e.g., *Horvat v. Croatia*, no. 51585/99, 26 July 2001; “42. Furthermore, for a party to be able to lodge a constitutional complaint pursuant to that provision two cumulative conditions must be satisfied. Firstly, the applicant’s constitutional rights have to be grossly violated by the fact that no decision has been issued within a reasonable time and, secondly, there should be a risk of serious and irreparable consequences for the applicant. 43. The Court notes that terms such as “grossly violated” and “serious and irreparable consequences” are susceptible to various and wide interpretation. In the present case it remains open to what extent the applicant risks irreparable consequences in so far as the case involves her civil claims for repayment. 44. The Court notes further that the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague ... In the present case, the Government produced before the Court only one case in which the Constitutional Court had ruled under section 59(4) of the Constitutional Court Act to support their argument concerning the sufficiency and effectiveness of the remedy. It is not for the Court to give a ruling on an

42. Fifthly, a remedy to expedite proceedings at the pre-trial stage is unlikely to be regarded by the European Court as effective in the absence of powers to fix time-limits for the completion of procedural acts, to order the setting of a date for a hearing or to close the investigation, or to decide that the case should be given priority treatment., as well as to impose penalties for proceedings exceeding a reasonable time.<sup>40</sup>

*v. Preventive remedies can become inadequate*

43. Sixthly, the European Court has recognised that there will be cases in which the availability of a remedy to expedite proceedings “may not be adequate to redress a situation in which the proceedings have clearly already been excessively long”.<sup>41</sup>
44. In such cases, which will generally be ones where the preventive remedy has been introduced after the proceedings have already been under way for some time, there will be a need for a compensatory remedy even if the remedy to expedite the proceedings has been effective. Such a remedy must, of course, be for the alleged excessive length of the criminal proceedings and not for some other failing.<sup>42</sup>

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issue of Croatian law that is as yet unsettled .... The absence of further case-law does, however, indicate the present uncertainty of this remedy in practical terms. In the Court’s view, the single case cited by the Government does not suffice to show the existence of settled national case-law that would prove the effectiveness of the remedy”.

<sup>40</sup> See *Panju v. Belgium*, no. 18393/09, 28 October 2014, at paras. 72 and 74. It was also noted that the reason why none of those measures had yet been taken in this case was perhaps the lack of staff and structural deficiencies in the Brussels public prosecutor’s office had not been addressed; para. 73. See also *Tomé Mota v. Portugal* (dec.), no. 32082/96, 2 December 1999 and *Holzinger v. Austria (No.1)*, no. 23459/94, 30 January 2001, in which the possibility to make a request, respectively to the Judicial Service Commission or the Attorney-General in the first case and to a superior court in the second one, to fix a time-limit for taking a procedural measure which the competent court or public prosecutor had so far failed to take was seen as an effective remedy to be exhausted before applying to the European Court.

<sup>41</sup> *Scordino v. Italy* [GC], no. 36813/97, 29 March 2006, at para. 185. See also *Atanasov and Ovcharov v. Bulgaria*, no. 61596/00, 17 January 2008; “The Court recognises that with the introduction in June 2003 of the new Article 239a of the Code of Criminal Procedure ... the possibility was introduced for an accused person to request to have his case brought before the courts if the preliminary investigation had not been completed within a certain statutory time-limit. The applicants used this possibility in June and July 2004 and successfully brought about the discontinuation of the criminal proceedings against them on 22 November 2004. However, the acceleration of the proceedings at that moment cannot be considered to make up for the delay of over nine years which had already accumulated” (paras. 57-58).

<sup>42</sup> See, e.g., *Karamitrov and Others v. Bulgaria*, no. 53321/99, 10 January 2008; “As regards compensatory remedies and the Government’s preliminary objection, the Court observes that they submitted that the applicant had failed to exhaust an available domestic remedy under section 2 (2) of the SMRDA and referred to the existing possibility therein to obtain redress for having been unlawfully charged with an offence. They did not, however, indicate how that would have remedied the complaint currently before this Court in respect of the alleged excessive length of the criminal proceedings” (para. 59).

*vi. Particular requirements for compensatory remedies*

45. Seventhly, excessive delays in an action for compensation are likely to render the remedy ineffective,<sup>43</sup> as will an inability to have recourse to such an action before the relevant proceedings have become final<sup>44</sup>.
46. Eighthly, there is no need for a court making an award of damages to have first made a finding of a violation of the reasonable time requirement where it was not empowered to do this in the absence of a reasonable time having been exceeded in the case concerned.<sup>45</sup>

*vii. Calculating compensation*

47. Ninthly, awards of compensation (a) need not match those made by the European Court but their level should not be unreasonable in comparison with them<sup>46</sup>; (b) should cover both pecuniary and non-pecuniary damage,<sup>47</sup> with a strong but rebuttable presumption that the latter will be occasioned by excessively long proceedings<sup>48</sup>; (c) should not focus

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<sup>43</sup> *Scordino v. Italy* [GC], no. 36813/97, 29 March 2006, at para. 195. In that case, it held that “the four-month period prescribed by the Pinto Act complies with the requirement of speediness necessary for a remedy to be effective” (para. 208) and that this deadline had been observed. See also *Galea and Pavia v. Malta*, no. 77209/16, 11 February 2020; “Further, the Court recalls that a remedy which could last for several years through two jurisdictions would not be reconcilable with the requirement that the remedy for delay (even before a constitutional court) be sufficiently swift (see *McFarlane*, cited above, § 123, and the case-law cited therein). In particular, the Court has held that to conform with the reasonable time principle, a remedy for length of proceedings should not in principle and in the absence of exceptional circumstances, last more than two and half years over two jurisdictions, including the execution phase ... The Court notes that quite apart from the fact that in the present case the proceedings before the constitutional jurisdictions lasted unreasonably long, the cases brought forward by the Government also indicate a substantial delay, as for example five years for one-instance ... In the absence of any examples showing a timely assessment of such complaints the Court has serious doubts about the speediness of the remedial action itself” (para. 63).

<sup>44</sup> See *Tunçe and Others v. Turkey (No. 1)*, no. 2422/06, 13 October 2009; although the code of criminal procedure allowed persons who had stood trial after being held on remand to claim compensation before the competent court on account of delays in the criminal proceedings, this remedy could be used only after the judicial decision concerned had become final and so did not therefore allow a detainee to request appropriate redress or the discontinuance of a violation while the proceedings were in progress.

<sup>45</sup> *Scordino v. Italy* [GC], no. 36813/97, 29 March 2006, at para. 194. In such cases, the European Court would necessarily conclude that such a finding had been made in substance.

<sup>46</sup> *Ibid.*, at para. 213; “With regard to the amount awarded, it would appear that EUR 2,450 for a delay of three and a half years amounts to applying a rate of EUR 700 per annum, that is, EUR 175 for each applicant. The Court observes that this amount is approximately 10% of what it generally awards in similar Italian cases. That factor in itself leads to a result that is manifestly unreasonable having regard to its case-law” (para. 214) Furthermore, the European Court observed in that case that: “According to the documents provided by the parties for the hearing, there is no disproportion in Italy between the amounts awarded to heirs for non-pecuniary damage in the event of a relative’s death or those awarded for physical injury or in defamation cases and those generally awarded by the Court under Article 41 in length-of-proceedings cases. Accordingly, the level of compensation generally awarded by the courts of appeal in “Pinto” applications cannot be justified by this type of consideration (para. 212). Similarly, see

<sup>47</sup> See, e.g., *Grasser v. Germany* (dec.), no. 66491/01, 16 September 2004; “The Court notes that under Sections 253 and 847 (in its version in force until 31 July 2002) of the Civil Code, compensation for non-pecuniary damage can only be claimed in exceptional circumstances explicitly recognised by law (see Relevant domestic law and practice, B.2., above). These Sections apparently do not award a right to damages for pain and suffering sustained due to an excessive length of proceedings. The Government, on whom the burden of proof falls in this respect, have therefore not succeeded in establishing that compensation for non-pecuniary damage can be awarded through an official liability action.

<sup>48</sup> *Scordino v. Italy* [GC], no. 36813/97, 29 March 2006, at paras. 203-204. The European Court recognised that, with regard to pecuniary damage, the domestic courts were clearly in a better position to determine the existence and quantum. It also accepted that, in some cases, the length of proceedings may result in only minimal non-

only on the outcome of the proceedings<sup>49</sup>; (d) should be consonant with the legal tradition and the standard of living in the country concerned but can take account of the contribution made by a remedy to expedite proceedings<sup>50</sup>; (e) might need to take account of delays in determining the amount.<sup>51</sup>

*vii. Procedural requirements for compensatory remedies*

48. Eleventhly, the applicable procedural rules do not have to be exactly the same as for ordinary applications for damages. However, the procedure followed must conform to the principles of fairness guaranteed by Article 6 of the European Convention.<sup>52</sup>

*ix. Costs should not be a barrier to recovering compensation*

49. Twelfthly, the rules regarding legal costs for recourse to a compensatory remedy should not place an excessive burden on the litigants concerned.<sup>53</sup>

*x. Payment should be timely*

50. Thirteenthly, although the European Court does accept that the authorities need time in which to make payment, it considers that this should not generally exceed six

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pecuniary damage or no non-pecuniary damage at all but emphasised that the domestic courts would then have to justify their decision by giving sufficient reasons.

<sup>49</sup> *Ibid.*, at para. 214; “The Court of Appeal’s decision appears to take account only of the excessive length, assessed at three years and six months, and the stakes involved in the dispute. The Court reiterates that the stakes involved in the dispute cannot be assessed with regard only to the final outcome, otherwise proceedings that are still pending would have no value. Regard has to be had to the overall stakes involved in the dispute for the applicants”.

<sup>50</sup> *Ibid.*, at para. 206.

<sup>51</sup> *Ibid.*, at para. 207; “It is even conceivable that the court determining the amount of compensation will acknowledge its own delay and that accordingly, and in order not to penalise the applicant later, it will award a particularly high amount of compensation in order to make good the further delay”.

<sup>52</sup> *Scordino v. Italy* [GC], no. 36813/97, 29 March 2006, at para. 200; “It is for each State to determine, on the basis of the rules applicable in its judicial system, which procedure will best meet the compulsory criterion of “effectiveness””.

<sup>53</sup> *Ibid.*, at para. 201; “the Court finds it reasonable that in this type of proceedings where the State, on account of the poor organisation of its judicial system, forces litigants – to some extent – to have recourse to a compensatory remedy, the rules regarding legal costs may be different and thus avoid placing an excessive burden on litigants where their action is justified. It might appear paradoxical that, by imposing various taxes – payable prior to the lodging of an application or after the decision – the State takes away with one hand what it has awarded with the other to repair a breach of the Convention. Nor should the costs be excessive and constitute an unreasonable restriction on the right to lodge such an application and thus an infringement of the right of access to a tribunal. On this point the Court notes that in Poland applicants are reimbursed the court fee payable on lodging a complaint if their complaint is considered justified (see *Charzyński v. Poland* (dec.), no. [15212/03](#), ECHR 2005-V)”. In the *Scordino* case, the applicants had to bear costs amounting to approximately two-thirds of the compensation awarded. The European Court considered that “the rate of procedural costs, and particularly certain fixed expenses (such as registration of the judicial decision), may significantly hamper the efforts made by applicants to obtain compensation” (para. 210). See also these remarks in *McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010; “The Court notes that the proposed action would be subject to the normal rules of litigation concerning legal representation, court fees and legal costs. While legal representation is not obligatory, as noted above, the remedy would be legally and procedurally complex. A judicial review action would not be covered by criminal legal aid, an action in damages would not appear to be covered by the Attorney General’s *ex gratia* scheme and the applicant would have to obtain the agreement of the Civil Legal Aid Board that the remedy had merit before legal aid would be granted. The action would, at least initially, be novel and uncertain (paragraphs 117-121): should an applicant be unsuccessful, there was a risk of a costs order against him or her; and, even if damages were pursued as an alternative claim in the prohibition action, there would be separate costs attributable to the damages claim (notably, those of the Attorney General who would be a respondent) and thus any costs’ exposure could be high. The Court considers that the Government have not demonstrated that, in such circumstances, an applicant would not be unduly hampered in taking an action for damages for a breach of the constitutional right to reasonable expedition” (para. 124).

months from the date on which the decision awarding compensation becomes enforceable.<sup>54</sup>

51. Moreover, it has emphasised that it is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt.<sup>55</sup>

*xi. Reduction in sentence and discontinuance as compensation*

52. Tenthly, compensation may also take the form of a reduction in sentence where the length of proceedings has been taken into account in an express and measurable manner.<sup>56</sup> Furthermore, the opportunity to request such a reduction, whether based on express statutory language or clearly established case-law, must be available to the convicted defendant as of right.<sup>57</sup>
53. Compensation could also be afforded by discontinuing the proceedings entirely on account of a delay that was excessive or was exceptionally prejudicial to the accused.<sup>58</sup> However, the public interest should not be adversely affected by such a discontinuance.<sup>59</sup>

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<sup>54</sup> *Ibid.*, at para. 198.

<sup>55</sup> *Ibid.*, at para. 199; “The Court would nonetheless stress the fact that, in order to be effective, a compensatory remedy must be accompanied by adequate budgetary provision so that effect can be given, within six months of their being deposited with the registry, to decisions of the courts of appeal awarding compensation, which, in accordance with the Pinto Act, are immediately enforceable” (para. 209).

<sup>56</sup> See, e.g., *Beck v. Norway*, no. 26390/95, 26 June 2001; “the Court notes in the first place that the City Court expressly upheld the substance of the applicant’s complaint under Article 6 § 1 of the Convention that the proceedings had exceeded a reasonable time. Secondly, the Court is satisfied that the applicant was afforded adequate redress for the alleged violation. On this point it should be recalled that, despite the gravity of the offences in question, the applicant was sentenced to 2 years’ imprisonment which was at the lower end of the scale of punishment authorised by the relevant penal provisions and appreciably less than in comparable cases (see paragraph 17 above). The Court is not convinced by the applicant’s argument that the length factor had been of minor or negligible importance in the sentencing. The City Court held expressly that it attached a “not insignificant” weight to this third factor and little weight to a second factor regarding the uncritical attitude of banks in giving loans. The age mitigating factor did not apply to all the defendants, yet they all received comparable sentences according to their respective responsibilities. Thus, the time/delay element stood out as being the primary mitigating factor. Although the City Court’s reasoning could have been more precise, the Court is satisfied, given the particulars on comparable sentencing practices submitted by the parties, that the reduction in sentence on account of the length factor was measurable in the present case, and had a decisive impact on the applicant’s sentence” (para. 28).

<sup>57</sup> *Dimitrov and Hamaov v. Bulgaria*, no. 48059/06, 10 May 2011, at para. 128. However, the European Court also emphasised that “Naturally, that does not mean that the courts must as a rule accede to such requests; in situations where a reduction of sentence would not be an appropriate measure, they may refuse to do so, and it will then be for the defendant to seek other forms of redress, such as pecuniary compensation”.

<sup>58</sup> See, e.g., *Sprotte v. Germany* (dec.), no. 72438/01, 17 November 2005; “the Court notes that the Potsdam District Court, by decision of 6 December 2004, discontinued the proceedings. It further ordered that the court fees had to be borne by the Treasury and that the applicant had to be reimbursed half of the necessary expenses incurred by the proceedings. While the District Court did not give any further reasons for its decision, it becomes clear from the context that it complied with the Federal Constitutional Court’s orders. It follows that the proceedings have been discontinued on account of their excessive length. Under these circumstances, the Court is satisfied that the applicant was afforded adequate redress for the overall length of the proceedings”. Discontinuance was also cited as a form of non-monetary redress in Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings, which was Adopted by the Committee of Ministers on 24 February 2010 at the 1077<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>59</sup> A point emphasised by the European Court in *Dimitrov and Hamaov v. Bulgaria*, no. 48059/06, 10 May 2011, at para. 129.



*xii. Duty to exhaust after introduction*

54. Finally, where a compensatory remedy has been introduced and this has been made available to persons who have pending applications before the European Court in respect of the length of criminal proceedings, the applicants concerned are likely to be required to use this remedy and their complaints rejected for non-exhaustion of domestic remedies under Article 35(1) and (4) of the European Convention.<sup>60</sup> It can thus be in a State's interest to make newly introduced remedies available to the situations covered by such applications.

