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ROUTE TO STATE AID DAMAGE ACTIONS AND SUCCESSFULNESS IN ESTONIA

Master`s thesis

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I hereby declare that I have compiled the thesis independently

and all works, important standpoints and data by other authors

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ABSTRACT

The possibility of submitting EU law based private actions has existed since the famous Van Gend en Loos judgment, which created the first window for private enforcement. Notwithstanding the route, the successfulness of EU law based private enforcement actions is up to this day dependent on the discretion of MS national courts and unharmonized MS procedural rules.

Based on the example set by EU competition law, where the submission of private enforcement actions through direct effect has been possible ever since 1974 BRT v Sabam judgement, the national procedural rules have a potential to impede the successfulness of such actions. In the narrow context of competition law damage actions, the referred obstacles were addressed and removed in 2014 damages directive to ensure that individuals who have been suffered damage through the infringement of Article 101 and 102 TFEU, are able to claim compensation for such damages.

Success story and relatively clear overview on competition law damage actions has however raised an interesting follow up-questions: does the infringement of article 108 (3) and 107 TFEU cause damages to individuals, which EU law instrument can be used as a route to damage claim and does the EU and MS national law provide a framework which supports the submission of successful damage actions?

Commission has briefly touched this subject in its 2009 Notice, stating that competitors of the state aid recipient and third persons could claim damages caused by the infringement of article 108 (3) TFEU through Francovich state liability principle. This position has been supported in academic literature by a handful of authors, including Liina Käis, who has analyzed the possibility of submitting such damage actions based on the Francovich liability specifically in the context of Estonia.

Author of this thesis opposes Commission and Liina Käis position and finds that state aid damage actions can be submitted only through the direct effect jurisprudence (as opposed to Francovich state liability) and in the context of Estonia, the applicable rules for establishing liability, access to evidence and time limits make it impossible to submit successful state aid damage actions.

State aid regulation, private enforcement, damage actions

LIST OF ABBREVIATIONS

TFEU	Treaty of The Functioning of European Union
ELTL	Euroopa Liidu toimimise leping
TEU	Treaty on European Union
EU	European Union
EL	Euroopa Liit
MS	Member State/Member States
LR	Liikmesriik/Liikmesriigid
ECJ	European Court of Justice
Notice	Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), OJ C 85/1, 9.4.2009.
EK	Euroopa Kohus
Commission	European Commission
Komisjon	Euroopa Komisjon

INTRODUCTION

It is well established notion that EU law can give individuals[1] rights, which latter are able to invoke. The enforcement of individuals EU rights can however take place through different routes and relies on de-centralized MS national courts and to a considerable extent, on unharmonized MS-s national procedural rules[2].[3]

This peculiar arrangement, where the primary right is prescribed by supranational legal order but enforcement left at the discretion of different legal systems, can and has been proven to be an obstacle for the successful private actions.

Good example can be seen in the EU competition law, where the private enforcement actions have been continuously promoted and supported by the ECJ and Commission ever since the 1974 BRT v Sabam[4] ruling, which asserted the direct effect of articles 101 and 102 TFEU.[5] Irrespective, the role of private enforcement actions in EU competition law has historically remained a rather marginal, which is mainly due to the procedural caps in national legal orders, making the successfulness of the private enforcement actions questionable or outright preclude it. [6]

Recently, the Commission managed to overcome the referred problem in the narrow context of private damage actions through the adoption of damages directive[7] which, taking into account the typical characteristics of the competition law damages and potential claimants, tackled and filled the procedural caps in national legal orders, which usually deprived the claimants from successfully obtaining compensation for damages caused by the infringement of articles 101 and 102 TFEU.

[1] For the avoidance of doubt- in the context of this thesis, the term „individual" stands for both legal and natural persons.
[2] It is necessary to point out that in the context of EU law, the term „procedural rules" includes also rules which are usually considered material in nature (e.g. secondary rights, which the claimant is able to claim). Baghrizabehi, D. (2016). The Current State of National Procedural Autonomy: A Principle in Motion. *Journal for International and European Law, Economics and Market Integrations*, 3 (1), p. 14.
[3] Faure, M., Weber, F. (2017). The Diversity of the EU Approach to Law Enforcement- Towards a Coherent Model Inspired by a Law and Economics Approach. *German Law Journal*, 18 (4), p. 1.
[4] ECJ decision, 27.03.1974, BRT v Sabam, C-127/73, ECLI:EU:C:1974:25
[5] Lang, J.,T. (1985). Injunctions and Damages in National Courts Under European Community Competition Law. *International Legal Practioner*, 10 (1), p. 29.
[6] Huschelrath, K., Peyer, S. (2013). Public and Private Enforcement of Competition Law: A Differentiated Approach. *World Competition*, 36 (4). p. 585.
[7] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014

To specify, the said directive addresses and solves, among other things, problems related to the establishment of liability, rules of evidence and limitation periods.[8]

Providing competition law with a mechanism which enables to successfully claim damages caused by the infringement of the said branch of law has however raised an interesting follow-up questions. Does the infringement of state aid regulation, more specifically, article 108 (3) and 107 TFEU cause damages to individuals, which EU law instrument can be used to claim compensation for such damages and does the EU and MS national law provide a framework which supports the submission of successful private damage actions?

The characteristics of state aid damages, potential claimants and the relevant rules for claiming compensation for such damages are not very well explored in the legal literature. [9] The Commission has touched the topic in its 2009 Notice[10], stating that the competitors of the state aid recipient and third persons could claim compensations for state aid damages based on the infringement of article 108 (3) TFEU through Francovich state liability principle[11]. This position has been supported by handful of authors[12], including in Estonian legal literature by Liina Käis[13], who has analysed the submission of state aid damage action through Francovich specifically in the context of Estonian jurisprudence.

The author opposes Commission and Liina Käis position and finds that the state aid damage actions can be submitted only through the direct effect jurisprudence. In addition, the author finds that in the context of Estonia, the possibility of submitting successful state aid damage actions is precluded by applicable rules concerning establishment of liability, rules of evidence and/or time limits[14].

