SLOVENIA

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I. Introduction

The legal basis for bringing an action for damages arising from breach of national competition law is the Slovenian Prevention of the Restriction of Competition Act ("*Zakon o preprečevanju omejevanja konkurence"*). There is no such explicit provision concerning EC law. This distinction is not important in practice, however, as actions for damages based upon national competition law and EC competition law would both be subject to the general tort rules applicable in Slovenia. According to the Act, a person who has suffered damages by an action prohibited under the Act is entitled to claim compensation in accordance with the rules of the legislation governing obligations, which means that such injured party has to bring an action for damages in accordance with the general tort rules applicable in Slovenia.

There are no publicly available final court decisions concerning the damages arising from breach of Articles 81 and 82 EC or from breach of national competition law (except concerning unfair competition claims). The competent courts for such disputes would be the generally competent district courts. In practice, monetary compensation is almost exclusively claimed and awarded in damages actions, restitution to the previous condition is also possible. A person who causes damages to another person is obliged to repay such damages unless the wrongdoer proves that the damages occurred without his fault. Fault exists when the wrongdoer causes damages intentionally or negligently.

II. Actions for damages - status quo

General note: In the answers below, court practice is sometimes mentioned. It should be noted that court practice is generally not a formally binding legal source in Slovenia.[1]

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there is a distinction between EC and national law in this regard?

The legal basis for bringing an action for damages arising from breach of national competition law is Article 44 of the Slovenian Prevention of the Restriction of

1 When applying legal rules, the judge is even independent from the higher courts which have already issued an opinion in the same matter. Article 11, Paragraph 2 of the Courts Act ("*Zakon o sodiščih – ZS*"), Official Gazettes 19/1994, 45/1995, 26/1999 (Civil Procedure Act – "*Zakon o pravdnem postopku"*), 38/1999, 28/2000, 26/2001 (Maritime Law – "*Pomorski zakonik*")), 56/2002 (Law on Public Officials – "*Zakon o javnih uslužbencih*"), 67/2002 (Law on Judges – "*Zakon o sodniški službi"*), 110/2002 (Law on Changes and Amendments of the Law on State Prosecutors – "*Zakon o spremembah in dopolnitvah zakona o državnem tožilstvu"*).
The only formal exception are the legal opinions of the General Meeting of the Supreme Court of the Republic of Slovenia ("*Občna seja Vrhovnega sodišča Republike Slovenije*"), which are binding upon the senates of the Supreme Court unless changed at a new General Meeting of the Supreme Court. The General Meeting of the Supreme Court of the Republic of Slovenia (composed of all Supreme Court Judges) adopts principle legal opinions on issues important for the uniform application of laws, as well as legal opinions on questions arising out of court practice (Article 110, Paragraph 1, Points 1 and 2 of the Courts Act, *ibidem)*. According to Paragraph 2 of Article 110 of the Courts Act (*ibidem*), such legal opinions are binding upon the senates of the Supreme Court unless changed at a new General Meeting of the Supreme Court.
In case a civil matter cannot be resolved on the basis of valid regulations, the judge is obliged to consider regulations which regulate similar cases. Should the correct legal solution to the matter still remain doubtful, the judge is obliged to decide in accordance with general principles of Slovenian law. While doing so, the judge has to act in accordance with the legal tradition and settled knowledge of legal theory. Article 3, Paragraph 2 of the Courts Act, *ibidem*.
In practice, the court practice, especially the practice of the Supreme Court of the Republic of Slovenia ("*Vrhovno sodišče Republike Slovenije*"), is considered by lower courts when deciding upon similar cases.

Competition Act (*"Zakon o preprečevanju omejevanja konkurence"*),[2] which allows a person who has suffered damages by an action prohibited under the Act to claim compensation in accordance with the rules of the legislation governing obligations.

There is no such explicit provision concerning the EC law.

This distinction is not important in practice, however, as actions for damages based upon national competition law and EC competition law would both be subject to the rules of the legislation governing obligations.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

Irrespective of the value of the claim, district courts are competent for all disputes concerning the protection of competition.[3] There are 11 district courts in Slovenia.[4] The general principle of territorial jurisdiction in Slovenia is jurisdiction according to the seat or permanent residence of the defendant,[5] however there are also other principles – among others, in case of non-contractual damages, the plaintiff can sue also with the court where the damaging act has been committed or with the court where the damages occurred.[6]

First instance judgments can always be appealed and, if appealed in time, judgments do not become final until the appellate decision is issued.[7] There are 4 higher courts in Slovenia[8] which act as courts of appellate jurisdiction for local and district courts in their territories. A higher court may:

- refuse the appeal (if not filed in time, if incomplete or if not allowed),
- reject the appeal as groundless and approve the first instance judgment,
- annul the first instance judgment and order a new trial in the first instance or
- annul the first instance judgment and issue a judgment in the matter.[9]

There are three possible extraordinary legal remedies against final judgments:

- Revision is decided upon by the Supreme Court of the Republic of Slovenia.[10] It can be filed by a party to the dispute and is allowed against all second instance judgments in competition matters, irrespective of the value of the claim.[11] The grounds are limited to issues of substantive law and to the most severe breaches of procedure.[12]
- Claim for protection of lawfulness is decided upon by the Supreme Court of the Republic of Slovenia.[13] It can be filed by the State Prosecutor's Office of the Republic of Slovenia and is allowed against all final judgments (first and second instance).[14] The grounds are limited to issues of substantive law and to the most severe breaches of procedure.[15]
- Proceedings can be reopened upon request by a party to the dispute in case of enumerated reasons (certain most severe breaches of procedure, criminal acts leading to the judgment, etc.),[16] of which the

2 Official Gazettes No. 56/1999 and 37/2004.

3 Article 32, Paragraph 2, Point 5 of the Civil Procedure Act (*"Zakon o pravdnem postopku"*), Official Gazettes No. 26/1999 and 96/2002. As a rule, local courts (*"okrajna sodišča"*) are competent for claims not exceeding SIT 2,000,000. When disputes concern competition, district courts (*"okrožna sodišča"*) are competent irrespective of the value of the claim.

4 Article 115 of the Courts Act, *ibidem*.

5 *Actor sequitur forum rei* principle – Articles 46 – 48 of the Civil Procedure Act, *ibidem*.

6 Article 52 of the Civil Procedure Act, *ibidem*.

7 Article 333, Paragraph 2 of the Civil Procedure Act, *ibidem*.

8 Article 116 of the Courts Act, *ibidem*.

9 Article 351, Paragraph 1 of the Civil Procedure Act, *ibidem*.

10 Article 368 of the Civil Procedure Act, *ibidem*.

11 Article 367, Paragraph 2 of the Civil Procedure Act, *ibidem*.

12 Article 370 of the Civil Procedure Act, *ibidem*.

13 Article 368 of the Civil Procedure Act, *ibidem*.

14 Article 385, Paragraph 1 of the Civil Procedure Act, *ibidem*.

15 Article 387 of the Civil Procedure Act, *ibidem*.

16 Article 394 of the Civil Procedure Act, *ibidem*.

most often used reason is the possibility of a party to use new evidence (under specified conditions). Request for reopening of proceedings is usually decided upon by the first instance court that issued the first instance judgment in the matter. [17]

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

No.[18]

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

The following may act as plaintiffs and defendants before Slovenian courts in civil matters (including actions for damages):[19]

- any natural person,
- any legal person,
- other entities to which the court grants standing for a particular lawsuit.[20]

Special regulations may also provide that other entities act as parties in civil procedures, however there is no such regulation with respect to the damages actions related to breaches of competition law.