## **D. COUNTRY CASE STUDIES**

55. In this section, the fulfilment of the obligation to provide an effective remedy for length of criminal proceedings is examined in respect of Bulgaria, Lithuania, Poland, Romania and Slovenia. It takes account of the proceedings before the European Court where measures taken in these member States have been considered in either proceedings before the European Court – whether as regards alleged violations of Article 13 or the existence of effective remedies for the purpose of complying with the requirement to exhaust domestic remedies under Article 35(1) – or by the Committee of Ministers in the course of the process of supervising the execution of the Court's judgments.<sup>61</sup>
56. The Committee of Ministers tends to use the term “acceleratory remedy” when examining preventive remedies and that will be used in this section of the Study.

### **1. Bulgaria**

57. The absence of effective remedies for violations of the reasonable time requirement in criminal proceedings was addressed in the European Court's pilot judgment in *Dimitrov and Hamanov v. Bulgaria*.<sup>62</sup> The adoption of the pilot judgment procedure was considered appropriate in view of the lack of effective remedies for excessive length of proceedings<sup>63</sup> and the recurrent and persistent nature of the underlying problem.
58. In the view of the European Court, there was a clear need for the introduction of a remedy or a range of remedies in respect of the excessive length of criminal proceedings. Moreover, it emphasised that the introduction of an acceleratory remedy

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<sup>60</sup> See, e.g., *Fakhretdinov and Others v. Russia* (dec.), no. 26716/09, 23 September 2010. However, for the sake of fairness and effectiveness, the European Court may decide to conclude its proceedings by a judgment in cases of this kind which have remained on its list for a long time or have already reached an advanced stage of proceedings.

<sup>61</sup> See Annex 2 for a chart giving an overview of the problems seen and solutions found in the country case studies.  
<sup>62</sup> No. 48059/06, 10 May 2011.

<sup>63</sup> There had been a possibility of an accused being able – after one or two years after being accused, depending upon the gravity of the offence alleged – to request a court to rule that the prosecution either enters an indictment or discontinue the proceedings within two months of the ruling. However, as an acceleratory remedy it could operate only at the pre-trial stage and could not act as a compensatory remedy in respect of delays before its introduction in 2003. Moreover, the approach to measuring “reasonable time” in some cases, contrary to the public interest that offenders be brought to justice, resulted in the undue discontinuance of criminal prosecutions; see, e.g., *Biser Kostov v. Bulgaria*, no. 32662/06, 10 January 2012. The relevant procedure was abolished in 2010 but reintroduced in 2013 with a three-month deadline to file the indictment.



alone would not be sufficient as Bulgaria was to be considered as a country in which length-of-proceedings problems already exist. As a result, it had to put in place a remedy which could provide redress for past delays.<sup>64</sup>

59. Thus, in the general measures indicated in application of Article 46 of the European Convention, the European Court referred to the key features of an effective compensatory remedy,<sup>65</sup> underlined the need for it to operate retrospectively and provide redress in respect of delays which predated its introduction, both in proceedings which are still pending and in proceedings which have been concluded but in which the persons charged with a criminal offence have already applied to the Court or might do so. The European Court also indicated that a reduction in sentence was sometimes a possible way of making good past delays and that, in cases of extreme delay or of delay exceptionally prejudicial to the accused, consideration could even be given to discontinuing the proceedings altogether provided that this did not adversely affect the public interest.
60. The first response to the *Dimitrov and Hamanov* judgment was to amend the Judiciary Powers Act in 2012, providing for the possibility of applications for compensation in respect of excessive length of proceedings to be addressed to the Minister of Justice through the Supreme Judicial Council's Inspectorate. In the examination of these applications, the Minister (or a person authorised by him or her) is assisted by a panel comprised of an Inspector and two experts working in a special unit of the Inspectorate. The authority dealing with the applications must draw up its record of findings not more than four months after the moment when the application has been lodged or rectified and they must be determined by the Minister within six months.<sup>66</sup> There is no charge for the procedure.
61. The applications under this administrative remedy are to be directed "against acts, actions or omissions of judicial authorities", breaching the right to have a case heard and decided within a reasonable time. This wording is supposed not to preclude the examination of applications concerning delays that do not stem from omissions by individual judges or judicial officers but, for instance, from an overburdening of the judicial system as a whole.
62. When examining applications account is to be taken of the overall length of the proceedings and the delays attributable to the authorities, as well as the delays attributable to the applicant and his representative. Furthermore, the merits of the application and the amount of compensation are to be determined in light of the case

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<sup>64</sup> See paragraph 122 of the judgment.

<sup>65</sup> Namely, "– the procedural rules governing the examination of such a claim must conform to the principle of fairness enshrined in Article 6 of the Convention; – the rules governing costs must not place an excessive burden on litigants where their claim is justified; – a claim for compensation must be heard within a reasonable time. In that connection, consideration may be given to subjecting the examination of such claims to special rules that differ from those governing ordinary claims for damages, to avert the risk that, if examined under the general rules of civil procedure, the remedy may not be sufficiently swift ...;– the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases ...; – the compensation must be paid promptly and generally no later than six months from the date on which the decision that awards it becomes enforceable ..." (para. 125).

<sup>66</sup> An extended time-limit of eighteen months was applicable for the examination of applications by persons who had already applied to the European Court.

law of the European Court. There is an upper limit of BGN 10,000 (EUR 5,112.92) on the amount payable.

63. The compensation is to be paid out of the budget of the Ministry of Justice. The Ministry of Finance must then restore to the budget of the Ministry of Justice the funds paid as compensation each quarter.
64. In addition, a civil remedy was established through an amendment to the State and Municipalities Liability for Damage Act, also in 2012. This made the State liable for damage caused to individuals or legal persons by breaches of the right to have one's case examined and decided within a reasonable time, in accordance with Article 6 § 1 of the Convention.
65. The examination of any claims for this purpose are to be governed by the Code of Civil Procedure and the court determining them is required to take into account the overall duration and the subject matter of the proceedings, their factual and legal complexity, the conduct of the parties and their procedural or legal representatives, the conduct of the other participants in the proceedings and of the competent authorities, as well as other facts which have a bearing on the proper determination of the dispute. The bringing of a claim for damages in respect of pending proceedings would not preclude the bringing of a fresh claim after the proceedings have come to end. There was no cap on the amount of compensation payable.
66. The making of an application to accelerate proceedings or the failure to do so is not relevant to any award of compensation under either remedy.<sup>67</sup>
67. Both these remedies were closely examined by the European Court in *Valcheva and Abrashev v. Bulgaria*<sup>68</sup> and *Balakchiev and Others v. Bulgaria*<sup>69</sup>. This examination

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<sup>67</sup> This would have been the remedy referred to in fn. 63 and not the one discussed later in this sub-section.

<sup>68</sup> (dec.), no. 6194/11, 18 June 2013.

<sup>69</sup> (dec.), no. 65187/10, 18 June 2013.

focused on issues relating to procedural guarantees,<sup>70</sup> costs,<sup>71</sup> speediness,<sup>72</sup> the amount of compensation,<sup>73</sup> its prompt payment,<sup>74</sup> scope<sup>75</sup> and retrospective effect<sup>76</sup>.

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<sup>70</sup> Although the administrative remedy did not follow a contentious procedure and thus would not be examined fully in line with the requirements of Article 6(1) of the European Convention, the Inspectorate was seen as enjoying considerable independence. It was doubted whether that was so as regards the authority involved in the second stage of the procedure (i.e., the minister or someone authorised by him/her) Minister of Justice. However, it was emphasised that the administrative remedy is only the first limb of the system of remedies and that there was a second, fully judicial procedure, which can result in a legally binding decision by a court. However, it was recognised that an issue might arise in relation to the impartiality of the courts hearing any claims directed against the court dealing with it. Nonetheless, not only was it thought that such claims would be rare but it was also important that the sums to be paid out as compensation would come from a distinct line item in the budget of each court. As a result, the European Court was satisfied that this factor will not call into question the impartiality of the courts hearing such claims or the effectiveness of the remedy; (paras. 98-100).

<sup>71</sup> No issue was seen to arise in relation to costs or fees since there were no fees for the administrative procedure, the court fees for the judicial procedure were a flat-rate (BGN 10 (5.11 euros (EUR))) in respect of first-instance proceedings, BGN 5 (EUR 2.56) in respect of appellate proceedings, and BGN 5 (EUR 2.56) in respect of cassation proceedings) and not excessive, claimants had to meet the defendant authority's costs only if their claims are rejected in full and successful claimants were able to recoup their own costs; (paras. 101-103)

<sup>72</sup> The speediness of the administrative remedy was not seen as giving rise to any general concern. The fact that applications under it could not be made while the underlying proceedings were still pending was seen as being largely offset by the possibility of bringing a civil claim while the underlying proceedings are still pending. Moreover, although civil claims in respect of proceedings that had come to an end could be brought only after exhaustion of the administrative remedy, it was considered reasonable to expect that in practice the vast majority of grievances will be resolved through the administrative procedure. Nonetheless, it was recognised that the effectiveness of the remedy would depend on those courts' ability to handle the cases brought before them with special diligence in terms of the length of time taken for their determination. Moreover, it was noted that several States had chosen to limit compensatory proceedings to one or two judicial instances unlike the three envisaged in Bulgaria and also that delays in the compensation proceedings may also be made good by an increase of the amount of compensation; paras. 104-107.

<sup>73</sup> No issue was seen to arise in relation to the amount of compensation as the criteria for the administrative remedy appeared analogous to those laid down in the Court's case-law, albeit in partly general terms. The cap on the amount payable was seen as allowing ample room for complying with the Court's criteria in respect of compensation and higher compensation could be sought by way of the civil claim for damages, for which the criteria appeared to be fully in line with those laid down in the case law. There was some uncertainty as to whether the inability of legal persons to compensation for non-pecuniary damage would be applicable to these civil claim but it was observed that the text of the relevant provision referred to "damage caused to individuals or legal persons" without distinguishing between pecuniary and non-pecuniary damage. However, given the background to the amendments, it was emphasised that the Bulgarian authorities and courts should take particular care to ensure that the above-mentioned provisions are applied in conformity with the European Convention and the case law of the European Court; paras. 108-113.

<sup>74</sup> Although no time-limit was specified for the payment of compensation under the administrative remedy, it was considered that the specific budgetary provisions for it should enable the authorities to pay compensation in time. Moreover, notwithstanding that there was no such time-limit in respect of the civil claim, no budgetary provisions were made in the amendments and Bulgarian law does not allow the enforcement of judicially determined money claims against State bodies, this problem was not seen as necessarily systematic and the European Court considered that it would be speculative at this stage to say that compensation would not be paid in due time; para. 114.

<sup>75</sup> The European Court noted that the Department for the Execution of Judgments had expressed misgivings about whether the civil claim remedy covers delays attributable to police investigators, who in Bulgaria are not regarded as "judicial authorities". However, as this was a question of interpretation and practice, it could not be assumed that the Bulgarian courts would not give proper effect to the new provisions; paras. 115-116.

<sup>76</sup> It was noted that both remedies were adopted with transitional provisions that enabled the domestic authorities and courts to deal with applications pending before the European Court and even with grievances concerning unreasonably lengthy proceedings that might come before it. Some infelicities in the provisions on this issue with respect to the administrative remedy were seen as having been amended with the subsequent enactment of paragraph 8(2) of the transitional and concluding provisions of the Act amending the 1988 Act; para. 117.

68. In the light of this examination, the European Court concluded that, taken together, the two remedies – i.e., the administrative and civil remedies that could lead to compensation – could be regarded as effective ones in respect of the allegedly unreasonable length of proceedings. As a result, it rejected both applications for non-exhaustion of domestic remedies.<sup>77</sup>
69. In doing so, it recognised that no long-term practice of domestic authorities and courts applying those provisions had been established at this time. However, it emphasised that they had been specifically designed to provide compensation for unreasonable length of proceedings and that special budgetary arrangements had been made to enable the Inspectorate attached to the Supreme Judicial Council to create a special unit administering the remedy.<sup>78</sup>
70. Subsequently, after having regard to these measures, the Committee of Ministers decided to close its examination of the *Dimitrov and Hamanov* judgment under Article 46(2) of the European Convention.<sup>79</sup> However, in doing so, it also noted the commitment of the authorities to pursue their efforts in the area of length of proceedings (including the putting in place of an effective acceleratory remedy in criminal matters) in the context of the two other groups of cases<sup>80</sup> – the *Kitov* and *Djangozov* groups – which, at that time, remained under the supervision of the Committee.
71. Subsequently, the Committee of Ministers decided also to close the examination of the *Kitov* and *Djangozov* groups these two groups of cases in part as a result of the re-introduction by the authorities of an acceleratory remedy in criminal matters, which it regarded as constituting an important safeguard for respecting the reasonable time requirement in criminal proceedings and in civil proceedings dependent on criminal proceedings.<sup>81</sup>
72. This remedy was found in the provisions introduced into Chapter 26 of the Criminal Procedure Code that became effective on 5 November 2017.<sup>82</sup> Under these provisions, both the accused and the injured party can seek the acceleration of either the investigation or the trial or appellate proceedings.

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<sup>77</sup> These decisions have been followed in *Nedyalkov and Others v. Bulgaria* (dec.), no. 663/11, 10 September 2013, *Delev v. Bulgaria*, no. 1116/03, 19 November 2013, *Mulin and Mulina v. Bulgaria* (dec.), no. 2092/08, 26 August 2014, *Agontsev v. Bulgaria* (dec.), no. 44448/07, 21 October 2014 and *Yankov v. Bulgaria* (dec.), no. 44768/10, 18 June 2019.

<sup>78</sup> The Inspectorate had then appointed a number of officials and assigned them to that unit, and later took practical steps enabling those concerned to lodge and track the progress of their applications for compensation with ease; para. 119.

<sup>79</sup> Final Resolution CM/ResDH(2015)154, adopted by the Committee of Ministers on 24 September 2015 at the 1236th meeting of the Ministers' Deputies.

<sup>80</sup> The leading ones were respectively *Kitov v. Bulgaria*, no. 37104/97, 3 April 2003 and *Djangozov v. Bulgaria*, no. 45950/99, 8 July 2004. In both cases, the European Court had a violation of Article 6(1) in respect of the length of the proceedings but in *Djangozov* – a civil case – it had also found a violation of Article 13 on account of the absence of any means of expediting the proceedings and the impossibility of obtaining compensation.

<sup>81</sup> Final Resolution CM/ResDH(2017)420, adopted by the Committee of Ministers on 7 December 2017 at the 1302<sup>nd</sup> meeting of the Ministers' Deputies. The existence by then of effective compensatory remedies was also a factor in the closure of the examination of these cases, as was the adoption of limits on the length of preliminary inquiries.

<sup>82</sup> See fn. 63 as regards the previous provisions in this Chapter.

73. For pre-trial proceedings, such a request can be made after the lapse either of 2 years in the case of crimes punishable with more than 5 years' imprisonment or of 6 months in all other cases. For first instance and intermediate appellate review instance proceedings, the period that must elapse is respectively more than two years or more than one year after the initiation of the proceedings.
74. The acceleration is to be sought through the prosecutor in the case of pre-trial proceedings and the court trying the case in appellate ones. The determination of these requests is to be by a single-judge panel in a closed session within 15 days in the former cases and by a three-judge panel from a higher court within a month and 7 days at the latest in the latter ones.<sup>83</sup>
75. In respect of all cases, the relevant court is required to make a pronouncement by assessing the factual and legal complexity of the case, whether there were delays in the activities relating to the collection, examination and assessment of evidence and objective forms of evidence, and the reasons for such delays. Where it finds undue delay, the court is required to set a suitable time period for completing such actions. Its determination is final but new requests for acceleration can be made after the expiry of the time period for completing the actions specified.
76. No specific sanction is prescribed in the Criminal Procedure Code for either a failure to refer the matter to the relevant panel or to take the measures that have been prescribed by it. In particular, unlike the earlier acceleratory remedy, there is no automatic termination of a case if the required action is not taken within the specified time limit. However, such a failure could give rise to disciplinary liability, which is unlikely to assist either the accused or the injured party.
77. Although the Committee of Ministers closed the examination of the *Kitov* and *Djanzov* groups of cases, it has continued the examination of the functioning of the acceleratory remedy in criminal proceedings in respect of two other groups of cases<sup>84</sup>, which are concerned with effective investigations and thus concerned with the interests of the injured party rather than the accused.
78. There do not appear to be any statistics available regarding requests for either acceleration or compensation in terms of the breakdown of those that are successful/unsuccessful and as the nature of the decisions or awards being made. Similarly, there do not appear to have been any studies analysing the impact of either remedy since their introduction in terms of reducing the length of criminal proceedings.
79. Although there is no specific provision in Bulgarian law regarding the reduction of sentences on account of the length of the proceedings in a case, there does seem to be a readiness to make such a reduction by reference to Article 6(1) of the European Convention in an express and measurable manner.<sup>85</sup>

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<sup>83</sup> In trial and appellate cases, a request will be deemed to have been withdrawn if the court trying the case has performed the relevant action within one month of the request.

