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**DELAY IN JUDICIAL PROCEEDINGS :**  
**A PRELIMINARY INQUIRY INTO THE RELATION BETWEEN THE DEMANDS**  
**OF THE REASONABLE TIME REQUIREMENTS OF ARTICLE 6, 1 ECHR**

**AND**

**THEIR CONSEQUENCES FOR JUDGES AND JUDICIAL ADMINISTRATION**  
**IN THE CIVIL, CRIMINAL AND ADMINISTRATIVE JUSTICE CHAINS**

**Preliminary Draft Report**  
**by**  
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## **Delay in judicial proceedings in Europe: a preliminary inquiry**

Report on assignment of the Council of Europe, Committee on the Efficiency of Justice

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### **1. Introduction**

This report is a first inquiry on some issues coping with delays in judicial proceedings. The goal of this preliminary report (which is supposed to be not longer than 20 pages) is to give some hints to stimulate discussion on court delay in Europe at the next meeting of the Committee on the Efficiency of Justice of the Council of Europe.

The concept of ‘court delay’ is basic to the rest of our report. So we will delve into that concept before giving our – inevitably – preliminary analysis. After that, we will first describe an outline of the jurisprudence of the European Court of Human Rights concerning the “reasonable time” clause in article 6, paragraph 1 ECHR. In this outline we try to relate the normative framework of the Court concerning the “reasonable time” clause to the organisational problems of judicial administration regarding the timeliness of civil, criminal and administrative proceedings. We do this by an exploration of (international) literature and the ECHR Jurisprudence Database HUDOC. Second, we will give an outline of the research and literature on court delay in Europe. Our explorative research of the literature available on court delay has shown, however, that very little has been published on this subject in Europe, at least what is available in English, French, Spanish, German and Italian. A few, technically very complicated studies have been done in the Netherlands, focussing on civil procedures (Eshuis). The issue of court delay has been much more addressed in the United States, Canada, and Australia; therefore, we will be forced to refer mainly to research and publications in these countries. This is quite strange, since nowadays court delay is recognized as the most important problem to be addressed in many European judiciaries (Langbroek, Pauliat, Fabri 2003).

Third, we will sketch what needs to be done in terms of research in order to indicate causes of timeliness and unreasonable delay in court proceedings in Europe.

### **2. Court delay and its operational conceptualisation**

The concept of court delay is difficult to define. In common language, ‘to delay’ means to postpone and to put off, and it has a bad connotation. In the court environment it means that a case does not move as fast as it could, because of problems that generally are recognized as court problems – this does involve judges, public prosecutors and their administrative organizations, as well as lawyers and their offices. Court delay is so difficult to define, because it not only refers to problems related to rules of procedure, but also to ways of working of the court. In criminal matters it refers to the interaction between the court-organization and the public prosecutor’s office, and to the interaction between the public prosecutor’s office and the police; in civil matters to the interaction between the court and advocates, their law firms included, and to the interaction between parties, the court and sometimes, the bailiffs; in administrative cases to the interaction between administrative bodies, pre-trial committees and the administrative tribunals (or courts). A last but not least point of attention is the (organizational) interaction between first instance courts, appeal courts and the court of last resort. So, the complexity of situations involving court delays is highly differentiated and highly complex.

According to the literature, usually delay deals with expectations and subjective perceptions of the “local legal culture” (Goerdts 1987, Mahoney 1988), which is different in every environment. A delay that could be acceptable in one community could be unacceptable in another one (Mahoney and

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Sipes 1985, Melcher 1984). The level of compliance is different in each area and for each person but, it has to be recognized that there is a certain *critical threshold* beyond which aversion and dissatisfaction for the administration of justice can be very dangerous for a country that bases its legitimacy on democratic consensus (Fabri 2000).

The difficulties to define the concept of “court delay” pose several problems also in the operationalization of the concept for empirical research. For example, what can be considered to be “court delay” if we do not have a common European definition to measure it? Would the different “legal cultures” and States contingencies affect the adoption of different definitions and standards of “court delay”?

A first interesting study would be what is perceived as “delay” in courts proceedings in the different countries by the various actors of the judicial process (judges, prosecutors, lawyers, court personnel) and by the citizens. Actually, if we refer to perceptions, the problems to make the concept of delay operative are easier to solve. Using the “perception perspective”, we can have a first idea of what is considered an “acceptable length of court proceedings” in the different communities, and we will probably find out how different countries have a very different idea of what can be considered “court delay”.

In addition, in this respect the jurisprudence of the European Court of Human Rights (further: ‘the Court’) can give us a first overview of what the judges have considered “unacceptable delay” in different countries. A part of this report will deal with a first analysis of the Courts’ jurisprudence.

Even though it is self evident, it is important to stress that the concept of delay cannot be generally applied without previously defining the kind of proceedings we are dealing with. In other words, data about court performance and length of court proceedings are not of any help for the definition of court delay, if they are not related to the kind of cases involved and the procedure used. This is particularly true when we adopt a comparative perspective among different countries, otherwise we make comparisons that are meaningless.