In case the legal interests of the plaintiff are not (claimed to be) affected, the court shall refuse the complaint.[21] The court may do so before submitting the complaint to the defendant or after receiving an answer of the defendant to the complaint.[22]

In case of cross-border litigation, where Regulation 44/2001 does not apply, Slovenian rules of private international law contain the following rules on territorial jurisdiction:

- Slovenian courts are generally competent in case the defendant has its seat or permanent residence in the Republic of Slovenia.[23]
- In case a number of defendants are sued and at least one of them has a permanent residence or seat in the Republic of Slovenia, Slovenian courts are competent in case such defendants are in a legal relationship or the claims against them are based upon the same legal and factual grounds.[24]
- In case Slovenian courts are competent to decide on a claim, they are also competent to decide on a counter-claim, provided that such counter-claim is in connection with the original claim.[25]
- In case of non-contractual damages, Slovenian courts are also competent in case the damaging act has been committed within the Slovenian territory and in case the damages occurred on the Slovenian territory.[26]
- In matters relating to a contract, Slovenian courts are also competent in case Slovenia is the place of performance of the obligation in question.[27]
- In case a foreign individual or legal entity has a branch office in Slovenia or has a person entrusted with the performance of its business in Slovenia,

17 Articles 397 – 401 of the Civil Procedure Act, *ibidem*.
18 According to Article 103, Paragraph 2 of the Courts Act, *ibidem*, the District Court in Ljubljana is exclusively competent for intellectual property matters (except for certain disputes between employers and employees), including (according to the court practice – Case No. I Cpg 459/2002, Higher Court in Ljubljana, June 7, 2002), unfair competition matters. There is no similar provision for competition matters.
19 Article 76 of the Civil Procedure Act*, ibidem*.
20 Such standing is granted in case the court establishes that such entity fulfils the main conditions to become a party considering the matter in dispute, in particular in case such party possesses the assets which can be seized.
21 Article 274 of the Civil Procedure Act*, ibidem*.
22 Article 275 of the Civil Procedure Act*, ibidem*.
23 Article 48 of the International Private Law and Proceedings Act (*"Zakon o mednarodnem zasebnem pravu in postopku"*), Official Gazette No. 56/1999.
24 Article 49, Paragraph 1 of the International Private Law and Proceedings Act, *ibidem.*
25 Article 49, Paragraph 3 of the International Private Law and Proceedings Act, *ibidem.*
26 Article 55, Paragraph 1 of the International Private Law and Proceedings Act, *ibidem.*
27 Article 56 of the International Private Law and Proceedings Act, *ibidem.*

Slovenian courts are competent as regards a dispute arising out of the operations of such branch or person in the Slovenian territory.[28]

- Slovenian courts are also competent in case any defendant's property is located in the Slovenian territory, provided that the plaintiff's seat or permanent residence is in Slovenia and that the plaintiff proves that the defendant's property is likely to be sufficient for the execution of judgment.[29]
- Parties, one or more of whom is has a permanent residence or seat in Slovenia, may agree that a Slovenian court is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship.[30] In case such agreement is permissible, competence of Slovenian courts may also be based upon defendant's submission to jurisdiction.[31] A defendant entering an appearance is deemed to have submitted to jurisdiction in case she does any of the following without contesting jurisdiction of Slovenian courts: (i) files a reply to a complaint, or (ii) starts discussing the merits of the case at a hearing.[32]
- In case court of another country is competent for disputes over Slovenian citizens on the basis of criteria not recognized in the Slovenian private international law, such criteria shall also be used for the jurisdiction of Slovenian courts over citizens of such a foreign country.[33]

In case the plaintiff is a foreign national or a person without nationality which does not have a permanent residence in the Republic of Slovenia, the defendant may request that the plaintiff posts a security for legal costs (*cautio actoris*), except in case of factual reciprocity[34] or international treaty providing otherwise. This security requirement does also not apply to nationals of EC member states or of states party to the EEA who are exempt from giving security by application of EC law.[35]

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Joint actions are permissible. Namely, it is possible for several plaintiffs to file a complaint jointly or for a plaintiff (or more) to file a complaint against several defendants. Claims may also be joined by the judge.[36] There is, however, no possibility of collective claims, class actions, representative actions or public interest litigation.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

In case of monetary damages, the responsible person is obliged to perform restitution to the previous condition (*restitutio in integrum*). In the event that such restitution does not remedy the damages entirely, the responsible person is obliged to pay monetary compensation for the non-remedied part in addition to such restitution. Monetary compensation alone is paid in the event that:

- restitution to the previous condition is not possible,

28 Article 59 of the International Private Law and Proceedings Act, *ibidem.*
29 Article 58, Paragraph 2 of the International Private Law and Proceedings Act, *ibidem.*
30 Article 52, Paragraph 3 of the International Private Law and Proceedings Act, *ibidem.*
31 Article 53, Paragraph 1 of the International Private Law and Proceedings Act, *ibidem.*
32 Article 53, Paragraph 2 of the International Private Law and Proceedings Act, *ibidem.*
33 Article 51 of the International Private Law and Proceedings Act, *ibidem.*
34 Articles 90 – 93 of the International Private Law and Proceedings Act, *ibidem.* The Law contains certain other circumstances where the plaintiff cannot require a security for legal costs, which would generally not be applicable in damages actions related to breaches of competition law. According to the court practice, reciprocity is presumed until proven otherwise. Case No. I Cp 1743/93, Higher Court in Ljubljana, March 9, 1994. According to the court practice, these provisions shall also be used in cases where the defendant is a foreign legal person. Case No. II Cp 536/2001, Higher Court in Ljubljana, August 22, 2001.
There are currently no publicly available drafts of proposed changes and/or amendments of the International Private Law and Proceedings Act, *ibidem.*
35 *See* C-323/95, *Hayes*, [1996] ECR I-1711.
36 Article 300 of the Civil Procedure Act*, ibidem*.

- the court is of the opinion that it is not necessary for the responsible person to perform restitution to the previous condition, and
- the plaintiff requests monetary compensation, unless the circumstances of the case require restitution to the previous condition.[37]

According to more recent legal theory, it is therefore up to the plaintiff to choose whether to require restitution to the previous condition or monetary compensation.[38] In practice, monetary compensation is almost exclusively claimed and awarded in damages actions, restitution to the previous condition is a rare exception.

When monetary damages are concerned, the court should, as a general rule and also taking into account circumstances arising after the damages were caused, award compensation in the amount which is necessary to make the plaintiff's financial situation as it would have been had the tort not taken place.[39]

The plaintiff is entitled to ordinary damages (i.e. monetary compensation for destroyed goods, costs of repair, costs arising from the fact that the plaintiff has temporarily not been able to use a certain product etc.) and to the lost profit. Lost profit to be awarded is the profit which could have been justifiably expected in the normal course of events or taking into account special circumstances, but which was not achieved due to the wrongful act of the defendant.[40]

Non-monetary damages are only available for expressly enumerated injuries,[41] of which the only potentially applicable type in actions for damages arising from breach of competition law would be damages to the reputation or goodwill of a legal entity. Monetary compensation alone is foreseen for such non-monetary injuries.[42]

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Disqualification of directors as a result of their company's participation in a breach of competition law is not possible in the context of a private action, but in the context of criminal procedures.

Criminal liability in this respect is only possible in case of a criminal abuse of dominant position. Namely, if monetary damages exceeding fifty average Slovenian monthly salaries occur or the dominant undertaking is enriched for an amount exceeding fifty average Slovenian monthly salaries as a result of concluding an agreement on creation of a dominant position in the market, this represents a criminal offence[43] for which the dominant legal person may be punished[44] with a monetary fine up to SIT 75 million (approximately EUR 312,900) or up to one hundred times the amount of damages suffered or enrichment acquired, whichever is higher.[45] If activities of the legal person have been entirely or predominantly abused for committing criminal offences, the court may order liquidation of such legal person.[46] The court may also order that the assets of such legal person to be liquidated are to be seized.[47] Individuals within such dominant

37 Article 164 of the Civil Code (*"Obligacijski zakonik"*), Official Gazette No. 83/2001.
38 *See* Plavšak N. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 925. *Cf.* Cigoj, S., *Komentar obligacijskih razmerij*, *I.-IV. knjiga* (ČZ Uradni list SRS, 1984-1986), p. 717.
39 Article 169 of the Civil Code, *ibidem*. In case of contractual damages, the plaintiff is entitled to ordinary damages and lost profits which should have been expected by the defendant at the time of breach, considering the facts that were known or should have been known to the defendant at the time of breach. Article 243, Paragraph 1 of the Civil Code, *ibidem*.
40 Article 168, Paragraph 3 of the Civil Code, *ibidem*.
41 Articles 178, 179, 181 and 183 of the Civil Code*, ibidem*.
42 Article 183 of the Civil Code, *ibidem*.
43 Article 231 of the Criminal Code (*"Kazenski zakonik")*, Official Gazettes No. 63/1994, 70/1994, 23/1999, and 110/2002.
44 Article 25 of the Responsibility of Legal Entities for Criminal Offences Act (*"Zakon o odgovornosti pravnih oseb za kazniva dejanja"*), Official Gazettes No. 59/1999 and 12/2000.
45 *Ibidem*.
46 Article 15 and Article 15 of the Responsibility of Legal Entities for Criminal Offences Act, *ibidem*.
47 *Ibidem.* Creditors can be compensated in any case, also if the assets are seized.

legal person who are responsible for such criminal offence may be punished by a term of imprisonment of up to three years or a monetary fine.[48]

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

A person who causes damages to another person is obliged to repay such damages unless the wrongdoer proves that the damages occurred without his fault.[49] Hence, violation of competition rules will not automatically imply that the fault element is fulfilled, but the burden of proof will be reversed as regards this element. This rebuttable presumption applies to violations national competition rules, as well as to violations of EC competition rules.

