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COMMENTS

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

by

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Conclusions to the preliminary draft report on national remedies in respect of excessive length of proceedings and recommendations as to the remedies to be used to obtain the speeding-up of the procedures

A. Remedies in case of lengthy pending proceedings

a) Criminal proceedings

1. Speeding-up criminal proceedings could be achieved by using procedural steps leading towards rendering of a decision by the same court or by a different one, thus making it possible for the interested party to obtain the taking of a measure which the dilatory judge (or other authority having competences in criminal procedures) had failed to take.

2. The remedy that a State may provide in this respect must be in accordance with the ECHR jurisprudence under Article 13, namely it must acquire a sufficient legal certainty in theory and in practice (meaning that there must exist sufficient case-law which can prove that the remedy is able to lead to the acceleration of the procedure) and it has to be available to the applicant at the date on which the application is lodged with the Court.

3. It is important to underline the fact that the length of criminal proceedings also includes the criminal investigation as the applicability of the article 6 begins the moment when the criminal charge is notified to the person concerned. Thus, it is useful to consider the existence of a remedy for speeding up the procedure in this stage, by guaranteeing a petition right before the prosecutor in charge with the supervision of the criminal investigation, or, in case the criminal investigation is conducted by the prosecutor, before his/her hierarchic superior. Against the response of this authority an appeal before a court – the competent court for hearing the grounds of the case – should be taken into account. In these two hypotheses, the prosecutor or the court should take the necessary measures in order to speed up the procedure – for instance, the establishment of a dead-line for the termination of the criminal investigation.

i. when finding a violation of the reasonable time requirement, the competent authorities may resort to remedies that constitute compensation in kind, such as abandonment/inadmissibility of prosecution, reduction or mitigation of sentence, exemption of punishment or even acquittal (the motivation used by the magistrate in such a decision is of great importance- for instance, the assessment that the defence rights were affected by the lengthy proceedings).

4. Advantage: These remedies constitute a good motivation for the reasonable time requirement to be strictly observed in criminal cases, especially considering the fact that, as a result of the aforementioned remedies, the crime itself might be left unpunished.

5. Disadvantage: Such a remedy might lead to a solution of criminal proceedings on the basis of procedural reasons, and not on the basis of the gravity of the alleged crime. However, taking into consideration that the substance of the criminal law and the final scope of the punishment is an educational one and not a mere application of the private justice principle “eye for an eye”, these remedies appear accurate as the social scope of the punishment can no longer be achieved and the society is no longer interested in punishing a crime committed a long time ago. Only the retributive scope of the punishment can be reached by continuing the criminal procedure. In this

light, the abandonment of the prosecution or the acquittal is in fact the consequence of the expiry of a special statutory time limit, which exists in the domestic criminal law of many countries.

- ii. when finding a violation of the reasonable time requirement, awarding compensations for the damages (pecuniary or non-pecuniary) that occur as a result of lengthy proceedings should become possible. This remedy can either be the only one, or it can be coupled with the abovementioned remedies that allow the speeding up of the proceedings in question.

6. Advantage: These remedies may constitute a good, although indirect, motivation for the reasonable time requirement to be observed in criminal cases.

7. Disadvantage: The possibility of introducing a demand or an action for damages during the allegedly lengthy proceeding may raise concerns as to the effect of the pressure exercised in this way upon the judge, thus possibly leading to rendering of a decision too quickly and, as a consequence, to a superficial solution of the case.

8. Taking into consideration these arguments, the possibility of introducing a demand or an action for compensating the damages should be provided before a higher court that would have the competence to analyze the length of the procedure and, if the action is appreciated as well founded, could award compensation for damages.

9. As to the ground for obtaining damages, it may be the heavy workload of the courts, the malfunctioning or the denial of justice, the fault of a judge or of another authority or a violation of the right to a hearing within a reasonable time.

10. The recommendation, in the light of the ECHR case law, goes in favour of an objective ground, namely the unreasonable length of the procedure, without referring to fault or malfunctioning. It is of evidence that in appreciating the excessive character of the length the three elements established by the ECHR are to be taking into consideration, namely the complexity of the case, the behaviour of the applicant and the conduct of the authorities. A subsequent regress action could be introduced, if the fault of an authority is under question. But for the scope of the remedy, it should be based on objective responsibility of the State.

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

- iii. when finding a violation of the reasonable time requirement, a disciplinary action against the dilatory judge may also be provided, by means of a complaint to a supervisory authority.

12. Advantage: The possibility of a disciplinary action has a certain effect as to the speeding up of proceedings in question.

13. Disadvantage: This remedy is accompanied by the risk of a superficial solution of the case and, to a certain extent, could affect the impartiality and independence on the judge, if the

disciplinary procedure is started while the criminal procedure is still pending before the dilatory judge. Thus, the disciplinary aspect could influence his/her behavior as to the impartiality. Moreover, the disciplinary procedure is rather a preventive method than a remedy, as it does not deal, as regard the applicant, with the length of the procedure and the award of damages for the violation of the right to a fair trial, but prevents similar violations in the future.