<sup>84</sup> The group in which *Velikova v. Bulgaria*, no. 41488/98, 18 May 2000 is the leading case and the group in which *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009 and *S.Z. v. Bulgaria*, no. 29263/12, 3 March 2015 are the leading cases.

<sup>85</sup> See, e.g., *Bivolarov v. Bulgaria* (dec.), no. 16694/06, 19 November 2013, in which the European Court stated that it was "satisfied that the ruling of the Supreme Court of Cassation making reference to Article 6 § 1 of the

80. Insofar as there may have been applications to the European Court other than those referred to above, complaining about the effectiveness of either the acceleratory or the compensatory remedy, there has only been one admissibility decision finding that the material before the European Court did not disclose any appearance of a violation of Articles 6(1) and 13<sup>86</sup> and no such application has been communicated to the Government.
81. It is clear that both the European Court and the Committee of Ministers are satisfied with the arrangements made to provide compensation in the event of excessive length of criminal proceedings. The operation of the new acceleratory remedy has yet to be considered in proceedings before the European Court. However, while the Committee of Ministers seems, in principle, to regard the acceleratory remedy as a positive development, it is clear that it will be sometime before actual practice confirms that it can be regarded as an effective remedy.

## 2. Lithuania

82. There have been two groups of cases before the European Court, the execution of the judgments relating to them has focused on the provision of effective remedies for excessive length of criminal proceedings.
83. The first was a group in which the leading case was *Girdauskas v. Lithuania*<sup>87</sup>, in which the European Court had found a violation of Article 6(1) on account of its conclusion that the domestic authorities had shown neither diligence nor rigour in the handling of the proceedings in a case, which had already lasted more than 8 years and 5 months and was then pending before the Supreme Court.<sup>88</sup> There was no complaint in this case about the absence of an effective remedy in respect of the length of the proceedings.

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Convention and explicitly finding that the length of the proceedings ran counter to the requirements of reasonableness, amount to such an acknowledgment. As to the mitigation of the sentence, the Court observes that the Supreme Court of Cassation agreed with the lower courts about the factors to be taken into consideration when establishing the sentence, but it also went on to add to those factors the unreasonable length of the proceedings, and to specifically state that this circumstance should reflect on the sentence, which it lowered by two years. In these circumstances, the Court is satisfied that the Supreme Court of Cassation's finding concerning the effect of the excessive length of the proceedings amounted to a primary ground to mitigate the sentence and had a decisive and measurable impact on it. The reduction therefore amounted to sufficient redress for the excessive length of the criminal proceedings against the applicant. In view of the foregoing, the Court considers that the applicant can no longer claim to be a victim of a violation of Article 6 § 1 within the meaning of Article 34 of the Convention". See also the similar ruling in *Aleksandrovi and Aleksandrova v. Bulgaria* (dec.), no. 38659/07, 28 January 2014, in which the European Court observed that "in its judgment of 11 April 2006 the Varna Regional Court expressly stated that for reasons not imputable to the applicants a period of fifteen years had elapsed between the date when the crime was committed and the issuing of the sentences, which obviously included the judicial pre-trial stage. The Court is satisfied that this ruling of the Varna Regional Court amounts to a sufficiently clear acknowledgment of the failure of the authorities to observe the reasonable-time requirement of Article 6 § 1 as to judicial proceedings, that is from the initiation of judicial investigation to final determination. As to the mitigation of the sentence, the Court observes that the courts went on to find that the length of the proceedings amounted to an exceptional mitigating circumstance requiring an imposition of punishments below the statutory minimum".

<sup>86</sup> *Stoyanov and Others v. Bulgaria* (dec.), no. 25626/08, 13 May 2014.

<sup>87</sup> No. 70661/01, 11 December 2003.

<sup>88</sup> Although it was recognised that the proceedings might be deemed as complex, owing *inter alia* to the nature of the alleged offences (i.e., the financial impropriety imputable to the applicant), the Government had failed to show why such a long time has been required for the authorities to deal with the case and for a period of more than 4 years the proceedings had been adjourned for audit of the applicant's company to be carried out.

84. The Committee of Ministers decided to close its examination of the case under Article 46(2) of the European Convention, having regard to the individual and general measures that had been adopted by Lithuania in a new Code of Criminal Procedure.<sup>89</sup> These had included provision for the investigating judge, upon complaint by a suspect alleging an excessively long pre-trial investigation, to be able to compel the prosecutor to complete or discontinue the investigation.<sup>90</sup>
85. The leading case in the second group of cases considered by the Committee of Ministers was *Šulcas v. Lithuania*.<sup>91</sup> In this case, the European Court had found a violation of Article 6(1) in respect of proceedings that had lasted 8 years and 9 months, having been adjudicated at three levels of jurisdiction.<sup>92</sup>
86. In addition, the European Court found that there had been a violation of Article 13 on account of the lack of an effective remedy under domestic law whereby the applicant could have, when he submitted his complaints to it, obtained a ruling upholding his right to have his case heard within a reasonable time.
87. The latter ruling was based upon the European Court's rejection of the objections and arguments as to the availability of an effective domestic remedy as regards the length of the criminal proceedings which the Government had put forward.<sup>93</sup> These objections and arguments had concerned the possibility of bringing a claim under (a) Article 6.272 of the Civil Code allowing a claim for pecuniary and non-pecuniary damage in respect of the unlawful actions of the investigating authorities or court, in the context of a criminal case and (b) the Constitution.
88. The European Court had previously decided that the civil claim under Article 6.272 – which envisages compensation for an unlawful conviction, an unlawful arrest or detention, the application of unlawful procedural measures of enforcement, or an unlawful administrative penalty - did not satisfy the test of effectiveness as this had not, at the moment of the introduction of the application, acquired a sufficient degree of legal certainty requiring its exhaustion before submitting an application complaining about length of proceedings.<sup>94</sup>
89. The European Court considered that the Government had not submitted any convincing arguments which would require a departure from this established case law. Moreover, the European Court noted that the object of a claim brought under the relevant provision – which had been suspended – had concerned the damage caused by an appellate court's allegedly unlawful decision in a related civil case with regard to the reasonableness and

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<sup>89</sup> Resolution CM/ResDH(2007)127, adopted by the Committee of Ministers on 31 October 2007 at the 1007th meeting of the Ministers' Deputies.

<sup>90</sup> The new Code had entered into force on 1 May 2003. It had also provided stricter time-limits for completion of criminal cases, notably a 6-month time-limit for pre-trial investigation and, subsequently, a 20-day time-limit for referral of a case to a court for a first hearing.

<sup>91</sup> No. 35624/04, 5 January 2010.

<sup>92</sup> Although it was accepted that the case was complex and that the applicant's conduct contributed to the length of the proceedings, some delays had been occasioned by mistakes or inertia on the part of the domestic authorities. As a result, the case had had to be returned for further investigations on 23 October 1996 by the Kėdainiai District Court, and to the trial court by the Panevėžys Regional Court on 11 July 2002.

<sup>93</sup> At paras. 60-63.

<sup>94</sup> *Norkunas v. Lithuania*, no. 302/05, 20 January 2009, at para. 30.

amount of the creditors' claims rather than the damage that the applicant had allegedly suffered due to the length of the criminal proceedings.

90. As regards the possibility of bringing a claim based upon the Constitution, the European Court held that the Government had not adduced any evidence to demonstrate that such a remedy had any reasonable prospect of success, especially before a ruling of the Constitutional Court on 19 August 2006 as to the possibility of claiming damages for the unlawful actions of State institutions and agents.<sup>95</sup> Furthermore, it considered that the Government had not provided any practical examples showing that the applicant could have relied effectively on the Convention at the domestic level before lodging his supplement to the application in October 2004.
91. However, in the light of the evolution of the case law of the Lithuanian courts, the European Court subsequently became satisfied that the uncertainty as regards the effectiveness of Article 6.272 of the Civil Code as a domestic remedy in cases of excessively long proceedings had been remedied by judicial interpretation on 6 February 2007, when the Supreme Court affirmed that the aforementioned provision should be applicable when assessing the damage caused by a breach of Article 6 § 1 of the Convention and the later rulings based on this.<sup>96</sup>
92. Thus, the European Court stated with respect to the February 2007 and subsequent rulings that:

80. ... In that case the Supreme Court acknowledged that when State liability for certain infringements was not regulated by national law, the court could establish State liability on the basis of the international treaties which constituted an integral part of the national legal system, in this case Article 6 § 1 of the Convention. The Supreme Court also rejected as unsubstantiated the argument that under Article 6.272 of the Civil Code the State was liable only where the State officials had acted unlawfully. It held that the lawfulness of a certain action under national law did not automatically mean that it was lawful within the meaning of the Convention ... The Lithuanian court then went on to examine the claimant's case and, on the basis of the Court's case-law, found that there had been a violation of her right to a trial within a reasonable time and awarded her compensation for non-pecuniary damage in the sum of LTL 15,000 for six years at one level of jurisdiction, as well as compensation for pecuniary damage .... The Court considers that this decision closely follows the Court's principles and guidelines and that the sum awarded in compensation cannot be considered derisory. The same holds true as regards the Supreme Court's decision of 15 October 2009, where an award of EUR 5,800 was made ...

81. Assessing further, the Court has regard to the Supreme Court's decision of 4 February 2009, in which the latter found it established that there had been unjustified inaction on the part of the pre-

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<sup>95</sup> This had stated that "...by virtue of the Constitution, a person has the right to claim compensation for damage caused by the unlawful actions of State institutions and agents, even if such compensation is not foreseen by law; the courts adjudicating such cases ... have the power to award appropriate compensation by directly applying the principles of the Constitution ... as well as the general principles of law, while being guided inter alia by the principle of reasonableness, etc"

<sup>96</sup> *Savickas and Others v. Lithuania* (dec.), no. 66365/09, 15 October 2013. The European Court's approach had already been evolving; "In *Giedrikas* ... it found, "having regard to the particular circumstances of the case" that the applicant, who had received LTL 8,000 in compensation for non-pecuniary damage, could no longer be considered a "victim" within the meaning of Article 34 of the Convention. In *Beržinis* ..., in the light of the material in the file and having regard to the particular circumstances of the case (the applicant had contributed substantially to the delay in the proceedings), the Court held that the sum of EUR 290 awarded to the applicant could be considered sufficient and therefore appropriate redress for the violation found. Lastly, in *Jonika* ..., the Court held that the sum awarded to the applicant (EUR 2,900) "almost correspond[ed] to the sum that the Court would be likely to have granted in accordance with its practice". It appears that these three cases were rather specific and were determined on their particular facts.



trial investigation officers and, on the basis of the Court's judgment it found to be most similar to the case of the claimant, awarded compensation for non-pecuniary damage .... In the same case the Supreme Court also found unjustified delays in the civil proceedings before the first-instance court. Even though both the claimants and the courts had been responsible for those delays, the Supreme Court considered that it was the court, and not the parties, which had an obligation to lead the process, and hence the larger share of the responsibility for the delay in the civil proceedings lay with the State ... Accordingly, in so far as the second and third applicants appear to have alleged an absence of domestic case-law concerning delayed civil court proceedings ..., their arguments must be dismissed.

82. Lastly, in the decisions of 30 November 2009 and 22 June 2010 the Supreme Court held that the obligation to redress non-pecuniary damage for excessively lengthy criminal proceedings as well as the method of assessing the damage were already established in Lithuanian legislation and case-law ...<sup>97</sup>

93. As a result, it considered that the applications submitted in this case should be found to be inadmissible for non-exhaustion of domestic remedies.<sup>98</sup>
94. In its decision, the European Court also referred a proposal by the Government to supplement Article 6.272 of the Civil Code with a norm which would explicitly establish a right to compensation for excessively lengthy court proceedings.<sup>99</sup>
95. This proposal was made in the light of the European Court's judgments finding a violation of the right to a hearing or trial within a reasonable time and not acknowledging Article 6.272 to be an effective remedy partly because this provision did not mention excessively lengthy court proceedings as giving grounds for compensation. The Government was concerned about the prospect of the European Court finding excessively lengthy court proceedings to be a systemic problem in Lithuania. In addition, it considered that the amendment would allow compensation to be awarded for excessively long court proceedings irrespective of the investigating officers' or courts' fault.
96. Moreover, taking into account the European Court's practice in length-of-proceedings cases, the amendment provided for the whole range of criteria – the impact of the

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<sup>97</sup> The Court also noted "the existence of domestic case-law as regards the State's liability for unduly long administrative court proceedings. The Supreme Administrative Court has emphasised that the administrative courts, in hearing cases, must apply the Convention provisions, including Article 6 § 1, directly and that in the event of a conflict the Convention provisions shall prevail over the national laws and other legal acts. On the basis of Committee of Ministers' Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings, it also stressed the member States' duty to take all possible measures and to guarantee that State institutions effectively examined complaints about the right to a hearing within a reasonable time, including acknowledging the fact of the violation and affording compensation for damage caused by it"; (para. 83).

<sup>98</sup> It did so on the basis that, where the remedy in question was the result of interpretation by the courts, it normally took six months for such a development of the case law to acquire a sufficient degree of legal certainty before the public may be considered to be effectively aware of the domestic decision which had established the remedy and the persons concerned be enabled and obliged to use it and the applications in this case had been lodged with the European more than six months after 6 August 2007, i.e., the day as of which effective domestic remedies capable of providing adequate redress for violations of the right to a hearing without undue delay exist.

<sup>99</sup> This would have added a paragraph 5 providing that: "In accordance with the rules set out in paragraphs 1, 3 and 4 of this Article, compensation shall also be afforded in respect of damage caused by an excessively lengthy pre-trial investigation or examination of the case by the court. The court, when it determines the issue of compensation for damage, in addition to the general criteria for assessment of the pecuniary and non-pecuniary damage as set out in this Code, shall also take into account the impact of the pre-trial investigation and court proceedings on the person claiming compensation for damage, their complexity and the procedural actions or failure to act by the pre-trial investigations officials, prosecutors or judges as well as those of the person claiming damages, and other relevant circumstances".

proceedings on the person concerned, and the actions or failure to act by the State authorities and by the person himself – to be taken into consideration. The Government also emphasised that a crucial element was that the draft amendment did not set out an exhaustive list of criteria as to when compensation could be awarded for damage.<sup>100</sup>

97. In the event, the proposed amendment to Article 6.272 was not adopted. However, its essence has been developed in the case law of the Supreme Court in cases of damage based on the excessive length of criminal proceedings and this is followed by all the other courts.
98. The Committee of Ministers in its decision to close its examination of the *Šulcas* group of cases under Article 46(2) of the European Convention did not take account of this amendment. Rather, it merely referred to the recognition by the European Court that there was an effective domestic compensatory remedy with regard to lengthy proceedings following the Supreme Court's February 2007 judgment.<sup>101</sup>
99. In this decision, the Committee of Ministers did, however, take note of an amendment to the Code of Criminal Procedure relating to the acceleration of proceedings, whereby a suspect may seek the termination of the pre-trial investigation or its completion within a prescribed time.<sup>102</sup>
100. There do not appear to be any statistics available regarding requests for acceleration of proceedings or compensation in terms of the breakdown of those that are successful/unsuccessful and as the nature of the decisions or awards made. Similarly, there do not appear to have been any studies analysing the impact of either remedy since their introduction and/or development in terms of their impact on reducing the length of criminal proceedings.
101. Insofar as there may have been applications to the European Court since the decision in *Šulcas v. Lithuania* and the introduction and/or development of these remedies complaining about their adequacy or effectiveness, none have been communicated to the Government or been the subject of an admissibility decision.
102. There is no specific provision in Lithuanian law regarding the reduction of sentences on account of the length of the proceedings in a case.