[8] Lucey, M. C. (2018). EU competition law Damages Directive: recalibrating the equilibrium between private and public enforcement? *Journal of Business Law*, 2018 (5), p. 390.
[9] Commission has conducted two studies- one in 2006 and second in 2009, which observed the state aid private enforcement actions at MS-s level. Based on the latter, it is possible to conclude that the court practice on the subject (both EU and national law level) is scarce. Honore, M., Jensen, N.E. (2011). Damages in State aid Cases. *European State Aid Law Quarterly*, 2011 (2), p. 266-269.
[10] Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), OJ C 85/1, 9.4.2009.
[11] Notice point 45.
[12] See for example Honore, M., Jensen, N.E. (2011*), supra nota* 9; Goyder, J., Dons, M. (2017). Damages Claims Based on State Aid Law Infringements. *European State Aid Law Quarterly*, 2017 (3), 418- 430.
[13] Käis, L. (2015). Euroopa Liidu riigiabireeglite rikkumisest tulenev kahju hüvitamise nõue. *Juridica*, 9, 613-623.
[14] Author analyses specifically rules which were modified by the damages directive in the context of competition law damages.

Therefore, the hypothesis of this work consists two parts: **a) damages caused by the infringement of article 108 (3) and/or 107 TFEU can be claimed only through direct effect jurisprudence as opposed to Francovich state liability principle and b) Estonian procedural rules for establishment of liability, limitation periods and/or rules of evidence make it impossible to successfully claim compensation for such damages.**

In relation to successfulness, the author focuses narrowly on the state aid damage actions in the context of Estonia since a) the scope of this thesis is not sufficient to analyse every MS jurisprudence and b) Liina Käis position has inadvertently created a wrong impression on the possibility of claiming compensation for state aid damages in Estonia.[15] Author of this thesis does not focus on the potential problems that the quantification of damages might impose.[16] Author uses qualitative research method.

Research questions of this thesis are the following:

1. What type of damages can the infringement of articles 108 (3) and/or 107 TFEU potentially cause and to whom (i.e., who is the potential claimant)?
2. Through what EU instrument is it possible to claim compensation for referred damages?
3. In the context of Estonia, what are the applicable rules (including EU rules) in relation to:
   3.1. establishment of liability (including, without limitation, who could be considered liable for damages caused by the infringement of articles 108 (3) and/or 107 TFEU and what is the scope of potential compensation)?
   3.2. access to evidence? and
   3.3. time limits?
4. How the rules referred in clause 3 above (or lack of specific rules) impede/support the submission of successful state aid damage actions?

[15] Author of this thesis disagrees with Liina Käis on two aspects: a) that the Francovich state liability is applicable in relation to state aid damage actions and b) that Francovich state liability has to be „translated" or „copied" into national legal order through national legal rules. Author asserts that Francovich state liability constitutes as stand-alone legal basis which is supplemented by the national procedural rules on aspects which are not governed by the former (see for example Supreme Court of Estonia decision, 23.11.2012, 3-3-1-37-12, where Francovich has been used directly as a legal basis).

[16] Similarly to competition law damage actions, the quantification of damages and establishing the causal link between the infringement and the damages also imposes a problem in relation to state aid damage actions. Honore, M., Jensen, N.E. (201*), supra nota* 9, p. 273.

1. STATE AID REGULATION

1.1. Objective of the state aid regulation

State aid regulation is a unique branch of law which exists only at EU and, to a certain extent, also in WTO level.[17] The general goal of the state aid regulation is the same as it is for traditional branches of competition law, such as anticompetitive agreements and merger control- to protect the free market from artificially created/manipulated distortions which in return, should foster economic growth.[18] State aid regulation role in achieving this purpose is to limit the MS-s ambit in subsidising certain market actors. The more specific, the reasoning behind the state aid regulation is, that if MS-s were to enjoy unlimited discretion at distributing benefits to market actors, MS-s would most likely use such discretion in a discriminating manner, which would, in a long run, affect the market the same way as anticompetitive agreements as companies who have been left aside from receiving the benefits are automatically subjected to unfavourable and weaker position in market.[19]

The EU state aid regulation is, similarly to other branches of EU law, comprised from Treaty articles, secondary EU legislation and ECJ practice.[20] The essence of the regulation is comprised in the articles 107 and 108 (3) TFEU.[21]

[17] Pesari, N., Casteele, V. D. K., Flynn, L., Slaterly, C. (2016). *EU Competition Law*. (2nd ed.) Deventer- Leuven: Claeys & Casteels Law Publishers, p. 119.
[18] *Ibid.*, p. 21.
[19] Nordberg, C. (1997). Judicial Remedies for Private Parties under the State Aid Procedure. *Legal Issues of European Integration*, 24 (1), p. 35.
[20] Since the enforcement of state aid regulation is mostly at the hands of the Commission, the Commission practice can be also viewed as part of state aid jurisprudence. Craig, P., De Burca, G. (2011). *EU Law Text, Cases and Materials*. (5th ed.) New York: Oxford University Press, p. 1086.
[21] In addition to these two articles and additional paragraphs they entail, the state regulation also includes article 109 TFEU. Latter however, concerns only the authorization to (EU) council, enabling latter to enact implementing regulations.

1.2. Article 107 TFEU

The first paragraph of article 107 TFEU states the following:

"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

Notwithstanding the unnecessarily long and overburdened wording[22], the paragraph entails a) the basic conditions for the MS measure to be considered state aid[23] and b) that state aid is incompatible with the internal market and therefore illegal[24].

It is necessary to emphasize that the notion of state aid itself is everything else than clear[25], as it is not limited with the distribution of direct subsidies (as might be the first impression) and MS intention[26] of giving an advantage to some enterprises.

[22]In the authors opinion, the drafters of the article 107 (1) TFEU failed considerably with the wording of the paragraph. It is understandable why the drafters avoided defining the „incompatible state aid" narrowly as it would have had the potential of undermining the aim of the regulation. However, it would have been sufficient if the drafters would have chosen only one condition, the most suitable candidate being „which distorts or threatens to distort competition".

