

ESTONIA

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I. Introduction

The Estonian national law equivalents of Articles 81 and 82 EC are Articles 4 and 16 of Estonian Competition Act¹ (*Konkurentsiseadus*, hereinafter referred to as ECA). The relevant provisions of ECA have been drafted similarly to Articles 81 and 82 EC. Article 4 of ECA prohibits restrictive agreements and Article 16 of ECA prohibits abuse of dominant position.

Article 78 ECA foresees that damage caused by acts prohibited by the ECA shall be subject to compensation by way of civil procedure.

There are no special provisions in the Estonian civil laws regulating actions for damages for breach of competition rules. The following analysis is therefore based on Estonian general civil laws, in particular the Law of Obligations Act² (*Võlaõigusseadus*, hereinafter referred to as LOA) and Code of Civil Procedure³ (*Tsiviilkohtumenetluse Seadustik*, hereinafter referred to as CCP).

A new Code of Civil Procedure is being prepared in Parliament now and any major changes thereof in comparison to the current Act, will be provided in this report (mostly in footnotes). Please note that the new Code of Civil Procedure (hereinafter referred to as draft CCP) has undergone only the first reading in Parliament, so the provisions of the draft may change.

There are no specific provisions in Estonian law, which would make a distinction between claims for damages under Estonian and Community law. Thus we will refer to Estonian laws, while considering the possibilities of claiming damages for breach of competition rules. However we believe that these Estonian laws should apply also to a claim under EC competition law.

To the best of our knowledge, there are no court decisions concerning claim for damages for breach of competition law Articles 4 and 16. It must also be noted that all Estonian laws, LOA in particular⁴, came into effect only recently and thus there is very little case law. Therefore, a number of issues of this report may be interpreted in several ways. Hopefully the future court practice will bring greater certainty to this area⁵.

Estonian Competition Board (*Konkurentsiamet*, hereinafter referred to as ECB) is charged with the enforcement of competition rules.

1 Adopted by the Parliament on June 5, 2001, came into force on October 1, 2001.

2 Adopted by the Parliament on September 26, 2001, came into force on July 1, 2002.

3 Adopted by the Parliament on April 22, 1998, came into force on September 1, 1998.

4 LOA came into force on July 1, 2002 and it incorporates a large number of very novel provisions into Estonian legal system, whereas it remains to be seen how the novel provisions of this Act will be implemented in the practice by the courts.

5 The references to the case law in this report shall mean the Supreme Court decisions. The positions on the interpretation of the law set out in the Supreme Court decisions are binding on such court of lower instance who conducts a new hearing in a particular matter (Article 365 CCP), however, in reality the courts of first and second instances often take the Supreme Court case law into account also in resolving other cases.

II. Actions for damages - status quo

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?

Other than Article 78 ECA⁶ mentioned above, there is no specific statutory basis for bringing an action for damages for breach of competition rules. Nor is any distinction made between EC and national law.

The statutory basis for an action for damages for breach of competition law, may be derived from non-contractual law provisions set out in LOA. Article 1043 of LOA⁷ provides that a person (tortfeasor) who culpably and unlawfully causes damage to another person (victim) shall compensate for the damage.

Article 1045 of LOA provides that the causing of damage is *inter alia* considered unlawful where the behaviour causing the damage:

- (a) violates a duty arising from law (Article 1045(1)(7) LOA⁸) and;
- (b) is intentional and contrary to good morals (Article 1045(1)(8) LOA⁹).

There is no practice in Estonia yet on which legal basis damages for breach of competition rules could be claimed. Furthermore, no court practice has developed with regard to LOA provisions regulating the unlawful causing of damage on other grounds of unlawfulness. It is up to the courts to establish in the future, whether the correct legal basis in the current claims could be Article 1043 LOA and either 1045(1)(7) or 1045 (1)(8) LOA.

The courts may, in the future, take into account relevant German legal practice¹⁰, e.g. the circumstance that a similar claim under German law can be based on a provision which is similar to Article 1045(1)(8) (acting in violation of good morals)¹¹. This, however, does not rule out that the courts may take a different view and consider Article 1043 together with 1045(1)(7) (acting in violation of law) as the correct legal basis for current claims.

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

(i) Which courts are competent?

All civil courts. All actions must be brought with the court of first instance (*maa- ja linnakohus*)¹², which has jurisdiction over the case. (See also section C(i) below) The competence of the court does not depend on the size of the claim. All decisions of the first instance courts can be appealed to a proper Appeal Court (*Ringkonnakohus*). There are three Appeal Courts and the appeal must be brought at the proper Appeal Court.¹³ With regard to the incorrect interpretation of substantive law or material violation of procedural law, appeal in cassation with

6 Article 78 ECA reads: "Proprietary or other damage caused by acts prohibited by this Act shall be subject to compensation by way of civil procedure."

7 Article 1043 LOA reads: "A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law."

8 Article 1045(1)(7) reads: "The causing of damage is unlawful if, above all, the damage is caused by:[...] behaviour which violates a duty arising from law."

9 Article 1045(1)(7) reads: "The causing of damage is unlawful if, above all, the damage is caused by:[...] intentional behaviour contrary to good morals."

10 Estonian Law of Obligations Act has been drafted largely on the basis of respective German laws and practices and Estonian judges are taught to take German legal practice as guidelines for cases, where there is no relevant Estonian practice.

11 Schlechtriem, P., *Võlaõigus. Eriosa (Law of Obligations. Special Part)* (Juura, Õigusteabe AS 2000), at point 816. The German equivalent of Article 1045(1)(8) is Article 826 of German Civil Code (*Bürgerliches Gesetzbuch*).

12 There are 18 first instance courts in different regions of Estonia.

13 Decisions of Kohtla-Järve and Narva City Court, Ida-Viru and Lääne-Viru County Court can be appealed to Viru Appeal Court. Tallinn City Court, Harju, Lääne, Hiiu, Saare, Rapla, Järva, Pärnu County Court decisions can be appealed to Tallinn Appeal Court. Jõgeva, Põlva, Tartu, Valga, Viljandi, Võru County Court decisions can be appealed to Tartu Appeal Court.

regard to the Appeal Court decision may be brought before the Supreme Court (*Riigikohus*). However, the Supreme Court does not have to accept all the appeals in cassation to its proceedings. In practice out of all cases appealed in cassation Supreme Court accepts approximately 20 %.

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

No.

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?

Any natural or legal person, whose rights or freedoms are violated or contested and who has active legal capacity, may bring an action for damages. The statement of claim is not accepted by the court and is returned to the person who submitted it only if (Article 149(2) CCP):

- (a) The civil court has no jurisdiction in the matter (including the cases where the case is subject to criminal or administrative proceedings or the court of another region within or outside Estonia has jurisdiction);
- (b) The parties' dispute has already been settled by an effective court decision;
- (c) A dispute between the same parties concerning the same cause of action on the same basis is already pending before a court;
- (d) The parties have entered into an agreement for referral of the dispute to arbitration;
- (e) The statement of claim is filed by a person without active civil procedural legal capacity¹⁴;
- (f) The statement of claim is filed on behalf of an interested person by a person without authorisation.¹⁵

Jurisdiction within Estonia¹⁶

CCP provides for rules governing territorial jurisdiction within Estonia. As a rule, a statement of claim must be filed with the court situated in the place of residence (natural person) or seat (legal person) of the defendant (Article 138 CCP).

The plaintiff may also choose to submit the current action to the following places:

- The court of the place where the damage was caused (Article 139(7) CCP)¹⁷;
- If the residence of the defendant is unknown- with the court of the location of an immovable of the defendant or the court of the defendant's last known residence (Article 139(1) CCP);
- An action against a non-resident of Estonia- with the court of the location of his or her property or with the court of his or her last known residence in Estonia (Article 139 (2) CCP).
- An action arising from the activities of an economic unit of a company (enterprise)- with the court of the place where the economic unit is situated. An action arising from the activities of a branch of a foreign company- with the court where the branch is situated (Article 139(3) CCP).