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<sup>100</sup> See paragraph 23 of the decision in *Savickas and Others v. Lithuania* (dec.), no. 66365/09, 15 October 2013.

<sup>101</sup> Resolution CM/ResDH(2014)291, adopted by the Committee of Ministers on 17 December 2014 at the 1215bis meeting of the Ministers' Deputies.

<sup>102</sup> Article 215 provides: "1. If the pre-trial investigation is not completed within six months after the first questioning of the suspect, the suspect, his representative or his defence counsel may lodge a complaint with the pre-trial judge regarding the delay of the pre-trial investigation. 2. In order to examine the complaint, the pre-trial judge shall hold a hearing to which the suspect or his lawyer and the prosecutor shall be invited. 3. After examining the appeal, the pre-trial judge shall make one of the following orders: 1) dismiss the complaint; 2) order the prosecutor to complete the pre-trial investigation within the established term; 3) terminate the pre-trial investigation. 4. The decision of the pre-trial judge may be appealed in accordance with the procedure established in Article 65 of this Code. If the complaint is rejected, the participants in the proceedings referred to in paragraph 1 may lodge a confirmatory complaint no earlier than three months after the previous complaint has been examined. 5. The prosecutor must complete the pre-trial investigation and draw up an indictment or issue a ruling on the termination of the pre-trial investigation within the time limit set by the pre-trial investigation judge. The prosecutor may apply to the pre-trial judge for an extension of the time limit for completing the pre-trial investigation. The question of extension shall be decided at a meeting to which the participants in the proceedings referred to in paragraph 2 of this Article shall be invited".

103. The achievement of an effective remedy in this case came not through a legislative reform – even though one had been envisaged in the course of the execution process – but from a re-evaluation by the courts of their approach to an existing compensatory remedy. This brought domestic practice into line with the requirements of the European Court with respect to the payment of compensation. Although an acceleratory remedy had actually been adopted, there was no consideration as to how this worked in practice. However, the fact that the compensatory remedy was proving effective undoubtedly meant that, when the examination of the *Šulcas* group of cases was closed, there was not seen to be a pressing need for reliance also to be placed on an acceleratory remedy in order to resolve the problem of excessive length of criminal proceedings.

### 3. Poland

104. As has already been noted<sup>103</sup>, the European Court found in *Kudla v. Poland* that it had not been shown that the remedies invoked by the Government – whether individually or in combination – could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred, meaning that the standard of “effectiveness” for the purposes of Article 13 had not been met.
105. Subsequent to that judgment Poland enacted the Law of 17 June 2004 (“the 2004 Act”) on complaint about breach of the right to have a case examined in judicial proceedings without undue delay.
106. The 2004 Act allowed parties to proceedings to complain that their right to a trial within a reasonable time has been breached if the proceedings in the case lasted longer than was necessary to examine the factual and legal circumstances of the case.<sup>104</sup>
107. A complaint could be lodged by a party to criminal proceedings or a victim even if not a party. Such a complaint had to be lodged while the proceedings were still pending and had to be examined by the court immediately above the court conducting the impugned proceedings. Only one complaint could be made per year.
108. A court considering the complaint to be justified was required to find that there was an unreasonable delay in the impugned proceedings. In addition, at the request of the complainant, it might instruct the court examining the merits of the case to take certain measures within a fixed time-limit. Such instructions were not to concern the factual and legal assessment of the case. In addition, if the complaint was justified, the court might, at the request of the complainant, grant just satisfaction in an amount not exceeding PLN 10,000 to be paid out of the budget of the court which conducted the delayed proceedings.
109. The 2004 Act also provided for the possibility of parties whose complaints had been allowed also seeking compensation from the State Treasury for the damage they suffered as a result of the unreasonable length of the proceedings. Furthermore, it was

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<sup>103</sup> See para. 33 above.

<sup>104</sup> It also applied to delay in enforcement proceedings.

provided that a party who had not lodged a complaint about the unreasonable length of proceedings that were still pending could submit a claim under Article 417 of the Civil Code after the proceedings concerning the merits of the case had ended, seeking compensation for the damage which resulted from the unreasonable length of the proceedings.<sup>105</sup>

110. The fee for lodging a complaint was PLN 100 but this was to be reimbursed if it was found to be justified.

111. There were also transitional rules in relation to applications already pending before the European Court, thereby providing a degree of retrospective effect.<sup>106</sup>

112. The European Court in *Charzyński v. Poland* found that

a complaint about a breach of the right to a trial within a reasonable time is capable of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred, and that it thus satisfies the “effectiveness” test established in the *Kudła* judgment.<sup>107</sup>

113. This admissibility decision, which concerned compliance with the requirement to exhaust effective remedies, was followed by the judgment in *Krasuski v. Poland*<sup>108</sup>, in which the European Court found that there had been no violation of Article 13 as such remedies had been introduced by the 2004 Act.

114. The focus of the *Krasuski* judgment was, however, particularly on the compensatory remedy as the European Court stated:

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<sup>105</sup> This originally provided that “The State Treasury shall be liable for damage caused by a State official in the course of carrying out the duties entrusted to him”. However, it was amended with effect from 1 September 2004 read: The State Treasury or a local government unit or another person exercising public authority by force of law shall be liable for any damage caused by an unlawful action or omission while exercising public authority. At the same time it was provided additionally that “If damage has been caused by failure to give a ruling (*orzeczenie*) or decision (*decyzja*) where there is a statutory duty to give them, reparation for [the damage] may be sought after it has been established in the relevant proceedings that the failure to give a ruling or decision was contrary to the law, unless otherwise provided for by other specific provisions”. However, transitional provisions stated that Article 417, as applicable before 1 September 2004, was to apply to all events and legal situations that subsisted before that date. Nonetheless, on 18 January 2005 the Supreme Court adopted a resolution, in which it ruled that while the 2004 Act produced legal effects as from the date of its entry into force (17 September 2004), its provisions applied retroactively to all proceedings in which delays had occurred before that date and had not yet been remedied.

<sup>106</sup> These provided, in particular, that “Within six months after the date of entry into force of this law persons who, before that date, had lodged a complaint with the European Court of Human Rights ... complaining of a breach of the right to a trial within a reasonable time guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ..., may lodge a complaint about the unreasonable length of the proceedings on the basis of the provisions of this law if their complaint to the Court had been lodged in the course of the impugned proceedings and if the Court has not adopted a decision concerning the admissibility of their case”.

<sup>107</sup> (dec.), no. 15212/03, 1 March 2005. The application was ruled inadmissible for non-exhaustion of domestic remedies since the extension of the complaint procedure to applications for which there had been an admissibility decision meant that it was available to the applicant, notwithstanding that the relevant proceedings were no longer pending before the Polish courts. There was a decision to similar effect in *Michalak v. Poland* (dec.), no. 24549/03, 1 March 2005. However, in *Ratajczyk v. Poland* (dec.), no. 11215/02, 31 May 2005, the application was not held inadmissible for non-exhaustion as the applicability of the time-bar of three years under the Civil Code meant that the tort claim would not have become available when the 2004 Act entered into force.

<sup>108</sup> No. 61444/00, 14 June 2005.

69. However, in view of the recent developments at domestic level, most notably the entry into force of the 2004 Act, the Court sees good reason to reconsider its previous position.

To begin with, the Court finds that section 16 of the 2004 Act created a completely new legal situation in comparison to that subsisting previously. Unlike before, the possibility of seeking damages under Article 417 of the Civil Code for the protracted length of judicial proceedings which have ended now has an explicit legal basis. Furthermore, merely from reading section 16 it is clear that the hitherto existing ambiguity as to the application of Article 417 to cases involving compensation for a breach of the right to a hearing within a reasonable time has been removed.

70. The Court does not find any *prima facie* evidence in support of the applicant's argument that the remedy in question would be "unrealistic" in this case. The applicant did not contest the availability of that remedy but confined himself to a bare statement that the remedy would not be effective, without substantiating his assertion in any way .... Given that the 2004 Act entered into force on 17 September 2004, the absence of established judicial practice in respect of Article 417 is not decisive (see, *mutatis mutandis*, *Charzyński v. Poland* (dec.), no. [15212/03](#), § 41, ECHR 2005-...). Nor does the fact that he cannot base his action on the – in his view more favourable – amended provisions of Article 417 make his possible attempt to seek damages futile or purposeless.

71. It is true that the effectiveness of the remedy depends on the Polish civil courts' ability to handle such actions with special diligence and attention, especially in terms of the length of time taken for their determination. It is also true that the level of compensation awarded at domestic level may constitute an important element for the assessment of the adequacy of the remedy ... However, mere doubts as to the effective functioning of a newly created statutory remedy does not dispense the applicant from having recourse to it. It cannot be assumed by the Court that the Polish courts will not give proper effect to the new provision.

72. Having regard to the foregoing, the Court considers that from 17 September 2004, the date on which the 2004 Act entered into force, an action for damages under Article 417 of the Civil Code acquired a sufficient level of certainty to become an "effective remedy" within the meaning of Article 13 of the Convention for an applicant alleging a violation of the right to a hearing within a reasonable time in judicial proceedings in Poland.

115. However, at an early stage of the operation of the 2004 Act, the approach followed in applying the compensatory remedy was found to be inconsistent with the case law of the European Court. This was because the courts adopted a practice of the "fragmentation of proceedings", whereby the assessment of a length complaint was generally limited to the period after the Act's entry into force or to] the pending stage of proceedings before a court of a given instance and did not consider the overall length of proceedings (including previous stages before courts of other instances) and thus the reasonableness of the length of the proceedings in the light of the particular circumstances of the case taken as a whole.<sup>109</sup> Also other problems emerged, in particular regarding the manner in which the courts assessed the length of proceedings and regarding the non-award of just satisfaction or its insufficient level.
116. The 2004 Act was amended in February 2009, with the explanatory notes to the legislation stating that its aim was to enhance the effectiveness of the 2004 Act since its application had indicated that it did not constitute a fully effective remedy against excessive length of proceedings.
117. As the European Court explained in its pilot judgment in *Rutkowski and Others v. Poland*, the background to the amendment was as follows:

In the light of statistical information demonstrating the number of complaints in 2005-07 and amounts awarded it was concluded that even if the courts acknowledged excessive length of proceedings in a given case, they too rarely granted any compensation. The amounts awarded were

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<sup>109</sup> As a result, violations of Article 6(1) were found in cases such as *Majewski v. Poland*, no. 52690/99, 11 October 2005 and *Kęsicczy v. Poland*, no. 13933/04, 16 June 2009.

also open to criticism as they often oscillated around 20% of the maximum statutory award – which, at the relevant time, was PLN 10,000, equivalent to some 2,500 euros (EUR).

The judicial practice in the application of the 2004 Act also showed that the courts, in their assessment of the length of proceedings, did not take into account the Court's standards in terms of disregarding such factors as the impact of the previous conduct of the case on the situation on the date of the ruling on a complaint and the lack of an assessment as to whether the proceeding had lasted longer than was necessary to examine the case.

It was further stressed that the 2004 Act did not provide for any remedy against the excessive length of an investigation, contrary to Article 13 of the Convention, and that one of the aims of the 2009 Amendment was to rectify that lacuna in the law.

In order to enhance the effectiveness of a length complaint, the courts would be obliged by law to award appropriate just satisfaction if the complaint was justified. Under the current rules the award was only optional and, as shown by the judicial practice, in the vast majority of cases the courts rejected claims for compensation or awarded merely symbolic sums of PLN 100-200 (some EUR 25-50).

It was stated that the proposed amendments would be in compliance with the Court's case-law regarding the determination of sufficient just satisfaction at domestic level – in particular the *Scordino (no. 1)* judgment and standards for an effective remedy under Article 13. Indeed, the judicial practice that had developed after the Act's entry into force had disclosed that the courts made only a fragmentary assessment of the length of proceedings. In situations where a complaint concerned proceedings before the first-instance court and on appeal, each stage was examined separately. That practice of "fragmentation" was incompatible with the aim of the 2004 Act and the Court's case-law, according to which "proceedings" comprised all their stages. Consequently, the court dealing with a length complaint should take into account the entirety of proceedings.<sup>110</sup>

118. Furthermore, specific criteria were introduced for determining whether the length of proceedings was excessive<sup>111</sup> and changes were made as to the bodies required to examine complaints,<sup>112</sup> the request that might be made in a complaint,<sup>113</sup> the action that could be taken by the court determining the complaint<sup>114</sup>, the obligation to award just satisfaction and the amount of just satisfaction payable<sup>115</sup>.
119. In addition, the name of the 2004 Act was altered to the Law on complaint about breach of the right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay, reflecting its applicability thereafter to the investigation stage as well as the trial one in criminal proceedings.

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<sup>110</sup> No. 72287/10, 7 July 2015, at para. 85.

<sup>111</sup> Namely, the court "should, in particular, assess the promptness and correctness of actions taken by the court [dealing with the case] in order to give a decision on the merits or actions taken by the prosecutor conducting or supervising the investigation in order to terminate the investigation or actions taken by the court [dealing with the case] or court bailiff in order to handle and terminate ...the proceedings, having regard to the nature of the case, its factual and legal complexity, what is at stake for the party who has lodged the complaint, the issues examined and the conduct of the parties, especially the party alleging excessive length of the proceedings".

<sup>112</sup> A court of appeal where the proceedings were before a district and a regional court, or before a regional court and a court of appeal and by the court immediately above the court competent to deal with the subject-matter of the case where the excessive length of an investigation was involved.

<sup>113</sup> Thus, a complaint could include a request for a court dealing with the case or a prosecutor conducting or supervising an investigation to be instructed to take appropriate actions within a fixed time-limit and for appropriate just satisfaction to be awarded.

<sup>114</sup> Thus, the court should, at the complainant's request or of its own motion, instruct the court [dealing with the case] or the prosecutor conducting or supervising the investigation to take appropriate actions within a fixed time-limit, unless instructions are obviously unnecessary. Such instructions may not interfere with the factual and legal assessment of the case.

<sup>115</sup> Thus, the just satisfaction could be in an amount ranging from 2,000 to 20,000 Polish zlotys, to be paid by the State Treasury. This meant that an award of just satisfaction became mandatory in cases where the court upheld complaint.

120. However, the European Court in the *Rutkowski* case,<sup>116</sup> in the light of the circumstances in that case and developments in the Polish judicial practice, including the Supreme Court's case-law on the interpretation of the 2004 Act that followed the decisions delivered by the European Court in 2005, saw

good cause for reconsidering its previous position on the effectiveness of a complaint under the 2004 Act in respect of its compensatory aspect.<sup>117</sup>

121. The matters of concern to the European Court were that: (a) the courts did not examine the overall length of the proceedings but only selected parts of them<sup>118</sup>; (b) this was not merely the situation in individual, isolated examples of the courts' practice<sup>119</sup>; (c) the level of the awards made for non-pecuniary damage in respect of considerable delays<sup>120</sup>; (d) the approach of the courts in examining complaints<sup>121</sup>; and (e) the suggestion that any shortfall in an award could be rectified by means of a subsequent, separate civil action based on the rules for the State's liability for tort<sup>122</sup>.

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<sup>116</sup> Which was comprised of 591 applications.

<sup>117</sup> Paragraph 179.

<sup>118</sup> "In the first applicant's and the third applicant's cases the courts disregarded periods occurring before the 2004 Act's entry into force and examined only the length of proceedings at the current instance. In the second applicant's case, the Court of Appeal limited its assessment to the court instance at which the main proceedings were currently pending"; para. 180.