So the decision of the Council of Europe to make a more in-depth study on two specific situations such as: divorce cases, and the position of victims regarding the timeliness of proceedings is a wise one.

### **3. The jurisprudence on reasonable time by the European Court of Human Rights**

Throughout the years, the ECHR has developed a normative framework to assess the reasonableness of the time used by a national court system to bring a case to its final conclusion. The normative framework is universally applied. In this section, we will first give an outline of the normative framework for civil, criminal and administrative cases. After that, we will go into the causes of delays as far as can be traced in the jurisprudence of the ECHR.

The relevance of such an analyses is a restricted one from the point of empirical research. The cases that reach the ECHR are no more than only one indicator of the performance of courts in a country, whereas different courts within a country may perform differently as it comes to timeliness. What can be learned however from the jurisprudence of the Court, is what factors may influence the timeliness of proceedings. The next step would be to make an inventory of measures that generally speaking, may speed proceedings up.

#### ***3.1. The normative framework concerning the “reasonable time” clause***

The reasonable time requirement concerns the guarantee of anybody going to court that a final decision in a case will be given within a reasonable time. The idea is that citizens are entitled to legal certainty. If a dispute arises or a criminal case is filed against someone, interested parties and suspects should not be left in uncertainty about their case endlessly. “... the object of the reasonable time requirement ... is to protect the accused from unduly protracted anxiety about his future

(Stephanos 1993, p. 83). There has to be an end to every dispute, so that everybody's life can go on. The entitlement of citizens under article 6 ECHR to a final decision concerning their dispute or accusation against them is about furthering societal continuity. On the other hand, parties should also be given enough time to prepare their defense – the timeliness requirements are not directed towards speed alone.

However that may be, the framework of the Court does not contain any fixed time limits. The concept of what constitutes a reasonable time, therefore, depends on external boundaries of applicability of the 'reasonable time' clause and on case-related criteria concerning the reasonableness of the actual time that passed during proceedings. From the point of view of developing standards, this is an uneasy situation. But one may rightly ask: whose responsibility is to set such fixed time limits of a more general nature? Surely this is not a prime responsibility of a court, given the situation that fixed time limits for judicial proceedings are neither set by the European Convention on Human Rights nor enforceable set by national statute acts. So far, we even do not know if fixing maximum times for judicial proceedings and making them enforceable would be more effective than, for example, developing budget systems with financial incentives to stimulate courts to speed up proceedings. According to the case law of the ECHR, the choice of such measures is a responsibility of the contracting states that ratified the European Convention on Human Rights.

For our analyses we restrict ourselves to the headlines and try not (yet) to go too deeply into the complicated technical details of the case law of the ECHR.

#### *External boundaries of applicability*

The reasonable time clause does hold if article 5, section 3 or article 6, section 1 ECHR is applicable in a case. Having said that, we leave it beyond consideration and we refer to the vast jurisprudence and literature on the questions what constitute 'civil rights and obligations' and 'criminal charge' under article 6, section 1 (e.g. Dijk, van and Van Hoof 1998, Viering 1994 and Merills 2001).

The extension of the demand of final decisions within a reasonable time is somewhat different in civil, criminal and administrative cases. This has to do with the view of the Court that national authorities are responsible for having the justice systems comply with the demand of a reasonable time. This point is repeated in numerous judgments of the Court<sup>2</sup>.

#### *Start*

The term of the reasonable time starts when authorities start to have a legal responsibility towards the citizen. Normally, in civil proceedings this is the case when the citizen or its lawyer files proceedings at a court. But in criminal proceedings the starting point does not have to be the formal indictment of the suspect. As soon as the burden of being a suspect actually is being imposed on a citizen, and it may reasonably be expected that the citizen knows s/he is a suspect, e.g. because his/her house was searched by the police, the term starts. In administrative proceedings the term also starts, either with a governmental legal or factual act causing any kind of burden on a citizen and its property or with the request of a citizen to the government concerning compensation, as can be learned from the König case<sup>3</sup> and the Case of Meldrum and Schouten against the Netherlands<sup>4</sup>.

#### *End*

The term of a reasonable time usually ends when there is an end to the legal uncertainty of the situation. In general, it takes a court decision to achieve that. This means that all possibilities of appeal have been used or the term for appeal has passed unused. The final decision may be a decision of a supreme court, but it may also be the decision of an appeal court after the court of

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<sup>2</sup> ECRM 25 05 1991, Vocaturo v. Italy Series A no. 206-C; ECRM 21 12 1999, G.S. v. Austria, HUDOC nr. 26297/95.

<sup>3</sup> Case of König v. Germany 28/06/1978 HUDOC 00006232/73.

<sup>4</sup> Case of Meldrum and Schouten against the Netherlands, 09 12 1994 Series A, vol 304.

cassation referred a case to it to give a final decision. Furthermore, in civil cases, execution/enforcement of decisions falls within the domain of the term 'reasonable time'<sup>5</sup>.