Slovenian tort law also regulates situations in which a person is responsible for damages irrespective of fault, most notably concerning damages deriving from subjects or activities which are the source of increased danger for the surroundings – such situations would normally not arise in actions for damages arising from breach of competition law.

Fault exists when the wrongdoer causes damages intentionally or negligently.[50] In case of intent, fault is based on subjective criteria. In case of negligence, however, the criteria are objective. Where the activity is professional, the required level of care is the level of care of a "good professional" who has to act with a greater degree of care than non-professionals, according to the rules of its profession and according to common practice.[51]

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

In general, the plaintiff needs to prove the facts which constitute the basis of its claim and the defendant needs to prove the facts which constitute the basis of its objections.[52]

In damages actions, however, the burden of proof is shifted to the defendant as concerns fault (fault of the wrongdoer is presumed unless proven otherwise). A person who causes damages to another person is obliged to repay such damages unless such person proves that the damages occurred without his fault.[53]

In lawsuits for damages arising from breach of competition law, therefore, the injured party (usually the plaintiff) has to prove the existence of:

- an unlawful damaging act,
- damages,
- causation (i.e. that the damaging act of the wrongdoer was the cause of damages),

while the alleged wrongdoer (usually the defendant) has to prove that the damages were caused without his fault (intent or negligence).[54]

48 Article 231 of the Criminal Code, *ibidem*.
49 Article 131 of the Civil Code, *ibidem.*
50 Article 135 of the Civil Code, *ibidem*.
51 Article 6, Paragraph 2 of the Civil Code, *ibidem*.
52 This rule derives from Articles 7 and 212 of the Civil Procedure Act*, ibidem*. *See also* Case No. II Ips 220/97, Supreme Court of the Republic of Slovenia, July 9, 1998; Ude, L., *Civilno procesno pravo* (Založba Uradni list Republike Slovenije, 2002), p. 256 and Zobec, J., *Dokazno breme v pravdnem postopku* (1996) 6 – 8 Pravnik, pp. 338 – 340.
53 Article 131 of the Civil Code, *ibidem.*
54 *See* Grilc, P., Zabel, B., Galič, A., Juhart, M., *Zakon o preprečevanju umejevanja konkurence (ZPOmK) s komentarjem* (Gospodarski vestnik, 2000), pp. 212 – 213 and Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), pp. 692 – 694.

According to case-law, only the lightest degree of fault is generally presumed (if not expressly or implicitly provided otherwise), the so-called "ordinary negligence" (*culpa levis*).[55]

The following facts do not need to be proven:

- facts acknowledged by the opposite party,[56]
- generally known facts,
- facts which are presumed by law (but the basis of presumption needs to be proven).

Legal basis does not need to be proven by the parties, law should be known by the court *ex officio* (*iura novit curia*). This generally also applies to foreign law. The parties are, however, also entitled to prove the contents of foreign law[57] and they often do so to speed up proceedings.

(ii) Standard of proof

The general rule is the free assessment of the evidence:[58] the court should determine which facts it believes have been proven on the basis of an honest and careful evaluation of each piece of evidence separately and all evidence taken together and on the basis of the entire evidentiary procedure.[59]

In case the court is not convinced, i.e. cannot establish a fact with a degree of certainty on the basis of all the evidence as presented, the court decides on the basis of the rules on the burden of proof.[60]

Preponderance of the evidence instead of certainty is only sufficient if so expressly provided by law (e.g. concerning certain procedural issues). This is also the case for injunction proceedings, where the standard of proof required is lower than in proceedings on the merits: proving the existence of claim by preponderance of the evidence is sufficient. In addition, the plaintiff needs to prove (again by preponderance of the evidence) that the enforcement of its claim is endangered.[61] It shall be presumed that the enforcement is endangered in case the enforcement would have to be performed abroad.[62] Furthermore, it is not necessary to prove that enforcement is endangered in case the defendant would only suffer negligible damages if the injunction is issued.[63]

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

There are no formal limitations concerning the form evidence must take. The court decides which evidence to admit[64] and also performs evidence at the hearing. The Civil Procedure Act enumerates the following forms of evidence: inspection (of places, persons, objects), documents, witnesses, experts and examination of the parties.

There are no categories of witnesses which can never be called, however there are certain types of witnesses that may not testify (witnesses that would breach their

55 Decree of the former Yugoslav collective session of the supreme federal and republic courts adopted on March 25 and 26, 1980, published in *Zbirka sodnih odločb – ZSO, V/1*, p. 20.
56 Except in case such a fact was acknowledged to enable disposal by the parties of their claims (denouncement of claim by the plaintiff, acknowledgement of claim by the defendant, settlement) in case such disposal violates mandatory rules or morals. Article 214 of the Civil Procedure Act, *ibidem*.
57 Article 12 of the International Private Law and Proceedings Act, *ibidem.*
58 Ude, L., *Civilno procesno pravo* (Založba Uradni list Republike Slovenije, 2002), pp. 119 – 120, 263 – 264.
59 Article 8 of the Civil Procedure Act, *ibidem*.
60 Article 215 of the Civil Procedure Act, *ibidem*.
61 Article 270 of the Enforcement and Security Act (*"Zakon o izvršbi in zavarovanju"*), Official Gazettes No. 51/1998, 89/1999, 75/2002, 87/2002, and 16/2004.
62 *Ibidem.*
63 *Ibidem*
64 Article 214, Paragraph 2 of the Civil Procedure Act, *ibidem*.

duty not to disclose official or military secret, until relieved from such duty by the competent body), that may decide not to testify (e.g. attorney-client communications) and that may decide not to answer a certain question (e.g. right not to incriminate oneself).[65] Witnesses may also refuse to answer a certain question for reasons of business secrets, however the court will consider, on a case-by-case basis, if the reason for refusal is grounded.[66]

Evidence from other jurisdictions can be admitted and there are no formal limitations, however the courts are usually reluctant to appoint foreign experts in commercial disputes.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis defendants, third parties and competition authorities (national, foreign, Commission)

• Defendants

The court cannot order disclosure of documents *ex officio*, except in case the court ascertains that the parties to the dispute intend to dispose of their claims (withdrawal of claim by the plaintiff, acknowledgement of claim by the defendant, settlement) in violation of mandatory legal rules or morals.[67]

In the event that the plaintiff refers to a document and claims that it is in the defendant's possession, the court orders the defendant to present the document within a specified period. The defendant may not refuse to present such a document if (i) it also referred to the same document within the same lawsuit, (ii) it has to present such a document by law or (iii) the document, by its contents, is valid jointly for both parties.[68] A document is "valid jointly for both parties" in case it was prepared in the interest of both parties (e.g. a will in which both parties are appointed as heirs) or was prepared by both parties and contains a description of their relationship (e.g. a contract between the parties).[69] The defendant may refuse the presentation of a document for substantially the same reasons as witnesses may refuse to testify (including the "protection of business secrets defense", if grounded). In case the defendant claims that the document is not in its possession, the court may allow the performance of evidence to ascertain such a fact. In case the defendant does not present the document (either without giving reasons or after it is established that the reasons are groundless), the defendant may not be forced to do so, but the court considers, taking into account all circumstances, the meaning of the fact that the defendant does not wish to present the document or falsely claims that the document is not in its possession.[70]

If the defendant testifies as a witness, the plaintiff should as a rule also do so (However, there are exceptions to this rule).[71] In case the defendant does not appear as witness or does not wish to testify, the defendant may not be forced to do so. [72]

• Third parties

The court cannot order disclosure of documents *ex officio*, except in case the court ascertains that the parties to the dispute intend to dispose of their claims (withdrawal of claim by the plaintiff, acknowledgement of claim by the defendant, settlement) in violation of mandatory legal rules or morals.[73]

Upon proposal of a party and in the limited *ex officio* case described above, the court may only request that a third party present a document if (i) such third party