<sup>119</sup> "In fact, the impugned decisions fully reflected the so-called principle of "fragmentation of proceedings", established by the Supreme Court in its rulings given between 2005 and 2012 ... In accordance with the Supreme Court's interpretation of the term "in the course of the proceedings in a case" referred to in section 5(1) of the 2004 Act, assessment of a length complaint was to be limited to the period after the Act's entry into force – unless the previous delay still continued on that date – and to the court instance at which the case was currently pending, notwithstanding the prior instances... That interpretation applied until 20 March 2013, when the Supreme Court issued the 2013 Resolution, analysing critically its previous case-law on the matter and endorsing a new interpretation, in compliance with the Court's case-law on the assessment of the reasonableness of the length of proceedings ... Inevitably, the fragmentation of the proceedings must have had decisive consequences for the outcome of the applicants' claims for compensation, which were either rejected in their entirety as being unjustified or, in the first applicant's case, granted only partly; para. 181.

<sup>120</sup> Thus, "Mr Rutkowski was granted PLN 2,000, the minimum statutory amount, which corresponded to 5.5% of what the Court would have awarded him had there been no domestic remedy. The award was a small fraction of the PLN 12,300 which he should have been awarded by the national court at the material time ... The domestic award must therefore be considered manifestly unreasonable in the light of the standards set by the Court".

<sup>121</sup> "The Court would also note that, by virtue of section 2(2) of the 2004 Act ..., the domestic court's examination of such complaints is to be focused on the question of whether the court dealing with the particular case displayed due diligence. However, it should be emphasised that a failure to deal with a case within a reasonable time is not necessarily the result of fault or omission on the part of individual judges or prosecutors. There are instances where delays result from the State's failure to place sufficient resources at the disposal of its judiciary ... or from deficiencies in domestic legislation pertaining to the organisation of its judicial system or the conduct of legal proceedings"; para. 184.

<sup>122</sup> "As pointed out by the applicants ..., the gist of their complaints is linked with the ineffectiveness of the primary compensatory remedy under the 2004 Act, designed to enable a party to judicial proceedings not only to expedite pending proceedings but also to recover compensation for non-pecuniary damage sustained on account of excessive length of proceedings. As explicitly stated in the explanatory notes to the 2004 Act and the 2009 Amendment, the Polish legislature intended the compensation thereby granted to be adequate. That being so, to expect the individuals concerned to have recourse to yet another remedy enabling recovery of compensation for non-pecuniary damage when the primary compensatory remedy has proved to be defective would entail imposing an unjustified and excessive burden on victims of unreasonable delay. It must also be noted that although the civil action relied on by the Government has been considered by the Court to have been effective, that was in a different factual and legal situation, namely where a complaint under 2004 Act had not been available to the applicant (see *Krasuski*, cited above, §§ 69-72). Consequently, the availability of another, *ex post facto* remedy at a later stage cannot alter the Court's conclusion as to the State's failure to ensure in the instant case a sufficient level of compensation for non-pecuniary damage arising from unreasonable length of proceedings"; para. 185.

122. The European Court thus found that there had been a violation of Article 13. However, the circumstances revealed by this analysis and the inflow of complaints to it underlined that there were deficiencies in the general measures adopted in execution of the *Kudla* judgment.
123. Although the amendments in 2009 removed certain shortcomings in the application of the 2004 Act (notably by extending it to the investigation stage, introducing a statutory minimum award, making it obligatory for the courts to grant compensation and doubling the maximum statutory award), the considerable scale of the problem of excessive length of proceedings, accompanied by the lack of sufficient redress for a breach of the reasonable-time requirement at domestic level, as demonstrated by the European Court's caseload<sup>123</sup> and the recurrent nature of the complaints, as well as the large number of persons that were, or are liable to be, affected by it meant that the situation complained of in the case had to be qualified as a practice incompatible with the European Convention.
124. As a result of this "systemic problem ... which has given rise [and] may give rise to similar applications", as referred to in Rule 61 § 1 of the Rules of Court, the European Court concluded that it was justified to apply the pilot-judgment procedure.
125. The European Court emphasised that there were two interrelated root causes behind the violation of Article 13 found in this case, namely: (a) the non-compliance with its case law on the assessment of the reasonableness of the length of proceedings, in particular its judgments holding that the period to be taken into consideration comprises the entirety of the domestic proceedings; and (b) the non-compliance with the standards for "sufficient redress" to be afforded to a party by the domestic court for a breach of the right to a hearing within a reasonable time, which was linked with and partly resulted from the practice of the limited – fragmentary – assessment of the length of proceedings.
126. The Supreme Court's 2013 Resolution was regarded by the European Court as an important measure aimed at correcting the defective judicial practice. However, it considered that was not sufficient and that the second root cause remained.
127. Thus, the European Court stated:

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<sup>123</sup> "Since the introduction of the remedy under the 2004 Act the Court has delivered 280 judgments finding a breach of the "reasonable-time" requirement in cases where the applicants had unsuccessfully attempted to obtain a ruling acknowledging that breach and compensation for non-pecuniary damage before the domestic courts. In addition, in 358 similar cases the same breach was in substance or expressly admitted by the Government and they paid compensation for a violation of the right to a hearing within a reasonable time to the victims under the terms of a friendly settlement or unilateral declaration ... As regards the state of affairs at the execution stage, at present, nearly eleven years since the 2004 Act's entry into force, over 300 Polish cases involving the excessive length of judicial proceedings are still pending before the Committee of Ministers. They constitute the majority of all not-yet-fully executed judgments against Poland ... Furthermore, since the Act's entry into force at least 100 *prima facie* well-founded applications per year have been lodged with the Court by persons who have exhausted the domestic remedies but have not obtained any, or obtained insufficient, redress for a violation of their right to a hearing within a reasonable time. The caseload developments demonstrate the growing and steady inflow of Polish length-of-proceedings cases on the Court's docket; in 2014 alone 144 cases were registered. As of the date of adoption of this judgment 650 Polish cases involving mainly, or at least partly, complaints of excessive length of civil and criminal proceedings are pending before the Court"; para. 204.



The present case and numerous similar cases listed in the annex to the judgment demonstrate that the level of domestic awards is evidently below the threshold fixed by the Court for victim status in the *Scordino (no. 1)* judgment. The statistical information produced by the parties supports the applicants' opinion that progress in adjusting domestic awards is markedly slow. Moreover, it does not appear that the setting of the minimum award and increasing of the maximum award have encouraged the Polish courts to grant higher sums, reasonably related to the Court's standards. The average amounts awarded are at the lower end of the scale set by the 2004 Act and oscillate around the minimum sum of PLN 2,000, in particular as regards complaints examined by the regional courts ...

The reluctance on the part of the national courts to award more substantial amounts may be linked with many factors, which are not for the Court but for the State to identify so that it can ensure compliance with the Convention in the future. However, the Court cannot but note that in the present case each applicant's claim for non-pecuniary damage could have been satisfied in accordance with the *Scordino (no. 1)* requirements at domestic level, without the need for any of them to address their complaints to the Court – if only the relevant courts had respected the Convention standards. The minimum domestic awards required in each case were all below the maximum ceiling set at PLN 20,000 .... It cannot therefore be said that the relevant courts were bound by the statutory limitations on awards or that they did not enjoy a sufficient margin of appreciation in their assessment of the relevant circumstance ...

In consequence, despite the introduction of a domestic remedy by Poland – a complaint designed to provide “appropriate just satisfaction” for unreasonable length of judicial proceedings ..., the Court is continually forced to act as a substitute for the national courts and handle hundreds of repetitive cases where its only task is to award compensation which should have been obtained by using a domestic remedy.

This situation, subsisting for already several years in Poland, is not only incompatible with Article 13 but has also led to a practical reversal of the respective roles to be played by the Court and the national courts in the Convention system. It has upset the balance of responsibilities between the respondent State and the Court under Articles 1 and 19 of the Convention. In that regard, the Court would once again reiterate that, in accordance with Article 1, the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities and that the machinery of complaint to the Court is only subsidiary to the national systems safeguarding human rights ... The Court's task, as defined by Article 19, cannot be said to be best achieved by repeating the same findings of a Convention violation in a series of cases ...<sup>124</sup>

128. The European Court thus saw the need for Poland, through appropriate general measures, to secure the effective implementation of the 2013 Resolution by the courts dealing with complaints under the 2004 Act and their compliance with its standards for the assessment of the reasonableness of the length of proceedings and “appropriate and sufficient redress” for a violation of the right to have a hearing within a reasonable time.<sup>125</sup>
129. It did not, however, provide for any specific actions to be taken or any time-limit for that purpose as it recognised that the process of implementation – considering that it primarily involved a change of judicial practice and approach - required a number of steps to be taken and raised issues which went beyond its function as defined by Article 19 of the European Convention. Thus, it left those matters to the Committee of Ministers, as a body better equipped to monitor the progress achieved in that process.<sup>126</sup>
130. The judgment in *Rutkowski* did not comment on the acceleratory remedy in the 2004 Act. However, in a subsequent judgment, the European Court stated that its earlier

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<sup>124</sup> Paras. 217-219.

<sup>125</sup> See paragraph 221.

<sup>126</sup> See paragraph 222.

judgment had “found a violation of Article 13 on account of the lack of effectiveness of this remedy only in its compensatory aspect”.<sup>127</sup>

131. In 2016, the 2004 Act was again amended, with the changes entering into force on 6 January 2017. In particular, these changes entailed the introduction of an interpretative directive according to which the 2004 Act’s provisions are to be applied in line with the standards arising from the European Convention, as well as a prohibition of fragmentation of proceedings, with the amendment underlining that the courts must take into account the entire length of the proceedings from their institution to the moment when a complaint is examined. In addition, there was provision for a mechanism of granting an adequate cash amount as a compensation for excessive length of proceedings (with an obligation to grant a lump-sum of at least 500 PLN per each year of excessive duration of the proceedings and not just the statutory minimum award of 2,000 PLN). The amendment also made it possible for the applicant whose complaint was rejected on formal grounds, to re-lodge it within 12 months from the date of lodging the previous complaint
132. The European Court subsequently observed that
- the so-called “fragmentation” of the proceedings” resulting from the national courts’ non-compliance with the Court’s case-law on the “reasonable time” assessment have been addressed by the 2016 Amendment.<sup>128</sup>
133. In the Committee of Ministers, the Deputies welcomed the amendments to the 2004 Act and invited the authorities to provide information on the application by the domestic courts of this new legal framework, and in particular on the level of compensation awarded and its conformity with the case law of the European Court.<sup>129</sup>
134. In its updated Action Plan of 24 April 2020,<sup>130</sup> Poland referred to a significantly slowing rate of increase in the number of complaints under the 2004 Act and an increase in the level of compensation, especially in criminal cases.<sup>131</sup> There continues to be training

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<sup>127</sup> *Wcisło and Cabaj v. Poland*, no. 49725/11, 8 November 2018, at para. 163.

<sup>128</sup> In *Zaluska, Rogalska and Others v. Poland* (dec.), no. 53491/10, 20 June 2017, at para. 44. In this case, following the Government’s unilateral proposal as to payment of just satisfaction and general measures, the case had been struck out of the list pursuant to Article 37(1)(b) and (c). In its decision, the European Court stated that “Having regard to the object of the pilot-judgment as stated above (see paragraphs 28-30 above) and the fact that within some 15 months after the judgment in *Rutkowski and Others* case had become final the respondent State introduced the general measures in the interest of other persons similarly affected, as well as committed itself to take such necessary measures in the future, the Court is satisfied that the settlement is based on respect for human rights as defined in the Convention and its Protocols. Accordingly, it finds no reasons to justify a continued examination of the present applications”.

<sup>129</sup> 1302th meeting in December 2017, DH-DD(2017)1196-rev.

<sup>130</sup> Available at [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)359E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)359E).

<sup>131</sup> It should be noted that since the delivery of the pilot judgment in the *Rutkowski and Others* case there has been a constant trend, further stimulated by the entry into force of the 2016 amendment of the 2004 Act, for the average amount of sums awarded by courts examining complaints on the excessive length of criminal proceedings to be increased (most complaints alleging excessive length of proceedings in violation of Article 6(1) of the European Convention, filed with the European Court against Poland, concern criminal proceedings). In 2015 the average sum awarded for the protracted criminal proceedings amounted to 3,207 PLN, in 2016 – 3,588 PLN (an increase of 9%), in 2017 – 3,870 PLN (an increase of 8%), in 2018 – 4,582 PLN (an increase of 18.4%), while in the first half of 2019 - up to 4,865 PLN (an increase of 6.1%). In total, in the period from 2015 to 30 June 2019, the average amount granted by courts for excessive length of criminal proceedings increased nominally by over 1,658 PLN, i.e. by 51.7%. In a survey for the Ministry of Justice by the Institute of Judiciary in 2018, the courts were found

for judges on the application of the domestic remedy in line with the European Court's standard.<sup>132</sup> However, the group of cases, of which *Rutkowski* is the leading case, remains under enhanced supervision by the Committee of Ministers.

135. On 19 September 2019 the Helsinki Foundation for Human Rights submitted a Rule 9 submission, raising certain issues concerning not sufficient levels of just satisfaction awarded by domestic courts and the unchanged duration of proceedings, which was related to the problem of the shortage of almost 900 judges in Poland. These issues were disputed by the authorities.<sup>133</sup>
136. The efforts to secure an effective compensatory remedy for excessive length of criminal proceedings have themselves been lengthy. Moreover, a resolution of the problem has yet to be regarded by the Committee of Ministers as having been achieved. The initial view by the European Court of a legislative reform was undoubtedly over-optimistic, particularly as there was no real practice to demonstrate its operation. The latter proved to be quite problematic and contributed to a large number of applications to the European Court. The source of the problem lay less with the legislation – although this has been improved – than with the approach of the courts to its application and their failure to have regard to the relevant case law of the European Court. The tide now seems to be turning in favour of an approach consistent with that required by the European Court but there is no rush to judgment by the Committee of Ministers as it waits to see whether this development is sustained. Undoubtedly, the training of the judiciary will be an important factor in ensuring that the lead given by the Supreme Court is followed.
137. The volume of criminal cases in which the proceedings are unduly long might raise doubts as to the effectiveness of the acceleratory remedy. However, this remains an unknown quantity since the European Court suggested that it was effective. This is because there seems to have been no assessment of its effectiveness within Poland and no issues have been raised in this regard either in applications submitted to the European Court or in the process of the supervision of the execution of the *Rutkowski* judgment by the Committee of Ministers.
138. Nonetheless, insofar as the acceleratory remedy might be proving inadequate in practice, this may well be a consequence of the way in which the courts have been assessing reasonable time – one factor in the shortcomings of the compensatory remedy – rather than its formal structure, which is not markedly different from those elsewhere and which do seem to work effectively.

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in 63.4% of civil and criminal cases to award sums equal to or higher than the standard required in the *Rutkowski* pilot judgment, with the awards in the remainder of the cases being regarded as adequate.

<sup>132</sup> In addition, all European Court judgments and decisions concerning violations of the European Convention are disseminated to court presidents, as well as to the newly appointed coordinators in the courts for international cooperation and human rights in, respectively, civil and criminal matters.

<sup>133</sup> See [https://hudoc.exec.coe.int/eng#{"EXECIdentifier":\["DH-DD\(2017\)1404E"\]}](https://hudoc.exec.coe.int/eng#{).

#### 4. Romania

139. In 2013, the European Court concluded in *Vlad and Others v. Romania* that a systemic problem existed with respect to breaches of the “reasonable time” requirement laid down in Article 6 § 1 in relation to criminal proceedings.<sup>134</sup>
140. Furthermore, it considered that it could not be established from the examples submitted by the Government that a claim based on the direct applicability of the European Convention, taken alone or combined with a liability for tort claim brought pursuant to Articles of the Civil Code 998 and 999<sup>135</sup>, represented an effective remedy for the excessive length of proceedings.
141. It reached this view on account of (a) the absence of a decisions showing that a litigant had successfully relied on the relevant provisions of the Convention in order to obtain the acceleration of his or her court action; (b) the decisive factor relied upon in awarding compensation was the finding either of a judicial error committed by State authorities or of a wrongful act or omission for which the State was found to be liable; and (c) the proposed remedy followed the ordinary civil procedure for claiming damages, which could thus last several years through three jurisdictions.
142. Although the European Court noted that certain general steps had been taken to remedy the structural problems related to the excessive length of civil and criminal proceedings it saw the need for the adoption of further measures. Thus, in order to prevent future findings of infringement of the right to a trial within a reasonable time, the European Court encouraged Romania to
- either amend the existing range of legal remedies or to add new remedies, such as a specific and clearly regulated compensatory remedy, in order to provide genuine effective relief for violations of these rights.<sup>136</sup>
143. *Vlad v. Romania* is a leading repetitive case, the execution of which remains under examination by the Committee of Ministers, along with another group of cases concerned with the length of criminal proceedings.<sup>137</sup>
144. However, there have been significant developments concerning both the introduction of an acceleratory remedy and the evolution of the practice of the courts with respect to the provision of compensation.
145. The possibility of challenging the duration of a criminal investigation or trial was introduced into the Criminal Procedure Code by new Articles 488<sup>1</sup>-488<sup>6</sup>, which entered into force on 1 February 2014.