Jurisdiction between Member States is regulated in Regulation 44/2001.

Jurisdiction with non Member States

14 All legal persons have civil procedural legal capacity.

15 There are some further grounds for refusal to accept the statement of claim, however these grounds are not relevant in actions for damages cases in the case of breach of competition rules.

16 The new draft CCP Article 70(4) provides that in international cases priority is given to the rules of Council Regulation No 44/2001.

17 Supreme Court has held that the place, where the damage is caused may be the place, where negative effects, which have been caused to the property of the plaintiff, occur. Case 3-2-1-140-01, *AS Kadarik v. Lahja Helena Nokelini*, published RT III 2001, 32, 341.

There is no general law regulating jurisdiction with non Member States. However, Estonia has concluded agreements on legal assistance with Russia¹⁸ and Ukraine¹⁹, which foresee that actions for damages may be filed at the court of the state, where act causing the damage was committed or at the court of the state of the defendant.

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

Estonian civil procedure rules do not allow the submission of collective claims, class actions, actions by representative bodies or other forms of public interest litigation in the cases for damages in competition based damages actions.²⁰

Submission of a joint action by several plaintiffs is allowed (Article 75 CCP). In such cases the plaintiffs may authorise one plaintiff to represent the others in the court proceedings (Article 85(1)(4) CCP). Notwithstanding this every plaintiff remains independent in the proceedings with regard to the other side and the award will be made individually to every plaintiff.

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

After the submission of the statement of claim and until the closing arguments, the plaintiff may amend the cause (the provision in the law, on which the action rests) or object (the claim of the plaintiff) of an action or increase the amount of a claim (Art 154(1) CCP).

Substantive conditions

To obtain damages for unlawful causing of damage the existence of a delict must be established. This is done in three stages.

Firstly, the plaintiff must prove that the defendant acted in a certain way (or did not act in a situation, where he was obliged by the law to do so) and that such act (or failure to act) caused²¹ damage to the plaintiff.

Secondly, the unlawfulness of the defendant's act must be proved by the plaintiff in two stages. In the first stage, it must be shown that the act of the defendant corresponds to one of the cases of unlawfulness, which are enumerated in Article 1045(1) LOA. In the second stage, it must be demonstrated that there are no grounds precluding unlawfulness²².

Thirdly, the fault of the defendant must be established, whereas fault must not be proven by plaintiff, instead absence of fault must be proven by the defendant²³.

(i) What forms of compensation are available?

The plaintiff may claim damages, including direct damages and loss of profit. The damages must be paid as a lump sum payment unless the nature of the damage makes it reasonable to pay the compensation in instalments (Article 136(1) LOA). In exceptional circumstances, the plaintiff may claim the payment of compensation for damage in a manner other than monetary compensation (Article 136(5) LOA).

18 Agreement between the Republic of Estonia and Russian Federation with regard to legal assistance and legal relationship in civil, family and criminal matters, concluded on 26.01.1993, came into force on 19.03.1995, Article 40(3).

19 Agreement between the Republic of Estonia and Ukraine with regard to legal assistance and legal relationship in civil and criminal matters, concluded on 15.02.1995, came into force on 17.05.1996, Article 33(3).

20 Article 5(1)(2) of CCP provides that a civil matter is commenced on the basis of a person in the interests of other persons (class action or petition by representative body or state and local government) only if the right to protect the rights of other persons has been granted to the person submitting the claim by a specific law. There is no such specific right in ECA. Such specific law is e.g. Consumer Protection Act, which will enter into force on April 15, 2004.

21 See also section E(d).

22 See also section F(i).

23 See also section D(iii).

In addition to damages, the plaintiff may demand that the defendant stop the unlawful causing of damage, i.e. the operation of the restrictive agreement or abuse of dominant position (Article 1055(1) LOA).

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

None under civil law.

Member of Board or Council can be deprived of the right to work as a member of Board or Council under criminal law. Namely, Penal Code (Karistusseadustik)²⁴ foresees that restrictive agreements and abuse of dominant position are criminal offences, whereas criminal liability is foreseen to Board and Council members and the legal person at the same time. Article 49 of Penal Code provides for a possibility to deprive a convicted offender of the right to work in a certain position for up to three years if the person is convicted of a criminal offence relating to abuse of professional or official status or violation of official duties. Even though there is no respective court practice yet, it may be concluded from this provision that this applies also to Board or Council members- they may be deprived of the right to work as a Board or Council member in whichever company for up to three years.

(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?

The defendant is liable only if he or she is guilty of committing such unlawful acts, whereas burden of proof is on the defendant to determine the absence of fault (Article 1050(1) LOA). The fault must be established in respect of unlawful act and not the damage that was caused by unlawful act²⁵.

There are three types of culpability: negligence²⁶, gross negligence²⁷ and intent²⁸. The fault of a person is assessed on the basis of subjective criteria- the situation, age, education, knowledge, abilities and other personal characteristics of a person are taken into consideration upon assessment of fault (Article 1050(2) LOA).

If damages are claimed on the basis of Article 1045(1)(8), then the claim is satisfied only if the behaviour of the defendant is contrary to good morals and has been committed intentionally.

If damage is claimed on the basis of Article 1045(1)(7), then as a rule, the laws can be violated only intentionally, and thus the defendant must prove the lack of intention to escape liability. However in certain exceptional circumstances it is not excluded that negligent violation of a legal provision may constitute a delict²⁹. It remains to be established in court practice whether intention or negligence is required in the case of a claim for damages for loss suffered as a result of competition law violations. Furthermore, even though the existence of violation of a legal provision (e.g. competition law) can as a rule be committed only with fault, it is not entirely excluded that certain competition law provisions (where it is not unequivocally clear what the company needs to refrain from doing, e.g. where existence of violation is dependant on the cumulative effect of parallel networks) could be violated without fault- in such case fault of defendant will not be considered as fulfilled where a violation of competition law exists.

E. Rules of evidence

(a) General

24 Adopted by the Parliament on June 6, 2001, came into force on September 1, 2002.

25 Tampuu, T., *Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus (Delict Law Under Law of Obligations Act. General Problems and the Liability Based on the General Composition of the Delict)* (2003) II Juridica, at 78.

26 Article 104(3) LOA defines negligence as failure to exercise necessary care.

27 Article 104(4) LOA defines gross negligence as failure to exercise necessary care to a material extent.

28 Article 104(5) LOA defines intent as the will to bring about an unlawful consequence upon the creation, performance or termination of an obligation.

29 See footnote 26, at 79.

(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.)

As a general rule of civil procedure, each party³⁰ to the litigation must prove the facts on which the claims and objections of the party are based. Thus, as a rule the plaintiff should prove the existence of circumstances, which form the basis of the claim. However, there is an exception in relation to claims for damages upon unlawful causing of damage. Namely, Article 1050(1) of LOA foresees that the tortfeasor must prove that he has no fault in causing the damage in order to escape liability. Thus, the plaintiff must prove that the defendant committed an act, which caused damage to him, the unlawfulness of such act and causal link between the act of the defendant and the damage. The defendant must then prove the absence of fault or unlawfulness to escape the liability.

The current version of new draft Code of Civil Procedure foresees for important differences with regard to burden of proof. The factual circumstances presented by a party shall be considered as proven until the opposing party disputes such circumstances (Article 240(4) draft CCP). Another important planned change is that if a party to the proceedings refuses to produce a document, then the court may consider the arguments of the other party with regard to the subject matter of such document as proven (Article 295 (2) draft CCP).

