



The Developing Remedial Practice of the European Court of Human Rights

8 November 2017, 4.00 – 6.00 pm

Council of Europe, Palais de l'Europe

Speakers

- Isabelle Niedlispacher, Government Agent in respect of Belgium and Chair of the Committee of Experts on the System of the European Convention on European Rights (DH-SYSC)
- Pavlo Pushkar, Head of Division, Department for the Execution of Judgments of the European Court of Human Rights
- Robert Spano, Judge of the European Court of Human Rights
- Kevin Steeves, Director, European Implementation Network

Middlesex University: Dr Alice Donald, Professor Philip Leach, Anne-Katrin Speck (for more information, please contact a.donald@mdx.ac.uk).

This seminar is organised by Middlesex University as part of the **Human Rights Law Implementation Project**, a collaborative research project between four universities (Bristol, Essex, Middlesex and Pretoria) and the Open Society Justice Initiative. It will discuss how far the European Court of Human Rights ('ECtHR', 'the Court') can – or should – recommend, or even require, states to take certain measures after the finding of a violation of the European Convention on Human Rights ('ECHR') and the implications of the Court's remedial practice for the prospects for success of implementation of judgments at the domestic level.

These questions are being increasingly debated as the Court, driven by states' failure to implement judgments, has moved away from its formerly limited, declaratory approach to remedial measures by sometimes being specific and/or prescriptive in the non-monetary remedies indicated, notably by means of the pilot judgment procedure and 'Article 46' judgments (where the Court indicates specific remedial measures, often as regards systemic problems, without invoking the pilot judgment procedure). Throughout this document, we will refer to 'specific remedial measures' to cover specific indications regarding general measures and non-monetary individual measures.