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<sup>134</sup> No. 40756/06, 26 November 2013, at para. 155. This conclusion was also in respect of civil proceedings.

<sup>135</sup> At the time these provided respectively that “Any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it” and “Everyone shall be liable for damage he has caused not only through his own actions but also through his failure to act or his negligence”.

<sup>136</sup> At paragraphs 163-164.

<sup>137</sup> For its last review of this group of cases, see Resolution CM/ResDH(2016)151, adopted by the Committee of Ministers on 8 June 2016 at the 1259th meeting of the Ministers’ Deputies. The leading case in the other group is *Stoianova and Nedelcu v. Romania*, no. 77517/01, 4 August 2005.

146. This possibility arises after a year has elapsed from the commencement of the investigation or trial and, in respect of ordinary or extraordinary appeals, after at least 6 months since the appeal was filed in court.
147. Such a challenge can be filed by the suspect, defendant, victim, civil party and person who carries civil liability, as well as by the prosecutor during the trial phase. The ruling on a challenge is at the investigation stage by the Judge for Rights and Liberties at the court that would have jurisdiction to try the case in first instance<sup>138</sup>, at the trial or appeal stage by the hierarchically superior court to the one that has the case on its docket and when the judicial procedure being challenged is on the docket of the High Court of Cassation and Justice to a different panel of judges in the same Chamber. In addition, the Constitutional Court has interpreted the relevant provisions as applicable also to the preliminary chamber procedure<sup>139</sup> and to the procedure for challenging investigation measures and acts<sup>140</sup>.
148. A ruling on the challenge must be reasoned. Moreover, for the purpose of determining the reasonable character of the duration of judicial procedures, there is a requirement to check the duration of procedures based on the work and material in the case file and the points of view formulated by the parties, taking account of the following elements: (a) the nature and object of the case; (b) its complexity, including the number of participants and difficulties in submitting evidence; (c) any international dimensions; (d) the procedural stage it is at and the duration of previous procedural stages; (e) the behaviour of the challenger as part of the challenged judicial procedure, including in terms of exercising their trial and procedural rights and in terms of complying with their obligations as part of the trial; (f) the behaviour of the other participants, including the authorities involved; (g) any changes made to the applicable legislation; and (h) other elements of a nature to impact on the duration of the procedure.
149. A ruling must be made no more than 20 days after it was filed and is to be made without any participation of the parties and the prosecutor. A challenge can be found to be grounded, not grounded, inadmissible from a procedural perspective<sup>141</sup> or withdrawn by the party filing on it.
150. Where a challenge is upheld, a time frame should then be set for the prosecutor to solve the case or the court to give a ruling. However, no guidance can be provided or solutions

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<sup>138</sup> A Judge for Rights and Liberties is a judge who, in court, according to its jurisdiction, during the course of the criminal investigation, decides upon applications, proposals, complaints, challenges or any other motions referring to: (a) preventive measures; (b) asset freezing; (c) temporary safety measures; (d) acts performed by prosecutors, in cases explicitly stipulated by law; (e) approval of searches, of the use of special surveillance or investigation methods and techniques or of other methods of proof, under the law; (f) anticipated hearing procedures; and (g) other situations explicitly stipulated by law.

<sup>139</sup> *Decision no. 641/2014 of the Ro. CCR*. The object of this procedure is the examination, after return of the indictment, of the court's jurisdiction and lawfulness of its receipt of the case, as well as examination of the lawfulness of evidence-gathering and performance of the criminal investigation acts. The duration of the Preliminary Chamber procedure is a maximum of 60 days after the case is registered with the court. See, e.g. Court minutes no. 821/2015, rendered by the High Court of Cassation and Justice (Criminal Chamber), in which the preliminary chamber judge that was hierarchically superior to the one that had the case on its docket ruled that a preliminary chamber procedure of 15 months (3 terms), when the legal provisions set a 60 day time limit did not meet the requirement of "reasonable time".

<sup>140</sup> I.e., complaints against the prosecutor's acts such as *resolutions to close a case or drop charges*; *Decisions no. 599/2014 and no. 663/2014 of the Ro. CCR*.

<sup>141</sup> I.e., it was filed by a person not a party to the process concerned.

offered on matters related to facts or law that would anticipate the final ruling on the case or impair the judge's freedom to rule, under the law, on the matter brought before them or, as the case may be, the prosecutor's freedom to return the resolution they believe to be legal and grounded. The ruling is not subject to any avenue of appeal.

151. If the finding is that the reasonable duration was exceeded, a new challenge in the same case can only concern matters subsequent to the filing of the previous challenge.
152. The filing of a challenge in bad faith, i.e., abuse of law, is punishable by a fine within the range 1.000-7.000 lei<sup>142</sup> and a requirement to cover the judicial expenses that it occasioned.
153. Although the ruling is mandatory for the prosecutor or judge concerned, there is no specific sanction for non-compliance with it. In the event of non-compliance, disciplinary action could be taken against the judge or prosecutor but this would not have a bearing on the conduct of the proceedings subject to delay. Nonetheless, it appears that the time frame set in the rulings made pursuant to challenges are generally observed.<sup>143</sup>
154. There are no official statistics regarding challenges to the duration of an investigation or trial. However, it has been estimated that there have been in the region of 8-9,000 such challenges between the entry into force of the possibility and the end of 2019 – approximately 1,400 per year – and approximately 1,000 in the first three months of 2020.<sup>144</sup>
155. There continues to be no special procedure concerning the award of monetary compensation for excessive length of criminal proceedings.
156. However, in *Brudan v. Romania*<sup>145</sup> the European Court reached the conclusion that the action for tort liability, on the basis of article 1349 of the new civil code<sup>146</sup>, as interpreted constantly by the domestic courts now represented an effective remedy for

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<sup>142</sup> Approximately EUR 200–1,500.

<sup>143</sup> See the Government's submission to the Committee of Ministers in DH-DD(2016)87 rev (30 March 2016), at pp. 14-15.

<sup>144</sup> These estimated figures are based on the personal research of the Council of Europe's consultant, Dr Radu Florin Geamănu undertaken for the Study. It should be noted that in the most recent Report on the State of Justice – for the year 2018 – which deals with the stock of all files (criminal, civil, commercial, administrative) on the role of all courts, 13 courts of appeal, 18 tribunals and 65 courts of first instance were "highly efficient", 3 courts of appeal, 32 tribunals and 109 courts of first instance were "efficient", 1 court of first instance was "satisfactory" and no court was "inefficient". The internal standard is that the files must be solved in 1 year in the case of appellate courts (superior courts) and 1 and a half years for other courts. Efficiency is calculated by reference to the sum of the files pending at the end reference period and unfinished and the degrees are: less than 5% = very efficient; 5-10% = efficient; 10-15% = satisfactory; over 15% = inefficient. Out of a total of 1.753.540 cases analysed in 2018 at all the prosecutor's offices, 543.971 cases were solved as follows: 189.396 (34,82%) in the first 6 months since the case was recorded; 105.001 (19,30%) between 6 months and 1 year since the case was recorded; 166.157 (30,55%) after a year since the case was recorded; and 83.417 (15,33%) after the intervention of the statute of limitations/prescription.

<sup>145</sup> No. 75717/14, 10 April 2018.

<sup>146</sup> This provides that: (1) Everyone shall respect the code of conduct which the law or local custom imposes and shall not breach, by action or inaction, the rights or legitimate interests of others.(2) Anyone who knowingly breaches this duty shall be liable for all damage and shall make amends for it in full.(3) In the cases provided for by the law, a person may also be liable for damage caused by the actions of another".

denouncing the excessive length of the proceedings taking place before the criminal (and civil) courts.

157. In reaching this conclusion, it emphasised that – although there was no specific time-limit to be observed - the time taken by the courts to examine tort actions targeting excessive length of the procedures in the examples cited by the Government did not seem to have been significantly extended and that there was no reason to doubt the diligence of the authorities in the payment of compensation awarded.<sup>147</sup>
158. Furthermore, the European Court did not detect any appearance of a breach of fairness in the course of this type of procedure and it considered that the legislation on legal costs appeared to be sufficiently accessible to persons wishing to denounce, by means of tort actions, the excessive length of the proceedings.<sup>148</sup>
159. Moreover, after scrutinising the amounts of compensation awarded by the courts, it found that in the majority of the cases cited, the amounts were higher than those awarded by the European Court in similar cases.<sup>149</sup> As a result, it considered that the internal reparation was adequate since this aligned with the amounts which it itself awards.
160. As regards the criteria used for assessing the reasonableness of the length of the proceedings, the European Court noted that the case law had evolved considerably in recent years and had been consolidated with the judgment no. 292 of 30 January 2014 of the High Court, in which the basic criteria to be used in this type of remedy were set out.<sup>150</sup> Subsequently, these criteria had been taken up by the courts called upon to rule

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<sup>147</sup> Thus, the Government cited: 10 proceedings that had lasted less than two years, for two or sometimes three degrees of jurisdiction; 8 that had lasted a little over two years, for two or sometimes three degrees of jurisdiction; 2 that had lasted approximately four years, for two or three degrees of jurisdiction; and one proceeding that had lasted five years, for three degrees of jurisdiction.

<sup>148</sup> It noted that, if persons wishing to bring an action against the State to obtain compensation for the excessive length of proceedings must pay the legal costs for this purpose, the legislation also provides for the granting of legal aid in the form of exemptions, reductions, instalments or deferrals of payment of legal costs for persons who have no sufficient resources. In addition, it pointed out that it is the party who loses the action or remedy which, in principle, must pay the related legal costs. Moreover, it appeared from the copies of the internal decisions produced in the case that the legal costs were reimbursed in full or in part in twelve of the examples. It was not possible to detect whether reimbursement requests had been made in the remaining cases.

<sup>149</sup> Thus, in sixteen examples of case law, the amounts awarded exceeded the compensation awarded by the European Court in similar cases and in only four cases were the awards 80% to 90% of the amounts which the European Court would normally have awarded.

<sup>150</sup> In this judgment, the High Court had criticised the absence, in Romanian law, of a procedure making it possible to denounce the excessive length and to make good the damage thus suffered under article 13 of the Convention. According to the High Court, in the absence of a remedy, it was for the national courts, in compliance with the guarantees provided for in Article 6 § 1 of the Convention, to assess and establish the procedures for processing such requests. Also, according to the High Court, in such a situation, the State's responsibility was of an objective nature with regard to the damage caused by the organization and faulty conduct of the proceedings. According to the High Court, this responsibility was also based on the positive obligation of the state to take all necessary measures to ensure respect for rights. Furthermore, in order to determine the period to be considered, the High Court recalled that, in criminal matters, the "reasonable time" provided for in Article 6(1) started from the moment a person was "accused", an approach also corresponding to the notion of "significant repercussions on the suspect's situation" in the case law of the European Court. In order to assess the reasonableness of the length of the proceedings, the High Court analysed the circumstances of the case and the criteria laid down by the case law of the European Court, in particular the complexity of the case, and the conduct of the applicant and that of the competent authorities. It also sought to answer the question of whether a fair balance had been struck between the requirement of expeditious proceedings and the principle of the proper administration of justice. In order to

on tort claims relating to the excessive length of proceedings. In the view of the European Court, these criteria corresponded to those which it has itself established in cases relating to compliance with the "reasonable time" referred to in Article 6(1) of the European Convention.

161. Although not referred to by the European Court, the Romanian case law does not refer to any obligation for the plaintiff to prove the responsibility of the State in subjective terms. Rather, its responsibility must be engaged regardless of the existence of any fault, as an objective guarantee for procedures not in conformity with the requirements of Article 6(1) of the European Convention.
162. As a result, this development of the case law could be seen as respecting the recommendation made by the European Court from the angle of Article 46 of the Convention in its judgment in *Vlad and Others v. Romania* so that the action for tort liability could be recognised as a sufficient remedy to be able to be used for the purposes of Article 35(1) of the European Convention.
163. The criteria used for determining awards of compensation do not make any specific reference to the use made of the acceleratory remedy in an attempt to limit the length of the proceedings. However, a failure to make such a challenge, where feasible, would undoubtedly be relevant to determining the contribution of the suspect or accused to the delay of which he or she complains, a relevant consideration in the case law of the European Court in assessing whether the length of proceedings is excessive.
164. There are no official statistics with respect to awards of compensation for the unreasonable length of criminal proceedings and there do not appear to have been any studies analysing what, if any, impact the development of the case law regarding this remedy has had on this problem.
165. There is no special provision for forms of compensation other than monetary awards. However, Romanian courts do apply the case law of the European Court regarding reduction of sentence in cases where there has been a failure to observe the reasonable time requirement, imposing lower prison sentences or non-custodial measures instead of imprisonment.
166. Insofar as there may have been applications to the European Court since the introduction of the acceleratory remedy and the judgment in *Brudan v. Romania* regarding compensation for breach of the reasonable time requirement, none have been communicated to the Government or been the subject of an admissibility decision.
167. The Committee of Ministers was aware of the introduction of the acceleratory and compensatory remedies at the time of its last review of the *Vlad* group of cases.<sup>151</sup> This was before the European Court's assessment of the latter in the *Brudan* case. Undoubtedly, it will be interested to see some consistent practice regarding both remedies as regards preventing proceedings becoming unduly long in the case of the acceleratory one and in following the case law of the European Court in the case of the

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establish the amount of compensation, the High Court, like the lower courts, took account of the criteria developed by the European Court in its case law in matters of just satisfaction.

<sup>151</sup> See fn. 137.



compensatory one. However, in principle, both seem now to meet the requirements set out by the European Court.

## 5. Slovenia

168. There have only been a few cases in which the European Court has held that there was no effective remedy in respect of the length of criminal proceedings.<sup>152</sup>
169. However, in all of them, it has relied upon the conclusion reached regarding the range of remedies that it had analysed in the case of *Lukenda v. Slovenia*<sup>153</sup>, which concerned civil proceedings. The remedies concerned were an administrative action, a claim for damages in civil proceedings, a request for supervision and a constitutional appeal.
170. In respect of each individual remedies, it identified deficiencies which prevented them from being regarded as effective within the meaning of Article 35 of the Convention.
171. Thus, there was uncertainty as to the effectiveness of the administrative action<sup>154</sup>; it was unclear whether there could be an award of compensation for non-pecuniary damage in a civil claim and such a claim would have no effect on the length of proceedings that are still pending when the claim is lodged<sup>155</sup>; the absence of any examples of successful requests for supervision and the fact that such requests had no binding effect on the

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<sup>152</sup> See, e.g., *Mamič v. Slovenia* (No. 2), no. 75778/01, 27 July 2006 and *Štavbe v. Slovenia*, no. 20526/02, 30 November 2006.

<sup>153</sup> No. 23032/02, 6 October 2005.

<sup>154</sup> It had reached this conclusion previously in *Belinger v. Slovenia* (dec.), no. 42320/2 October 2001. In that case, it had concluded effectiveness would be jeopardised by the probable length of the proceedings given the backlog of cases and the absence of any indication that such actions would be treated with priority. In addition, it had been concerned that there was no indication as to how applicants would obtain preventive relief since, although compensation could be awarded and measures to remedy the situation could be indicated, no specific measures (i.e., to decide a case or take specific procedural measures within a fixed time-limit) to expedite the determination of the applicants' civil rights were indicated. In *Lukenda*, it considered that the Government had failed to show clearly, to its satisfaction, that the judgments and decisions of the administrative courts did in fact speed up unduly protracted proceedings or award reparation for violations of the right to a speedy trial that have already occurred. Thus, an administrative action could not be regarded as providing effective redress in length of proceedings cases; paras. 47-53.