The following circumstances are considered to be proven without producing further evidence:

- Facts of common knowledge, the court has sole discretion in determining which facts it deems to be of common knowledge (Article 94(1) CCP);
- Circumstances which have been established by a civil court judgement, which has entered into force in other civil proceedings between the same parties (Article 94(2) CCP)³¹;
- Where there is a judgement in a criminal matter or an administrative offence, then such judgement is binding on the civil court with regard to whether the act occurred and whether the person in question committed such act (Article 94(3) CCP). Thus, if a person has been convicted in the commission of competition law violation, then the plaintiff need not prove that convicted person violated ECA.
- Circumstances on which the claim or defence of a party is based, and which have been admitted by the other party, unless the circumstance as proven violates the rights or lawful interests of other parties in the case, or unless admission was influenced by deceit or force or was based on an error (Article 116 CCP)³².

The Supreme Court has held that in the situation where the allegations of a party are general and unfounded, the court must draw the attention of the party to the fact that the allegations are unfounded and only if the party does not provide further evidence to support its allegations, may the court resolve the matter by taking into account the fact that the allegations of one party are unfounded³³.

It has been established in court practice that if the only evidence in the case are the statements of the parties and the defendant denies the circumstances provided

30 The participants in the proceedings are plaintiff, defendant and third party (Article 66(1)(1), 72(1) CCP). The court joins a person as a third party in the proceedings who either has an independent claim with regard to the object of a dispute, in which case he or she has equal rights with the plaintiff (Article 79 CCP), or has no independent claim against the object of the dispute, however the outcome of the case may affect his or her rights or obligations towards plaintiff or defendant (Article 80(1) CCP). For ease of reference, plaintiff, defendant and third party shall be referred to in this report as party or parties.

31 The new draft CCP does not provide that this ground will be considered as proved, the civil court decision is considered as documentary evidence.

32 The Supreme Court has held that the admittance must be clear and unconditional and submitted to the court in the written document by a party or entered into the minutes of the court session. Case 3-2-1-104-02, *Olle Veisserik v. AS Lonessa*, published RT III 2002, 25, 291 at point 15. The new draft CCP Article 240(4) provides that a fact shall be deemed as proven unless the other party disputes a fact.

33 Case 3-2-1-129-03, *OÜ Kipling v. Rocco Kaubanduse OÜ*, published RT III 2003, 36, 380, at point 17.

in the statement of the plaintiff, then the plaintiff must produce further evidence, otherwise the action shall be rejected by the court³⁴.

The court may, for the protection of the public interest, collect evidence on its own initiative (Article 91(2) CCP). It remains to be seen in the court practice, whether the actions for damages for breach of competition rules will be considered as cases concerning public interest.

(ii) Standard of proof

The general rules of civil procedure establish that the court must evaluate all evidence from all perspectives, thoroughly and objectively pursuant to law (Article 95(1) CCP) and no evidence shall have predetermined weight for a court (Article 95(2) CCP). Thus there are no general technical expressions, that would lay down the standard of proof and the assessment of the evidence is subjective.

Uniform practice as to the standard of proof used by the judges has not developed yet. Every judge assesses the evidence in accordance with his or her best understanding. Thus, a judge needs to be convinced that the claims and arguments of a party are proven, which basically means that the party who has more probable arguments, which are supported by clear evidence, wins the case.

As regards injunction proceedings, Estonian law recognises a possibility of obtaining an injunction for securing an action. Different types of injunctions are exhaustively enumerated in Article 156(1) CCP, including *inter alia* (i) establishment of a judicial mortgage on defendant's real estate; (ii) prohibition of disposal of property in property register³⁵; (iii) attachment of a movable belonging to the defendant which is in the possession of the defendant or another person, e.g. attachment of bank accounts; (iv) prohibition on a defendant from departing from his or her residence; (v) prohibition on the defendant from entering into certain transactions or performing certain acts; (vi) prohibition on other persons from transferring property to the defendant or performing other obligations with regard to the defendant.³⁶

Standard of proof in injunction proceedings is lower than in the proceedings on the merits. The court will issue an injunction if failure to issue an injunction may render compliance with the judgement difficult or impossible (Article 155(1) CCP).

Due to the fact that national competition law violations are under Estonian law criminal offences, a short description of standard of proof in criminal proceedings is provided below. Standard of proof in criminal proceedings differs greatly from standard of proof in civil proceedings. In criminal proceeding an accused person needs not to accept or deny the accusations. It is the obligations of preliminary investigator and prosecutor to prove the circumstances of the case, whereas the court needs to be convinced and any doubts must be interpreted in the favour of the accused person.

(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?)

Forms of evidence

CCP provides for an exhaustive list of allowed forms of evidence (Article 90(2) CCP):

1. testimony of a witness;
2. statements of a party to the court proceedings or third party in the court proceedings;
3. documentary evidence;

34 Case 3-2-1-103-97, *AS Merineid v. AS Balpada*, published RT III 1997, 29, 303.

35 Only disposal of such property, which must under the law be registered in a specific register, may be prohibited under this clause, including e.g. real estate; buildings, which are not part of real estate; certain vehicles.

36 There are two further measures of injunction, however, these are not relevant in claims for breach of competition law.

4. physical evidence³⁷;
5. on-the-spot visit of inspection³⁸;
6. expert opinion³⁹.

Witnesses

As a rule, every person who may be aware of the facts relevant to a matter may be heard as a witness (Article 101(1) CCP). However certain persons may not be called as witnesses: parties to the proceedings (Article 101(1) CCP); public servants with regard to state or business secrets (Article 102(1) CCP); an advocate or employee of a law office or Bar Association with regard to matters concerning provision of legal services (Article 102(5) CCP, Article 43(1) Bar Association Act, *Advokatuuriseadus*); representatives in civil matters or criminal defence counsel in criminal matters (Article 102 (2)(1) CCP). Certain relatives of the plaintiff or defendant may be called as witnesses, however, they have the right to refuse to give testimony on a reasoned basis if his or her testimony implicates himself or herself or a relative (Article 103(1), (2) CCP).⁴⁰

A CEO may not be called as a witness if he or she is, under Estonian law a member of Board of a legal person or representative of the legal person on the basis of a power of attorney, otherwise, he or she can be called as a witness⁴¹.

It has been established through court practice that written statements of persons who are not parties are not considered as evidence. If these persons know relevant circumstances, then they must be called as witnesses⁴².

Hearsay evidence is not excluded under Estonian civil court procedure rules, however, depending on the circumstances of the case they may have less evidentiary value.

Witnesses from other jurisdictions

If there is a need to hear a witness from another jurisdiction (within⁴³ or outside Estonia), then the court may, at the request of a party, issue a ruling on the hearing of witnesses in the court of different jurisdiction (Article 96(1) CCP). In such case, the testimony of such witness, collected in another jurisdiction, is disclosed in a court session (Article 112(1) CCP). Similarly, other forms of evidence may be requested from other jurisdictions.

Estonia is a party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. In accordance with this convention, evidence from abroad may be obtained from Contracting States.

Witnesses from Latvia, Lithuania, Poland, Ukraine and Russia can be summoned pursuant to agreements on legal assistance and legal relations (e.g. Article 12 of the Agreement with Latvia and Lithuania) concluded between Estonia and the

37 Physical evidence is a thing the existence or characteristics of which may facilitate ascertainment of the facts relevant to the adjudication of a matter (Article 122 CCP), this type of evidence shall not be considered in more detail as in actions for damages for breach of competition law cases they are not likely to have large importance.

38 If the inspection of an immovable, area or the scene of an event is necessary for the adjudication of a matter, the court may, at the request of a party or on its own initiative, conduct an on-the-spot visit of inspection. In the course of an on-the-spot visit of inspection, an immovable, area or the scene of an event shall be described in detail and, if necessary and possible, its relevant characteristics shall be photographed or recorded in some other manner (Article 127 CCP). This type of evidence shall not be considered in more detail as in actions for damages for breach of competition law cases they are not likely to have large importance.

39 See answer to E(b)(i) for more.

40 Additionally minister of religion and employees of medical institutions may not be called as witnesses with regard to knowledge in the course of their professional activities (Article 102(4), 102(2)(2) CCP).