[23] These conditions are a) MS has conveyed advantage to market actor, b) advantage is distributed by MS and from MS resources, c) advantage is selective and d) advantage distorts or threatens to distort competition and affects trade between MS. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 1088-1093. Some authors find that the article 107 (1) TFEU holds five conditions instead of four. Biondi, A. (2007). Some Reflections on the Notion of State Resources in European Community State Aid Law. *Fordham International Law Journal*, 30 (5), p. 1428.

[24] Ezrachi, A. (2018). *EU Competition Law, An Analytical Guide to the Leading Cases*. (6th ed.) Oxford: Hart Publishing, p. 663.

[25] Käis, L. (2015), *supra nota* 13, p. 614.

[26] Based on Stjeenkolemijen case (C-30/59), the notion of state aid governs every MS action which holds or has a potential to hold an effect similar to direct subsidies. Leigh, H., Towards a New Definition of a State Aid under European Law: Is There a New Concept of State Aid Emerging, European State Aid Law Quarterly 2003, 2003 (2), p. 365.

In addition, each and any condition in the article 107 (1) packs a considerable amount of abstract[27] and sometimes even controversial[28] case law, whereas the applicable case law and emphasizes on the different conditions varies depending on the type of MS measure under question[29]. Unfortunately, the scope of this thesis is not sufficient to analyse the definition of state aid in detail.[30]

Notwithstanding the presumption of incompatibility in article 107 (1) TFEU, paragraphs 2 and 3 of article 107 TFEU provide a certain exceptions from paragraph 1 by listing a specific types of state aid or conditions based on which state aid is or can be considered compatible.

1.3. Article 108 (3) TFEU and ex-ante control mechanism

Article 107 TFEU is inseparably connected with article 108 (3) TFEU, which obliges the MS-s to subject themselves to preliminary check (conducted by the Commission) every time MS wishes to grant state aid to market participant/sector and wait with the implementation of the notified state aid until Commission has issued positive (or conditional) decision about the compatibility of the state aid (also known as stand-still obligation[31]).

The specific wording of the article 108 (3) TFEU is the following:

"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2 (in article 108). The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision".

[27] Käis, L. (2015), *supra nota* 13, p. 614.
[28] Good example about the controversy could be seen in relation to second conditions, where in the early case law, the ECJ obtained a position that for the fulfilment, the state aid has to be distributed by MS **or** through MS resources. Later on, the ECJ changed its approach and stated that both elements of the condition have to be fulfilled cumulatively. Biondi, A. (2007). *supra nota* 23, p. 1432.
[29] Piernas, L., Juan, J. (2010). The Notion of State Aid and Regulation in the EU: Drawing the Shape of a Moving Target. *Cuadernos de Derecho Transnacional*, 2 (2), p. 174; Buendia, S. (2017). State Aid Assessment, What National Courts Can Do and What They Must Do. *European State Aid Law Quarterly*, 2017 (3), p. 412.
[30] Author of this thesis finds that the definition of the "state aid" should combine a) Stjeenkolemijen effect guided principle, b) conditions laid out in article 107 (1) TFEU and c) the different lines of court practise. Based on this, the author offers a following wording for the definition of state aid: „State aid is any MS action, which directly or indirectly affects or has a potential to affect the financial situation of the market participant and which, based on applicable ECJ practice, fulfils all the conditions of article 107 (1) TFEU."
[31] Ghazarian, P. (2017). Recovery of State Aid. *European State Aid Law Quarterly*, 2016 (3), p. 229.

This set-up, where the planned action is subjected to a prior assessment and administrative decision-making before the execution is allowed is also known as ex-ante control mechanism[32] , which constitutes as the most crucial difference between state aid regulation and competition law[33].

Purpose of the ex-ante control mechanism is to offer article 107 TFEU an additional layer of protection. To be more specific, the ex-ante control mechanism should (at least in theory), ensure that incompatible state aid is never implemented.[34]

To bring an example: if Estonia wishes to distribute state aid to a certain enterprise or enterprises (and the state aid does not fall within any of the exceptions created by the Commission), the Estonia should inform the Commission prior to the distribution of the state aid and wait for the Commission decision.

If the decision is affirmative, the Estonia is entitled to distribute the state aid but only after the decision has been issued. Negative decision however, would render the prohibition in the stand-still obligation indefinite.[35]

It is necessary to stress that ex-ante control mechanism entails that the distribution of state aid has two levels of illegality- formal where MS has just infringed the stand-still obligation (unlawful state aid) and material, where the distributed state aid is also incompatible with the internal market (illegal state aid[36]). [37] Keeping in mind the objective of the state aid regulation, the unlawfulness of the state aid is a excusable, while the implementation of illegal state aid constitutes as a "mortal sin".[38]

[32] Piet, J. S., Farley, M. (2017). *An Introduction to Competition Law*. North America: Hart Publishing, p. 272.
[33] Although ex-ante control mechanism has been used in relation to illegal agreements (article 101 (1) TFEU). Latter was changed in 2004 with the adoption of modernization regulation (Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003). Bergh, V. D. R. (2017). *Comparative Competition Law and Economics*. Northampton: Edward Elgar Publishing, p. 431.
[34] ECJ decision, 12.02.2008, CELF, C-199/06, ECLI:EU:C:2008:79. point 47-49. Vajda, C., Stuart, P. (2010). Effects of the Standstill Obligation in National Courts- All Said after CELF- An English Perspective. *European State Aid Law Quarterly*, 2010 (3), p. 631.
[35] Piet, J. S., Farley, M. (2017), *supra nota* 32, p. 277.
[36] For clarification purposes, from hereon, the author refers to state aid which infringes article 107 TFEU as „incompatible state aid" and to state aid which infringes article 108 (3) TFEU as „unlawful state aid". Buendia, S. (2017), *supra nota* 29, p. 410.
[37] Elias, S. (2014). Ebaseadusliku riigiabi saaja usalduse kaitstavus riigiabi tagasinõudmise korral. *Juridica*, 6, p. 434.
[38] Buendia, S. (2017), *supra nota* 29, p. 411.