<sup>155</sup> The claim would be based on a violation of the right to a trial within a reasonable time under Article 26 of the Constitution. Bringing such a claim would not have been open to the applicant in this case as the relevant proceedings were still pending but the European Court still considered its effectiveness. Previously, it had held in *Predojevič and Others v. Slovenia* (dec.), no. 43445/98, 9 December 2004 that such a possibility was not effective because of a lack of any examples. However, the Government had cited two cases in which compensation had been awarded on the basis of Article 26 of the Constitution because of the excessive duration of proceedings that had ended. It thus accepted that, in an action in tort, a court could in principle find that unduly long proceedings that have already been concluded were the cause of the damage sustained by the claimant and might accordingly award compensation. Notwithstanding what was seen as signs of positive development, this did not resolve the concern about awards for non-pecuniary damage or the lack of impact on the length of proceedings that are still pending when the claim is lodged; paras. 54-60.

court concerned and there was no right of appeal<sup>156</sup>; and the probable length of time involved in a constitutional appeal<sup>157</sup>.

172. Furthermore, the European Court concluded that – notwithstanding that an aggregate of remedies could, in principle, satisfy the requirement of “effectiveness” – to so find in the circumstances of these cases would run counter to the principles and spirit of the European Convention.

173. In reaching this conclusion, it observed that:

69. As already stated, within the framework of domestic remedies relied on by the Government, it is possible that a request for supervision lodged in conjunction with, or followed by, an action in the administrative courts, will not suffice to redress delays in the proceedings. In addition, as stated above, the Government have not shown that an action in tort can provide compensation for non-pecuniary damage, while a constitutional appeal can only be lodged after all other remedies have been exhausted. Lastly, the Government have failed to demonstrate how the combined use of the above-mentioned remedies would boost their effectiveness.

70. A further issue arises where an individual first brings an action in the administrative courts, which is subsequently dismissed on the ground that the original proceedings have ended, and is then required to lodge a claim in tort in order to obtain compensation. Over and above the fact that the claimant is required to institute two sets of proceedings, a more serious problem which may occur in such cases is the probable excessive duration of the combined proceedings. Particular attention should be paid to, among other things, the speediness of the remedial action itself, as the possibility that a remedy may be deemed inadequate because of its excessive duration cannot be excluded (see *Doran v. Ireland*, no. [50389/99](#), § 57, ECHR 2003-X). It would be putting an unreasonable burden on the applicant to require him to make use of both remedies.

174. Following the judgment in *Lukenda v. Slovenia* and decision no. U-I-65/05 of the Constitutional Court,<sup>158</sup> both of which required the establishment of conditions in which the right to a trial without undue delay must be afforded, the Government adopted a Joint State Project on the Elimination of Court Backlogs, the so-called Lukenda Project. Its goal was the elimination of backlogs in Slovenian courts and prosecutor's offices by the end of 2010, by providing for structural and managerial reform of the judiciary.

175. A part of this project was the preparation of the Act on the Protection of the Right to a Trial without undue Delay (“the 2006 Act”), which was adopted in 2006 and came into force on 1 January 2007.

176. The provisions of the 2006 Act apply to, amongst others, the parties to court proceedings and injured parties in criminal proceedings. It provides two remedies to expedite pending proceedings – a supervisory appeal and a motion for a deadline – and,

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<sup>156</sup> The Court had previously found – in *Majarič v. Slovenia*, no. 28400/95 (dec.), 3 December 1997 and in the *Belinger* case – that such requests were a remedy in the framework of judicial administration and not within court proceedings. However, it acknowledged that some legislative amendments had meant that, in theory at least, the revised supervisory procedure may contribute to expediting court proceedings. Nonetheless, given the shortcomings mentioned in the text, this remedy could not have any significant effect on expediting the proceedings as a whole; paras. 61-64.

<sup>157</sup> “The Court reiterates that a constitutional appeal, in principle, can only be lodged after domestic remedies have been exhausted, that is, an action in the administrative courts or a claim in tort. In *Belinger*, cited above, the Court found that the efficiency of the constitutional appeal was already problematic in view of the probable length of the combined proceedings. Since the Government have not submitted any new material concerning constitutional appeals, the Court considers that, at present, it cannot be regarded as an effective remedy”; para. 65.

<sup>158</sup> 22 September 2005.

ultimately, for a claim for just satisfaction in respect of damage sustained because of the undue delay.

177. The criteria to be taken into account when assessing complaints are:

the circumstances of the particular case shall be taken into account, namely: its complexity in terms of facts and law; actions of the parties to the proceedings, in particular as regards the use of procedural rights and fulfilment of obligations in the proceedings; compliance with rules on the set order for resolving cases, or with statutory deadlines for fixing preliminary hearings or for giving court decisions; the manner in which the case was heard before a supervisory appeal or a motion for a deadline was lodged; the nature and type of case and its importance for a party.

178. If a party considers that the court is unduly protracting the decision-making, he or she may lodge a supervisory appeal in writing before the court hearing the case and the decision thereon is to be taken by the president of the court.<sup>159</sup> Unless the appeal is manifestly unfounded or is incomplete, the president of the court is then required to request the judge to whom the case has been assigned for resolution to submit – within 15 days – a report indicating reasons for the duration of proceedings.

179. In the light of this report, the president of the court is then required to conclude the appeal if it is stated that all relevant procedural acts will be performed within 4 months,<sup>160</sup> dismiss it if it is established that the court is not unduly protracting the decision-making in the case or order a deadline for the performance of certain procedural acts if it is established that the court is unduly delaying decision-making in the case<sup>161</sup>. In addition, it is possible to reassign the case.<sup>162</sup>

180. If the president of the court dismisses the supervisory appeal or fails to respond to the party within two months or fails to send the notification about the procedural acts being performed within the 4 month time-limit or if appropriate procedural acts have not been performed within the time-limit set in the notification or ruling of the president of the court, the party may lodge a motion for a deadline with the court hearing the case.<sup>163</sup>

181. The motion may be dismissed if it is manifestly ill-founded. However, if the president of the higher court hearing in the judicial area concerned establishes that the court is unduly protracting the decision-making in the case, he or she must order the appropriate procedural acts to be performed by the judge concerned and must also set the time-frame for their performance, which may not be less than fifteen days and not longer than four months, as well as set the appropriate deadline for the judge to report on the

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<sup>159</sup> A judge may be assigned by the annual schedule of allocation to act in place of or together with the president of the court.

<sup>160</sup> The president of the court must inform the party concerned thereof.

<sup>161</sup> These will depend upon the status and nature of the case. In such a case, the president of the court may also order that the case be resolved as a priority owing to the circumstances of the case, particularly when the matter is urgent. If he orders that appropriate procedural acts be performed by the judge, he shall also set the time-frame for their performance, which may not be less than fifteen days and not longer than six months, as well as the appropriate deadline for the judge to report on the acts performed.

<sup>162</sup> If it is established that the undue delay in decision-making in the case is attributable to an excessive workload or an extended absence of the judge. Also, he or she may propose that an additional judge be assigned to the court or order other measures in accordance with the statute governing the judicial service.

<sup>163</sup> This may be lodged within fifteen days after receiving the ruling or after the specified time-limits.

acts performed. Moreover, it is possible, particularly when the matter is urgent, to also order that the case be resolved as a priority.

182. A supervisory appeal may also be lodged with the Ministry of Justice rather than with the court of competent jurisdiction. In such a case, the Minister must refer it to the president of the court of competent jurisdiction to hear it in accordance with the 2006 Act and must also ask to be kept informed of the findings and decision.
183. Where a supervisory appeal has been granted or a motion for a deadline has been lodged, the party may also claim just satisfaction in the form of monetary compensation<sup>164</sup> or a written statement of the State Attorney's Office or the publication of a judgment to the effect that the party's right to a trial without undue delay has been violated.
184. Monetary compensation is payable for non-pecuniary damage caused by a violation of the right to a trial without undue delay and strict liability for any damage caused lies with the State. However, it can only be awarded in respect of individual, finally decided cases.
185. Awards can be between EUR 300 and 5,000. In determining the amount, the criteria referred to in paragraph 177 above must be taken into account, in particular the complexity of the case, actions of the State, actions of the party and the importance of the case for the party.
186. The payment of monetary compensation is to be made by the State Attorney's Office whether this is on the basis of a settlement or a court decision. This shall include all appropriate costs incurred by the party in connection with any settlement and the party's costs of the court proceedings. For this purpose, there is a requirement that funds shall be earmarked in the Budget of the Republic of Slovenia within the framework of the financial plan of the State Attorney's Office.
187. There is also provision for payment of just satisfaction in relation to the applications already pending before the European Court.<sup>165</sup>

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<sup>164</sup> Proceedings before the State Attorney's Office with a view to reaching an agreement on the type or amount of just satisfaction must be brought within nine months after the final resolution of the case and must be determined within a period of three months if it establishes that the just satisfaction claim is substantiated. Where the agreement has been reached with the party, the State Attorney's Office must enter into an out-of-court settlement with the party. No claim for monetary compensation may be asserted by way of just satisfaction by bringing an action before the competent court within the three-month period. If no agreement is reached upon the application for settlement, or the State Attorney's Office and the party fail to negotiate an agreement within three months of the date of the application being lodged, the party may bring an action for damages not later than eighteen months after the final resolution of the party's case

<sup>165</sup> In section 25: "(1) In cases where a violation of the right to a trial without undue delay has already ceased and the party had filed a claim for just satisfaction with the international court before the date of implementation of this Act, the State Attorney's Office shall offer the party a settlement on the amount of just satisfaction within four months after the date of receipt of the case referred by the international court for the settlement procedure. The party shall submit a settlement proposal to the State Attorney's Office within two months after the date of receipt of the proposal of the State Attorney's Office. The State Attorney's Office shall decide on the proposal as soon as possible and within a period of four months at the latest. ... (2) If the proposal for settlement referred to in subsection 1 of this section is not acceded to or the State Attorney's Office and the party fail to negotiate an agreement within four months after the date on which the party filed its proposal, the party may bring an action before the competent court under this Act. The party may bring an action within six months after receiving the

188. This legislation was first considered by the European Court in *Grzinčič v. Slovenia*.<sup>166</sup> In its judgment it recalled that:

94. ... it has given certain indications in the *Scordino* judgment ... as to the characteristics which effective domestic remedies in length-of-proceedings cases should have. In this connection, it notes that the purpose of the new Slovenian remedies is twofold.

95. Firstly, a supervisory appeal and a motion for a deadline are designed to obtain acceleration of pending proceedings and/or a finding that time-limits have been exceeded. The Court has stated on many occasions that Article 6 § 1 imposes on Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution (see *Scordino*, cited above, § 183). Since a supervisory appeal and a motion for a deadline, as they stand, consist in different tools for expediting pending proceedings, the Court considers that the test of “effectiveness”, as established by the recent case-law, is satisfied.

96. Secondly, the 2006 Act provides for a compensatory remedy – a request for just satisfaction – through which a party may, where appropriate, be awarded just satisfaction for any non-pecuniary and pecuniary damage sustained. A compensatory remedy is, without doubt, an appropriate means of redressing a violation that has already occurred. According to the Court's recent case-law, a combination of two types of remedies, one designed to expedite the proceedings and the other to afford compensation, seems to be the best solution for the redress of breaches of the “reasonable time” requirement (see *Scordino*, cited above, § 186).

97. As is evident from section 4 of the 2006 Act, in assessing the reasonableness of the length of proceedings the national authorities are in essence required to look at the criteria established by the Court's case-law, namely the complexity of the case, the applicant's conduct and that of the competent authorities which are further specified, and the importance of what is at stake for the applicant in the dispute ....

189. In view of the foregoing and basing its conclusions on an assessment of the legislative provisions as they stand, the European Court concluded that it was

satisfied that the aggregate of remedies provided for by the 2006 Act in cases of excessively long proceedings pending at first and second instance is effective in the sense that the remedies are in principle capable both of preventing the continuation of the alleged violation of the right to a hearing without undue delay and of providing adequate redress for any violation that has already occurred.<sup>167</sup>

190. The view that the aggregate of remedies was effective has since been followed by the European Court in a number of cases<sup>168</sup>.

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reply from the State Attorney's Office that its proposal referred to in the previous paragraph was not acceded to, or after the expiry of the period fixed in the previous paragraph for the State Attorney's Office to decide to proceed with settlement. Irrespective of the type or amount of the claim, the provisions of the Civil Procedure Act concerning small claims shall apply in proceedings before a court”

<sup>166</sup> No. 26867/02, 3 May 2007.

<sup>167</sup> Paragraph 98. Since the proceedings impugned in the case were still pending at second instance, the applicant could avail himself of the aggregate of remedies afforded by the 2006 Act, which the Court had found to be effective, and so his application was inadmissible for non-exhaustion of domestic remedies.

<sup>168</sup> Namely, in *Korenjak v. Slovenia* (dec.), no. 463/03, 15 May 2007 and *Korelc v. Slovenia*, no. 28456/03, 12 May 2009, *Zurej v. Slovenia* (dec.), no. 10386/03, 16 March 2010 (in respect of civil proceedings) and in *Šakanovič v. Slovenia*, no. 32989/02, 13 December 2007 (in respect of criminal proceedings).

191. However, it has also dealt with a number of cases – albeit concerned with civil proceedings – where the acceleratory remedy did not work in the circumstances of the case<sup>169</sup> and where there was not prompt access to the compensatory remedy.
192. The latter was considered particularly important where the acceleratory remedy had been used but had not so far proved successful.
193. Thus, the European Court stated in *Žunič v. Slovenia*

47. As regards the remaining alternative, the Court notes that the 2006 Act provides the possibility to lodge a claim for just satisfaction; a possibility which is, however, limited. It observes that for the just satisfaction claim to be admitted, two cumulative conditions must be satisfied pursuant to sections 15, 19 and 20 of the 2006 Act. Firstly, a party had to properly exhaust the accelerative remedies and, secondly, the proceedings must be finally resolved ... The Court furthermore observes that the maximum amount that can be awarded in respect of non-pecuniary damage sustained as a result of the excessive length of proceedings which have been finally resolved cannot exceed EUR 5,000 ...

48. In the present case the applicant satisfied the above mentioned first statutory condition by using the two accelerative remedies. Each of them was decided by the competent authority in less than a month ... It remains for the Court to determine whether the second condition, namely that just satisfaction can be claimed only in the given period following the final resolution of the case, permits the conclusion that the applicant will have at his disposal a remedy which he should use before applying to the Court.

49. The Court appreciates that the second condition could have the legitimate aim of simplifying the procedure by, *inter alia*, preventing repeated filing of just satisfaction claims during the pending proceedings. The Court also understands from sections 4 and 16 of the 2006 Act that the compensation for excessive delay should reflect the circumstances and the overall length of the proceedings up to their final resolution ...

50. However, the Court notes that, because of this condition, those who believe that they have suffered a violation of their right to a trial within a reasonable time may be obliged to wait even further before being able to seek relief. Therefore, also taking into account that the maximum amount of compensation for non-pecuniary damage is fixed at EUR 5,000 ..., the Court finds it indispensable that the proceedings, which have already been long, are finally resolved particularly promptly following the exhaustion of the accelerative remedies. Indeed, it cannot be ruled out that the question of a reasonably prompt access to a just satisfaction claim will affect whether this remedy, alone or in combination with the accelerative remedies, is effective in respect of the delays which had already occurred ...

51. In this respect, the Court observes that the respondent State adopted several measures in the framework of the Lukenda Project to address the structural problem of delays in the judicial proceedings ... The Court further notes that the measures aimed at reducing the backlog, such as the employment of additional judges, were also implemented at the court dealing with the applicant's case. A large backlog of pending cases and shortage of staff were, according to the reply of the President of the court, the very reasons for the delay in the proceedings concerned ... The Court also notes that since April 2007 two hearings were scheduled in the applicant's case, while beforehand none had been, and that the applicant can again use the accelerative remedies if new reasons for a delay arise ...<sup>170</sup>

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<sup>169</sup> See *Žunič v. Slovenia* (dec.), no. 24342/04, 18 October 2007, in which a supervisory appeal and motion for a deadline were dismissed on the grounds that the delays had resulted from systemic problems, and through no fault of the sitting judge. In dismissing the supervisory appeal, the president of the court indicated that further delays should be reduced as a result of the new judicial posts created in the framework of the Lukenda Project. However, the European Court observed that the acceleratory remedies had "failed to be effective so far" and that "the proceedings at first instance had lasted almost seven years by the time the 2006 Act became operational and therefore the accelerative remedies, even if they were effective in respect of possible future delays, would most likely not be sufficient in respect of the delays which had already occurred".