41 Estonian Commercial Code (*Äriseadustik*) does not provide for the position of CEO as a body of a company. Companies always have a Board, and it is usual that a person who manages the company's day to day activities and is commonly referred to as CEO is a member of Board in Estonia. However in the cases, where the CEO is not a member of Board, he or she can be called as a witness unless he or she has already presented to the court a power of attorney signed by the board member(s), to represent the company in the current court case.

42 Case 3-2-1-145-01, *Regina Lõovälja v. Republic of Estonia*, RT III 2002, 3, 16. The new draft CCP Article 262(1) provides for a possibility of a written testimony.

43 Even though there are a number of court jurisdictions within Estonia, the witnesses are generally called from any part of Estonia. If the witness is for exceptional reasons unable to appear at the court, then the witness can be heard at the court, which is closer to his or her place of residence.

respective country. However, the summons may not include any sanctions for non-appearance. The witnesses can not be summoned from countries other than those listed above. However it is usual that the party, who is interested in the calling of a particular witness, ensures that the person will appear at the court, even if such person can not be summoned under the law.

Statements of parties⁴⁴

Statements of parties are considered as evidence. The statement of a party must be given in the court session⁴⁵, whereas in the case of a company only its Board members may give statements. Representatives of a company acting on the basis of a power of attorney may not give statements. It must be noted that a written statement of a party is not considered as having necessary procedural form.

A party to the proceedings may request from the court that the opposite party or third party in the proceedings gives a statement under oath (113(3) CCP). There is no established difference for the purpose of assessment of the evidence between a regular statement by the party and a statement under oath.

Documentary evidence

Documentary evidence can take the form of a written document or other documents which are recorded by way of photography, video, audio or other data recording, contain information on facts relevant to the adjudication of a matter and can be submitted to the court in a perceptible form (Article 117(1) CCP). The opinions of specialists are considered as documentary evidence (Article 117(3) CCP), unless they are given in accordance with the rules for expert opinion. (See also section (E(b)(i) below)

A copy of the documentary evidence may be submitted to the court, however, the court may require the submission of the original (Article 118(1) CCP).

If certain documentary evidence is unavailable to a party, then such a party may request the court's assistance in the submission of the document from a party to the proceedings or any other person⁴⁶ (Article 119(1), 120(1) CCP). The court may request such documents from the local competition authorities, except for documents which include state or business secret or other confidential data, which the competition authority may not disclose.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court:

Estonian civil court procedure lays down requirements as to when different evidence has to be submitted and what methods can be used for obtaining evidence.

The evidence must, as a rule, be submitted to the court in preliminary proceedings, which are conducted by the court after the filing of a statement of claim (Article 163(1) CCP). All evidence, which the party wishes to use, must be submitted in the pre-trial proceedings within the time fixed by the court. The court may reject evidence which is submitted later, if it becomes evident that a party in the proceedings wants to delay the proceedings, surprise the opposing party or achieve some other improper aim (Article 165(4) CCP). In the pre-trial proceedings the court also decides on the requests of the parties, e.g. conduct of an expert assessment, on-the-spot visit of inspection, hearing of a witness, submission of physical or documentary evidence (Article 165(2) CCP).

44 The new draft CCP Article 278 limits the role of the statement of a party. Namely the statement of a party may be requested only if the other party has been unable to prove the existence of a circumstance with other evidence. A person may request interrogation of himself or herself only if the other party consents. If a party refuses from giving a statement then the court may consider that the circumstance of the other is considered as proven because the other party did not give his statements as to the contrary (Article 281(1)).

45 If a party can not appear in the court, then the court may take the statement from the party in his or her location (Article 115 CCP).

46 Documentary evidence may not be requested from persons who may not be called as witnesses (Article 120 CCP).

The court holds a preliminary hearing, to which the parties are summoned (Article 169(1) CCP). During this hearing, the parties must explain all their claims and objections orally to the court and specify all the evidence (including identities of witnesses and the facts to be proven by testimony of witnesses) on which their claims and objections are based (Article 169(3) CCP). The court decides on whether to accept the evidence submitted by the parties (Article 169(4)(3) CCP).

Production of documents

There is a specific procedural means for obtaining evidence, which is similar to common law "production of documents". If certain documentary evidence is inaccessible to a party, then such a party may request the court's assistance in obtaining such a document from another party to the proceedings or any third party (Article 119(1), 120(1) CCP). Party requesting the production of documents must describe the document and indicate why he or she believes that the document is in the possession of such person (Article 119(2) CCP). The law does not provide for further rules on how exact the description of the document must be, however, it can be deduced from the spirit of the law, that the description must be so exact, that such a description refers to a single document.

There is a theoretical possibility that a request for production of documents could be submitted to the court already before the submission of an action. This could be possible in cases, where it can be shown that at a later date it may be impossible or difficult to obtain such a document (Article 98(1), (2) CCP). Furthermore, the applicant must show, why it is impossible to submit an action at that period of time. We are not aware of any such applications ever submitted to the court.

The court will order the production of such documents, which have relevance in the case, whereas the power to decide on the relevance and consequently on whether to order documents is enjoyed by the judge alone. If the court decides not to order the production of a document, then the judge must give his reasons for refusal (Article 119(3) CCP).

Certain persons, e.g. attorneys, are entitled to refuse the production of document (Articles 120(2)-(5) CCP), however companies may not refuse to produce documents, even on the grounds that a document contains business secrets. Local competition authorities and other state or local government institutions can not be ordered to produce documents, which include state or business secrets or other confidential data.

If a person fails to comply with a court order to produce documents, then the court may impose a fine on such person. The amount of fine shall be determined by the court in the range of ¼ to 6 minimum salaries⁴⁷. If the person still fails to comply with the court order, a new fine in the amount of up to 12 minimum salaries may be imposed, and such fine may be repeated (Article 120(6), 32(2) CCP).⁴⁸

47 Minimum salary has been determined by the Government at 2480 EEK, which is approximately 160 EUR.

48 As provided at E(a)(i) above, new draft CCP foresees that if a party to the proceedings refuses to produce a document, then the court may consider the arguments of the other party with regard to the subject matter of such document as proven (Article 295 (2) draft CCP).

(b) Proving the infringement

(i) Is expert evidence admissible?

Yes. At the request of a party, the court may appoint an expert (Article 129(1) CCP), who must give a reasoned expert opinion (Article 132(1) CCP) on questions submitted by the court (Article 131(1) CCP). If the parties have agreed on the expert then the court must appoint such person as an expert provided that he or she is qualified.

An expert is a person who can ascertain facts relevant to the matter and has the requisite expertise. CCP foresees that a forensic expert from a national forensic institution, an officially certified expert or another qualified person may be an expert (Article 130(1) CCP). Therefore, if the court agrees that certain person has expertise, anyone can be appointed as an expert. As a rule an expert may not be appointed to ascertain circumstances of laws. As an exception in international private law cases the expert may be used to determine relevant provisions of foreign law and the practice of interpretation of foreign law.

The questions to the expert are submitted by the court, who may take the parties' suggestions on the questions into account.

It must be noted that the expert opinion does not have a predetermined weight in comparison to other forms of evidence⁴⁹.

However, where an expert opinion has been provided in the matter, the party may dispute the findings of the expert only by disputing the competence of the expert. If the expert opinion is unclear or incomplete, the party may request a further expert assessment, which shall be conducted by the same or another expert (Article 136(2) CCP). Where an expert opinion is ambiguous, contradictory or insufficient and cannot be corrected by oral questioning, the court has the right to order a reassessment on its own initiative or at the request of a party, which shall be conducted by another expert (Article 136(1) CCP).

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

A witness may be questioned by the party opposed to the party who called the witness after the party who called the witness has completed the questioning (Article 107(3) CCP). The court has the right to exclude leading questions and questions which are not relevant to the matter in hand (Article 107(5) CCP).

(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?

A statement or decision of ECB or competition authority of another EU Member State has the value of documentary evidence, provided that the statement or decision has relevance to the matter (Article 117 CCP). Even though such statements and/or decisions do not have a predetermined weight it is quite likely, that in practice such decisions would be given great weight.