#### *Case related criteria*

Criteria used by the Court are of different kinds: the complexity of the case, the conduct of the applicant, the conduct of the authorities (courts included) and: what is at stake for the applicant. Only delays caused by the State are relevant for the judgment whether the time for the procedure was reasonable. This is matched with the complexity of the case and with the behavior of the applicant and its advocate.

#### *The complexity of the case*

Reading literature and scanning the HUDOC database, the complexity of the case refers to the complexity of the law, but also to factual aspects of the case itself regardless of the legal complexity. As far as the legal situation at hand is concerned, international aspects make a case more complex. But as far as the facts are concerned, the number of witnesses, proof to be delivered by experts<sup>6</sup>, the size of the file, complications with juveniles, intervening third parties, cases that are interrelated, all these factors may contribute to the complexity of the case. The complexity of the case may make lengthy proceedings more acceptable. But also in complicated cases there are limits – 25 years is too long<sup>7</sup>, also if a case is complicated, and the same holds for proceedings taking 16 years<sup>8</sup>. But in a complex criminal case in the United Kingdom, even a period of 4,5 years was judged to be within the reasonable time period<sup>9</sup>. And so were the 6,5 years in *Boddaert v. Belgium*<sup>10</sup>.

#### *The conduct of the applicant*

Generally speaking, applicants may make a normal use of their procedural rights to defend their interests. In criminal proceedings, applicants do not have to co-operate actively to speed up his/her conviction. In *Jabłoński v. Poland* the Court acknowledges the delays caused by the hunger strike of the applicant and the self-inflicted physical harm, but also points at the responsibility of the judicial authorities, giving more weight to the latter<sup>11</sup>. In proceedings concerning civil rights and obligations, a more active attitude is required. An applicant should not repeatedly wait till the last moment in sending a reaction to court. That weakens his position<sup>12</sup>. But a party does not have to engage in efforts to accelerate proceedings (*Janssen*, p. 142, 245). Of course, in civil and administrative proceedings not only the applicants, but also third parties maybe involved. The Court looks primarily at the behavior of the applicant during proceedings, including its conduct vis à vis actions of a third party. However actions of third parties causing delays are not attributed to the applicant<sup>13</sup>.

#### *The conduct of the authorities*

The occurrence of backlogs and peak loads in a court is no excuse for the authorities. In criminal proceedings all kinds of logistic difficulties in the management of a case are the responsibility of the authorities<sup>14</sup>. In civil cases the Court does not accept the idea that parties are responsible for the proceedings and that judges should remain passive. Also in civil cases the court is responsible for the timeliness of, for example, an expert report<sup>15</sup>. All in all, it is the courts responsibility to 'ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay' (*Mole and Harby*, p. 25). In some cases where the parties and the court faced many problems,

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<sup>5</sup> ECRM March 23 1994, *Silva Pontes against Portugal*, Series A, vol. 286 NJ 1994.

<sup>6</sup> E.g. ECRM 15 10 1999, *Humen against Poland*, HUDOC nr. 26614/95.

<sup>7</sup> ECRM 15 01 2002, *Maczynski v. Poland*, HUDOC nr. 43779/98.

<sup>8</sup> ECRM 07 08 1996, *Ferantelli and Santangelo v. Italy*.

<sup>9</sup> ECRM 19/09/2000, *I.J.L, G.M.R and A.K.P. v. The United Kingdom*, HUDOC nr. 29522/95.

<sup>10</sup> ECRM 12 October 1992, *Boddaert v. Belgium*, A 235-D. P81-83.

<sup>11</sup> ECRM 21 12 2000, *Jabłoński v. Poland* HUDOC nr. 33492/96.

<sup>12</sup> E.g. the *König Judgement* (see note 3) and see also ECRM 25 june 1987, *Capuano v. Italy*, HUDOC nr. 9381/81. a clear case is ECHR 25 03 1999, *Papachelas v. Greece*, HUDOC nr. 31423/96 where there was no violation of the reasonable time requirement.

<sup>13</sup> ECRM 25 06 1987, *Capuano v. Italy*, HUDOC nr. 9381/81.

<sup>14</sup> ECRM 25 01 2000, *Agga v. Greece* HUDOC nr. 37439/97; ECRM 21 12 1999, *G.S. v. Austria* 26297/95.

<sup>15</sup> See ECRM 25 june 1987, *Capuano v. Italy*, HUDOC nr. 9381/81.

including lawyers on strike, the Court identified long periods of court inaction, and judged there was a breach of the 'reasonable time' requirement.

#### *Specific interest of a party*

If a party has an obvious interest in a case, as usually in criminal proceedings, or regarding the legal position of juveniles, employment cases, or any other case where irreversibility is at risk, the Court demands special 'expediency'. This holds especially when a suspect is held in pre-trial detention, where the court requires 'special diligence'<sup>16</sup>. A nice example is the case of *X en Vallée and Karakaya v. France*, where persons infected with aids by blood transfusion, some of them in a rapidly deteriorating condition, sought damages from the French government, which required 'exceptional diligence'<sup>17</sup>. Another example is the case of *Silva Pontes* whose car accident made him unfit for work<sup>18</sup>.