65 Articles 230 – 235 of the Civil Procedure Act, *ibidem*.
66 Article 235 of the Civil Procedure Act, *ibidem.*
67 Article 7 of the Civil Procedure Act, *ibidem.*
68 Article 227 of the Civil Procedure Act, *ibidem*. According to case-law, such a document needs to be clearly specified by the plaintiff. Case No. I Cpg 1205/2001, Higher Court in Ljubljana, September 12, 2002.
69 Juhart, J., *Civilno procesno pravo FLR Jugoslavije* (Univerzitetna založba v Ljubljani, 1961), p. 374.
70 Article 227 of the Civil Procedure Act, *ibidem*.
71 Article 258 of the Civil Procedure Act, *ibidem*.
72 Article 236 of the Civil Procedure Act, *ibidem*.
73 Article 7 of the Civil Procedure Act, *ibidem.*

has to present such document by law, or (ii) the document, by its contents, is valid jointly for such third party and the party that requested its presentation. A document is "valid jointly for such third party and the party that requested its presentation" in case it was prepared in the interest of these two parties or was prepared by these two parties and contains a description of their relationship.[74] In case a third party claims that the document is not in its possession, the court may allow the performance of evidence to ascertain such a fact. If a third party is (established to be) obliged to present the document and does not do so, it is possible to force it to do so by recourse to an enforcement procedure (e.g. by repeatedly fining it). [75]

Witnesses are always examined orally, there are no written interrogatories. In the case of legal entities, their representatives are examined.

Each third party summoned as witness has to appear in court and, if not otherwise provided by law, also has to testify.[76] If after formal invitation the witness does not appear and does not excuse his / her absence, such witness can be fined and / or brought to the court by force. In case the witness does not wish to testify (without having a legally valid reason), such witness may be fined or jailed (for up to a month).[77] These measures are extremely rarely employed in commercial disputes.

• Competition authorities (national, foreign, Commission)

Evidence can be requested from competition authorities, but production cannot be ordered.

Documents issued in the prescribed form by state authorities, municipalities or entities (company, other entity or individual) when exercising public authority within their sphere of their competence are considered as "public documents" (*"javna listina"*). Facts stated in such public documents are presumed to be true, but it may still be proven that such facts are incorrectly established or that the document itself is incorrectly composed.[78] Unless otherwise provided by an international agreement, foreign public documents which are properly legalized, have the same validity as national public documents under condition of reciprocity.[79] In case the document is in a foreign language, it has to be submitted together with a certified translation into Slovenian.[80]

• Evidence obtained through disclosure outside Slovenia

Evidence obtained through discovery in other countries should be admissible in Slovenia, subject to constitutional principles, as there is no rule of the national law prohibiting the use of such evidence. There is no applicable court practice concerning this issue.

(b) Proving the infringement

(i) Is expert evidence admissible?

Yes, expert evidence is admissible.[81] Experts can also be appointed for the assessment of the amount of damages.

If expert evidence is duly proposed by the parties, the expert is selected by the court,[82] which may (and in practice usually does) consult the parties before the selection is made.[83] More than one expert can exceptionally be appointed if the court finds the expert work complicated. Permanently appointed court experts for a

74 Juhart, J., *Civilno procesno pravo FLR Jugoslavije* (Univerzitetna založba v Ljubljani, 1961), pp. 374 – 375.
75 Article 228 of the Civil Procedure Act, *ibidem*.
76 Article 229, Paragraph 1 of the Civil Procedure Act, *ibidem*.
77 Article 241 of the Civil Procedure Act, *ibidem*.
78 Article 224 of the Civil Procedure Act, *ibidem*.
79 Article 225 of the Civil Procedure Act, *ibidem*.
80 Article 226, Paragraph 1 of the Civil Procedure Act, *ibidem*.
81 Articles 243 – 256 of the Civil Procedure Act, *ibidem*.
82 Article 244, Paragraph 1 of the Civil Procedure Act*, ibidem*.
83 Article 244, Paragraph 2 of the Civil Procedure Act*, ibidem*.

particular field[84] should primarily be appointed[85] (if they exist). In case there exist special institutions which perform specific types of expert work, such expert work should primarily be entrusted to such special institutions, especially in case it is more complicated.[86] In our experience, courts tend to rely very much on the expert opinions, especially in complicated commercial disputes.

(ii) To what extent, if any, is cross-examination permissible?

Initial examination of witnesses, experts and parties is performed by the judge presiding the senate. Questions may then be asked by the members of the senate. Parties, their representatives and proxies may directly question witnesses, experts and opposite parties if the judge presiding the senate allows such direct questioning. The presiding judge prohibits a certain question or answer if the question is leading or irrelevant. The respective party may require that the question which was prohibited or to which the answer was prohibited be recorded.[87]

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

If the court's decision depends on whether there exists a certain right or legal relationship and such a preliminary question has not yet been decided upon by the court or another competent body, the court is entitled to solve such a preliminary question itself if not provided otherwise in the applicable legislation.[88] The court may, however, also decide not to solve such a preliminary question itself. In such a case, the court will stay proceedings until the competent body's final decision on the issue.[89]

When deciding on damages arising from breach of national and/or EC competition law, such a preliminary question is the question of whether such a breach exists. If the competent body (e.g. the Slovenian Competition Protection Office – *"Urad Republike Slovenije za varstvo konkurence"*) has already decided that there is a breach, the court is, according to the commentators[90] and court practice,[91] bound by such a decision. If the competent body has not yet decided, the court can decide upon the breach itself. Such a decision would only be applicable for the lawsuit in question, the competition authority would still be entitled to take a decision on the issue. Alternatively, the court may stay proceedings until the competent competition authority has finally decided about the issue. In case of Commissions decision, Article 16 of Regulation 1/2003 needs to be considered. *See* also section J (vi) below.

Other statements and/or decisions by a national competition authority, a national court or an authority from another EU Member State would not be formally binding, but could be presented by a party in the dispute in support of its arguments.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

Generally, damages need to be proven in the same manner as any other fact. If the court establishes that a party is entitled to monetary compensation for damages, but the amount of such compensation cannot be established or could

84 Such permanent court experts are appointed by the Ministry of Justice in accordance with the Courts Act, *ibidem*, and the Regulation on Court Experts and Court Appraisers (*"Pravilnik o sodnih izvedencih in sodnih cenilcih"*) Official Gazettes No. 7/2002 and 75/2003.
85 Article 245, Paragraph 2 of the Civil Procedure Act*, ibidem*.
86 Article 245, Paragraph 4 of the Civil Procedure Act*, ibidem*.
87 Article 284 of the Civil Procedure Act, *ibidem*.
88 Article 13 of the Civil Procedure Act, *ibidem.*
89 Articles 206 and 208 of the Civil Procedure Act, *ibidem*.
90 *See* Grilc, P., Zabel, B., Galič, A., Juhart, M., *Zakon o preprečevanju umejevanja konkurence (ZPOmK) s komentarjem* (Gospodarski vestnik, 2000), pp. 212 – 213.
91 Case No. III Ips 42/2002, Supreme Court of the Republic of Slovenia, June 20, 2002.

only be established with excessive difficulties, the court can decide on the amount at its own discretion.[92]

This provision represents an exception and should, as such, be interpreted narrowly. It should only be used when the amount of damages cannot be established by evidence or such determination is not economically sensible.[93] Hence, if an expert could establish the amount of compensation, then this provision should not be used.[94] It should also not be used in case the party bearing the burden of proof did not propose adequate evidence.[95] The courts sometimes use this provision (also in commercial disputes) when it would be "excessively difficult to prove the amount of damages" due to the long period of time between the damaging act and the date of the hearing. [96]

Where the existence of damage can be determined but not its extent a partial judgment can be rendered and the procedure continued until such time as ascertation and liquidation of damages is possible.[97]

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Indirect causation is sufficient.[98] The Civil Code does not contain any rules on causation, so the courts decide on a case-by-case basis, considering the tort system, the theoretical knowledge, and factual circumstances.[99] Usually, the court practice uses two theories of causation: the theory of adequate causality and the theory of ratio legis causality.[100] According to the theory of ratio legis causality, the court should only take into consideration the causes which simultaneously represent violations of a legal norm and which the legal norm itself considers as causes (which depends on the intention of such a legal norm). In line with the theory of ratio legis causality, only if the legal norm itself does not give any indication as to the causation, other theories should be considered, in particular the theory of adequate causality. According to the theory of adequate causality, only the causes that lead to a result in the normally course of affairs should be considered the causes of such a result.[101]

F. Grounds of justification

(i) Are there grounds of justification?