The court may involve ECB in the proceedings as the state agency protecting public interest (Article 89(1) CCP) if the court considers that there is a public interest and their involvement is necessary. In such cases, ECB provides an opinion with regard to a matter to be considered by the court together with the evidence gathered in the case (Article 89(3) CCP).

Amendments have been proposed to ECA and if they are adopted, then the courts will be obliged to join ECB to the court proceedings for opinion every time the application of Articles 81 or 82 EC are in question.

49 In accordance with the new draft CCP Article 241(3) the opinion of a specialist, appointed at the consent of the parties, is, as a rule, binding on the court.

The evidential value of court decisions is considered at E(a)(i) above. In the situation where a party to the proceedings has not been a party to proceedings from which a court decision is submitted, the court decision is considered as documentary evidence⁵⁰.

(c) Proving damage

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

CCP does not provide for any specific rules for evidence of damage. However, the Supreme Court has held that damage can not be deemed as proven on the basis of only the statement of the plaintiff⁵¹.

Under Article 127(6) LOA the court may determine the amount of compensation if it has been established that damage has occurred but exact extent of the damage cannot be established. This applies to e.g. future losses. In the case of future losses, the court may also decide the amount of compensation in the future (Article 127(7) LOA). In such case CCP does not provide for specific rules on how the court must render a decision in the future. It may be concluded that the injured party must submit a new action to claim the determination of the amount of compensation, in such proceedings it needs not to be proven any more that damage has occurred.

(d) Proving causation

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

The plaintiff must prove causation between (a) the defendant's act and the breach of law, which results in the commission of a delict (unlawful act) and (b) the defendant's act and damage to the plaintiff⁵².

In determining the existence of a causal link, the rule of *conditio sine qua non* is used. Causation between the defendant's act and the breach of law exists if the breach of competition rules has occurred as a result of the action of the defendant. If it is possible to ignore the action of the defendant and as a result the current breach of competition rules would have occurred anyway then there is no causal link between the defendant's act and the breach of law and there is no delict (Article 127(4) LOA).

In determining the causation between the defendant's act and the damage, a similar method is used, and the question asked is whether the damage to the defendant would have occurred if the plaintiff had acted differently. If the damage would still have occurred, then there is no causation.

It must be noted, that if several persons may be liable for causing damage and it has been established that any one of them may have caused the damage, then damages may be claimed from all such persons. Damage may be claimed from them in proportion to the probability that the damage was caused by the person concerned. Each person escapes liability if he or she proves that he or she did not cause the damage (Article 138 LOA).

It is unclear whether the courts will in practice accept indirect causation. There is no direct impediment to it arising from the law. Depending on the situation, the legal literature provides for both cases, where only direct causation is allowed⁵³ and cases, where also indirect causation⁵⁴ is allowed. Even though it is probable that Estonian courts will be cautious in accepting indirect causation it is not excluded that the courts may take into account the specific features of competition

50 Case 3-2-1-28-03, *WESOTRA-Spedition und Transport GmbH v. OÜ T.R. TAMME AUTO*, published RT III 2003, 10, 107, at point 11.

51 Case 3-2-1-17-96, *ÜÜ Sivex Invest v. Tallinn Bank Haapsalu branch*, published RT III, 1996, 9,123.

52 See footnote 26, at 79.

53 See footnote 11, at point 763.

54 Hager, G., *Õigusvastaselt kahju tekitamine. (Unlawful Causing of Damage)* (Ministry of Justice, 2001), at 299.

law, particularly the need to protect indirect purchasers, and allow indirect causation in competition based damages cases.

F. Grounds of justification

(i) Are there grounds of justification?

LOA Article 1045(2) and 1045(3) enumerates circumstances, when the causing of damage is not unlawful and the person causing the damage is not liable:

- Where the purpose of the provision which the tortfeasor violates is other than to protect the victim from such damage (Article 1045(3) LOA)⁵⁵. It must be determined, whether the objective of Article 4 and 16 of ECA is to protect the victim from damage or not. It is quite clear that the object of Article 4 and 16 ECA is to protect third parties, thus there is no justification for excluding liability towards the third parties under this ground. However, it is not excluded that the courts could find that the object of Article 4 ECA is not the protection of parties to a restrictive agreements (which could lead to with a situation contrary to the ECJ's findings in *Courage v. Crehan*) or that the object of the above ECA provision is not the protection of a party to the restrictive agreement, who bears significant responsibility for the distortion of the competition (which could lead to practice in accordance with *Courage v. Crehan*). It is very unlikely that the liability of a dominant undertaking could be excluded on this ground.
- If the victim consents to the damage being caused, except in the case where the grant of such consent is contrary to law or good morals (Article 1045(2)(2) LOA). The consent of a weaker party to the restrictive agreement is contrary to the law. It is not excluded that the courts could consider the consent of a person to the abuse of dominant position as justification to exclude the liability of a dominant undertaking.
- If the tortfeasor acted out of necessity. It is provided in Article 141(1) of the General Principles of the Civil Code Act (*Tsiviilseadustiku üldosa seadus*, hereinafter referred to as GPCCA) that a person who causes damage in order to prevent danger to himself or another person or to property does not act unlawfully if the damage is necessary to prevent the danger and the damage is not unreasonably extensive compared to the danger. On the basis of this definition this ground could be used by the courts to exclude liability of a weaker party to an agreement restricting competition. There is no court practice concerning this ground.

It is not entirely excluded that force majeure could be considered as ground of justification. It remains to be seen in future court practice, whether this could be the case.

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

Passing on

There is no statutory provision regulating this issue, nor is there any court practice. However, the plaintiff may demand compensation only for such damage which it has actually suffered and furthermore, any gain received by the plaintiff as a result of the causing of damage shall be deducted from the amount of compensation (Article 127(5) LOA). Thus, if the plaintiff suffered a smaller amount of damage as a result of "passing on" the higher prices to its customers, then the plaintiff's claim in respect to the damage which was not suffered, will not be compensated by the court.

55 It must be noted that this ground for excluding unlawfulness is valid only if the courts will take the position that the legal basis for the current claim is Article 1045(1)(7) LOA (violation of a duty arising from law), thus it is not valid if the claim is based on Article 1045(1)(8) LOA (behaviour contrary to good morals).

There are no special provisions or practice to shift the burden of proof. The plaintiff must prove the damage in order to receive satisfaction of the claim. However, in cases where the plaintiff asserts that the defendant has caused the damage by way of increasing prices as a result of an anti-competitive agreement, the court may award the payment of all the damages (claimed amount) unless the opposing party refers to the possibility that the increased prices may have been passed on. If the opposing party provides sufficient proof that the prices have been passed on, then it is likely that the court will not award the damages in the claimed amount unless the plaintiff proves that the prices were not passed on.

There is no presumption that higher prices have been passed on.

Indirect purchaser

There is no relevant practice in competition law cases. The question here is whether the causal link between the act of the tortfeasor and the damage could be indirect. It is left up to the courts to determine whether such claims may be successful.⁵⁶

In different circumstances, the Supreme Court acknowledged in the *Jacobsen* case that an indirect link is sufficient⁵⁷. Indirect causation is thus not excluded under Estonian law. However, it is unclear, whether LOA allows indirect causation and it remains to be seen whether the "indirect purchaser" will have a claim under Estonian law.

(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 is (partly) responsible for the infringement then the amount of compensation for damage suffered shall be reduced to the extent that the infringement by the plaintiff contributed to the damage (Article 139(1) LOA). Similarly, the amount of compensation shall be reduced if the person, who suffered damage, failed to draw the attention of the person causing the damage to an unusually high risk of damage or to prevent the risk of damage or to perform any act which would have reduced the damage caused if the person, suffering the damage, could have reasonably been expected to do so (Article 139(2) LOA).

