

Private Enforcement of Competition Law – the Case of Estonia*

by

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Abstract

Jurisprudence on private enforcement of competition law has so far been almost non-existent in Estonia. Most cases where competition law issues are raised within the context of damage claims are solved by out-of-court settlements. One of the main reasons for this scarcity is the fact that this is a fairly unfamiliar field for Estonian lawyers, attorneys and judges. The first reason for the low number of private enforcement of competition law cases in Estonia is therefore lacking awareness and legal uncertainty. The other key barrier lies in burden of proof issues associated with damage claims. It has proven very difficult in practice for an injured person to prove that he/she sustained damages as a result of a competition

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law infringement; even more so to prove the actual extent of such damages. There is no juridical practice yet on how to calculate business losses and judges face considerable difficulties when confronted with this task. Another problem lies in the availability of evidence. As discovery is not possible in Estonia, its civil procedure rules make it difficult for claimants to obtain evidence necessary to prove the facts underlying their claims.

Estonian law does not provide for a special procedure for antitrust damage claims – there are no collective claims, no class actions, nor actions by representative bodies or other forms of public interest litigation (no collective redress). It is thus only possible to file damage claims arising from competition law infringements either in normal civil proceedings or as a civil claim within the framework of criminal proceedings on a competition law crime. The need for collective redress has not yet been subject to a legal debate at the national level, and there has not been a single private enforcement case opened by a consumer in Estonia so far. The only Supreme Court case in existence in this field, which was decided in 2011, has cleared the basis and availability of damage claims for competition law infringement. It has shown, at the same time, the many problems connected to calculating damages in this context.

Résumé

La jurisprudence relative à l'application privée du droit de la concurrence a été jusqu'à présent presque absente en Estonie. La plupart des cas où les questions de droit de la concurrence sont soulevées dans le cadre de demandes d'indemnisation, sont résolus par des règlements à l'amiable. L'une des raisons principales de cette pénurie est le fait que c'est un domaine assez inconnu pour les avocats, les procureurs et les juges estoniens. La première raison pour le faible nombre de cas de l'application privée du droit de la concurrence en Estonie est donc la manque de conscience et l'incertitude juridique. L'autre obstacle majeur réside dans des questions relatives à la charge de preuve liées à des demandes d'indemnisation. Il s'est avéré très difficile en pratique pour une personne blessée à prouver qu'il/elle a subi des dommages à la suite d'une infraction au droit de la concurrence; plus encore à prouver l'étendue exacte de tels dommages. Il n'existe pas encore de pratique juridique sur la façon de calculer les pertes commerciales. Alors les juges font face à des difficultés considérables lorsqu'ils sont confrontés à cette tâche. Un autre problème réside dans la disponibilité de la preuve. A cause du fait que la découverte n'est pas possible en Estonie, ses règles de procédure civile rendent l'obtention des preuves nécessaires pour soutenir les faits qui prouvent des revendications soumis par des demandeurs difficile.

La législation estonienne ne prévoit pas de procédure spéciale pour les demandes de dommages antitrust – il n'y a pas de revendications collectives, aucune action de classe, ni des mesures prises par les organes représentatifs ou d'autres formes de litiges d'intérêt public (pas de recours collectif). Il n'est donc possible que de déposer des demandes d'indemnisation en cas d'infraction au droit de la

concurrence soit dans les procédures civiles normales, soit comme une action civile dans le cadre d'une procédure pénale sur un crime de droit de la concurrence. La nécessité de recours collectif n'a pas encore fait l'objet d'un débat juridique au niveau national, et il n'a pas eu en Estonie un seul cas de l'application privée ouverte par un consommateur jusqu'à présent. Le seul cas qui a été présenté à la Cour suprême en ce domaine (le jugement a été prononcé en 2011), a autorisé la base et la disponibilité des demandes d'indemnisation pour violation du droit de la concurrence. Il a présenté en même temps les problèmes nombreux reliés à la calculation des dommages dans ce contexte-là.

Classifications and keywords: antitrust damage claim; collective redress; Estonia; evidence; private enforcement of competition law; public enforcement of competition law.

I. Introduction

This paper covers the legal background and practice of private enforcement of competition law in Estonia. Described first is its legal, structural and institutional background, including factors such as the available types of legal remedies for private enforcement, compensation of legal fees and procedural costs as well as the possibility of the passing-on defence. Relevant Estonian jurisprudence is analysed thereafter, focussing on the reasons for its scarcity and the results and reasoning of the very first Estonian Supreme Court ruling in this field.