The following grounds of justification exist in Slovenian tort law: self-defence, distress, allowed self-help, assumption of risk by the defendant (consent). Additional requirements and conditions are provided in the Civil Code for each of these cases.[102] Consents is null and void in case it is given for the damages which would be caused by an action prohibited by law.[103]

92 Article 216 of the Civil Procedure Act, *ibidem*.
93 Case No. I Cpg 704/2000, Higher Court in Ljubljana, June 6, 2002.
94 Case No. II Ips 38/2002, Supreme Court of the Republic of Slovenia, January 15, 2003.
95 Case No. II Cp 1644/2001, Higher Court in Ljubljana, January 30, 2002.
96 Case No. I Cpg 236/2000, Higher Court in Ljubljana, December 4, 2001.
97 Article 315 of the Civil Procedure Act*, ibidem*.
98 *See* Grilc, P., Zabel, B., Galič, A., Juhart, M., *Zakon o preprečevanju umejevanja konkurence (ZPOmK) s komentarjem* (Gospodarski vestnik, 2000), p. 213.
99 *See* Jadek Pensa, D. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), pp. 672 – 683 and Strohsack, B., *Odškodninsko pravo in druge neposlovne obveznosti (Obligacijska razmerja II)* (Časopisni zavod, Uradni list RS, 1996), p. 36.
100 *See* Jadek Pensa, D. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 682.
101 See Novak, B., *Vzročna zveza, protipravnost in krivda pri odškodninski odgovornosti* (1997) 57 Zbornik znanstvenih razprav; Jadek Pensa, D. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 671 – 683,; Polajnar Pavčnik, A., *Vzročnost kot pravno vrednostni pojem* (1997) 57 Zbornik znanstvenih razprav, pp. 185 – 189, and Strohsack, B., *Odškodninsko pravo in druge neposlovne obveznosti (Obligacijska razmerja II)* (Časopisni zavod, Uradni list RS, 1996), pp. 232 – 237.
102 Articles 138 – 140 of the Civil Code, *ibidem*.
103 Article 140 of the Civil Code, *ibidem*.

Monetary compensation can be reduced in the following cases: (i) if the defendant also contributed to the occurrence of damages or caused the damages to be greater than they would otherwise have been, (ii) if the defendant is in a weak financial position and the payment of damages could cause distress, the plaintiff's financial position is relatively stronger and the damages were not caused intentionally and also not by gross negligence, (iii) if the plaintiff acted in the interest of the defendant, considering the level of care exercised by the plaintiff in its own matters and (iv) if the defendant did not mitigate damages, but it could have done so.[104]

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

The passing on defence could be used by the defendant as a way of reducing the amount of damages (possibly even to zero). There is no presumption that higher prices have been passed on, however the amount of damages needs to be proven by the plaintiff. The compensation awarded may never exceed the damages suffered.[105] Should the overcharges attributed to abusive or anti-competitive behaviour be indeed "passed on" (partially or wholly) to a subsequent purchaser, the plaintiff would be unable to prove the amount of damages (partially or wholly).

Indirect purchasers may theoretically claim damages. However, in practice it will be difficult for them to prove causality. Also, in such a case, there exists no presumption that the higher prices have been passed on and the indirect purchasers would therefore have to prove *inter alia* that the higher prices had been passed on to them by the direct purchaser.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

If the plaintiff also contributed to the occurrence of damages or caused the damages to be greater than they would otherwise have been, such plaintiff is only entitled to a proportionally reduced amount of damages.[106] Should it not be possible to ascertain to what extent the damages were a consequence of the plaintiff's actions, the court awards damages taking into account the facts of the particular case.[107]

The burden of proof concerning such contribution of the plaintiff is on the defendant.[108] The defendant does not need to show that the plaintiff was grossly negligent or acted intentionally, ordinary negligence is sufficient. However, the plaintiff's actions have to constitute at least a failure to exercise the required degree of care.[109] In practice, the court will assess the contribution of the plaintiff as a percentage and award compensation for damages accordingly.

In case the plaintiff has benefited from the infringement, the amount of benefit is deducted from the compensation as awarded (*compensation lucri cum damno*).[110]

If the defendant did not mitigate damages, but it could have done so, the damages can also be reduced.

104 Articles 170 – 171 of the Civil Code, *ibidem*.
105 Article 169 of the Civil Code, *ibidem*.
106 Article 171, Paragraph 1 of the Civil Code, *ibidem*.
107 Article 171, Paragraph 2 of the Civil Code, *ibidem*.
108 Plavšak, N. in in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 964.
109 *Ibidem,* pp. 964 – 968.
110 This derives from the general rule according to which the compensation as awarded may never exceed the damages suffered, Article 169 of the Civil Code, *ibidem*. *See also* Jadek Pensa, D. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 920.

G. Damages

Note: Unless expressly stated otherwise, the answers below concern non-contractual material damages. In several cases, there are specific provisions concerning contractual damages claims. There are also specific provisions concerning non-monetary damages.

(a) Calculation of damages

(i) **Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?**

Damages are assessed on the basis of injury suffered by the plaintiff.[111]

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

Provided that Slovenian courts are competent,[112] damages can be awarded for injury suffered more widely than the national territory (EC or broader).

(iii) What economic or other models are used by courts to calculate damage?

As a general rule of the Civil Code, the court should, also taking into account circumstances arising after the damages were caused, award compensation in the amount which is necessary to make the plaintiff's financial situation as it would have been had there been no damaging act.[113] The plaintiff is entitled to ordinary damages (i.e. monetary compensation for destroyed goods, costs of repair, costs arising from the fact that the plaintiff has temporarily not been able to use a certain product etc.) and to the lost profit. Lost profit to be awarded is the profit which could have been justifiably expected in the normal course of events or taking into account special circumstances, but which was not achieved due to the wrongful act of the defendant.[114]

In practice, it is rather difficult to prove the amount of damages in commercial litigation before Slovenian courts. Decisions are made on a case-by-case basis, there is no settled economic model.

According to certain commentators, courts should assess indirect damages in actions for damages arising from breach of national competition law on the basis of market relationships that would have foreseeably existed had there been no violation of competition rules.[115] There is no court practice which would either confirm or alter this approach or further elaborate on how it is to be performed in practice.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The court should, also taking into account circumstances arising after the damages were caused, award compensation in the amount which is necessary to make the plaintiff's financial situation as it would have been had there been no damaging act.[116] Monetary compensation is awarded taking into account price levels as of the date of judgment.[117] Lost profit is also considered at the time of trial.[118]

111 The more recent legal theory is considering whether the profit made by the defendant should be considered in exceptional cases (violations of personal rights). The basic principle, however, is still that only the injury suffered by the plaintiff should be considered. *See* Jadek Pensa, D. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 919.

112 *See* questions B and C above.

113 Article 169 of the Civil Code, *ibidem*.

114 Article 168, Paragraph 3 of the Civil Code, *ibidem*.

115 *See* Grilc, P., Zabel, B., Galič, A., Juhart, M., *Zakon o preprečevanju umejevanja konkurence (ZPOmK) s komentarjem* (Gospodarski vestnik, 2000), p. 213.

116 Article 169 of the Civil Code, *ibidem*.

117 Article 168, Paragraph 2 of the Civil Code, *ibidem*.

118 *See* Jadek Pensa, D. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 930.

In case of contractual damages, the plaintiff is entitled to ordinary damages and lost profits which should have been expected by the defendant at the time of breach, considering the facts that were known or should have been known to the defendant at the time of breach.[119]

With respect to causation, it is the subject of debate whether causation should be analyzed retrospectively or prospectively.[120] Court practice is not yet settled with respect to this issue as it is rarely expressly mentioned at all in court decisions.

(v) Are there maximum limits to damages?

There are no maximum limits to damages that may be awarded, however the compensation as awarded may never exceed the damages actually suffered.[121]

Limits may be contractually agreed, but only under the conditions and in the situations provided in the Civil Code.[122]

(vi) Are punitive or exemplary damages available?

No.[123]

(vii) Are fines imposed by competition authorities taken into account when settling damages?

No, fines imposed by competition authorities are not taken into account since they form part of the state budget and are, therefore, not connected to the injury suffered by the plaintiff.

(b) Interest

(i) Is interest awarded from the date the infringement occurred, the date of the judgment or the date of a decision by a competition authority?

Damages are considered due from the date when the infringement occurred.[124] If not provided otherwise, however, monetary compensation for damages is awarded according to the prices applicable on the date of the first instance judgment.[125] In the past, the court practice had to adapt to the situation of extremely high inflation and the fact that the prescribed interest rate contained both revaluation due to inflation and a "real" default interest rate.[126] Recently, the situation has changed

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119 Article 243, Paragraph 1 of the Civil Code, *ibidem*.