If the plaintiff has benefited from the infringement, then any such benefit, including also any costs avoided by the plaintiff, shall be deducted from the amount of compensation (Article 127(5) LOA).

G. 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. It is possible that profit by the defendant could constitute an indicator of the level of damage suffered by the plaintiff, however, there are no clear legal provisions or practice in this regard.

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

⁵⁶ See also E(d)(i).

⁵⁷ In Case 3-2-1-125-03, *Anne Margret Jacobsen v. Margit Mets*, published RT III 2004, 1, 9, at point 27 Supreme Court held, that in accordance with Article 20(1) of Notaries Act (*Notariaadiseadus*, no longer in force) the causation must not appear in the direct link between the unlawful act and the consequence (damage), but may lie in the chain of causes (series of events), the possibility for which has been created by the Notary Public by breaching its obligations. In such case the plaintiff must prove that the series of events resulting in the damage to the plaintiff could not have started without the act of the Notary Public.

Estonian law does not generally limit the award of damages with regard to the place where the injury has occurred. However ECA applies to acts and omissions committed in Estonia or acts and omissions committed outside Estonia the effects of which occur in Estonia (Article 1(2) ECA). Therefore, damage caused by violation of ECA can be claimed in full as regards the injury suffered in Estonia. Damages for injury suffered outside Estonia can be claimed if the act which caused the damage is in conflict with ECA, i.e. the restrictive agreement has been concluded in Estonia or abuse has occurred in Estonia, however injury was suffered outside Estonia.

If, in the future, damages are claimed for violation of EC competition rules, then it should be possible to claim damages for injury suffered throughout the Community, as it is the object of EC competition rules to prohibit restriction of competition within the common market.

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

Estonian court practice in respect of calculation of damages is not so extensive to be able to make a generalization of the economic models used. The damages are to be calculated in accordance with the general rules provided in Article 127 LOA. The damages must be calculated so that the plaintiff would be placed in a situation as near as possible to that in which he would have been if competition had not been restricted or the defendant had not abused its dominant position (rule of total reparation). As a result, direct damages⁵⁸ as well as loss of profit⁵⁹ shall be compensated.

Damage shall not be compensated to the extent that prevention of damage was not the purpose of Article 4 or 16 of ECA. To elaborate on this, there is a general rule in the LOA Article 127 that damage is not compensated to the extent that the prevention of the damage was not the purpose of such a provision, which constitutes the basis of claim. In the current situation Articles 4 and 16 constitute the basis for the claim for damages. Even though there is no relevant practice it is likely that the courts will find that the purpose of Articles 4 and 16 ECA is to protect customers, economic operators, who are harmed by violation of competition, and certain other persons. Thus these persons should be given the right to claim damages under the general rule of compensation for damages. This general rule may however prevent, similarly with Article 1045(3) LOA (see section F(i) first subparagraph) stronger party from claiming damages for their own breach from weaker undertakings, because it is not the purpose of Articles 4 and 16 to protect the stronger party.

The Supreme Court has held that the damage may in principle be calculated in two ways: for positive damages in the cases of breach of agreement, where the plaintiff must be restored to the position it would have been had there not been a breach of agreement or for negative damages, where the plaintiff must be restored to the position, it would have been in if the agreement had not been concluded. Negative damages can be claimed on the basis of a null and void agreement, in such a case the plaintiff may demand also the costs of the conclusion of the agreement (e.g. notaries fee and legal costs).⁶⁰ No uniform practice has developed as to which of these models should be used in case on non-contractual liability. However, it must be noted that restrictive agreements are null and void under Article 8 ECA, thus negative damages should be awarded in the case the damage is claimed on the basis of violation of Article 4 ECA.

The Supreme Court has held that loss of profit does not include avoided costs, i.e. costs, which the person would have incurred to receive profit, thus if the plaintiff

58 Article 128(3) LOA defines direct damages as primarily, the value of the lost or destroyed property or the decrease in the value of property due to deterioration even if such decrease occurs in the future, and reasonable expenses which have been incurred or will be incurred in the future due to the damage, including reasonable expenses relating to prevention or reduction of damage and receipt of compensation, and including expenses relating to establishment of the damage and submission of claims relating to compensation for the damage.

59 Article 128(4) LOA defines loss of profit as loss of the gain which a person would have been likely to receive in the circumstances, in particular as a result of the preparations made by the person, if the circumstances on which compensation for damage is based would not have occurred. Loss of profit may also include the loss of an opportunity to receive gain.

60 Case 3-2-1-106-03, *AS Balteco v. Priit Suviste*, published RT III 2003, 33, 342, at 14.

made certain expenses in order to receive a certain income, then these expenses shall be deducted from the compensation amount.⁶¹ Also the sum in which the plaintiff avoided the fulfilment of his or her obligations, must be deducted from compensation amount.⁶² Consequently the loss of profit is calculated so that not all of the income, which a person would have received, had there been no violation, will be awarded to such person. Certain costs must be incurred by any person in order to receive some income and such costs, i.e. avoided costs, shall not be awarded to the plaintiff. Furthermore, it may be that as a result of the violation by the defendant, the plaintiff suffers loss, however, at the same time, the plaintiff does not have to incur certain costs as a result of the violation.⁶³

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

Both estimates can be used, and which one particularly depends on the specific case. Ex-post estimates could be generally more able to place the plaintiff in the situation he or she would have been had there have been no unlawful causing of damage by the defendant⁶⁴.

(v) Are there maximum limits to damages?

No.

(vi) Are punitive or exemplary damages available?

No. Estonian civil law does not provide for a possibility of punitive or exemplary damages. It follows from general principles of Estonian civil law that the aim of the compensation for damage is not to punish the offender but to reinstate the injured party to the state it would have been had there been no violation by the offender.

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

Estonian laws do not foresee any situation where fines imposed by competition authorities should be taken into account when awarding damages. However, Article 140(1) of LOA provides that the court may reduce the amount of damages if the award of damages in full would be grossly unfair to the defendant or not reasonably acceptable for any other reason. The law further provides that in such cases all circumstances are taken into account, in particular the nature of the liability, relationships between the persons and their economic situations, including insurance coverage. It is possible that the courts will, in awarding the damages, take into account the fines imposed on the defendant and reduce the damages claimed by the plaintiff to ease the burden of the defendant. However, the practice of the courts remains to be seen in this respect.

(b) Interest

(i) Is interest awarded from the date

The plaintiff can claim interest as of the time the obligation to pay damages falls due. The obligation to pay damages for a delict falls due at the moment in time when it is possible to calculate the amount of damages. In accordance with the general principle, the defendant should pay interest as of the moment, when the damages amount could be calculated. However, distinguished Supreme Court judge T. Tampuu has expressed his conviction that if the defendant does not know

61 Case 3-2-1-90-99 OÜ Peipus v. Republic of Estonia, published RT III 1999, 28, 270.

62 Case 3-2-1-153-02, AS A.R.B (in bankruptcy) v. Republic of Estonia, RT III 2003, 2, 25, at point 15.

63 For example, in the A.R.B case (see previous footnote), there was a situation, that the bailiff sold certain property of the plaintiff, whereas such property was sold without legal basis. Before the illegality of the execution proceedings was established, the proceeds from the sale of the property were transferred to the bank, who was a creditor of the plaintiff. The plaintiff claimed the return of the whole sum, which was received from the sale of property of the plaintiff, because the execution proceedings were unlawful. Supreme Court found that the courts must take into account the fact that the plaintiff was released from the performance of its obligations as a result of unlawful execution proceedings, namely, the plaintiff's obligation towards the bank was fulfilled by the bailiff, and in such sum the plaintiff avoided the payment of necessary sums to the bank- these are avoided costs, which must be reduced from the compensation amount

64 See footnote 63.

that the obligation to pay damages for a delict has fallen due because the plaintiff has not yet submitted his claim, then for such period the amount of interest amount should be reduced by the court in accordance with Articles 113(8) and 162 LOA.⁶⁵

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

The level of interest is provided in Article 113(1) of LOA. The respective rate is last interest rate applicable to the main refinancing operations of the European Central Bank before 1 January or 1 July of each year, plus seven per cent, per year, thus now the interest rate is 9%.