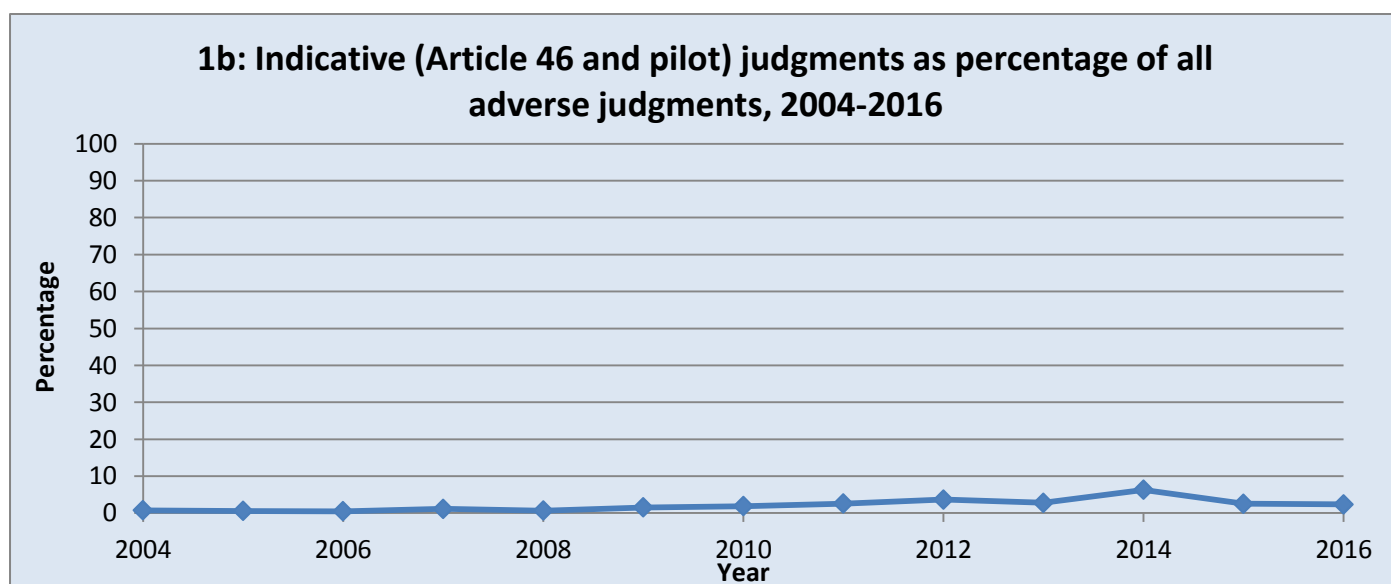
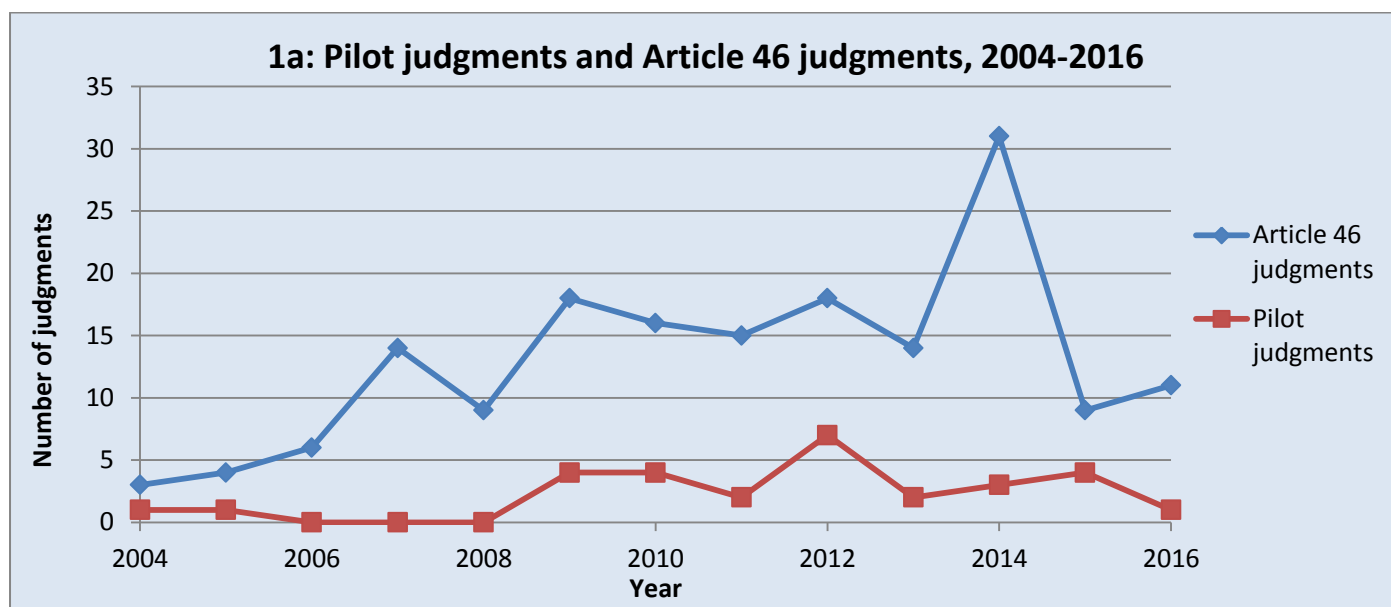
This handout presents a statistical analysis of pilot judgments and Article 46 judgments issued in 2004-16. The Court handed down its first pilot judgment in 2004, which also marked the start of the Court's more frequent use of Article 46, although it had occasionally specified broader remedial measures in earlier judgments.

Key points

- Judgments specifying remedial measures are still a small fraction of the Court's case law and their use has not increased in recent years.
- The Court indicates general measures more often than individual measures in both Article 46 and pilot judgments.
- The use of the operative part of Article 46 judgments to specify remedies is low – and perhaps declining.
- The Grand Chamber is proportionately more likely than Chambers of the Court to indicate specific remedial measures.
- While pilot judgments almost invariably include deadlines, the use of deadlines in Article 46 judgments is rare and declining.