120 *See* Plavšak, N. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 730 and the articles cited therein.

121 Article 169 of the Civil Code, *ibidem*.

122 Article 242 of the Civil Code*, ibidem*.

123 The only area of Slovenian law where punitive damages are available is the copyright law.

124 Article 165 of the Civil Code, *ibidem*.

125 Article 168 of the Civil Code, *ibidem*.

126 The court practice was unified for the first time in 1979. Since May 29, 1987 and prior to June 26, 2002, the court practice uniformly determined the amount of damages as of the date of issuance of the first instance judgment (according to the prices valid as of the date of issuance of the first instance judgment) and awarded default interest only for the period following the date of issuance of the first instance judgment. Such court practice was based upon Decree of the former Yugoslav collective session of the supreme federal and republic courts adopted on May 27 – 29, 1987, published in *Poročilo VSS, 1/87*, p. 4.
On June 26, 2002, the General Meeting of the Supreme Court of the Republic of Slovenia ("*Občna seja Vrhovnega sodišča Republike Slovenije*") adopted a new decision concerning this issue, according to which, in case the amount of material damages is determined as of the date of issuance of the first instance judgment:
- default interest is not awarded for the period prior to January 1, 2002,
- after the occurrence of damages (and in any case only after January 1, 2002) until the date of the first instance judgment in the amount of prescribed interest rate, decreased for basic interest rate (currently 13,5% interest rate),
- after the first day following the first instance judgment in the amount of prescribed interest rate.
Legal opinion of the General Meeting of the Supreme Court of the Republic of Slovenia ("*Pravno mnenje, občna seja VSS*"), adopted on June 26, 2002 and published in *Pravna mnenja VSS 1/2002,* p. 11.
This decision was based upon the Civil Code, *ibidem*, the Law on Prescribed Interest Rate of Default Interest and Basic Interest Rate (*"Zakon o predpisani obrestni meri zamudnih obresti in temeljni obrestni meri – ZPOMZO"*), Official Gazette No. 45/1995, and the Law on Changes and Amendment of the Law on Prescribed Interest Rate of Default Interest and Basic Interest Rate ("*Zakon o spremembah in dopolnitvah zakona o predpisani obrestni meri zamudnih obresti in temeljni obrestni meri – ZPOMZO – A"*), Official Gazette No. 109/2001.

due to the adoption of new opinion of the Supreme Court of the Republic of Slovenia and new legislation. According to the prevailing view,[127] the situation is now as follows in case of monetary damages which are awarded according to the prices applicable on the date of the first instance judgment:

- if the damages occurred prior to January 1, 2002 and the first instance judgment is not yet issued, the annual interest rate shall be 13,5% from January 1, 2002 until June 27, 2003, 17% from June 28, 2003 until January 1, 2004 and 15,5% from January 1, 2004 on,
- if the first instance judgment was issued prior to June 28, 2003, the annual interest rate from January 1, 2002 until the first instance judgment issuance is 13,5% and the interest rate following the first instance judgment issuance is the legal default interest rate (currently 15,5%),
- for the period after June 28, 2003, the annual interest rate is the legal default interest rate (currently 15,5%), irrespective of which prices are considered – prices at the time the damages occurred or prices at the time of judgment.

(ii) What are the criteria to determine the levels of interest?

In non-contractual damages actions, default interest is awarded (if properly claimed) in the amount as provided in the applicable legislation. The currently applicable interest rate is 15,5%.[128] Once the monetary situation has settled, it is to be expected that special legislation on the level of interest rate shall no longer be required– at this time, the default interest rate of 8% as determined in the Civil Code[129] shall become applicable.

See also answer (i) above.

(iii) Is compound interest included?

No.

H. Timing

(i) What is the time limit in which to institute proceedings?

The proceedings need to be instituted before expiry of the statute of limitations.[130] The statute of limitations concerning non-contractual claims for damages expires:[131]

- within three years of the moment when the injured party got to know about the damages[132] and the identity of the wrongdoer,[133] and

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After June 28, 2003, when the Law on Interest Rate of Default Interest (*"Zakon o obrestni meri zamudnih obresti - ZPOMZO-1")*, Official Gazette No. 56/2003 entered into force, the scope of application of the above mentioned Supreme Court opinion became questionable.

127 Balažic, V., *Oblikovanje obrestnega dela odškodninskega tožbenega zahtevka* (2003) 21 Odvetnik, pp. 11-13. Please note that the court practice following June 28, 2003 is not yet sufficiently settled. We do not, however, expect it to materially differ from the above expressed view.

128 Law on Prescribed Interest Rate of Default Interest (*"Zakon o predpisani obrestni meri zamudnih obresti – ZPOMZO-1")*, Official Gazette No. 56/2003, 135/2003. The Slovenian Government (*"Vlada Republike Slovenije"*) is entitled to change the interest rate pursuant to Article 2 of the cited law. It did so on December 31, 2003 when it reduced the applicable default interest rate from 17% to 15,5% (applicable from January 1, 2004).

129 Article 178, Paragraph 2 of the Civil Code, *ibidem*.

130 Theoretically, proceedings could also be instituted later as the court is not allowed to consider the expiry of the statute of limitations *ex officio*. In case the defendant raises such a defence, however, the court is obliged to follow it and reject the claim.

131 Article 352, Paragraphs 1 and 2 of the Civil Code, *ibidem*.

132 Court practice developed criteria concerning this condition: the time when the injured party got to know about the damages is the time when the injured party has collected or could and should have (according to the circumstances of the case and the required level of care) collected all elements enabling it to determine the amount of the claim – i.e. only after damages are stabilized and only after the injured party is able to ascertain the amount of damages, either by itself or, if necessary, with the help of an expert. *See* Kranjc, V. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), pp. 478 – 479.

133 According to court practice, the injured party has to exercise the requisite degree of care to find out identity of the wrongdoer. It is relevant when the injured party could and should have gotten to know about the wrongdoer. *See* Kranjc, V. in Plavšak, N., Juhart, M., Jadek Pensa, D., Kranjc, V., Grilc, P., Polajnar Pavčnik, A., Dolenc, M., Pavčnik, M., *Obligacijski zakon s komentarjem (splošni del)* (GV Založba, 2003), p. 480.

- in any case within five years following the time when the damages occurred.[134]

With respect to the contractual damages claims (i.e. if the damages occurred as a result of a violation of a contractual obligation), the statute of limitations expires in time determined for the expiry of the statute of limitations of such contractual obligation, which is generally within three years for claims arising from commercial contracts.[135]

The Civil Code contains provisions detailing when the statute of limitations does not run, but these would usually not be applicable in competition-based damages actions.

(ii) On average, how long do proceedings take?

Proceedings in commercial disputes are rather lengthy and can take up to several years before the first instance court.[136] Further delays are caused by the fact that, following appeals and other legal remedies, the second instance courts and the Supreme Court of the Republic of Slovenia (*"Vrhovno sodišče Republike Slovenije"*) often (especially in complicated cases) decide to annul the first instance judgment and return the matter to be decided again, which means that the first instance procedure has to be repeated.

The Slovenian Government and the Supreme Court of the Republic of Slovenia are attempting to reduce court delays and accelerate proceedings,[137] The measures implemented and/or proposed to be implemented include changes in legislation (Courts Act (*"Zakon o sodiščih"*), Judicial Service Act (*"Zakon o sodniški službi"*), Court Order (*"Sodni red"*), Tariff of Attorney Fees (*"Odvetniška tarifa"*), procedural and material legislation), court-assisted mediation, changes in educational system, changes in systemization, personnel and material equipment of courts etc.

(iii) Is it possible to accelerate proceedings?

Generally matters are decided in accordance with legislation and the Court Order (*"Sodni red"*), which is adopted by the Minister of Justice (*"Minister za pravosodje*") pursuant to the previously acquired (non-binding) opinion of the General Meeting of the Supreme Court of the Republic of Slovenia (*"Občna seja Vrhovnega sodišča Republike Slovenije"*).[138] The parties may institute proceedings of internal court supervision in case they consider that the court is illegally delaying proceedings.