### **3.2 The meaning of the jurisprudence of the ECHR on 'reasonable time' for judicial administration**

From this quick scan of several cases and some literature, one may learn that the Court applies these criteria in an interrelated way. The main message of the Court to the contracting states is that they are responsible for the adequate functioning of their justice system, and next to that the procedural behavior of the parties plays a role. This jurisprudence revolutionizes the ways in which proceedings are organized; from the *Grotius*<sup>19</sup> project on quality of justice we know that many EU-member states have changed their civil rules of procedure attributing explicit case management responsibilities to judges (Fabri, Langbroek, Pauliat 2003).

The Court merely takes a consequent, case-by-case normative stand. In its judgments, it repeatedly urges contracting states to comply with its normative demands. Most striking however is, that the Court does not give any indication on how contracting states should do this. Moreover, in many cases the Court does not give an indication of what has gone wrong exactly, leaving the 'implicit' understanding of what went wrong to the government of the contracting state.

However, scanning judgments from the HUDOC database, it is clear that causes of delay in individual cases can be found in:

- A) the interactions between the different actors/parties in the civil, criminal and administrative justice chains.
- B) inactivity of the courts.

We will give some examples of what may go wrong in different kinds of cases.

#### *Interactions*

Sometimes delays are caused by a combination of factors. In criminal cases the court depends on the adequate functioning of the public prosecutions' department. If the prosecution fails to deliver an adequate formal charge in time, or if the charges are being changed repeatedly, a special alertness of the court concerning the management of the case is required, even if it deals with a suspect of rape or child abuse<sup>20</sup>. That requires an independent judicial attitude and a stern judicial attitude towards the victim, the press and society.

If the prosecution fails to present witnesses, or if the accused cannot reach the court because of traffic jams, or if the advocates are on strike<sup>21</sup>, the management of a case requires special alertness

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<sup>16</sup> ECRM 21 12 2000, *Jabłoński v. Poland* HUDOC nr. 33492/96.

<sup>17</sup> ECRM 31 03 1992 and ECRM 26 04 1994 respectively.

<sup>18</sup> See footnote 5.

<sup>19</sup> *Grotius* was a grant programme set up by the European Commission.

<sup>20</sup> ECRM 25 07 2000 *Mattoccia v Italy*, nr. 23969/94; ECRM 06 04 2000 *Labita v. Italy* HUDOC nr. 26772/95.

<sup>21</sup> ECRM 25 01 2000, *Agga v. Greece*, HUDOC nr. 37439/97.

as well. That involves the recognition by court staff and judges that they should take the responsibility for being alert on the management of a case. Postponement without mentioning a date is unforgivable from that perspective.

In administrative cases, courts often depend on the file on the case to be delivered by the administrative body responsible for the case. If such a file is not received in time, the court cannot treat the case adequately<sup>22</sup>. The normative stand of the Court implicates that the national authorities should do something about it – many choices are possible – like giving the administrative body notice that it will lose its case if it fails to deliver its file on time – and arranging the competences to do so.

In other cases sometimes the advocate does not show up in the court session. Or a party changes advocate every 6 months. Or the advocate dies and has to be replaced by someone else, needing time to prepare the case.

In the execution of civil cases often the help of a bailiff is necessary. Occasionally the bailiff may need police assistance. But if the police organization does not prioritize this kind of services, the bailiff may not be effective in e.g. a property claim, and has to retry several times<sup>23</sup>.

When a case is appealed against, the file has to be sent to an appeal court. The first instance court should be able to send the file to the appeal court and the appeal court should be able to receive and register the appeal and the file belonging to it. Simple as this may seem, it is not self evident that such an operation will be successful; cases may be temporarily lost for a while.

#### *Inactivity of the courts*

What does 'inactivity of the court' mean? It means that there is no traceable sign that the court is working on a case. What is most interesting is, what causes this inactivity. Regarding the jurisprudence of the ECHR these causes are manifold, but they are often not mentioned at all<sup>24</sup>. A case is often assigned to a certain judge. If this judge has auxiliary functions or if this judge changes court the adequate handling of that case may be jeopardized<sup>25</sup>.

Another cause of delay may be the existence of backlogs at a court. The workload prevents the court from handling cases adequately – even if it is not accepted as an excuse<sup>26</sup> but no indications are given of what causes the backlogs. Maybe judges are lazy, or there is a lack of judges and staff or the court administration does not work properly, or judges and staff do not co-operate very well. Backlogs in courts may have many different causes and the jurisprudence of the ECHR does not give enough information to know which causes have occurred.

All these examples show how immensely complex it may be to find remedies for all causes of delay. Nevertheless the Court must be followed in its attribution of responsibility to the national authorities and to the courts. The question however, which remedies are required depends on our knowledge of the organizational functioning of the courts and the actual interactions in the civil, penal and administrative justice chains. In order to give a more elaborate look at the organizational factor we present an inventory of empirical research on these subjects below.

#### **4. Factors that, according to empirical research, affect court delay**

As mentioned earlier empirical research has been conducted in the United States, Canada and Australia on court delays, and on ways to avoid unnecessary events and court action for a fair

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<sup>22</sup> E.g. ECRM 29 07 2003, *Beumer v. The Netherlands* HUDOC nr. 48086/99.