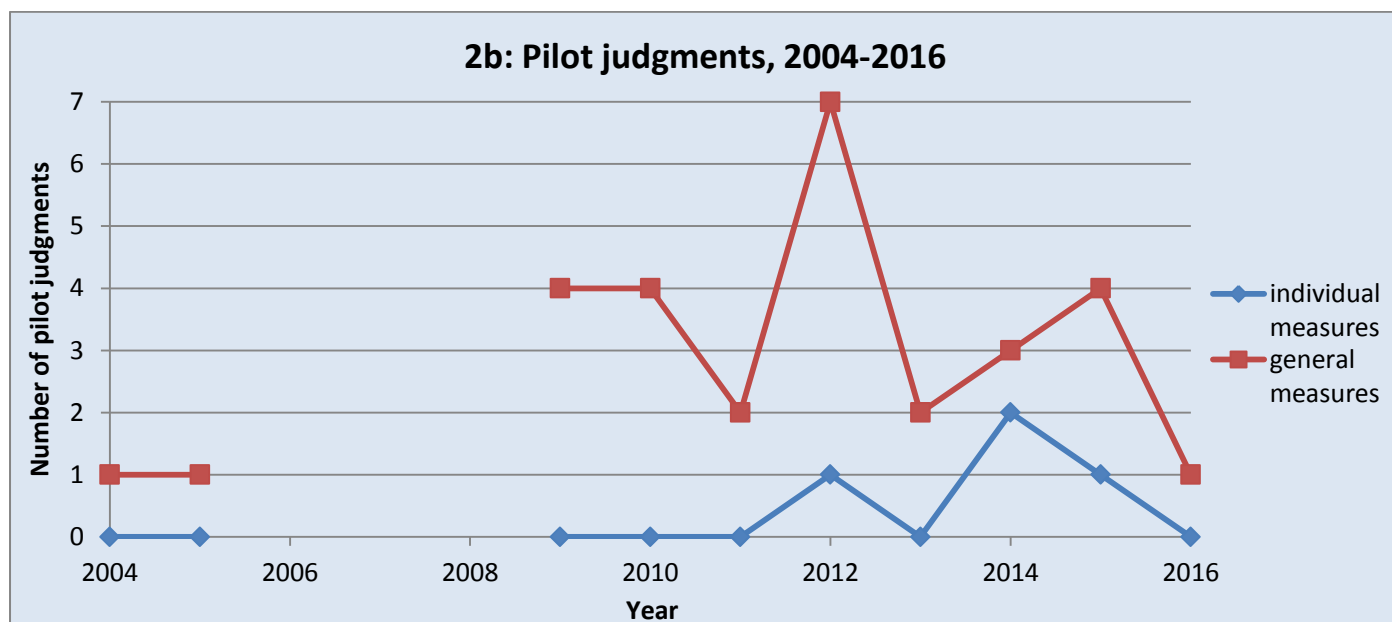
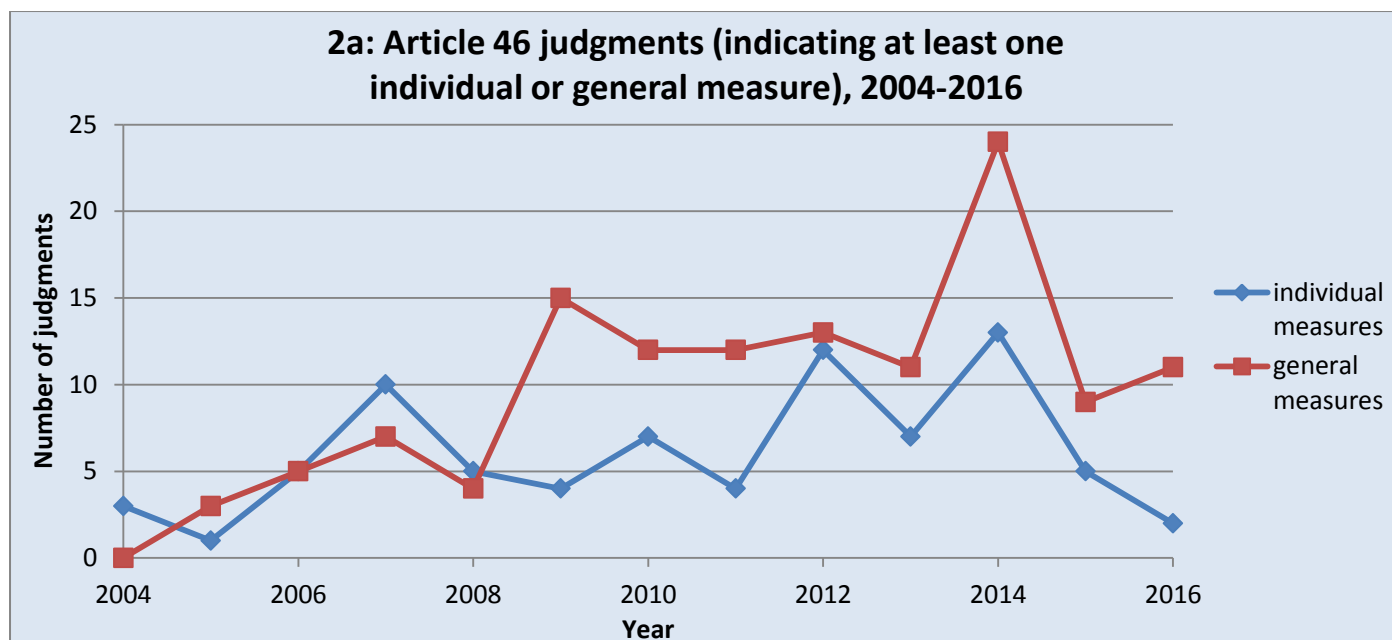
Charts 1a and 1b: Judgments specifying remedial measures are still a small fraction of the Court's case law and their use has not increased in recent years