134 Article 352, Paragraph 2 of the Civil Code, *ibidem*.

135 Article 352, Paragraph 3 and Article 349 of the Civil Code*, ibidem*.

136 In 2001, for example, commercial disputes were completed at the first instance in up to 1 year in 29.6% of cases, in one to three years in 42.5% of cases and in more than three years in 28% of cases. The timing also depends on the competent court. In 2001, 6.01% of commercial disputes were completed before the District Court in Ljubljana in up to 3 months, 11.19% in 3 to 6 months, 13.90% in 6 months to 1 year, 67.05% in 1 year to 3 years and 1.84% in more than three years. In the same period, 47.62% of commercial disputes were completed in less than 3 months before the District Court in Krško, but 72.22% of commercial disputes were completed in more than 3 years before the District Court in Koper. In 2002, 9.99% of commercial disputes were completed before the District Court in Ljubljana in up to 3 months, 13.18% in 3 to 6 months, 16.44% in 6 months to 1 year, 60.39% in 1 year to 3 years and 0.00% in more than three years. In the same period, 46.09% of commercial disputes were completed in less than 3 months before the District Court in Novo mesto, but 46.18% of commercial disputes were completed in more than 3 years before the District Court in Celje. *See* the annual court statistics (*"sodna statistika"*), available at:
http://www.gov.si/mp/si/vsebina/statistika/sodna_statistika/sodna_statistika2001.pdf,
http://www.gov.si/mp/si/vsebina/statistika/sodna_statistika/sodna_statistika2002.pdf,
http://www.gov.si/mp/si/vsebina/statistika/sodna_statistika/sodna_statistika_1_polletje2003.pdf,
It should be noted that difficult matters such as actions for damages based upon competition law shall most probably not be completed within the average term, but shall take longer than the average, sometimes considerably longer than the average.

137 *See* the document prepared by the Government of the Republic of Slovenia and the Supreme Court of the Republic of Slovenia entitled "Court Delays in the Republic of Slovenia (Analysis of Reasons and Proposals for Reduction and Abolition)" (*"Sodni zaostanki v Republiki Sloveniji (analiza vzrokov in predlogi za zmanjšanje in odpravo"),* http://www.gov.si/mp/si/vsebina/aktivnosti/sodni_zaostanki.pdf.

138 Official Gazettes No. 17/1995, 35/1998, 91/1998, 22/2000, 31/2000 (Law on Amendments of the Law on Misdemeanor Offences, *"Zakon o spremembah in dopolnitvah zakona o prekrških (ZP-L)"*), 113/2000, 62/2001, 88/2001, 102/2001, 22/2002, 15/2003.

(iv) How many judges sit in actions for damages cases?

When the dispute concerns protection of competition, there is a senate with the District Court (court of first instance), which is composed of one judge and two lay judges ("jurors").[139] Senates with the Higher Courts are composed of three judges when deciding about appeals[140] and senates with the Supreme Court of the Republic of Slovenia are composed of five judges when deciding about revisions and claims for protection of lawfulness.[141]

(v) How transparent is the procedure?

Generally, all hearings are public, each person over 18 can participate.[142] The judge or senate can exclude the public (except for the parties, their representatives and proxies) from the entire hearing or part of it for reasons of official, business or personal secrets, public order or morality and in case it cannot ensure uninterrupted course of the hearing by using the means provided by the Civil Procedure Act.[143] Court files may not be reviewed by the general public.

As a rule, judgment should be pronounced at the end of the hearing (and issued later in writing). The sentence of judgment should always be read, irrespective of whether the public was excluded from the procedure or not. In practice, however, judgments are almost always issued in writing, especially in commercial disputes.[144]

Judgments are generally not public. Judgments of the Supreme Court of the Republic of Slovenia are available (without the names of the parties and other participants in the procedure being disclosed) on the web site of the Supreme Court of the Republic of Slovenia (free of charge) and upon payment from a commercial database, some judgments of the Higher Courts (without the names of the parties and other participants in the procedure being disclosed) are available in a payable commercial database.

I. Costs

(i) Are Court fees paid up front?

Court fees for the complaint and answer to the complaint fall due when the respective complaint / answer is filed. Court fees for the judgment are due when the hearing is completed or, if the party is not present at the hearing, when the party or its representative are served a copy of the decision.[145] In higher-value disputes, court fees for the complaint amount to 1% of the value of the dispute and in any event not more than a specified amount (currently approximately EUR 1.600).[146] The same amount of court fees needs to be paid for the answer to the complaint, [147] as well as for the judgment.[148] Twice the amount needs to be paid for the appeal, for the revision and for the request to reopen proceedings. [149]

139 Article 34 of the Civil Procedure Act, *ibidem.* This is an exception to the general rule according to which a single judge is competent to decide on the first instance. Article 33 of the Civil Procedure Act, *ibidem.*
140 Article 36 of the Civil Procedure Act, *ibidem.*
141 Article 38, Paragraph 2 of the Civil Procedure Act, *ibidem.*
142 Article 293 of the Civil Procedure Act, *ibidem.*
143 Articles 294 – 297 of the Civil Procedure Act, *ibidem.*
144 Articles 321 – 232 of the Civil Procedure Act, *ibidem*. According to the Law, it is not necessary for the court to pronounce judgment at the end of the hearing in more complicated cases. In such cases, the judgment is not pronounced, but is only delivered to the parties within 30 days following the completion of the hearing.
145 Article 4 of the Court Fees Act (*"Zakon o sodnih taksah")*, Official Gazettes No. 30/1978, 10/1979, 36/1983, 46/1986, 34/1988, 22/1989, 83/1989, 1/1990, 30/1990, 43/1990, 48/1990, 14/1991, 9/1991, 17/1991, 31/1991, 19/1992, 8/1993, 6/1994, 19/1995, 23/1996, 38/1996, 22/1997, 20/1998, 35/1998, 35/1998, 50/1998, 8/1999, 70/2000, 29/2001, 41/2001, 46/2001, 93/2001, 16/2002, 77/2002, 99/2002, 73/2003, 121/2003.
146 Tariff Number 1 of the Court Fees Act, *ibidem.*
147 Tariff Number 1 of the Court Fees Act, *ibidem.*
148 Tariff Number 2 of the Court Fees Act, *ibidem.*
149 Tariff Number 3 of the Court Fees Act, *ibidem.*

(ii) Who bears the legal costs?

Litigation costs of each party (attorney fees, travelling expenses, postage…) and the court fees to be paid by such party are preliminarily borne by such party.[150] Preliminarily each party is also obliged to pay costs of the court related to the performance of certain evidence, which is proposed by such party (such as inspection, hearing of an expert, hearing of a witness…).[151]

After completion of the lawsuit, there are two general rules on recovery of costs – "the loser pays" and "the guilty pays" (*see* point (iv) below).

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Contingency fee arrangements are permitted under the following conditions:

- they have to be concluded in writing,
- the contingency fee should not amount to more than 15% of the amount awarded to the client.[152]

Contingency fee arrangements are not considered by the court when deciding about the recovery of costs.

We are not aware of any case in Slovenia based upon the violation of national or EC competition rules in which the issue of damages would have been finally decided upon. Therefore, it is unclear whether such matters shall generally be taken by attorneys on a contingency-fee basis.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Generally, the successful party (plaintiff or defendant) is entitled to recover its costs, provided that such recovery is properly required ("the loser pays" rule). In case both parties are partially successful the court may, considering the degree of success of each party, determine that each party bears its costs or order one party to pay to the other party a proportional part of the costs. In case one of the parties loses only with respect to an insignificant part of its claim and there were no special costs related to such part of its claim, the court may also order that such party has a right to recover its entire costs from the other party.[153]

Irrespective of the outcome of the litigation, each party is allowed to recover any costs incurred due to a fault of the other party or due to coincidence on its side, e.g. in case the hearing had to be postponed due to such party's illness ("the guilty pays" rule).[154]

There are no expressly excluded items. When deciding about the recovery of costs, the courts are, however, allowed to consider only the costs which were necessary for the lawsuit. The court has to consider all circumstances when deciding which costs were necessary and to which extent. Attorney fees are considered according to the tariff, irrespective of whether a contingency fee arrangement was agreed upon. Where a tariff exists for another type of cost (e.g. translation costs), such costs are also considered according to the tariff.[155] Such tariffs are generally "realistic", however there are certain types of costs that would usually not be considered as necessary and would hence not be recoverable (such as the costs of conferences between the client and its attorney).