<sup>170</sup> *Ibid.*

194. In that case, the European Court concluded that the application should be regarded as premature and thus inadmissible. Its reasoning was as follows:

Having regard to the above considerations and in view of the fact that no more than six months had elapsed since the applicant had exhausted the accelerative remedies and that progress had indeed been made in dealing with his claim, the Court is inclined to conclude that the applicant should soon be able to use a claim for just satisfaction, which in principle appears to be an effective remedy (see *Grzinčič*, cited above, § 98). Moreover, there is no reason to believe at this point that the just satisfaction claim, once available, would not have a reasonable prospect of success in the applicant's case.<sup>171</sup>

195. However, the European Court later found in the particular circumstances of *Jana v. Slovenia* that there had been a violation of Article 13 on account of the lack of an effective remedy. It did so because: (a) there had been no significant progress following resort to the supervisory remedy; (b) it was not possible to claim compensation since access to a compensation claim was dependent upon the termination of the proceedings but these were still pending; and (c) the limit for awards for non-pecuniary damage to EUR 5,000 was likely to be insufficient.<sup>172</sup>

196. Furthermore, the operation of the transitional provision was also found in *Ribič v. Slovenia*<sup>173</sup> to give rise to a violation of Article 13 on account of the lack of a remedy under domestic law whereby the applicant could have obtained a ruling upholding his right to have his case heard within a reasonable time, as set forth in Article 6(1) of the European Convention.

197. The transitional provision applied to applications where the violation of the “reasonable time” requirement had already ceased to exist – i.e., that the proceedings had terminated – and which were lodged with the European Court before 1 January 2007.<sup>174</sup> Under the scheme, it was envisaged that the State Attorney's Office was to offer an applicant a settlement proposal in respect of just satisfaction and that, if the applicant's proposal in response was not acceded to or the Office and the applicant failed to negotiate an agreement, it would then be possible for the applicant to bring a civil claim.<sup>175</sup>

198. However, this scheme did not work in this case since, as the European Court observed:

it transpires from the text of section 25, subsection 2 of the 2006 Act, that the opportunity to lodge a “just satisfaction claim” is given only to dissatisfied applicants upon receipt of a settlement proposal. As regards the present case, the Court notes that the applicant has never been offered a settlement proposal from the State Attorney's Office because the latter considered that his right to a trial without undue delay had not been breached.<sup>176</sup>

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<sup>171</sup> *Ibid.*, at para. 53.

<sup>172</sup> *Jama v. Slovenia*, no. 48163/08, 19 July 2012. On the last point, the European Court observed: “in a situation where the proceedings have lasted a very long time and have moreover ground to a halt despite the use of acceleratory remedies, the compensatory remedy may not provide for a sufficient redress due to the aforementioned limitation”; para. 48..

<sup>173</sup> No. 20965/03, 19 October 2010.

<sup>174</sup> They do not apply to applications that have been communicated by the European Court to the Government before the 2006 Act entered into force; see *Grzinčič v. Slovenia*, no. 26867/02, 3 May 2007, at para. 66 and *Sirc v. Slovenia*, no. 44580/98, 8 April 2008, at para. 176.

<sup>175</sup> See further fn. 165 above.

<sup>176</sup> At para. 40.

199. As a result, the European Court was not persuaded that the applicant had access to the “just satisfaction claim” and found the remedies of the 2006 Act ineffective in these particular circumstances.<sup>177</sup>
200. Further amendments have been made to the 2006 Act. Thus, in 2009, the compensatory remedy was also made available in the proceedings pending before the Supreme Court<sup>178</sup> and in 2012, it was made available to parties to the lengthy proceedings brought to an end before the 2006 Act entered into force but which had not until then filed an application for length of proceedings before European Court<sup>179</sup>.
201. In 2016, the Committee of Ministers, having examined the action report provided by the Government indicating the measures adopted and having satisfied itself that all the measures required by Article 46(1) had been adopted, decided to close the *Lukenda* group of cases.<sup>180</sup>
202. In the action report, the Government addressed the indication of the European Court in the *Jama* case that the maximum statutory amount of EUR 5,000 which can be awarded for non-pecuniary damage might not provide for a sufficient redress in a situation where the proceedings have lasted a very long time. In its view, the significant reduction in the length of proceedings meant that no amendment on this statutory limitation was necessary as EUR 5.000 was capable of providing adequate redress in almost all the cases concerned.<sup>181</sup>
203. Insofar as there may have been applications to the European Court other than those referred to above, relevant to the effectiveness of either the acceleratory or the compensatory remedy, there has only been one application considered since the Committee of Ministers closed the *Lukenda* group of cases.
204. The issue raised in this application was whether there had been a violation of Article 6(1) of the European Convention because the legal fees incurred by the applicant in the proceedings instituted under the 2006 Act had only been reimbursed in a small part despite the applicant being successful with her principal claim. However, this

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<sup>177</sup> It reached the same conclusion in *Hartman v. Slovenia*, no. 42236/05, 18 October 2012, *Fortunat v. Slovenia*, no. 42977/04, 18 April 2013. See also, *Tomažič v. Slovenia*, no. 38350/02, 13 December 2007, in which a the transitional provision did not afford an effective remedy where the impugned proceedings had continued after 28 September 2006, the day the application was communicated to the Slovenian Government, and that the State Attorney’s Office has made no proposal to the applicant for a settlement under section 25 of the 2006 Act.

<sup>178</sup> Pursuant to the finding in *Robert Lesjak v. Slovenia*, no. 33946/03, 21 July 2009 that the 2006 Act did not provide an effective remedy in respect of alleged delays in Supreme Court proceedings. The acceleratory remedy was also considered ineffective in that case given that the proceedings had been pending for more than 7 years (para. 55). In *Jeseničnik v. Slovenia* (dec.), no. 30658/03, 12 January 2010, this finding was considered inapplicable where the delay was much shorter. Also, in that case, there had not been proper use made of the acceleratory remedy, having made the application before the first instance court when the proceedings were pending before the Supreme Court.

<sup>179</sup> Following a ruling of the Constitutional Court that there was an unconstitutional differentiation in the compensatory remedy being only available if the domestic proceedings had been terminated and the individuals concerned had filed an application before the European Court before the 2006 Act became applicable.

<sup>180</sup> Resolution CM/ResDH(2016)354, adopted by the Committee of Ministers on 8 December 2016 at the 1273rd meeting of the Ministers’ Deputies.

<sup>181</sup> For the action report, see DH-DD(2016)1212, 14 November 2016; available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b7e41>. This report – at p. 28 - contains statistics on the operation of the remedies under the 2006 Act.



application was held to be manifestly ill-founded in respect of Article 13, the European Court having upheld the Government's objection of loss of victim status on the grounds that the compensation awarded by the domestic courts had been sufficient in view of the length of the proceedings, taking into account also the sums awarded with respect to the costs relating to the applicant's legal representation.<sup>182</sup>

205. The length of criminal proceedings has been less of a problem in Slovenia than that for civil ones. However, the European Court's approach to what amounts to an effective remedy does not depend upon the nature of the proceedings; both can benefit from acceleratory and compensatory remedies.
206. None of the shortcomings found by the European Court with respect to the effectiveness of remedies – notably, as regards the actual impact of the acceleratory remedy, the circumstances in which compensation could be claimed, the amount that could be awarded and the transitional arrangements – seem to have arisen in connection with criminal proceedings, insofar as applications that have been submitted to it. Nonetheless, such shortcomings provide important lessons as to the missteps to avoid when adopting remedial measures.
207. The Committee of Ministers is undoubtedly satisfied that the shortcomings with respect to the compensatory remedy have been resolved. There seems to have been less attention paid to the acceleratory remedy given that the overall length of proceedings generally had fallen. The structure of this remedy is similar to those found elsewhere to be effective but it is actual practice that will always be decisive in this regard.

## **E. CONCLUSION**

208. The country studies have shown that, although not always straightforward, it is possible to adopt the measures necessary to ensure that there is an effective remedy available where there is concern on the part of a suspect or accused person and victim that criminal proceedings that have been instituted are not being dealt with within the reasonable time required by Article 6(1) of the European Convention. This is so whether the actual or potential delay arises in the course of the investigation stage, during the trial stage or while appeals are being considered.

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<sup>182</sup> *Novak v. Slovenia*, no. 52195/12. 19 June 2018; "As regards the applicant's argument concerning the limited reimbursement of the legal fees ..., the Court reiterates that, in cases arising from individual applications, it is not its task to examine the domestic legislation in the abstract, but it must consider the manner in which that legislation was applied to the applicant in the particular circumstances of the case ... It further notes that in the present case the applicant was awarded, in the compensation proceedings concerning the length of the contentious proceedings, EUR 65 for legal fees ... Apart from the fact that the applicant does not seem to have been awarded significantly less than what she would have likely received in ordinary civil proceedings ... the Court notes that she also received EUR 360 in respect of the legal fees relating to the redress for the length of the inheritance proceedings ... Bearing in mind that these two sets of proceedings were to be viewed together for the purpose of the "reasonable time" requirement ..., the Court does not find the total sum received by the applicant with respect to legal fees, that is to say EUR 425, unreasonable or such as to place an excessive burden on her and undermine the redress obtained in relation to the violation of her right to a hearing within a reasonable time ...; para. 54.

209. The requirements for the provision of such a remedy have been clearly identified in the case law of the European Court, entailing the provision of either a preventive/acceleratory or a compensatory one.
210. Although a choice between the two forms of remedy is, in principle, consistent with the obligation under Article 13, in practice – as the experience of the country case studies shows – it is better for these remedies to work on a complementary basis and this has also been recognised by the European Court.
211. However, legislating for either form of remedy or for both of them is no guarantee that the obligation under Article 13 will be fulfilled.
212. As the country case studies illustrate, potentially well-intentioned measures can be rendered ineffective because of the failure to follow the standards elaborated in the case law of the Europe Court as to what is a “reasonable time” for proceedings and as to how compensation is to be calculated. Failings in this respect may result from the way the legislation is framed but also from the way that it is interpreted and applied. The latter consideration underlines the importance of legislative measures being accompanied by appropriate and effective training for the judges and others who are charged with providing the remedies.
213. Moreover, in terms of compensation, it is important that there are no limits that preclude compliance with the approach required by the European Court and that the necessary funding is in place to give effect to awards that are made.
214. In addition, although not a major feature of the case law, effective compensation can in some cases be afforded by reducing the sentence to be imposed on someone who has been convicted so long as that is not contrary to safeguarding the rights of the victim.
215. The provision of remedies that are, in principle, effective can be undermined by the delay in considering applications for them, the costs imposed in efforts to obtain them and the failure to implement them in a timely manner. In many instances, these problems arise from the resources required to operate the remedial system not being provided.
216. Whenever a system of remedies is introduced, it is vital not to be concerned about delays that will arise in the future as there will undoubtedly already be many cases in which the length of proceedings has breached the reasonable time requirement. The arrangements made must, therefore, have appropriate retrospective reach, including as regards those cases that have become the subject of applications to the European Court but not yet communicated to the government.
217. Finally, although the introduction of a satisfactory compensatory remedy may prove costly at the outset, it will be possible to prevent it from becoming a financial burden in the longer term if the criminal justice system is organised in a more efficient manner, to which the acceleratory remedy can make a useful contribution.

## ANNEX 1

### CHECKLIST FOR EFFECTIVE REMEDIES FOR EXCESSIVE LENGTH OF CRIMINAL PROCEEDINGS

There is some *freedom* under Article 13 of the European Convention to choose remedies to address the excessive length of criminal proceedings. Nonetheless, a *combination* of preventive and compensatory remedies is recommended by the European Court.

A compensatory remedy can take account of the contribution made by a remedy to expedite proceedings and can be consonant with a country's legal tradition and standard of living.

However, any remedies provided *must be effective*.

To determine whether the test of effectiveness is met, an *affirmative* answer will be needed to the following questions when examining proposals for remedies - whether preventive or compensatory – and/or evaluating them:

#### Preventive remedies

- Will the application for acceleration of proceedings be examined without being subject to any discretion on the part of the body concerned?
- Can the party to the proceedings apply directly to the body with competence to order the taking of steps to secure their acceleration?
- Are the conditions for making an application clearly prescribed in terms of when one can be submitted?
- Does the body concerned have the power to set deadlines within which particular actions relating to the proceedings must be taken and/or to require priority to be accorded to the proceedings?
- Does the failure to take those steps within the prescribed deadline have consequences in terms of penalties for non-compliance and/or leading to their discontinuance?
- Are there concrete examples of the procedure having led to the acceleration of proceedings?

#### Compensatory remedies

- Is it possible to obtain compensation without waiting for the proceedings to become final?
- Are claims for compensation considered and determined speedily?
- Is the criterion of “reasonable time” used for assessing any delay – whether in a legislative provision or case law – shaped by the case law of the European Court?
- Can awards of compensation cover both pecuniary and non-pecuniary damage?
- Is there a string but rebuttable presumption that delay will cause non-pecuniary damage?
- Is the assessment of any damage sustained guided by the case law of the European Court?
- Will awards be increased where the determination of a claim has been delayed?
- Does the procedure for dealing with claims for compensation conform to the principles of fairness in Article 6 of the European Convention?
- Are there arrangements to ensure that legal costs do not inhibit the submission of claims for compensation?
- Is there a deadline for the payment of compensation once awarded or are there other arrangements to ensure that such payment occurs in a timely fashion?

- Will a remedy, if newly adopted, apply to proceedings already pending before the European Court?
- Will any reduction of sentence following a conviction in which the length of the proceedings was excessive refer to this consideration in an express and measurable manner?
- Will any discontinuance of proceedings on account of the length of the proceedings – if available - take into account the impact of this step on the public interest?

## ANNEX 2

### CHART GIVING AN OVERVIEW OF THE PROBLEMS SEEN AND SOLUTIONS FOUND IN THE COUNTRY CASE STUDIES

Country	Underlying problem	Solution	Outstanding issue (if applicable)
<b>Bulgaria</b>	Excessive length of proceedings a recurrent and persistent problem, with a general lack of effective remedies	Introduction first of administrative and civil remedies to obtain compensation, followed by an acceleratory remedy	The effectiveness of the acceleratory remedy is still under review by the Committee of Ministers
<b>Lithuania</b>	Length of criminal proceedings not a systemic issue but no acceleratory remedy and uncertainty as to the availability of any compensatory remedy	Introduction of an acceleratory remedy and evolution of case law to establish availability of compensatory remedy	None
<b>Poland</b>	Initial view that compensatory remedy was effective overturned by large volume of cases showing that approach to determining reasonableness of length of proceedings and assessment of compensation was problematic	Evolution of case law to establish availability of compensatory remedy that was consistent with the approach of the European Court as to assessment of length of proceedings and of compensation to be provided	There is an acceleratory remedy. However, its effectiveness in practice has not been subjected to any scrutiny
<b>Romania</b>	A structural problem with respect to length of proceedings, in respect of which the effectiveness of neither the acceleratory nor compensatory remedies were established	Introduction of a new acceleratory remedy and evolution of case law to establish availability of compensatory remedy consistent with the approach required by the European Court, particularly as to amounts awarded, costs involved and timeliness of payment	The effectiveness of acceleratory and compensatory remedies still to be confirmed by the Committee of Ministers
<b>Slovenia</b>	Length of criminal proceedings not a major problem but effectiveness of acceleratory and compensatory remedies found in general to be lacking	Introduction of new acceleratory and compensatory remedies. The impact of the former in civil proceedings was called into question and the latter was seen to be problematic both as regards the size of awards and the transitional arrangements. Issues relating to the compensatory remedy were addressed in further legislative changes	The effectiveness of the acceleratory remedy remains uncertain. However, the length of proceedings now seems generally consistent with the requirement in Article 6(1) of the European Convention.