- a) Chart 1a shows that from 2004 onwards, specific remedial measures have been indicated not only in pilot judgments but also in Article 46 judgments, the two practices developing in parallel. Further, the Court has indicated specific remedial measures in almost six times more Article 46 judgments than in formal pilot judgments (168 compared with 29 between 2004 and 2016).
- b) From 2004 to 2009, there was a fairly steady upward trend in the number of Article 46 judgments, since when the numbers have fluctuated for no immediately apparent reason, peaking in 2014 (when the Court issued 31 Article 46 judgments) and then declining markedly in 2015 (when nine were issued).
- c) Chart 1b shows that in every year from 2004 to 2016, the number of judgments containing specific remedial measures was very small as a percentage of all judgments finding at least one violation of the Convention or its Protocols. Even at its peak in 2014, when the Court issued a total of 34 (pilot and Article 46) judgments specifying remedies, this number represented only six per cent of the overall number of Chamber and Grand Chamber judgments finding at least one violation (34 out of 548). The average percentage from 2004 to 2016 was just two per cent.
- d) These observations run counter to the perception (among some academics as well as some actors within the Council of Europe) that there has, at least until recently, been an *increase* in the Court's tendency to issue judgments specifying remedial measures. Rather, the figures (at least from 2009) appear to show a natural fluctuation in the Court's case law and it is not possible to discern with confidence a significant trend either upwards or downwards.