(iii) Is compound interest included?

No (Article 113(6) LOA).

H. Timing

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

The limitation period for a claim arising from damage caused unlawfully is three years as of the time when the injured party became or should have become aware of the damage and of the identity of the person obligated to compensate for the damage (Article 150 (1) GPCCA). It is probable that the courts will determine in future practice that a party to a restrictive agreement becomes aware of the damage and the person obligated to compensate for the damage as of the conclusion of the agreement. Regardless of when the injured person became aware of the above circumstances, the claim for unlawfully caused damage expires not later than ten years after performance of the unlawful act (Article 150(3) GPCCA).

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

Pursuant to the civil courts' statistics for 2002, judgements in the first instance courts were handed down within an average of 140 days.⁶⁶ If the first instance court decision is appealed, then the appeal proceedings usually do not take more than 3-4 months. If the Appeal Court decision is further appealed and the Supreme Court decides to proceed with the matter, then the Supreme Court makes a decision within an average of 3-4 months.⁶⁷ However, as a claim for damages for breach of competition rules is a claim based on novel provisions of law and may involve complex economic questions or context, it may be expected that the conduct of such a case could take longer.

(iii) Is it possible to accelerate proceedings?

There are no possibilities under the current civil procedure whereby the party could request any accelerated procedure⁶⁸. However, if both parties have an interest in a more speedy solution, then there are some possibilities.

In the first instance courts, if both parties attend the preliminary hearing and all the relevant evidence has been submitted, then the parties may request that the court session be held and the merits of the matter be adjudicated immediately as a continuation of the preliminary hearing.

In the appeal court, the proceedings may be accelerated if neither the plaintiff nor the defendant requests for the adjudication of a matter in court session. In such a case, the appeal court may decide the matter in written proceedings without summoning the parties (Article 316(1) CCP).

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

65 See footnote 26, at 71.

66 Court statistics is available in Estonian at: http://www.just.ee/files/statistika/2002I_II.htm

67 Supreme Court statistics is available in Estonian at: <http://www.nc.ee/riigikohus/>

68 The new draft CCP Articles 426-428 provide for a possibility of written proceedings if both parties consent to it and accelerated procedures for claims not exceeding 50,000 EEK (approximately 3200 EUR).

In the courts of first instance the actions for damages cases are reviewed by a court panel consisting of one judge unless at least one party demands the participation of two lay judges or the judge considers the participation of lay judges as necessary (Article 11(2) CCP).

In the Appeal Courts and Supreme Court three judges sit in actions for damages cases (Articles 14(1), 14(3)(1), 15(2) CCP).

(v) How transparent is the procedure?

As a rule the court hearings are open to the public (Article 8(1) CCP). The court may hold the court hearing *in camera* if it is necessary for the protection of business secrets (Article 8(3)(1) CCP)⁶⁹. The court decision in such cases is in any event made public (Article 8(6) CCP).

Until there is an effective court decision, the file of the case can be inspected only by the parties to the proceedings (Article 67 CCP). After the court decision has become effective, a person with a legitimate interest has the right to examine the court file unless the court hearing was held *in camera* (Article 8(8) CCP)⁷⁰. Accordingly there is access to the whole file, including the parties written pleadings. Such access is provided by judge of the court, where the file is located. It has not been provided in the law, who has legitimate interest, thus this is decided on a case-by-case basis. CCP does not foresee for an effective possibility of disputing the decision of the judge not to allow access to file.

I. Costs

(i) Are Court fees paid up front?

The state fee must be paid by the plaintiff upon submission of an action (Article 47(1)(1) CCP)⁷¹. Fees for experts, interpreters and translators, costs of on-the-spot visits of inspection, postage and costs of serving summonses shall be paid in advance by the party who submits the application from which such costs arise. If both parties submit an application or if the court summons a witness or expert or requests that an on-the-spot visit for inspection be conducted, the costs shall be paid by the parties in equal amounts (Article 54(1) CCP).

(ii) Who bears the legal costs?

As a rule each party must bear its costs, however, these costs may be recovered from the other party under certain circumstances as indicated below.

The court may release a natural person from payment of the state fee (Article 57(1) CCP) and/or for legal assistance and to charge the advocate's fees to the state if the court finds that the person is insolvent (Article 59(1) CCP).

The State Fees Act (*Riigilõivuseadus*) Article 16(1)(4) provides that all persons are released from paying a state fee in actions for damages caused by a criminal or administrative offence. Articles 399 and 400 of the Penal Code foresee that restrictive agreements and abuse of dominant position are criminal offences. Consequently, if it has been established in criminal proceedings that a criminal offence has been committed, then the plaintiff has the right to submit an action for compensation of damage caused by such criminal offence without paying the state fee.

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

69 The new draft CCP Article 39(1)(6) provides that the court hearing may be heard *in camera* for the protection of business secret only if the public hearing would be detrimental to the interest worthy of protection.

70 Under the new draft CCP Article 59(3) the interested persons may be able to inspect the file in the cases, where the hearing had been held *in camera*.

71 The amount of the state fee is dependant on the amount of claim and it is provided for in the State Fees Act. For example, in case the amount of the claim is € 100,000, the state fee is approximately € 4100. If the amount of the claim exceeds € 639,111, then the state fee is 3,5 % of the claimed amount.

Fees, which are charged for lawyers' services only if the lawsuit is successful are permissible, although not very usual in Estonia.

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

At the request of a party, in whose favour a judgement is made, the court orders that the other party shall pay the necessary and justified legal costs of the first party (Article 60(1) CCP). If an action is satisfied in part, the legal costs to be borne by the plaintiff shall be calculated in proportion to the satisfied claims and the legal costs to be borne by the defendant shall be calculated in proportion to the part of the action which was dismissed. If an action is satisfied in part, the court may also decide that the legal costs of both parties will be borne by the parties themselves (Article 60(1) CCP).

Payment for the costs of legal assistance are ordered by the court only in an amount up to five per cent of the value of the satisfied part of the action in favour of the plaintiff or in an amount up to five per cent of the value of the dismissed part of the action in favour of the defendant (Article 61(1)(1) CCP)⁷².

If a plaintiff discontinues an action, the court may order that the plaintiff must pay the legal costs of the defendant unless the plaintiff discontinues the action due to satisfaction of the claim by the defendant (Article 62(1) CCP).

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

The Court fees are (Article 46 CCP) (i) state fee; (ii) costs essential to proceedings (e.g. fees for experts, interpreters and translators and compensation for witnesses; costs of obtaining documentary evidence; costs for legal assistance; wages which a party does not receive due to absence from work and travel and accommodation expenses, etc); (iii) security on cassation⁷³.

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

There are no specific rules.

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

Currently, there are no insurance firms, which offer legal aid insurance. Furthermore legal aid in such cases is not available from government /public authorities.

(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?

Since we are not aware of any such cases brought before the courts, it is extremely difficult to estimate the relevant costs. If the claim for the damages would amount to EUR 1 million, then state fee in the amount of EUR 35,000 must be paid upon commencement of the action. If expert evidence is used, then the respective costs should be added as well as any other costs provided for at Section I(v) above. Furthermore, the costs for legal advice accompany. It is very difficult for us to estimate the respective costs for legal advice, however it should be noted, that irrespective of how large the costs for legal assistance are, only costs up to 5 % of the claimed sum, i.e. EUR 50,000 can be recovered from the losing party. The court may also decide that legal costs below 5 % of the claimed sum can be recovered. Furthermore, it is not excluded that the costs for legal assistance alone may exceed EUR 50,000.

72 The new draft CCP Article 185(1) abolishes the "five per cent rule" and provides that reasoned and necessary costs for legal assistance may be compensated to the winning party. The maximum rates shall be provided in the regulation to be adopted by the Government of the Republic.