<sup>23</sup> E.g. ECRM 31 07 2003 *De Genanaro v. Italy*, HUDOC nr. 59634/00.

<sup>24</sup> E.g. ECRM 06 05 2003 *Pilka v Poland*, HUDOC nr. 39619/98; ECRM 08 04 2003, *Simko v. Hungary* HUDOC nr. 42961/98.

<sup>25</sup> ECRM 31 07 2003, *Doran v. Ireland* HUDOC nr. 50389/99.

<sup>26</sup> ECRM, 06 04 2000, *Thlimmenos v. Greece* HUDOC nr. 34369/97.

resolution of a case. A certain level of delay is inevitable but it can be reduced through some policies and management tools. Delay is both “a disease that requires specific treatment and a symptom of unhealthy conditions” (Hewitt W., G. Gallas and B. Mahoney 1990).

The more recent literature refers to an “old conventional wisdom” versus a “new conventional wisdom” to reduce delays. In the “old conventional wisdom” delays were related to a chronic lack of resources, workload, and formal rules and procedures. In the “new conventional wisdom”, these factors “operate through complex systems of practitioners’ attitudes and practices (Mahoney B. 1988, p. 45). These latter aspects must be kept into consideration in order to develop realistic solutions. These studies have originally introduced the concept of court case-flow, which can be considered the process by which cases go through the court from filing until court jurisdiction is ended (Clifford and Jensen 1983), and the concept of case-flow management: the active monitoring, supervising and managing of case-flow so that each cases moves through the court without undue delay. Therefore case-flow management is studied to control delay and decrease unnecessary waiting times (Baar 1997; Sackville 1997).

It is important to stress that research evidence (Weatherburn D. and J. Baker 2000, p. 11) has proved that: “shortage of capacity is not the explanation for criminal court delay, inefficiency in case processing seems the likely alternative”, confirming the findings of research conducted in the United States. However, it is worth mentioning that below a certain threshold court resources are certainly an issue that effect court performance, and then court delay, but in many cases the causes of court delay deal with court inefficiency rather than lack of court resources.

In addition, empirical research has also shown that court delay does not seem to be related to the court size, the seriousness of the caseload, the caseload per judge, the existence of alternative dispute resolution programs.

Findings of empirical research have shown that the critical factors to develop a successful programme of delay reduction are the following:

- judicial commitment, leadership and adequate accountability mechanisms;
- involvement of the different actors in the system;
- court supervision of case progress;
- definition of goals and standards;
- monitoring of cases by an information system;
- a case management approach;
- a policy against unjustifiable continuances, like a firm trial date and a ‘backup judge’ system for trials;
- an individual assignment system;
- education and training (Mahoney 1988, Steelman 2000).

Research has not defined a weight for each of these factors but, according to the researchers, they are all important elements to cope with court delays. In particular, programs of court delay reduction cannot be successful without a *strong commitment from the judge* and the chief judge in particular, and of the involvement of the principal actors of the systems such as judicial personnel and lawyers. The importance to tackle court delay within a court must be promoted by the chief judge, setting a vision of change, showing *leadership* in promoting programs to increase the timeliness of court decisions without diminishing their quality. Judges commitment is a key factor for the success of any initiative against court delay, they must built consensus around the need to include timeliness as a professional value for the judiciary. In addition, *accountability mechanisms* must be introduced to further stimulate both the adoption of policies and practices against court delay and the idea of a self-evaluating organisation (Wildavsky 1972).

The court, this is particularly important in common law systems, must *supervise the case progress*. “The court, and not the other case participants, should control the progress of cases” (Stelman 2000, p. 3). The court should be fully responsible for the movement of the cases from filing to

disposition (ABA 1992), implying a firm policy to avoid unnecessary continuances, and a firm trial date, which seems to be extremely important to stimulate a pre-trial settlement between parties.

On this regard also Lord Woolf's report to the Lord Chancellor of England and Wales (1995, sec. II, chapter 5) stresses that: "there is no alternative to a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisers to the courts [...] In the absence of any effective control by the court itself, [...] the lack of firm supervision enables the parties to exploit the rules to their own advantage. [...] the complexity of civil procedure itself enables the financially stronger or more experienced party to spin out proceedings and escalate costs, by litigating on technical procedural points or peripheral issues instead of focusing on the real substance of the case. All too often, such tactics are used to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay".

The *definition of goals and standards* is strictly related to the case supervision, since it is a useful tool to monitor activities and adopt necessary changes in accordance within the outcomes. The process to set goals and standards is also important to share knowledge and best practices among the different actors of the justice systems.

The *monitoring of the cases* through a good information system is strictly related to the definition of standards. In particular, six areas of interesting data can be identified that have to be considered to know "where the court is" and then "where it would like to go". The monitoring should consider:

- measures of activity;
- measures of inventory;
- measures of delay;
- measures of scheduling accuracy;
- evaluation measures;
- individual case progress information.
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Inside each of these large categories it is possible to breakdown the analysis on the base of the capability of the information system and the needs of the courts. It is fundamental at least to monitor the number and the age of pending cases globally, per type of case and per judge (Solomon and Somerlot 1987).