II. Legal, structural and institutional background

1. Types of remedies available

There is no specific judicial or other procedure for competition law proceedings in Estonia; nor does the law provide for collective redress, including consumer collective redress. There is no possibility of collective claims, class actions, actions by representative bodies or other forms of public interest litigation¹. For that reason, it is only possible to file a damage claim arising from competition law infringements either in normal civil proceedings

¹ E. Tamm, L. Naaber-Kivisoo, [in:] *Competition Litigation 2010*, Global Legal Group, London, p. 52.

regulated by the Estonian Civil Procedure Code (hereafter, CCP)² or as a civil claim in the framework of criminal proceedings on competition crimes according to sections 37–40 of the Estonian Criminal Procedure Code (hereafter, CPC)³.

It is possible to file both stand-alone and follow-on actions in Estonia but there is no specific mechanism for the latter. The decisions of the Estonian Competition Board and/or the European Commission are neither binding on courts in follow-on civil cases nor do they constitute a rebuttable presumption of an infringement. They are merely an element that the judge can take into consideration during civil proceedings⁴. However, the importance of the competition authority should not be underestimated as it is likely to have a persuasive influence on courts.

The use of discovery procedure is unavailable in Estonia. National legislation follows the procedural principles of a civil law country⁵ and thus gathering of documentary evidence occurs during the trial and under the supervision of the court. The requesting party must identify the documents required and show their relevance to the case. This situation is further complicated by the fact that the Civil Procedure Code and the Criminal Procedure Code both entitle the defendant to refuse to produce a document if the latter can incriminate him/her with respect to criminal or misdemeanour offences⁶. Since violations of competition law constitute either a criminal or a misdemeanour offence under Estonian law, the defendant (or any other party who is requested to produce a document) may refuse to produce a requested document if its contents include proof of an antitrust violation⁷.

The basis and calculation principles of a delictual damage claim are regulated in the Estonian Law of Obligations Act⁸ (hereafter, LOA). Damages awards serve primarily a compensatory purposes⁹; it is therefore not possible to award punitive or treble damages in competition law cases. Damages are meant to restore the aggrieved person's condition to a situation as close as possible to what it would have been if the circumstances which are the basis for the compensation had not occurred (subsection 127(1) LOA). Estonian

² RT I, 21 December 2012, 18.

³ RT I, 21 December 2012, 10.

⁴ This is a general principle of the Estonian civil procedure law, see, for example, P. Varul, I. Kull, V. Kõve, M. Käerdi, *Võlaõigusseadus I. Üldosa, Kommenteeritud väljaanne*, Juura, Tallinn 2006, p. 436; the Decision of the Estonian Supreme Court no. 3-2-1-41-05.

⁵ I. Soots, 'Kohtu selgitamiskohustus hagemenetluses' (2011) 5 *Juridica* 323.

⁶ Subsections 257 (1) of CCP and 71 (2) of CPC, respectively.

⁷ E. Tamm, L. Naaber-Kivisoo, [in:] *Competition Litigation 2010*, p. 54.

⁸ RT I, 8 July 2011, 21.

⁹ Varul et al, *Kommenteeritud...*, p. 438; the decision of the Estonian Supreme Court no. 3-2-1-137-05.

law follows in this sense the principles of compensatory damages and full compensation¹⁰. The available types of damages are: direct damage and loss of profit (subsection 128(1) LOA). However, compensation is possible only if the prevention of such very damage was the actual purpose of the provision that has been violated, that is, the purpose of the Estonian Competition Act in competition law cases (subsection 127(2) LOA). However, there is no well-established court practice yet on calculating damages and applying general damages rules to antitrust cases.

A leniency programme was introduced in Estonia in February 2010. The competition authority can offer immunity from fines to a ‘whistle-blower’ if he/she fully co-operates with the Competition Board facilitating the conviction of other cartel members. Participating in the leniency program does not, however, grant immunity from civil claims¹¹.

A national debate has not yet arisen concerning the review of Estonia’s legal position on collective redress in general, and/or in relation to competition law in particular. Fighting cartels remains one of the main priorities of the Estonian Competition Board since the beginning of 2008, a fact that causes a more active public enforcement of competition law. However, private enforcement of competition law has not yet gained the attention it should – neither in the decisional practice nor on the academic level.