It is also worth to note that whereas paragraphs 2 and 3 of article 107 TFEU create a certain exceptions based on which the state aid could be considered compatible with the internal market, the European Council and Commission have adopted several pieces of secondary EU legislation, which create an exceptions from **both articles 108 (3) and 107 TFEU** (i.e. for state aid which is not subject to stand-still obligation and which is automatically compatible). Such exceptions can be found from[39]:

1. Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 10 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352/1, 24.12.2013[40];
2. Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114/8, 26.4.2012;
3. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 114/8, 26.4.2012[41];
4. Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interests (2012/21/EU) OJ L 7/3, 11.1.2012, which has to be read together with clarifying Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02), OJ C 8, 11.1.2012[42].
5. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248/9, 24.9.2015[43].

[39] Piet, J. S., Farley, M. (2017), *supra nota* 32, p. 275.
[40] It is interesting to note, that the de minimis aid as such is not considered „state aid" on behalf of the Commission. See: http://europa.eu/rapid/press-release_MEMO-06-482_en.htm?locale=en 15. October 2019.
[41] Even though the state aid which falls under the general block exemption regulation is exempted from the stand still obligation and automatically compatible, the MS is still under obligation to notify the Commission about the distribution of such state aid. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 1099.
[42] It is interesting to note that whereas the basis for de minimis and block exemption regulations lies in the paragraph 109 and 108 TFEU (state aid regulation) the referred Commission Decision together with the Communication is also partially based on the competition law provisions (article 106 TFEU).
[43] Article (2) 1 of the referred regulation states that the MS is not obliged to follow stand-still obligation in relation to existing state aid.

2. INTERACTION OF EU AND NATIONAL LAWS

2.1. General

Because the state aid regulation is inherent to EU law, it is necessary to clarify the interaction between EU and national laws.

Upon signing of the Treaty of Rome, the EU law as such constituted a separate legal system, which had very limited means to interact with national laws. Indeed, in the early days, the EU law was only able to affect the MS legal systems with the adoption of directives and regulations, provided that they concerned the competence areas of EU. The enforcement mechanism as such did not differ from other international treaties in a sense, that the person liable for following the EU law was MS. [44]

In another words, if MS were to infringe the obligations of the Treaty of or the secondary EU legislation, the Commission[45] and other MS could have sought action only against the MS who violated the EU treaty. Had this original EU law jurisprudence remained unchanged, it would be impossible to speak about individual private enforcement actions in the context of EU law.

This original set-up was however drastically changed after Van Gend en Loos[46] case, which created the principle of direct effect.[47] Latter entails that EU law provisions are capable of giving rights directly to individuals. [48] To be directly effective, the EU law norm originating from primary EU law and regulations has to fulfil all the following conditions[49]:

1. norm has to be clear;
2. negative (a negative rather than positive obligation);
3. unconditional;
4. containing no reservation on the part of MS; and
5. not dependant on any national implementation measure.

[44] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 185.
[45] It has to be pointed out that the creation of two centralized enforcement bodies (Commission and ECJ), was an innovative move, distinguishing EU legal system from other international treaties. Commission and ECJ are also responsible for the remarkable developments of the EU law. Vlaicu, A. M. (2011). Effectiveness of EU Law in Member States. *Lex ET Scientia International Journal*, 18, p. 162.
[46] ECJ decision, 05.02.1963, Van Gend en Loos, C- 26/62, ECLI:EU:C:1963:1
[47] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 185.
[48] Subject to certain conditions. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 186.
[49] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 186.

In practice, the establishment of direct effect in relation to EU law norm means that individuals are entitled to pursue private enforcement actions based on the infringement of the said norm.[50]

Van Gend en Loos, which tightened the relationship between EU and national legal orders was shortly followed by Costa v Enel[51]decision which asserted the supremacy of EU law. [52] In another words, the Costa v Enel established that in the event of a conflict between EU and national law, the former has priority.

2.2. National procedural autonomy/responsibility

The creation of direct effect raised two practical questions- a) what are the EU rights[53] and b) how and through what means could individuals enforce them?[54] Since the EU law was not ready to offer the administrative resources and both procedural and substantive rules to answer that question, the ECJ decided to make use of MS legal orders.[55] To be more precise, the ECJ left the private enforcement of EU law as a whole into the competence of MS national courts and procedural rules.[56]

This competence which is also known under term "national procedural autonomy"[57], entails the MS-s courts right to assess the infringement of EU law, determine the content of secondary EU rights in the light of national legislation and apply other procedural rules to the proceedings.[58]

[50] ECJ motive behind the direct effect, similarly to making available competition law damage actions, to improve the effectiveness of EU law as commission and MS alone did not have sufficient resources to effectively monitor and discover infringements of EU law. Another argument towards enhancement of private enforcements was the possible threat, that the public enforcement alone could lead to politically motivated enforcement actions. Novitz, T., Kilpatrick, C., Skidmore, P. (2000). *The Future of Remedies in Europe*. North America: Hart Publishing, p. 3.
[51] ECJ decision, 15.07.1964, Flaminio Costa v E.N.E.L, C- 6/64, ECLI:EU:C:1964:66
[52] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 257.
[53] Even though it is usually possible to determine the primary EU right, the EU law usually remains vague in regards to secondary rights (rights available to remedy the infringement).
[54] Durand, A. (1987). Enforceable Community Rights and National Remedies. *Denning Law Journal*, 2, p. 43.
[55] *Ibid.*
[56] EU law term „procedural rules" entails both procedural and substantive rules. See Baghrizabehi, D. (2016), *supra nota* 2, p. 14.
[57] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 220.
[58] In its earlier case-law, ECJ even expressed that the EU law was not intended to create new remedies. Havu, K. (2012). Horizontal Liability for Damages in EU Law- The Changing Relationship of EU and National Law. *European Law Journal*, 18 (3), p. 410. This no-new-remedies rule has been however, bluntly disregarded by ECJ in several occasions. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 220-221.

However, the scope of discretion enjoyed by the MS courts in the context of the original "procedural autonomy" threatened to impede the objective pursued by the direct effect, since MS were able to outright deny the protection of EU rights or discriminate against them.