The importance to manage the case through a *case management system* is of paramount importance to decrease court delay. A case management system approach is, in synthesis, the active management by the court of the case progress from filing to disposition. Among the different case management systems, we like to mention the "differentiated case-flow management" system (DCM), which has been implemented in many courts in the United States, Canada and Australia (Cooper, Solomon 1993). It changes the chronological concept of handling the cases in the courts. In other words, the system "first-in, first-out" is substituted with a system, which takes into account the complexity of each case, and assigns it to a particular track of procedure. In this way, simple cases can be disposed of quickly, they do not wait for cases filed before them but much more complex in nature, taking longer to dispose of. If DCM is adopted, there is an early court intervention on each case. The screening criteria to assign each case to the correct track involve the parties and are based on established variables. There is a different way to process each case in each track, with predetermined events and time standards for each track. The case assignment system can be suited to each track. As a consequence, the workloads as well as the calendar of the judges are better managed. The courts have substantive information about cases earlier. Court personnel can be better allocated on the basis of the caseload for each track.

This approach to case management is also welcomed by the Lord Woolf's report with a pre-set "Fast Track System" for simple cases and a "Multi Track system" for varieties of complex cases (1996, section II, chapter 5).

A *court policy against unjustifiable continuances* (e.g. a firm trial date, a 'backup judge' system for trials) has been recognized as useful to strengthen the concept of fighting against court delay among lawyers.

The *assignment system*, the moment each case is given to a judge or to a pool of judges, the following calendar, and the way in which the work of judges is organized, have been considered important factors in court delay. After the case has been assigned it can be handled by an *individual*, a *master* or a *hybrid* calendar. In an *individual calendar*, a judge is responsible for a case from the beginning to the end, for all the steps that will occur from the moment of assignment till disposition. In a *master calendar*, each judge has a particular function to conduct different steps of the proceedings. There is a functional specialization based on the assumption that, because of the increasing complexity of the law, it is necessary to have judges specialized in a portion of the proceeding. The *hybrid calendar* can assume different forms. As the word suggests, it is a mixture of individual and master calendars applied during one or more steps of the proceeding. There are pros and cons for each of the calendars mentioned, even if some empirical research has shown that an individual calendar seems to be a little bit faster than the other methods for civil cases (Goerdts 1987; Mahoney 1988).

*Education and training* are considered necessary to implement a delay reduction program, but they are also of paramount importance to bring the concept of case-flow management, delay reduction, and court management into the courts personnel and the legal profession. Delay reduction, court efficiency and effectiveness must not be considered in competition with pursuing a good quality of justice: "Slow justice is bad, but speedy injustice is not an admissible substitute" (Rosemberg 1965, p. 58) but are important components of the concept of justice since, according to the famous Jeremy Bentham's motto: "justice delayed is justice denied". "There is no necessary conflict between economy, efficiency and effectiveness and the requirements of justice in the sense of fair outcomes arrives at by fair procedures. Indeed, to a very substantial extent they reinforce each other [...] The exercise of legal rights is always devalued if delayed" (Spigelman 2001, p. 749, see also Maier 1999).

We do not know how many courts in Europe have experienced these or similar techniques to improve the management of their caseloads. As far as we know, in Europe no studies have addressed these issues in depth<sup>27</sup>. This is an embarrassing situation, which should stimulate the European Institutions to promote further cross-country research on judicial administration, and in particular on court management and delay reduction.

However, even if there are not specific studies on court delay in Europe, evidence of other empirical research give an opportunity to identify some factors that should be further investigated to verify their relevance on court delay. We will use a bottom up approach, starting from some procedural variables and then moving towards some more general ones.

Besides the ones mentioned in the literature presented earlier, which must not be forgotten (judicial commitment, leadership and mechanism of accountability; involvement of the different actors in the system; court supervision of case progress; definition of goals and standards; monitoring of cases by an information system; a case management approach; a policy against unjustifiable continuances and a firm trial date; individual assignment system; education and training, local legal culture), research in Europe should explore the relationship between court delay and three major areas:

- Features of court proceedings (criminal, civil, and administrative);

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<sup>27</sup> Maybe some studies have been made by consultant agencies but they are not available. Some interesting work has been done in the U.K. on the general issue of improving the criminal (several works by the Home Office), civil (the well known Woolf's report) and administrative (Modernisation of the Tribunal Service) justice systems, but few studies have dealt specifically with court delay (Choongh 1997; Bridges and Jacobs 1999).

- Management of the courts;
- Governance setting of the courts.

#### *Features of court proceedings*

Within this area, we have identified some factors that should be tested to check their influence on court times. In particular, the requirement to give *legal arguments in writing* to support a sentence could be one of the factors contributing to court delay in some jurisdictions. For example, in the Netherlands, in first instance criminal proceedings concerning lesser crimes a written motivation is only given if a party announces to be willing to appeal. We think this should be further investigated.