73 Security on cassation must be paid upon submission of appeal in cassation to the Supreme Court. The amount of the security on cassation is 1 per cent from the contested amount, but not less than 200 EEK (€ 12.7) and not more than 20 000 EEK (€ 1,278). If the appeal in cassation is satisfied in full or in part, then the security on cassation is returned.

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?

There are no specific procedural or substantive rules as 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 courts may take into account public policy issues. It is not clear, however, whether the courts will consider claims for damages for breach of Estonian competition rules to involve public interest or not.

If the court determines the existence of a public interest, there are several specific provisions which require different procedures to be followed:

- Default judgement cannot be made in preliminary proceedings (Article 168(2) CCP);
- The court may not accept the discontinuance of an action nor approve a settlement of the parties if this is detrimental to the public interest (Article 182(5) CCP);
- The court may not appoint a mediator to settle the dispute (Article 165(3) CCP);
- If the court considers that it is necessary for the protection of the public interest, the court may take an active role in gathering the evidence and gather the evidence itself (Article 91(2) CCP)⁷⁴ and base the decision on that evidence, which has not been submitted by the parties (Article 229(2) CCP).
- The court may involve the Estonian Competition Board in proceedings as explained at E(b)(iii) above.

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

CCP provides that only natural and legal persons may be defendants. State and local government act in civil proceedings through their agencies. There is no difference according to whether the defendant is a legal person belonging to the state, any other legal person or natural person.

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

There are no leniency programmes in Estonian competition law.

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

There is no court practice in the actions for damages for breach of competition rules in Estonia yet. It is expected that there will be no major differences in the future, as the Supreme Court ensures the uniform application of laws in Estonia.

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

It must be noted that the legal basis for submitting an action for unlawful causing of damage by violation of competition rules is provided in Law of Obligations Act, which is very recent. Thus, there is little legal literature and court practice on the relevant provisions. To a certain extent guidance can be taken from German legal

74 The new draft CCP Article 239(3) provides that the court may collect evidence at its own initiative, only if such possibility has been provided for in the law. Unless ECA or any other law is changed to allow the court to gather evidence in competition cases, the court will not be allowed to gather evidence in competition law cases.

literature and practice, but it must be born in mind that LOA has not been copied entirely from German legislation, it has been inspired by the laws of many other jurisdictions, and thus German legal practice cannot provide complete solutions. Therefore, a major part of the LOA provisions will be clarified in future court practice. How such practice will develop cannot be determined with complete certainty.

Estonian law does not foresee specific provisions for the implementation of directly effective EC provisions. The knowledge of the legal and business community with regard to the EC law is not great and thus claims submitted on the basis of Articles 81 and 82 EC may face a number of obstacles due to the lack of knowledge of the operation of EC *acquis communautaire*. It remains to be seen, whether there will be a small or large number of cases where effect on trade between Member States could be achieved by a restriction of competition in Estonia. ECA Articles 4 and 16 are similar to Articles 81 and 82 EC, thus the courts will be able to benefit from this similarity in implementation of both Estonian and EC competition rules.

Applicable law

Further to Private International Law Act⁷⁵ (*Rahvusvahelise eraõiguse seadus*, hereinafter referred to as PILA) claims for unlawful causing of damages are governed by the law of the state, where the act which forms the basis for causing the damage was performed (Article 50(1) PILA), i.e. the law of the state, where breach of competition law was performed. However, if the consequences of the breach occur in another state, then at the request of the plaintiff, the law of the state, where the consequences of the act forming the basis for causing the damage, occurred (Article 50(2) PILA).

Furthermore, if the non-contractual obligation has a closer connection with the law of the state that would be applicable in accordance with the above rules, then the law of the state having closer connection, will be applied (Article 53(1) PILA). Practice as to what forms a closer connection has not developed yet, however, legal relationship and factual connections between the parties and the fact that the parties reside in the same state, may constitute a closer connection (Article 53(2) PILA).

(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

There are no cases decided on the basis of the relevant laws.

I. 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?

The general legal framework, which enables the submission of claims for private enforcement of Articles 81 and 82 EC as well as Articles 4 and 16 ECA, is in place. However, since the relevant provisions in the LOA came into force only on July 1, 2002, we have no knowledge of any court decisions which have been handed down and which have been based upon LOA and concerning the private enforcement of competition rules.

Even though the general legal framework is in place, private enforcement of competition rules could be enhanced, by providing specifically in LOA (Article 1045), that violation of Articles 4 and 16 of ECA and respective EC Treaty provisions is unlawful.

It is not entirely clear whether a defendant in the competition law violation cases must prove lack of intent or negligence (see Section D(iii)). In order to enhance

75 Adopted by the Parliament on March 27, 2002, came into force on July 1, 2002.

the private enforcement of competition law, it could be stipulated specifically that even negligent acts violating the provisions of ECA, could serve as a basis for liability.

As explained at F(i) above, the provision in LOA excluding the unlawfulness of a specific action can be construed so that the party to a restrictive agreement could be considered as not having the right to claim damages because the object of the law is not to protect victim in such a case or because unlawfulness is excluded as it is necessary for the tortfeasor to cause damage. It is the belief of the authors of this section, that Articles 1045(2) and 1045(2)(3) should be construed so that they could bar the claims for damages only for the party to a restrictive agreement who carries the main responsibility for the breach of competition law (stronger party). There is no relevant court practice, however, and the increase in private enforcement of competition rules could be *inter alia* achieved by provisions in the law, whereby it is specifically provided, that a weaker party to a restrictive agreement could not be barred, from claiming damages for breach of competition rules.

On the basis of current legislation it is not clear, whether an "indirect purchaser" (See answer at F(ii)) could submit a claim against a person who violates competition rules as a result of which the plaintiff suffers damages in the situation where the "indirect purchaser" does not have a direct contractual link with the tortfeasor. In accordance with the definition of causal link provided in Article 127(4) LOA, it is more probable that the claim of "indirect purchaser" would be denied. In order to provide unequivocally that the "indirect purchaser has a claim, a respective qualified provision should be added to the respective laws.

Private enforcement of competition law infringements could also be enhanced by stipulating specifically that no state fee needs to be paid on actions for damages in competition law violations.

In general, the private enforcement of competition law could also be taken to a higher level, e.g. if there were specialised judges sitting in competition law cases. Now, there is no specialisation within the civil courts as to the types of cases to be heard by each particular judge, therefore one judge can have at the same time cases relating to matrimonial, bankruptcy and competition laws. This does not allow for the development of the expertise of the judges.

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

We do not know of any cases where damages for breach of competition law would have been claimed in arbitration. Also, we have no knowledge of any arbitration case where it would have been decided that competition law matters cannot be settled by arbitration for public policy reasons. There are no court decisions on the recognition or refusal to recognise arbitral awards on competition law matters.

The Act of Estonian Chamber of Commerce and Industry Arbitration Court (*Seadus Eesti Kaubandus- Tööstuskoja Arbitraažikohtu kohta*)⁷⁶ provides that an interested party may submit an application to Tallinn Court of Appeal to repeal an arbitral award if the settlement of the dispute is not within the competence of the Arbitration Court (Article 7(1)(6) or the recognition or enforcement of the arbitral award would be contrary to Estonian public policy (Article 7(1)(7). ECA Article 78 foresees that damage caused by acts prohibited by ECA shall be subject to compensation by way of civil procedure. It is not excluded that this provision may be construed so that claims based on competition law could be considered as incapable of settlement by arbitration.

In any case, arbitration can only be available in cases where a restrictive agreement includes an arbitration clause. In other cases (i.e. competitors to a restrictive agreement, persons suffering from abuse of dominant position) where

76 Adopted by the Parliament on August 14, 1991, came into force on August 31, 1991.

there is no agreement on settlement of the dispute by arbitration, the claim cannot be settled by arbitration.

There are no mediation or conciliation institutions in Estonia, thus disputes are not settled by such alternative means.