150 Article 152 of the Civil Procedure Act, *ibidem.*
151 Article 153 of the Civil Procedure Act, *ibidem.*
152 Article 17, Paragraph 3 of the Attorneys Act ("*Zakon o odvetništvu*"), Official Gazettes No. 18/1993, 24/1996 and 24/2001 and Article 18 of the Tariff of Attorney Fees ("*Odvetniška tarifa"*), Official Gazettes No. 67/2003 and 70/2003.
153 Article 154 of the Civil Procedure Act, *ibidem.*
154 Article 156 of the Civil Procedure Act, *ibidem.*
155 Article 155 of the Civil Procedure Act, *ibidem.*

(v) What are the different types of litigation costs?

Types of litigation costs are not enumerated. Generally, all expenses arising during the court procedure or due the court procedure are considered litigation costs.[156]

There are the following types of litigation costs:

- court fees,
- costs of the court related to the particular court proceedings (costs of collecting evidence, including expert fees, per diems and travelling expenses in case certain activities, such as inspections, are performed out of court…),
- costs of parties, such as attorney fees, travelling expenses, postage, translation costs, etc.

(vi) Are there national rules for taxation of costs?

The party entitled to recover costs has to specify them and request the recovery within a specified term (generally until the end of the hearing for the costs of first instance proceedings and in the appeal or extraordinary legal remedy for further costs). Court decides about the recovery without a hearing (in chambers) and decision about costs is usually a part of the judgment. Such a decision can be appealed, but revision is not possible.[157]

(vii) Is any form of legal aid insurance available?

Yes, legal aid insurance is commercially available.

The following types of legal aid are available:

- Different types of legal aid (ordinary, extraordinary, special, urgent) are available if such legal aid is requested and conditions pursuant to the Free Legal Aid Act are fulfilled by individuals and certain non-profit legal entities. Such legal aid can cover attorney fees and all other costs of procedure, except for the costs and fees that might need to be reimbursed to the opposite party. Legal aid may also be granted for a part of such costs.[158]
- Costs of procedure (court fees or court fees and other costs or a part thereof) may also be waived pursuant to the Civil Procedure Act.[159]
- "First legal advice" is freely available to individuals and certain non-profit legal entities without additional restrictions.[160]

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

The following estimate is based upon the following assumptions: value of the dispute is SIT 10,000,000 (approximately EUR 42,000), the plaintiff (represented by attorney, who is paid according to the applicable tariff) files a complaint and three preliminary briefs, there are three hearings. The court appoints an expert upon proposal of the plaintiff, who prepares an elaborate written opinion on complicated issues and is heard at one hearing. There are no significant costs related to other evidence. The first instance court decision is appealed and the matter is not returned to the first instance court by the higher court. No extraordinary legal remedies are filed with the Supreme Court of the Republic of Slovenia. Under these assumptions, the approximate costs of the plaintiff would amount to SIT 1,350,000 (approximately EUR 5,700).

156 Article 151, Paragraph 1 of the Civil Procedure Act, *ibidem.*
157 Articles 163 – 166 of the Civil Procedure Act, *ibidem.*
158 Free Legal Aid Act (*"Zakon o brezplačni pravni pomoči"*), Official Gazettes No. 48/2001 and 50/2004.
159 Articles 168 - 173 of the Civil Procedure Act, *ibidem*. Article 168, Paragraph 6 of the Civil Procedure Act which provided for that such waiver cannot apply to independent entrepreneurs and legal entities was partially annulled by the Constitutional Court.
160 Article 25 of the Free Legal Aid Act (*"Zakon o brezplačni pravni pomoči"*), *ibidem*.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

The answers to the previous questions are not specific to the private enforcement of competition rules.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

The fact that EC competition rules and national competition rules are regarded as being public policy does not influence any answers given.

The court may not allow any disposal by the parties of their claims (withdrawal of claim by the plaintiff, acknowledgement of claim by the defendant, settlement) if such disposal violates mandatory rules or morals.[161] In such cases, the court may also establish facts not stated by the parties, as well as gather and perform evidence not proposed by the parties.[162] These provisions are generally applicable when public policy rules are in question.

(iii) Are there any differences according to whether defendant is public authority or natural or legal person?

There are no substantial differences in procedure according to whether defendant is public authority or natural or legal person.

The following differences exist:

- The Republic of Slovenia and its bodies that are independent legal persons are represented by the State Attorneys General ("*državni pravobralnilci*") in civil proceedings. The State Attorneys General are generally entitled to perform all procedural actions that could, on the basis of procedural law, be performed by the Republic of Slovenia or its bodies. The courts have to serve them all written documents that should otherwise be served on the represented body.[163]
- The potential plaintiff has to propose to the State Attorneys General to settle a case prior to initiation of civil lawsuit against the Republic of Slovenia or another body represented by the State Attorneys General. The State Attorneys General have to inform the potential plaintiff about their position as soon as possible, and in any event within 30 days.[164]
- The Republic of Slovenia, its bodies and municipalities are exempt from paying court fees.[165]

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

No leniency programmes have been created in Slovenia by the Slovenian Competition Protection Office ("*Urad Republike Slovenije za varstvo konkurence"*) so-far.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

No.

161 Article 3 of the Civil Procedure Act, *ibidem.*
162 Article 7 of the Civil Procedure Act, *ibidem.*
163 State Attorney General Act ("*Zakon o državnem pravobranilstvu*"), Official Gazettes No. 20/1997 and 56/2002 (*Law on Public Officials*), in particular Articles 1, 7, 9 and 15.
164 Article 14 of the State Attorney General Act, *ibidem*.
165 Article 11 of the Court Fees Act, *ibidem*.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

In case the court decision depends on whether there exists a certain right or legal relationship and such a preliminary question has not yet been decided upon by the court or another competent body, the court is entitled to solve such a preliminary question itself if not provided otherwise in the applicable legislation.[166] The court may, however, also decide not to solve such a preliminary question itself. In such a case, the court orders the staying of proceedings until such time as the competent body finally decides on the issue.[167]

When deciding on damages arising from breach of national and/or EC competition law, such a preliminary question is the question whether such a breach exists. In a recent case pending before the District Court in Ljubljana (between two Slovenian entities) and concerning the damages arising from breach of national competition law, the court decided to stay proceedings and order the plaintiff to initiate proceedings before the Slovenian Competition Protection Office (*"Urad Republike Slovenije za varstvo konkurence"*) who shall decide about the breach. Therefore, proceedings before the Slovenian Competition Protection Office were not initiated by the court itself, but by the plaintiff.

If such a practice is continued by the Slovenian courts, damages actions shall in practice be even lengthier and shall only be possible in connection with other regulatory proceedings, but not independently.

The basic rule for deciding on applicable law in non-contractual damages disputes is the selection of law of the place of infringement. If this is more favourable to the damaged person, law of the place where the effects are felt may also be applied, provided that wrongdoer could and should have anticipated the place where the effects are felt. In case these two laws do not have a closer connection to the subject matter, but a connection with another law is evident, the latter shall be used.[168]

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

We are not aware of any case in Slovenia based upon the violation of EC competition rules in which the issue of damages would have been decided upon.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

Predominantly, reduction of court delays in Slovenia and increased general awareness of competition issues would facilitate private enforcement. Furthermore, proceedings would be faster (and therefore more appealing to potential plaintiffs) if the national courts used their powers to decide upon violations of national competition law themselves instead of staying proceedings and ordering the plaintiffs to first initiate proceedings before the Slovenian Competition Protection Office which shall decide about the violation.

To achieve a higher degree of expertise and make court proceedings independent from other regulatory proceedings,[169] a specialized court (or exclusively competent court, such as the District Court in Ljubljana for intellectual property disputes)[170] would be an advantage.

166 Article 13 of the Civil Procedure Act, *ibidem.* If the competent body has already decided that there is a breach, the court is, according to the commentators and court practice, bound by such a decision.
167 Articles 206 and 208 of the Civil Procedure Act, *ibidem*.
168 Article 30 of the International Private Law and Proceedings Act, *ibidem.*
169 *See* question J.(vi) above.
170 *See* footnote 18 above.

A method for calculating damages which is more favourable to the plaintiff (e.g. by taking into account also the profit made by the defendant) or introduction of punitive damages could also facilitate private enforcement of competition claims.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

There exists a permanent arbitration body within the Slovenian Chamber of Commerce, which is considered successful, predominantly as its decisions are usually rendered faster than court decisions, however it does usually not resolve non-contractual damages cases. Both parties namely have to consent to arbitration and the defendant is often not interested to do so after the alleged damaging act. Proceedings are not public.

Other alternative means of dispute resolution are only being developed, in particular mediation and conciliation. They have not been sufficiently tested in practice to enable the assessment of their degree of success.

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V. National case law summaries

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