To remedy the situation, ECJ developed two principles which limit and guide the national procedural autonomy- principle of equivalence and effectiveness. [59] In addition, ECJ has, in several occasions, stepped into the territory of procedural autonomy and created secondary EU rights and guided the application of national procedural rules.[60] One of the most "complete" EU right as such, which will also be discussed in this thesis, is Francovich state liability principle.

2.3. Basis for private enforcement actions

In general, there are two routes for the private enforcement of EU rights. [61] First is through the direct effect which was already mentioned. The second is through Francovich state liability, which was created after direct effect and which similarly to former, creates a window for a private enforcement actions. In addition, the private enforcement actions submitted through Francovich state liability are, similarly to enforcement actions submitted through direct effect, subject to national procedural autonomy and principles of equivalence and effectiveness regarding the questions/rules not regulated by the Francovich. [62]

The main difference between direct effect and Francovich state liability is, that while the former just creates a window for private enforcement of EU right, leaving the procedural rules (including remedies) at the discretion of national court (at least in most part), the Francovich state liability constitutes as a specific EU law based offence, which contains specific conditions for the establishment of liability and prescribes compensation for damages as remedy. It is therefore worth to elaborate the background and content of the Francovich.

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[59] Laenarts, K. (2011). National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness. *Irish Jurist*, 46, p. 15.

[60] Chalmers, D., Davies, G., Giorgio M. (2010). *European Union Law.* (2nd ed.) Cambridge: Cambridge University Press, p. 268. The limitations imposed on the national procedural autonomy, together with the co-operation obligation deriving from Article 19.1 TEU, has lead some authors to re-name it as national procedural competence or obligation. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 220.

[61] In relation to tools available for the private enforcement in general, Vlaicu recognizes five different in EU law- direct effect, indirect effect and Francovich state liability, preliminary ruling procedure and incidental horizontal effect, Vlaicu, A. M. (2011), *supra nota* 45, p. 162- 165. However, only direct effect and Francovich create a route for private enforcement actions.

[62] Craig, P., De Burca, G. (2011), *supra nota* 20. p. 251.

2.3.1. Francovich

The principle, as the name itself indicates, is based on an ECJ-s Francovich judgement[63], which was further developed by several follow-up cases. To summarize, the Francovich case concerned Francovich and other individuals who brought a damage claim against Italy for the failure to implement a directive on time. Had the said directive been implemented on time, the Francovich and others (employees) would have received a certain payment in the event of an employer´s insolvency. The employer´s insolvency unfortunately took place before the implementation of the directive.

At the time of the Francovich ruling, it was already established that provisions of directives (which always need further implementing measures on behalf of the MS) could have a direct effect once the implementation deadline passed and respective provision fulfilled the necessary criteria.[64]

However, the problem with the provision, which the Francovich tried to invoke was, that it lacked sufficient precision to be directly effective.[65] ECJ perceived the Francovich scenario as a threat to the effectiveness of EU law, since Francovich and others had no means to rely on to bring an enforcement action.[66]

To solve the problem, the ECJ upheld the damage claim, stating that the "full effectiveness of the Community rules would be impaired and the protection of the rights which they create would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a MS can be held responsible".[67]

However, Francovich failed to specify the conditions under which such state liability could arise[68], limiting the use of the judgement strictly to Francovich type of cases.

[63] ECJ decision, 19.11.1991, Francovich, C- 6/90 and C 9/90, ECLI:EU:C:1991:428
[64] Dougan, M. (2000). The Disguised Vertical Direct Effect or Directives. *Cambridge Law Journal*, 59 (3), p. 586-587.
[65] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 243.
[66] *Ibid*.
[67] ECJ decision, 19.11.1991, Francovich, C- 6/90 and C 9/90, ECLI:EU:C:1991:428. point 33.
[68] Chalmers (2010), *supra nota* 60, p. 304.

It also failed to specify, among other things, the scope of damages that could be claimed[69] although the damages claimed (and actually awarded) indicate that Francovich liability covers at minimum, the compensation of direct damages.[70]

ECJ elaborated the Francovich liability in Brasserie du Pecheur[71] and Factortame III[72] cases, in which claimants sought, similarly to Francovich, damages which were caused by the MS infringement of EU law.[73]

Once again, ECJ upheld the damage claims and expressed that EU law confers right to damages "where three conditions are met: a) the rule of law infringed is intended to give rights to individuals, b) the breach is sufficiently serious and c) there is direct causal link between the breach of the obligation resting on the MS and the damage sustained by the injured party".[74]

ECJ also elaborated the scope of damages, stating that the "total exclusion of loss of profit" is not acceptable and MS might even be required to upheld exemplary damages where such a possibility exists in national law.[75]

To conclude, the Francovich state liability created a specific EU law-based offence based on which a) individual is able to pursue enforcement action and b) the MS is considered liable for direct damages and (to an unclear extent) loss of profit born to individual as a result of the infringement. It is worth to mention Francovich bluntly overstepped the earlier ECJ no-new remedies rule, which was meant to protect the national procedural autonomy.[76]

For the detailed analysis about the application of Francovich liability in relation to state aid damage actions, see chapter 5.1.

[69] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 251.
[70] Following the ECJ wording in the Francovich closely, it could be even stated, that ECJ did not connect the amount of „compensation" with the amount or nature of the actual damages.
[71] ECJ decision, 05.05.1996, Brasserie Du Pecheur, C- 46/93, ECLI:EU:C:1996:79
[72] ECJ decision, 19.06.1990, Factortame, C-213/89, ECLI:EU:C:1990:257
[73] Chalmers (2010), *supra nota* 60, p. 304. It is interesting to note, that in Brasserie du Pecheur, the breach of EU law concerned directly effective provision. Nonetheless, ECJ upheld the damage claim which somewhat contradicts later rulings.
[74] ECJ decision, 05.05.1996, Brasserie Du Pecheur, C- 46/93, ECLI:EU:C:1996:79. point 51. State liability principle was further developed in the Köbler (ECJ decision, 30.09.2003, Köbler, C-224/01, ECLI:EU:C:2003:513) and Traghetti (ECJ decision, 13.06.2006, Traghetti, C-173/03, ECLI:EU:C:2006:391) cases in which ECJ decided that the state liability can also arise in cases where national court of last instance has caused the damage by misinterpreting the EU law. Chalmers (2010), *supra nota* 60, p. 306; 311-312.
[75] ECJ decision, 05.05.1996, Brasserie du Pecheur, C- 46/93, ECLI:EU:C:1996:79, point 87-89.
[76] Craig, P., De Burca, G. (2011), *supra nota* 21, p. 243.