The *feature of the appeal process* is another variable that could affect the length of the proceedings. The appeal process can review only legal points, as it is in the Anglo-Saxons countries, or check both legal points and facts already presented at the first stage. This latter could increase the overall time of the proceedings.

The ways in which *expert witnesses* are managed in the proceedings is another factor that could affect the length of a case. Again, we are not aware of studies that have empirically researched the influence of this variable on court delays, but other research findings have shown a certain role for this factor.

The possibility to use *pre-trial settlement procedures* between parties, in both criminal and civil proceedings, could affect the length of the process in court. We have to stress that it is not only the presence of these particularly proceedings that automatically allow a timeliness disposition of cases, but it is the way in which these special proceedings are used that can make the difference. For example, in the criminal process the possibility to plea-bargaining also during the hearings before the judge – this is the case in Italy – does not help much an early disposition of the cases. Apart from that, pre-trial proceedings are to be counted to the domain of the reasonable time clause, as far as they are legally obligatory.

The *discovery phase* is certainly one of the most critical, also to stimulate pre-trial agreements between parties. The way in which discovery works in each jurisdiction should be carefully analyzed in order to check its impact on court delay.

It is debated in several justice systems around Europe whether the *role of the judge* should be more proactive, in particular in civil proceedings, in order to improve caseload management and early supervision by the court of the case progress. In countries with a civil law tradition, where the trial is a process in different installments and the judge is supposed to play a leading role in managing the proceedings, some policy makers are trying to promote forms of litigation that lay more burden on parties rather than on judges. Conversely, countries with a more adversarial tradition claim a major role of the judge in the management of the cases to improve the pace of litigation and a more “equal” trial. Evidence, in particular in the United States, has shown how a more proactive role of judges can positively affect the pace of litigation. More in detail, the “third party role” of the judge, even in “adversarial system”, is the most important one to guarantee a fair pace of litigation, contrasting the opportunistic behaviors that can characterize the parties’ legal strategies (Zuckerman 1999).

With regard to civil procedures, the work of the Council of Europe concerning recommendation no. R (84) 5 is also worth mentioning, which considers some principles to improve the functioning of justice. This may be beneficial to remedy court delays.

In the criminal field, the principle of *mandatory criminal action* can be a variable that affects the length of the proceedings due to the enormous paper work it implies. However, as far as we know, this principle is only stated in the Italian Constitution. In this respect, the Council of Europe has accepted written recommendation no R (87) 18, which states the principle of discretionary prosecution, although with some safeguards.

The way in which the concepts of “*fair trial within a reasonable time*”, stated by article 6 of the European Convention on Human Rights have been implemented in each country should be better explored since the two concepts: “fair trial” and “reasonable time” sometimes can be in competition.

#### *Management of the courts*

Within the *management area* one of the most important factor that we think could have an impact on court delay is the possibility and competence of the court to *establish court rules*. Since there is not a single model of successful delay reduction or of delay prevention program, and due to the need to adapt general rules to “local contingencies”, the possibility to establish rules of practice by the court may be considered as an important tool to give the necessary leadership to the court to develop delay reduction programs. This however does not comply with the need for transparency and accountability for courts, which would not require diversity of court rules but uniformity. From that point of view some form of central control and authorization of local court rules seems desirable, although the tension between this desirability and demands of professional autonomy of court organizations should be solved.

The existence of *case management practices*, of a *professional court manager*, and of a *reliable and effective automated case-flow management* system are factors to be empirically tested to check their influence on court delay. As mentioned earlier, the monitoring of case progress is a fundamental tool to study the court performance status. In this respect, information and communication technology (ICT) can be very useful. However, we would like to stress that ICT is just a tool among others to pave the road towards court efficiency. ICT to be productive must be inserted in an enabled organizational setting; it is not just a “plug and play” tool (Fabri and Contini 2000).

The definition of *goals, targets, and standards* is certainly of some help to monitor the functioning of the court and doing so, indirectly, supply the policy makers of precious information on the court business. However, it is worth mentioning that each performance indicator has its own defect and it always induces its own distortions, at worst, targets can create perverse incentives. Therefore they have always to be considered in their organizational context. It is also important that at least some targets or standards are defined at the basic organizational level, since organizational change in the public sector comes often from individuals and small groups that find better ways to do business.

A study on court delay in Europe cannot be made without collection of some data: “delays in the courts are capable of measurement [they] are not a measure of the performance of judges. They measure the performance of a system in which judges have an important, but not determinative, role” (Spigelman 2001, p. 752). In order to compare data, it is of paramount importance to have a *data dictionary* to describe in detail what is counted. Data must be reliable or they will lead to wrong findings. Much will depend on the governance setting of the judiciary. For example, a centralized judiciary, such as France, Austria, Italy and the Netherlands, will have apparently lesser problems in the consistency of data supplied by the courts, but it might be less reliable due to the opportunistic behavior in the data collection to be presented to the Ministry of Justice. In decentralized judiciaries, such as Germany, Spain, and the United Kingdom, there will be more problems to collect consistent data, due to occasional huge differences between jurisdictions.