Charts 2a and 2b: The Court indicates general measures more often than individual measures in both Article 46 and pilot judgments¹

- Chart 2a shows that in every year from 2009, the Court issued more Article 46 judgments specifying at least one general measure than it did Article 46 judgments specifying at least one individual measure.
- While the figures fluctuate annually, reflecting the fluctuations (shown in Chart 1a) in the overall number of Article 46 judgments, there is an upward trend in the Court's specification of general measures in Article 46 judgments from 2004 to 2016, while for individual measures the trend is almost flat.
- Chart 2b shows that out of the total of 29 pilot judgments issued between 2004 and 2016, only four contained an order concerning individual measures to be taken (alongside general measures).²



¹ Between 2006 and 2016, a total of 34 Article 46 judgments indicated a combination of *both* individual *and* general measures. As our interest in this chart is to determine the Court's overall tendency to indicate either individual or general measures, we have disaggregated these judgments and allocated them to the figures shown for individual measures and general measures, i.e. a judgment that contains at least one individual measure and at least one general measure has been counted twice in order to reflect the Court's decision to be indicative as to both types of measure.

² *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, No. 60642/08, Chamber Judgment, 6 November 2012 and Grand Chamber Judgment, 16 July 2014; *Gerasimov and Others v. Russia*, Nos. 29920/05 et al., Judgment, 1 July 2014; *Neshkov and Others v. Bulgaria*, Nos. 36925/10 et al., Judgment, 27 January 2015.

Chart 3: The use of the operative part of Article 46 judgments to specify remedies is low – and perhaps declining³

- From 2006 onwards, the Court has included specific remedial measures in the main body of Article 46 judgments more than it has in the operative part.
- There has been a decline in the use of the operative part since 2013; however, it is premature to assess whether this apparent trend will continue.
- The specification of remedies only in the main body of Article 46 judgments increased fairly steadily from 2004 to 2009 but has since plateaued or fallen, apart from a peak in 2014 (reflecting the peak in the overall number of Article 46 judgments in that year; see Chart 1a).
- Further analysis reveals that of the 33 Article 46 judgments with indications in the operative part, 19 judgments indicated individual measures; six indicated general measures; and eight contained both individual and general measures.