3. PROCEEDINGS IN RELATION TO STATE AID INFRINGEMENT

3.1. Distinction between public and private enforcement

As already hinted, if MS is to distribute state aid which infringes the stand-still obligations, there are two different proceedings that can take place[77]:

1. Public enforcement action, which is started by a Commission[78];
2. Private enforcement action(s), which is/are started by a harmed individual(s) who lodge an action(s) against the infringer in the national court.

In addition to the aforesaid proceedings, it might also happen that a) MS recovers the state aid without a Commission or national court decision or b) unlawful state aid remains unnoticed, which means that after ten years from the distribution, the state aid shall be considered escaped from the stand-still obligation and will be treated as an existing state aid.[79]

It is necessary to stress that both the public and private enforcement actions can take place simultaneously and in principle independently.[80] This means that Commission in the context of public enforcement actions and MS national court in connection with private enforcement actions might be required to interpret and apply the same EU law norm but in different context.[81] In principle, this could lead to a situation where two institutions reach to a conflicting decision.

[77] Kohler, M. (2012). Private Enforcement of State Aid Law- Problems of Guaranteeing the EU Rights by Means of National (Procedural) Law. *European State Aid Law Quarterly*, 2012 (2), p. 370.
[78] Commission has two different phases of proceedings reserved for the notified state aid- preliminary, which cannot exceed two months and formal investigation, which is not bound by time limits, Craig, P., De Burca, G. (2011), *supra nota* 20, p. 1011. However, in relation to unlawful aid (or suspicion about unlawful aid) the commission is entitled to start the formal investigation directly, Article 9 (6) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248/9, 24.9.2015
[79] Article 17 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248/9, 24.9.2015
[80] Dunne, N. (2013-2014). Role of Private Enforcement within EU Competition Law. *Cambridge Yearbook of European Legal Studies*, 16, p. 148.
[81] Aim of the public enforcement actions is to end the infringement, whereas Commission has a specific tools/sanctions to achieve that. In relation to private enforcement actions, the aim is to protect the individuals rights and the procedural rules (including remedies) usually derive from the national law.

In relation to competition law, the possibility that national courts and Commission could reach to a conflicting decisions was mitigated with the adoption of regulation 1/2003, in which the article 16 (1) states that national courts cannot reach to a different decision where the Commission has already issued a decision in relation to the infringement.[82]

However, this does not preclude the possibility, that Commission might rule differently where national court is first to decide (in the context of private enforcement action).

In relation to state aid regulation, the situation is somewhat more complex. Academic literature recognizes that the private and public enforcement of state aid regulation can run independently[83] subject to following restraints:

1. National courts are not allowed to decide on the compatibility of the state aid;[84]
2. Based on the principle of sincere cooperation, which derives from the article 4 (3) TEU, the national court should take into account the Commission decision on the compatibility/incompatibility of the state aid where such decision has been issued;[85]
3. Where the national court determines that the state aid is distributed unlawfully, the national court should, on its own motion, order the recovery of the state aid together with illegality interest or, if latter is precluded due to the fact that Commission has already adopted positive decision, the payment of illegality interest for the time of unlawfulness.[86]

[82] See article 16 (1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.
[83] Buendia, S. (2017), *supra nota* 29, p. 408; Goyder, J., Dons, M. (2017), *supra nota* 12, p. 422.
[84] ECJ decision, 16.12.1992, Lornoy and Others, C-17/91, ECLI:EU:T:1992:514, point 30. Vajda, C., Stuart, P. (2010), *supra nota* 34, p. 631.
[85] Buendia, S. (2017), *supra nota* 29, p. 413.
[86] ECJ decision, 12.02.2008, CELF, C-199/06, ECLI:EU:C:2008:79. point 52 and C- 71/04 point 49. It is unclear, if the referred judgements create a new remedies for private individuals in the context of private enforcement or impose obligations to national courts in the context of public enforcement. The wording of the judgements seems to incline towards latter. In addition, in Transalpine Ölleitung (ECJ decision, 06.10.2006, Transalpine Ölleitung, C-368/04, ECLI:EU:C:2006:644), the ECJ found that national court should order the recovery of unlawful state aid even where Commission has already declared it compatible. In Lübeck (ECJ decision, 04.04.2014, Lübeck, C-27/13, ECLI:EU:C:2014:240) and Deutsche Lufthansa (ECJ decision, 21.11.2013, Deutsche Lufthansa, C-284/12, ECLI:EU:C:2013:755), the ECJ decided that where the Commission has already taken an opening decision to start a formal investigation proceedings, the national courts should take it into account in relation to private proceedings. However, ECJ positions in Transalpine Ölleitung,Lübeck and Deutsche Lufthansa were later overturned in CELF (Kohler, M. (2012), *supra nota* 77, p. 372.) and SEA (ECJ decision, 02.09.2015, SEA, T-674/14, ECLI:EU:T:2015:590) and Airport Handling (ECJ decision, 02.09.2015, Airport Handling, T- 688/14, ECLI:EU:T:2015:588) cases (Buendia, S. (2017), *supra nota* 29, p. 412.)

The national courts limited competence on interpreting the compatibility of state aid (i.e. applying article 107 TFEU) does not necessarily mean, that the private enforcement based on the infringement of article 107 TFEU is impossible. The private enforcement actions as such is just dependant on the Commission decision on the compatibility.