2. Limitation periods and the possibility of the passing-on defence

Estonian limitation periods (periods of time during which compensation claims must be filed) are regulated in the General Part of its Civil Code Act (hereafter, GPCCA)¹². For tort claims, Estonian law combines minimum and maximum limitation periods. According to Subsection 150(1) GPCCA, the limitation period for a claim arising from unlawfully caused damages is three years from the moment when the entitled person became or should have become aware of the damage and of the identity of the person obliged to compensate it. Under subsection 150(3) GPCCA, the maximum limitation period extends to ten years after the performance of the act or occurrence of the event which caused the damage. Subsection 160(1) states, moreover, that the limitation period is to be suspended when the entitled person files a damage claim. Court practice has not yet tested whether these limitation periods are adequate to provide effective protection to damaged parties.

¹⁰ Varul et al, *Kommenteeritud...*, p. 438.

¹¹ E. Tamm, L. Naaber-Kivisoo, [in:] *Global Competition 2010*, p. 56.

¹² RT I, 6 December 2010, 12.

Neither has it been decided yet when is the claimant supposed to ‘become aware of the damage and of the person obliged to compensate for the damage’.

The passing-on defence – whether the direct purchaser is entitled to receive compensation for the part of the overcharge that he/she has passed on to indirect purchasers – has not yet been used in Estonian court practice¹³. Surrounding questions will probably be solved on the basis of subsection 127(5) LOA which stipulates that:

‘Any gain received by the injured party as a result of the damage caused, particularly the costs avoided by the injured party, shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation.’

It could be argued that passing on of inflated prices to others could constitute ‘gain’ within the meaning of this provision. It could be said, therefore, that an entity that should have sustained damages from a competition law infringement in such circumstances, has not in fact suffered any loss that had to be compensated. The decisive question is here whether such deduction would be ‘contrary to the purpose of the compensation’. This issue has not yet been resolved either by jurisprudence or legal literature.

3. Legal fees and costs in competition proceedings

Another factor that might affect the effectiveness of private enforcement of competition law in Estonia is the legal basis and the mechanisms according to which legal fees and costs associated with competition law proceedings are financed and compensated. In Estonia, attorney fees can be agreed upon either on an hourly basis, as a lump sum or as a contingency fee: those possibilities are expressly allowed in Subsection 61(1) of the Estonian Bar Association Act¹⁴. The level of legal fees can vary, depending on the law firm as well as on the region; the highest fees are collected in Tallinn, the capital of Estonia. In competition cases an average hourly fee stands at 100-150 EUR. Fees are usually agreed upon on an hourly basis but lump sum payments are also used. Contingency and conditional fees are permitted, but they occur, at least in competition law cases, fairly seldom in practice. Legal aid is guaranteed for low-income citizens through a state financed scheme¹⁵.

¹³ The same has been stated by E. Tamm, L. Naaber-Kivisoo, [in:] *Global Competition 2010*, p. 55.

¹⁴ RT I, 21 December 2012, 4.

¹⁵ This principle is established by Subsection 162 (1) CCP.

As for cost recovery, Estonia has adopted the ‘loser pays’ principle whereby the party that loses has to compensate the legal costs of the winner¹⁶. The maximum amount of legal costs that can be recovered from the losing party is in a Government regulation¹⁷ (the amount depends on the value of the claim). In exceptional cases, the court has the discretion to rule that both parties bear their own costs. It can also limit the loser’s liability in cases where the enforcement of the usual ‘loser pays’ principle would lead to extremely unfair results.

There are no specific funding mechanisms for competition litigations in Estonia, neither with, nor without contingency fees. General principles of civil litigation are applicable instead: the claimant has to pay the legal fees and costs first, the judge will decide on the issue of costs, usually based on the ‘loser pays’ principle, upon making the judgment.

Estonia’s extremely high court fees have been reduced since 1 July 2012 in light of repeated rulings of the Supreme Court which declared some of them as unconstitutional¹⁸. This fact might act as an incentive for antitrust damages claims.

III. Estonian jurisprudence on private enforcement of competition law

1. Reasons for jurisprudential scarcity

It was revealed by searching national legal databases¹⁹ and consulting competition law practitioners that jurisprudence on private enforcement of competition law has thus far been almost non-existent in Estonia. Most cases where competition issues are raised within the context of damage claims are solved by out-of-court settlements. One of the main reasons for that scarcity is that this area is fairly unfamiliar to Estonian lawyers, attorneys and judges. Most attorneys are not ready to advise their clients to file a damage claim and even if they are, clients might be reluctant to start court proceedings because

¹⁶ The provision of legal aid to low-income persons is regulated by Sections 180-193 CCP and the State Legal Aid Act, RT I, 28 December 2011, 16.