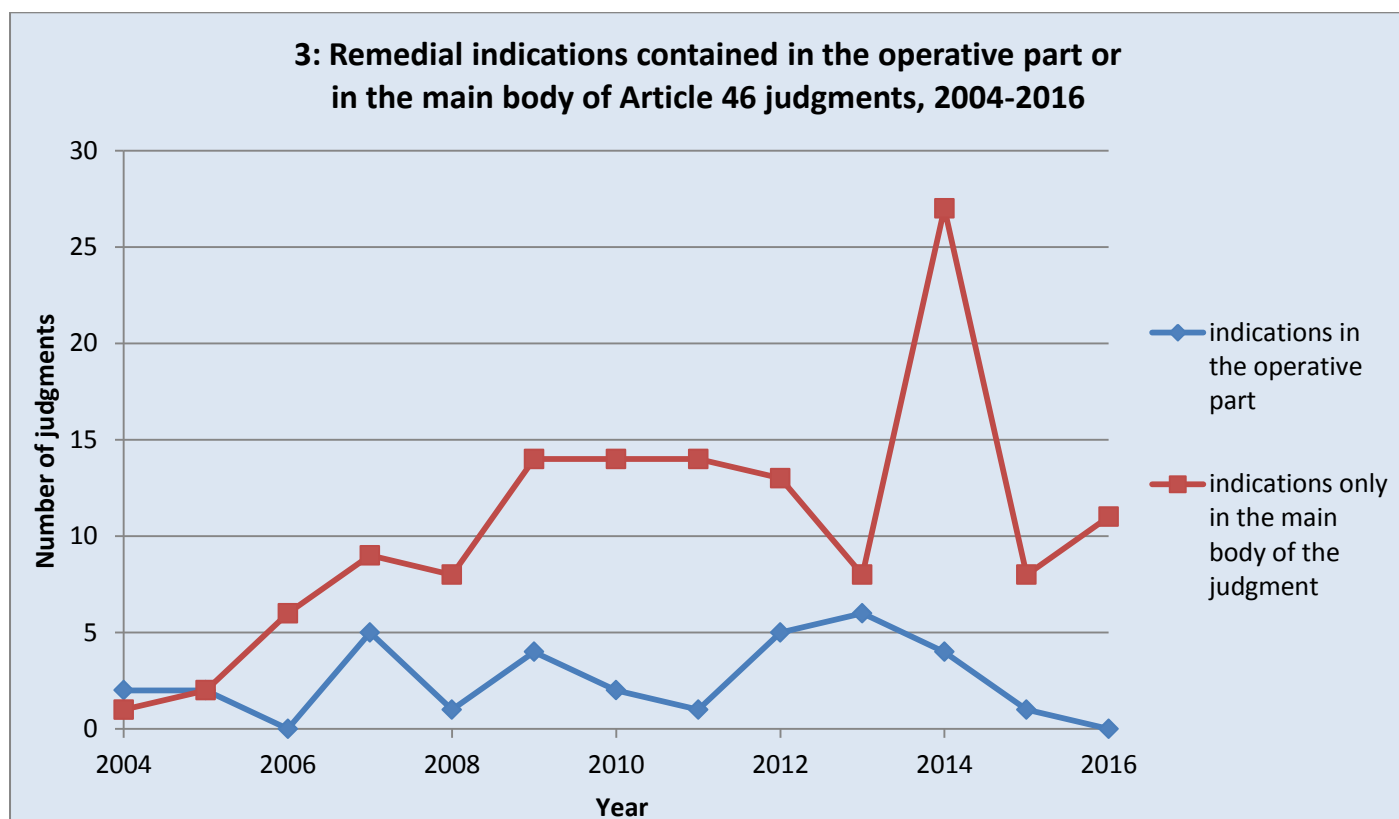