Author finds that the aim of the ECJ decision on the division of competences is clearly aimed at avoiding situations where:

a) national court and the Commission reach to a different conclusions on the compatibility;
b) national court (in the context of private enforcement action) refers the decision making through preliminary ruling to ECJ, i.e. the aim is to eliminate the threat, that ECJ would be required to decide on the compatibility in the context of both private and public enforcement proceedings.

This does not however preclude the national courts competence to follow through private enforcement proceedings based on the infringement of article 108 (3) TFEU where the Commission has not issued a decision on the subject and where, paradoxically, the national court could still refer the question of possible infringement to ECJ and/or reach to a different conclusion than the Commission. However, due to the sincere cooperation principle, this situation should, in principle, not occur where the Commission has already issued a decision on the compatibility.

When it comes to the national courts obligations to rule in relation to unlawful state aid on their own motion, such obligations clearly refers to the national courts public enforcement competence, since the civil proceedings should adhere only to the claimants claims, i.e. in the context of private enforcement actions, the national court cannot impose illegality interest on the unlawful state aid where the claimant has not specifically asked that.[87] In addition, it is worth to note that national courts have played a role in the context of public enforcement proceedings even before the CELF and Xunta de Galicia judgements, as according to TWD case law[88] the national courts are the last resort for the claimants who did not had a standing in front of the ECJ at the time it was possible to invoke the Commission decision directly.[89]

[87] Vutt, M. (2011). Hagi ese ja alus ning hagi muutmine kohtupraktikas. *Juridica*, 5, p. 333.
[88] C-188/92
[89]In this situation, national court refers the action to ECJ for a preliminary ruling. Buendia, S. (2017), *supra nota* 29, p. 414.

3.2. Content of the enforcement actions

The content of both the public and private state aid enforcement action is to answer to the following questions[90]:

1. Does the measure under question amount to a state aid?;
2. Whether the state aid is part of existing aid scheme or not?;
3. Whether the state aid is exempt from the stand-still obligation and compatible (e.g. based on the general block exemption regulation, de minimis regulation, etc[91])?;

The prerequisite for determining the answer to any of the question is that the answer to the previous question is yes.[92] In the event that the answers to all the questions were affirmative, the Commissions (in the context of public enforcement action) moves further to determine if the state aid was granted without the prior authorization of the Commission and if yes, is the state aid compatible with the internal market. If the Commission decides that the unlawful state aid is also incompatible, it will issue a legally binding order, which obliges MS to recover the state aid together with illegality interest.[93]

In the same time, the national courts assessment of the abovesaid questions depends on a) what stage is the public enforcement action and b) whether the enforcement action is based on the infringement of article 108 (3) TFEU or 107 TFEU.

In a situation where Commission has already decided on the compatibility (including also unlawfulness) of the state aid, the national court (in the context of private enforcement action) can and should adhere to the Commission decision, meaning that national court itself does not have to conduct the assessment on the abovesaid questions. However, national court should nevertheless additionally decide whether the unlawfulness or illegality of the state infringed the claimant´s rights.

[90] *Ibid*., p. 411.
[91] Piet, J. S., Farley, M. (2017), *supra nota* 32, p. 275.
[92] Buendia, S. (2017), *supra nota* 29, p. 412.
[93] Article 16 (2) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248/9, 24.9.2015

In a situation, where Commission has yet to decide on the unlawfulness and compatibility of the state aid, the national court **can only initiate and conduct private enforcement actions which are based on the infringement of article 108 (3) TFEU**, since national court cannot assess the compatibility of the state aid. In the context of private enforcement which is based on the article 108 (3) TFEU, the national court should assess all the abovesaid questions and decide whether the claimant´s rights were infringed by the article 108 (3) TFEU. Should the national court face the private enforcement action based on the infringement of article 107 TFEU, the national court should stay the proceedings until Commission has issued a decision.

4. STATE AID DAMAGES

The three main differences, which distinguish state aid regulation infringements from the competition law ones, are that:

a) the infringer of state aid regulation is always the MS as opposed to undertakings in competition law;
b) while the competition law prescribes a variety of specific infringements, the MS can infringe the state aid regulation only through the distribution of state aid, i.e. advantage; and
c) the state aid infringements are either formal or formal and material, whereas in competition law which does not contain ex-ante control mechanism, the infringement can be only material.

It is therefore interesting to consider what type of damages can the MS formal and material infringements of state aid regulation cause and to whom. [94] In principle, the infringement of state aid regulation has to be capable of causing damages. To state otherwise would undermine the objective of the regulation.[95]

In the context of competition law where only material infringement can take place, the damages which might follow are broadly divided as "overcharge" and/or "exclusionary" damages.[96] While the former refers to a overcharges which are imposed by the infringing supplier to a purchases, the exclusionary damages include damages which are caused by the infringers attempt to exclude the competitors from the market. [97]

[94] Goyder, J., Dons, M. (2017), *supra nota* 12, p. 425.
[95] This is also evident from the wording of the article 107 (1), which states that incompatible aid has to „distort or threaten to distort the competition".
[96] Legal issues in Competition law damages. Competition law journal (2008) Claims, Jowell, Daniel, p. 44.
[97] *Ibid*.

4.1. Damages caused by the illegal state aid

Similarly to competition law damages, the infringement of state aid regulation can cause "exclusionary" damages.[98] Exclusionary damages can only occur in relation to illegal state aid, as the compatible state aid in its nature cannot distort or threaten to distort competition. Exclusionary state aid damages can occur, for example, where the illegal state aid enables recipients to gain a competitive advantage in a market which can materialize as increase of market share or a specific business opportunity. [99] It is necessary to clarify that under "competitive advantage" the author does not mean the distribution of the state aid alone as the recipient has to make use of the illegal state aid for his/her favour. [100]

The competitive advantage can (and most likely is to) cause exclusionary damages to the **competitors of the state aid recipient**[101], whereas the nature of such exclusionary damages is generally loss of profit.[102] However, competitors might also suffer direct "exclusionary" damages, where they are[103]:

a) forced to make investments in order to combat the competitive advantage;
b) are successfully "excluded" from the market, i.e. forced to declare bankruptcy and liquidate the company[104];
c) have incurred expenditure during preparation for a bidding which was won by the recipient of the state aid;
d) etc.