¹⁷ Regulation no. 137 of the Estonian Government. RT I, 3 December 2010, 8.

¹⁸ Decisions of the Estonian Supreme Court no. 3-4-1-7-12 and 3-2-1-67-11.

¹⁹ All Estonian Supreme Court rulings are published in an online database accessible via the website of the Estonian Supreme Court (*Riigikohus*) at www.nc.ee. Judgements of lower instance courts are available in an online-database only since the end of 2006. Earlier judgments of lower instance courts were available to a very limited extent only. Since the end of 2006, all judgments of lower courts ought to be published in an online-database at http://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/main.html.

their outcome is largely unforeseeable. The first reason for the scarcity of private enforcement of competition law cases in Estonia is, therefore, lack of awareness and legal uncertainty.

Burden of proof in damage claims constitutes another main obstacle. For a successful damage action, the claimant must prove that (i) a competition law infringement occurred, (ii) that he/she has suffered damages, and (iii) that a causal link exists between the violation and the damage²⁰. Injured parties have found it very difficult in practice to prove that they have suffered damages as a result of a competition law infringement, as well as the exact extent of the damage. There is no court practice yet how to calculate such losses and judges face considerable difficulties when being confronted with the task.

Another problem lies in the availability of evidence. As discovery is not available in Estonia, its civil procedure rules make it difficult for claimants to obtain evidence necessary to prove the facts underlying their damage claims²¹. It is particularly difficult to prove a breach of competition law – this is basically only possible if the Estonian Competition Board or a criminal court had earlier issued a ruling to that effect²². Filing damage actions arising from competition law breaches is not encouraged by the relatively modest number of competition crimes cases. Still, abuse of dominance can be prosecuted in Estonia not only as a criminal offence but also as a misdemeanour. However, the latter expire after only two years from the commissioning thereof²³, and the Competition Board is often not able to reach a conviction within such a short time period. The short expiry periods of misdemeanours can thus pose a problem for private enforcement of competition law in Estonia.

As a result, there had been no judgments at all on damage claims in civil or criminal proceedings for competition infringements until 2009²⁴ in Estonia; not a single case of consumer private enforcement of competition law has been reported even until now. However, 2011 saw the first private enforcement of competition law case to reach the Estonian Supreme Court.

²⁰ The fault of the defendant is presumed under Estonian tort law: thus the tortfeasor must prove the absence of fault to escape liability. See further on the prerequisites of delictual liability in Estonia in P. Varul, I. Kull, V. Kõve, M. Käerdi, *Võlaõigusseadus III. Kommenteeritud väljaanne*, Juura, Tallinn 2009, p. 630-632.

²¹ The same concern has been expressed in K. H. Eichhorn, C. Ginter, *Euroopa Liidu ja Eesti konkurentsioigus*, Juura, Tallinn 2007, p. 178.

²² Neither a judgement of a criminal court nor a decision of the Competition Board is binding for a civil court, nor does it constitute a rebuttable presumption of a competition law infringement. It is merely an element that the judge can take into consideration during civil proceedings, see above.

²³ Subsection 81(3) of the Penal Code, RT I, 20 December 2012, 12.

²⁴ That was also the conclusion of E. Tamm, K. Paas, [in:] *Enforcement of Competition Law 2009*, Global Legal Group, London, p. 59.

2. The First Supreme Court case on private enforcement of competition law

The first Estonian Supreme Court case on private enforcement of competition law was decided in 2011. It concerned damages suffered due to an abuse committed by an undertaking holding a dominant position on the electricity market²⁵. The parties of the dispute had no contractual relationship. Instead, the defendant (Estonia's main electricity producer) had concluded two contracts for the fixed supply of electricity²⁶ with two network operators. The same network operators had, in turn, concluded two open supply contracts²⁷ with the claimant. According to the open contracts, the claimant acted as a balance provider for the network operators – it had a contractual obligation to maintain their electricity balance.

In 2008, the defendant unilaterally changed the standard terms of its fixed supply contracts. Seeing as the network operators refused to accept the change that placed upon them the obligation to conclude new open supply agreements with the parent company of the defendant, the latter stopped its electricity supplies. In order to maintain the network operators' electricity balance, the claimant had to buy electricity from other suppliers for considerably higher prices and to re-sell it to the network operators at a loss. The defendant ultimately restored electricity supplies to the two network operators, but only four months later and only after an injunction to that effect issued by the Estonian Competition Board. The claimant demanded from the defendant the reimbursement of the damages it sustained from the price difference during those four months.