- iv. when finding a violation of the reasonable time requirement, the possibility for a higher court to establish a time limit for the dilatory judge to deliver a solution or/and give instructions to the dilatory judge should be considered. These measures might be joined by the decision of the higher court to transfer the case to another judge.

14. Advantage: This could constitute a remedy and a factor that would speed up the pending procedure.

15. Disadvantage: Problems might appear if this remedy is not accompanied by guarantees against a superficial judgment of the case, in such a way that the time limit does not affect the other guaranties of the fair hearing, as the equality of arms and the proofs or the adversary principle. The impartiality problem may also occur (see above). It can be avoided by transferring the case to another judge, but the latter will need (some) time in order to get acquainted with the details of the case.

b) Civil and administrative proceedings

16. Speeding-up civil and administrative proceedings could be achieved by using procedural steps that may lead towards the rendering of a decision by the same court or by a different one, thus making it possible for the interested party to obtain the taking of a measure which the dilatory judge had failed to take.

17. These measures are practically the same as described above, in Section a), adapted to the specificities of the civil/administrative procedures: compensation in kind (such as holding a hearing, obtaining an expert's report, issuing another necessary order or taking an act which the concerned authority had failed to take), a disciplinary action against the dilatory judge by means of a complaint to a supervisory authority, the possibility for a higher court to establish a time limit for the dilatory judge to deliver a solution or/and give instructions to the dilatory judge (this measures might be joined by the decision of the higher court to transfer the case to another judge), awarding compensations for the damages that occur as a result of lengthy proceedings (this remedy can either be the only one, or it can be coupled with the abovementioned remedies that allow the speeding up of the proceedings in question).

18. As regards the ground and the amount of the damages to be awarded, the same principles and solutions as the ones mentioned above are applicable in these proceedings.

19. The advantages of such measures are clear. The disadvantages might result from the fact that in civil proceedings there are private parties, having different/opposing interests, including as far as the length of these proceedings is concerned. Anyway, the public interest in this case cannot be but a fair solution of the litigation, within a reasonable time frame (the fact that a party of a specific civil procedure has the interest of delaying the trial and acts to this purpose is generally considered, in many national legislations, as a procedural abuse, if certain limits are crossed).

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

21. It is important to note the fact that the civil procedure also includes the execution of the judgment. This phase, conducted by the bailiff at the request of the creditor, could represent an important part in the analysis of the length of the proceedings, as a whole. In the light of the ECHR case law, it is essential for the domestic legislation to provide a remedy for an unreasonable length of the execution.

22. This remedy should consist in the possibility of seizing the competent court in order to obtain the speeding up of the execution procedure. The measures described above regarding a possible disciplinary action against the bailiff for his/her lack of diligence, the possibility for the tribunal to set a time limit for the termination of the execution or the award of damages for loss of the creditor are applicable in this hypothesis. In the case of the demand for damages, if they are the consequence of the bailiff's conduct, they may lead to a mitigation of his/her fees.

23. Regarding administrative proceedings, it is clear that the public interest is both to ensure prompt and efficient decision making, and to enable individuals who apply to administrative authorities or to administrative courts to receive fair and equitable treatment. Further to the measures described above, the efficiency of the administrative proceedings could be improved by the preventive measure of providing the silent procedure, within a prescribed time limit, for certain administrative acts (such as authorizations, licences etc) to be issued or renewed (if a public authority fails to take a decision in the prescribed time limit, it shall be deemed to have made a decision in favour of the applicant).

24. It is of great importance that the procedure established by the State in order for the interested person to complain about the excessive length of proceedings, either criminal, civil or administrative, respect the time limit requirement. For this reason, the States should prescribe a strict time limit in which the judge called upon to examine the complaint regarding excessive length of the procedure must render a solution.

B. Remedies in case of lengthy completed proceedings

25. The considerations in respect of criminal, civil and administrative proceedings are the same as far as the remedies in case of lengthy completed proceedings are concerned.

26. The remedy that a State may provide must be in accordance with the ECHR jurisprudence under Article 13, namely it must acquire a sufficient legal certainty in theory and in practice (meaning that there must exist sufficient case-law which can prove the awarding of adequate redress) and it has to be available to the applicant at the date on which the application is lodged with the Court.

27. It is not necessary that the remedy provided for speeding up the pending proceedings and the one provided for reparation of damages in case of completed procedures be cumulative. However, in the case the procedure is already completed, the only possible remedy for the violation of the right to a trial in a reasonable time is awarding compensation of damages for the unreasonable length of the procedure.

28. In case the criminal procedure ends at the stage of criminal investigation without going to trial, the defendant should also be able to lodge an action for compensation of damages produced by the excessive length of the criminal investigation phase, knowing that the requirement of the reasonable time limit represents a guarantee for a defendant against the delaying of the procedure.

29. As in the case of pending proceedings, it is of great importance that the procedure established by the State in order for the interested person to complain about the excessive length of proceedings respect the time limit requirement. For this reason, the States should prescribe a strict time limit in which the judge called upon to examine the complaint regarding excessive length of the procedure must render a solution.