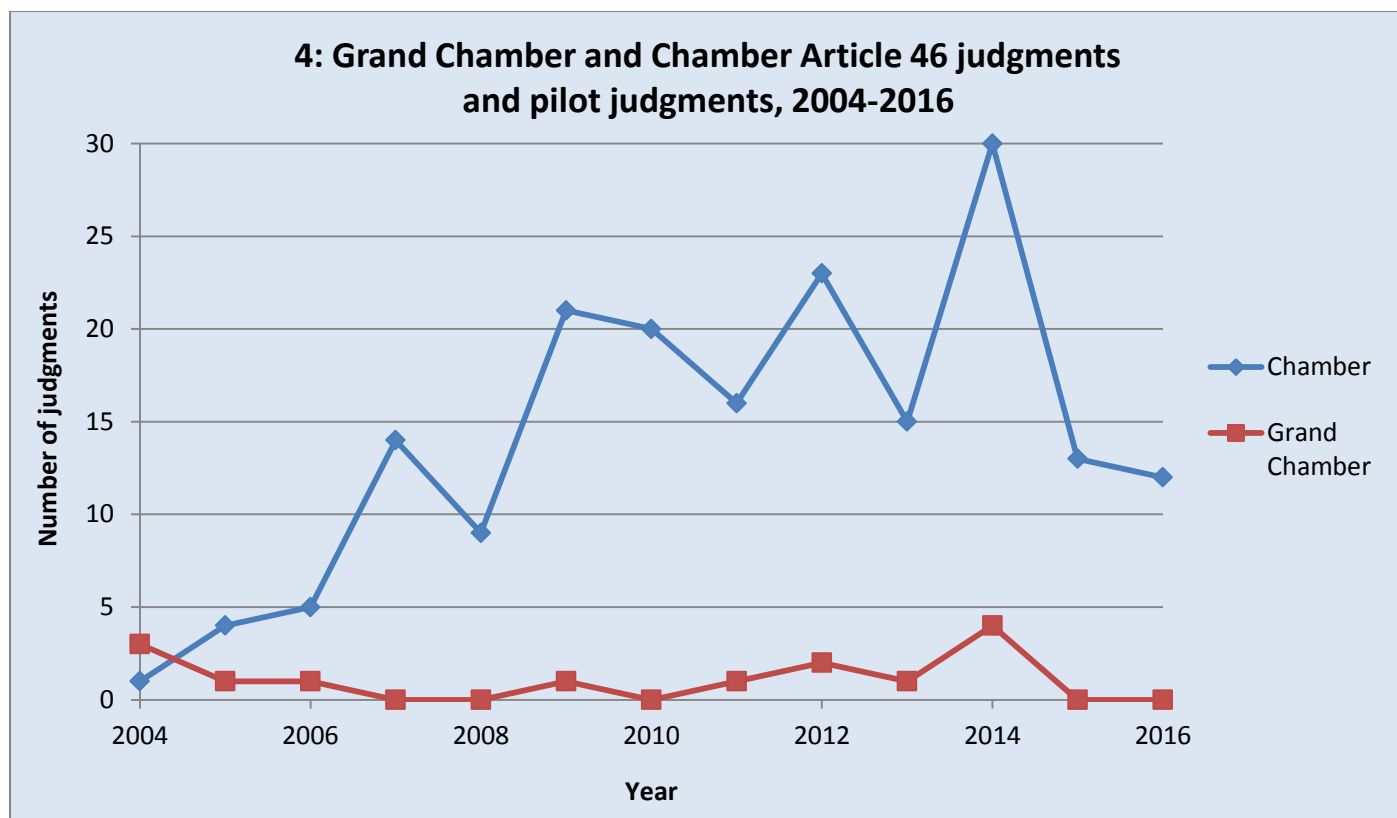