The claimant was successful in the court of the first instance. However, that ruling was repealed in the second instance. The Supreme Court analysed the legal arguments of the parties but, in the end, it sent the case back for re-consideration to the second instance court. The Supreme Court first determined the legal basis and nature of the damage claim. Accordingly, such claim can be based on section 1043 LOA which provides that:

‘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’.

²⁵ Ruling of the Estonian Supreme Court no. 3-2-1-19-11.

²⁶ I.e. the sale to a market participant of a fixed amount of electricity agreed upon in advance for a trading period and of which the balance provider is informed in advance.

²⁷ I.e. the sale to a market participant of the total amount of electricity needed by the market participant or, in order to ensure the balance of a market participant, the sale to the market participant of an amount of electricity that the participant lacks in a trading period or the purchase from the market participant of the surplus amount of electricity during a trading period.

Thus one of the central requirements for delictual liability under Estonian law is the ‘unlawfulness’ of the defendant’s behaviour. Pursuant to subsection 1045(1) no. 7) of LOA, causing the damage is unlawful, *inter alia*, if the damage is inflicted by a behaviour which breaches an obligation arising from the law. However, causing the damage by infringing an obligation arising from the law is not unlawful, if the purpose of the violated provision is other than to protect the victim from such damage (subsection 1043(3) LOA)²⁸. It is thus necessary to determine whether the purpose of section 16 of the Estonian Competition Act²⁹ is to protect the claimant from such damage.

Section 16 no. 4 and 6 of the Competition Act prohibits any direct or indirect abuse by an undertaking, or several undertakings, of a dominant position. That includes making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which have no connection with the subject of such contract, or unjustified refusal to sell or buy goods. Seeing as the Estonian Competition Board has found the defendant guilty of the abuse, and that the parties had not contested that fact during the juridical proceedings in the second instance, the Supreme Court ruled that the breach of section 16 no. 4 and 6 of the Competition Act (the abuse of the dominant position of the defendant) was proven. It was more difficult to decide, however, on the issues of causality and damages.

The Supreme Court said that it was indeed possible that the purpose of section 16 of the Competition Act was to protect the defendant from the damage (the price difference) which the company had suffered due to the fact that the defendant had arbitrarily stopped electricity supplies to the two network operators. The Court explained that the purpose of the Competition Act is, *inter alia*, to guarantee the existence of effective competition and to protect the market as a whole (and not only the contract partners). According to the Supreme Court, competition rules are meant to protect the economic interests of market participants. It was thus of the opinion that the type of damage suffered by the claimant lies within the protection range of section 16 of the Competition Act. It also stated that a causal link between the abuse of the dominant position of the defendant and the damage suffered by the claimant could have indeed existed.

Ultimately however, the Supreme Court did not decide on the outcome of the dispute. In order to determine the existence of causality as well as the actual amount of damages, the Supreme Court referred the case back to the second instance court³⁰. No final judgment has yet been delivered in

²⁸ See further on this question in Varul et al (note 20), pp. 650-651.

²⁹ RT I, 27 June 2012, 11. Section 16 of the Estonian Competition Act is a domestic equivalent of Article 102 TFEU.

³⁰ Decision of the Estonian Supreme Court no. 3-2-1-19-11, p. 18.

this case; it is highly possible that the parties have reached an out-of-court settlement.

IV. Conclusion

The system of private enforcement of competition law in Estonian is fairly undeveloped. Estonian law has no special procedure for antitrust damages claims: there is no possibility of collective claims, class actions, actions by representative bodies or other forms of public interest litigation. This issue has not yet been subject to a legal debate at the national level either. Since there is no collective redress for antitrust damages in Estonian law, it is only possible to file damage claims arising from competition law infringements either in normal civil proceedings or as a civil claim in the framework of criminal proceedings on competition law crimes.

Estonian jurisprudence on antitrust damages, including consumer initiated private enforcement, is virtually non-existent. Only one case has so far reached the Supreme Court. The main reasons for this scarcity are lack of awareness and legal uncertainty as well as problems surrounding the burden of proof and availability of evidence. The sole existing Supreme Court ruling on this issue has cleared the basis and availability of damage claims for competition infringement. It has shown, at the same time however, that calculating damages can be problematic in this context.

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