#### *Governance setting of the courts*

*The governance setting* of the judiciary may have an “indirect”, but not less important, impact on court performance and then on court delay. In recent years, several countries in Europe have adopted policies to change the governance structure of their judiciary.

Among these policies, here we can recall just some of them such as the *unification of courts* to rationalize the location of judicial offices and pursue economies of scale; the *establishment of courts of limited jurisdiction*, with lay judges and simplified procedure to decrease the caseload of the “ordinary” courts; the *establishment of judicial councils* with the purposes of improving the

functioning of the judiciary and increasing the role of the judiciary both in setting budgets and appropriation. Also the establishment of *specialized courts*, and the increasing role of *administrative tribunals*, have been policies implemented to tackle court delay (Langbroek, Pauliat, Fabri 2003). Last but not least, the *role of lawyers* in the governance setting of the justice system (e.g. training, professional accountability, payment, etc.) plays a major role in court proceedings and therefore in court delay. An analysis of these policies would need another report to be explained. The committee should decide if it is worthy to develop this section of our work any further.

### **5. Preliminary conclusions: in Europe almost no empirical research in the field of judicial administration has been done, and especially not on case management and delay reduction**

As stated at the beginning of this report, this work would like to stimulate some thoughts as well as some discussion during the next meeting of the Council of Europe to address the issue of court delay in Europe.

There exists a gap between the jurisprudence of the ECHR on the ‘reasonable time’ – requirement and a judicial administration (organization) perspective on timeliness of judicial proceedings. The jurisprudence of the ECHR gives no more than incidental clues concerning the causes of court delays. They concern amongst others: judges changing functions, lack of personnel, lack of adequate organization, lawyers on strike, postponement of bringing out a formal accusation, witnesses not showing up on court sessions, parties changing lawyers whenever possible (delay may be a strategy if you are sued and have bad chances in court), courts doing nothing, experts (medical doctors, forensic laboratories) delaying reports etc.

The complexity of the environments of courts in general, which are part of different (criminal, administrative, civil) justice chains, demands specific national legislative and organizational provisions and also local organizational measures to make courts comply with the normative demands of the Court. What measures are most effective is to be decided by the governments of the contracting states; the Court attributes responsibility explicitly to them.

Our preliminary research of the literature available has shown that there are not many studies on court delay in Europe published or available on the internet. We were forced to make reference to the extensive literature published in the United States, Australia, Canada. We are not aware of empirical research that has tested the research finding of these three countries in European contexts too. Maybe something has been done in Eastern Europe, due to the strong U.S. influence, but if reports have been produced they do not seem directly accessible. Based on evidence of research conducted on European judicial systems, the absence of specific studies on court delay is surprising, since court delay has been recognized as one of the most important problems affecting European judiciaries.

Research evidence of other studies on the functioning of courts in Europe has also allowed us to introduce some other factors, not included in the specific literature on court delay analyzed, that could affect the pace of litigation, and then court delay, in Europe. Given the complexities of national judicial systems, and the differences in culture and design of national judicial systems, it seems impossible to give a workable advise on what to do first. Even knowing that some countries have gone through considerable efforts to improve the functioning of their justice systems (like Denmark or the Netherlands – Langbroek 2001), their successes or lessons from their failures cannot be copied immediately to other countries without further knowledge and research on specific causes of delays or of final judgments within a reasonable time and the interactions in which court organizations take part.

We would like to conclude our report with suggestions for the development of tools for the improvement of case management in national judicial systems. The current state of knowledge – as far as we know – does not enable us to do that. Therefore, we wish to identify research priorities as

expressed in the following questions in order to identify the most important factors that are to be considered causes of court delay.

- Is delay perceived as one of the most important problems to be addressed by the courts and in particular by the judges?
- Would it be possible to have a shared definition of court delay in Europe?
- Would it be feasible to establish European standards, benchmarks or criteria to “measure” court delay?
- What kind of cases should be used as tests to establish these standards?
- Are there specific efforts in European countries to develop delay reduction programs that have not been published?
- In how far is delay related to the interaction between the courts and other stakeholders (advocates, public prosecutions department, the police, administrative bodies, experts, third parties) in court proceedings. What kinds of remedies for failing interactions are being developed in European countries?
- Are some of the factors mentioned in the Anglo-Saxon literature (a) judicial commitment, leadership and mechanism of accountability; b) involvement of the different actors in the system; c) court supervision of case progress; d) definition of goals and standards; e) monitoring of cases by an information system; d) a case management approach; e) a policy against unjustifiable continuances, a firm trial date and a ‘backup judge’ system for trials; f) an individual assignment system; g) education and training) useful to approach the issue of court delay in European courts too?
- Are these variables of the same importance in all the European countries? Which ones should be further investigated?
- Amongst the other factors identified (procedural, managerial, governance) as possible causes of court delay, which one should be further investigated?
- Which ones are considered priorities? Are these shared priorities by all European countries?
- Are there European countries in which surveys on causes or factors of court delays have been conducted? Are the results available?

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Field Code Changed