Chart 4: The Grand Chamber is proportionately more likely than Chambers of the Court to indicate specific remedial measures

- While Grand Chamber judgments make up only one per cent of all judgments finding at least one violation of the Convention or its Protocols issued between 2004 and 2016, they account for six per cent of all judgments that specify remedial indications.
- Ninety-three per cent of all (pilot and Article 46) judgments specifying remedies issued between 2004 and 2016 were handed down by a Chamber formation. In relative numbers, however, an average of only 1.6 percent of all adverse Chamber judgments (183 out of 11,174) contained a remedial indication under Article 46, while ten per cent of adverse Grand Chamber (14 out of 138) judgments did.

³ This chart omits pilot judgments since, almost invariably, remedial measures are indicated in the operative part of pilot judgments. The single exception is *Kurić and Others v. Slovenia* [GC], No. 26828/06, Judgment (Just Satisfaction), 12 March 2014, the operative part of which deals with the application of Article 41 of the Convention (just satisfaction), a matter reserved in the Grand Chamber's earlier judgment on the merits.

4: Grand Chamber and Chamber Article 46 judgments and pilot judgments, 2004-2016



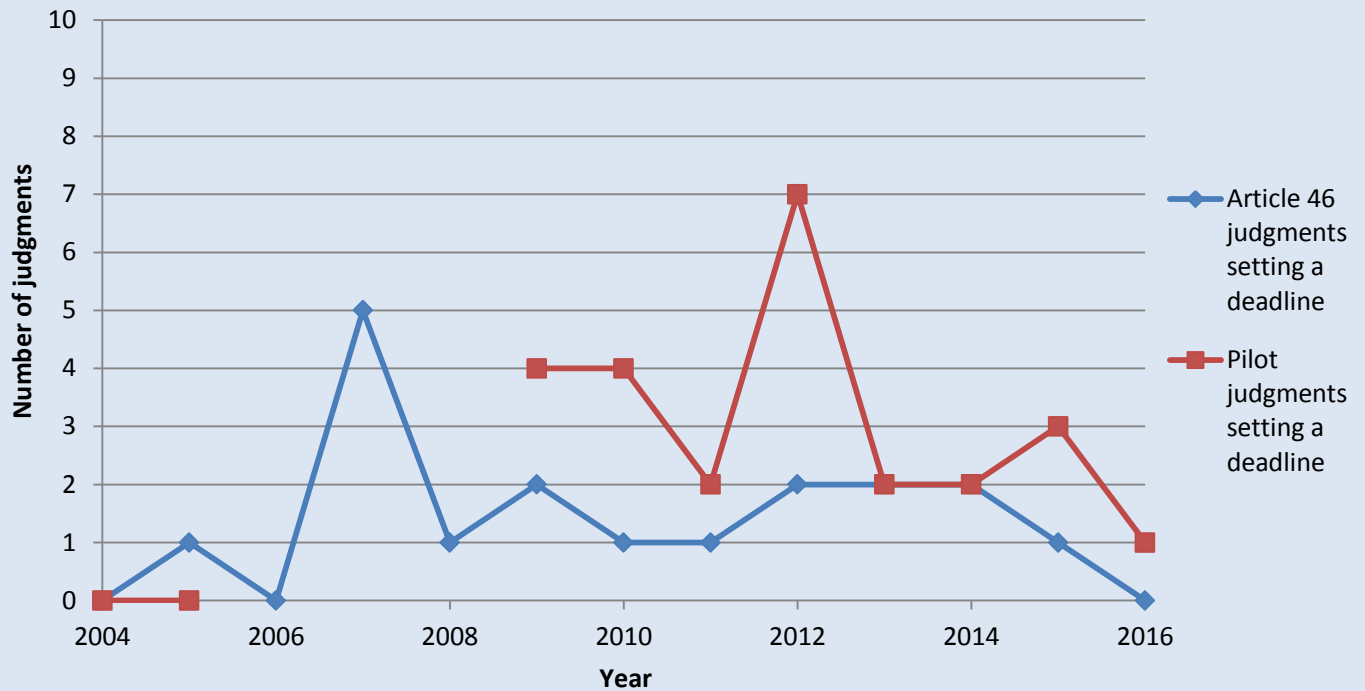
Charts 5a and 5b: While pilot judgments almost invariably include deadlines, the use of deadlines in Article 46 judgments is rare and declining

- The Court sets two distinct types of deadlines: deadlines for the adoption of specific (individual or general) remedial measures (which the judgment may specify in greater or lesser detail), and – much less commonly⁴ – deadlines for the submission of a comprehensive implementation plan with a timeline. Charts 5a and 5b combine both types of deadline. The Court also uses a range of terms to indicate urgency (such as ‘immediate’, ‘as a matter of urgency’, ‘at the earliest possible date’ or ‘as soon as possible’); those cases are not included in the charts below.
- Chart 5a shows that the number of Article 46 judgments setting a deadline is small overall and one may observe a slight decline after a peak in 2007, since when (as shown in Chart 5b) Article 46 judgments specifying a deadline have accounted for less than 15 per cent of all Article 46 judgments in any given year.
- Chart 5a shows that in most years from 2009, pilot judgments have used deadlines more than Article 46 judgments. Indeed, as indicated in Chart 5b, pilot judgments issued since 2009 have almost invariably included a deadline.⁵
- Further analysis reveals that the Court has used deadlines in respect of both individual and general measures. Deadlines have ranged from three months (in respect of individual measures) to two years, but it is not possible to discern a trend of deadlines either lengthening or tightening, either as regards pilot judgments or Article 46 judgments.

⁴ There have been four such deadlines; one was contained in an Article 46 judgment from 2011 and three were contained in pilot judgments issued in 2012, 2013 and 2015: *Kharchenko v. Ukraine*, No. 40107/02, Judgment, 10 February 2011; *Ananyev and Others v. Russia*, No. 42525/07, Judgment, 10 January 2012; *M.C. and Others v. Italy*, No. 5376/11, Judgment, 3 September 2013; *Varga and Others v. Hungary*, Nos. 14097/12 et al., Judgment, 10 March 2015.

⁵ When looking at the percentage figures for pilot judgments in Chart 5b, it should be borne in mind that the overall number of pilot judgments in any given year is tiny.

5a: Number of Article 46 and pilot judgments setting a deadline, 2004-2016



5b: Percentage of Article 46 judgments and pilot judgments setting a deadline, 2004-2016