Due to the fact that the main objective of the state aid regulation is to preclude the occurrence of the abovesaid damages (identically to exclusionary and overcharge damages in the context of competition law) the author would state that the abovesaid damages constitute true state aid regulation damages.

[98] Infringement of state aid regulation cannot cause „overcharge damages" since distribution of state aid does not cause overcharges (at least not directly).
[99] Käis, L. (2015), *supra nota* 13, p. 618.
[100] Honore, M., Jensen, N.E. (201*), supra nota* 9, p. 271-272.
[101] Käis, L. (2015), *supra nota* 13, p. 616.
[102] *Ibid.*, p. 618.
[103] Goyder, J., Dons, M. (2017), *supra nota* 12, p. 424.
[104] Soltesz, U. (2013). Effet Utile Taken to Extremes: Does an Opening Decision Already Trigger the Stand-Still Obligation. *European State Aid Law Quarterly*, 2013 (4), p. 643.

4.2. Incidental consequences caused by the unlawful state aid

As already stated, the infringement of state aid regulation can also be purely formal, i.e. the distributed state aid infringes the article 108 (3) TFEU but is later declared compatible with the internal market. Legal literature on the subject finds that purely formal infringement has a potential to cause damages to competitors through the timely advantage that the recipient enjoys. [105] Logic behind the timely advantage reasoning is, that had the MS followed the stand-still obligation, the compatible state aid would have been distributed later, after Commission positive decision.

Author agrees that the distribution of state aid, irrespective of the illegality, can cause variety of consequences. For example, the distribution of unlawful state aid can, similarly to illegal state aid, allow recipient to obtain a specific business opportunity. This means that the purely formal infringement can, at very least, entail loss of profit to competitors of the recipient.

Author would not however consider any of the consequences caused by the purely formal infringement as true state aid damages, since such consequences are not connected with the objective of the state aid regulation, i.e. neither article 108 (3) TFEU nor 107 TFEU are aimed at preventing such damages. Instead, the consequences for purely formal infringement are incidental and in the legal perspective, undistinguishable from any other consequences following an action at any kind.

In addition, it is relevant to note that due to the nature of compatible state aid, consequences of purely formal infringement cannot be considered as distortions of competition, i.e. from the state aid regulation perspective the consequences are not harming competition and competitors.

[105] ECJ decision, 12.02.2008, CELF, C-199/06, ECLI:EU:C:2008:79. point 47-50. Hofmann, Herwig, C. H., Micheau, C. (2016). *State Aid Law of the European Union*. Oxford: Oxford University Press, p. 453.

4.3. Incidental consequences caused to recipients and third persons

State aid infringements (both formal and material) can also cause negative consequences to the **recipients of the state aid**[106] and **third persons**[107].

In relation to recipients, the negative consequences may arise where the distributed state aid is declared illegal by the Commission, in which case the Commission issues recovery order, which imposes on recipient also an additional obligation to pay illegality interest.[108] However, the unlawful state aid can also be recovered together with the illegality interest by the national court, irrespective of the illegality of the state aid.[109] ECJ has even found that in a situation where the unlawful state aid is declared compatible by the Commission and subsequent recovery is out of question, the MS national court should order the payment of illegality interest for the time of the unlawfulness. [110]

If the recipient of the state aid is ordered to pay the illegality interest[111], the illegality interest as such constitutes clearly as unwanted and negative consequence to the recipient.[112] Recovery of the illegal state aid can cause negative consequences to recipients where recipient has taken obligations based on the illegal state aid and after recovery is unable to fulfil such obligations. In relation to recovery of the unlawful state aid, which is always temporary[113], the recipient might suffer negative consequences where he/she misses a specific business opportunity due to the recovery.

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[106] Bacon, K. (2017). *European Union Law of State Aid*. (3rd ed.) Oxford: Oxford University Press, p. 563.
[107] Käis, L. (2015), *supra nota* 13, p. 616.
[108] *Ibid.*, p. 616.
[109] Kohler, M. (2012), *supra nota* 77, p. 372-373.
[110] ECJ decision, 12.02.2008, CELF, C-199/06, ECLI:EU:C:2008:79. point 52-55. Kohler, M. (2012), *supra nota* 77, p. 372-373.
[111] The aim of the illegality interest is to restore the market situation before the infringement. To be more specific, the logic behind the illegality interest is, that had the MS obtained the benefit construed in the state aid in accordance with market conditions, such benefit would have been accompanied by the interest. Ghazarian, P. (2017), *supra nota* 31, p. 228.
[112] Since the objective of the illegality interest is to restore the market situation before the infringement (Ghazarian, P. (2017), *supra nota* 31, p. 228.), it is questionable, if the illegality interest could be considered as "damages" and passed on to the MS, as this would bluntly defeat the objective. On the other hand, awarding illegality interests as damages would benefit the private enforcement of state aid. Ultimately, the decision remains at the discretion of national courts but some parallels with conflicting EU interest could be drawn from the Pfleiderer case (ECJ decision, 14.06.2011, Pfleiderer, C-360/09, ECLI:EU:C:2011:389).
[113] It is logical to presume, that once the recovered unlawful state aid is declared compatible with internal market, it will be reimplemented.

Somewhat mirroring the recipients, the recovery of the illegal state aid could also cause negative consequences to third parties.[114] Good example could be the creditors of the recipient, where the recipient is, due to the recovery of illegal state aid, unable to fulfil his/her obligations owed to creditors through which creditor suffers loss. [115]

In the context of negative consequences caused to the third parties, it is necessary to also consider a scenario, where the illegal state aid is directly financed from the third-party taxes/contributions, as latter is described in the Commission Notice.[116]

Similarly to negative consequences that can occur in the context of purely formal infringement, the author of this thesis does not consider any of the abovesaid as true state aid damages.

First and foremost, none of the abovesaid scenarios are connected with the objective of the state aid, i.e. neither article 108 (3) nor 107 TFEU are aimed at preventing such negative consequences. Instead, these scenarios constitute, similarly to consequences following purely formal infringement, as incidental consequences.

In addition, the third persons taxes/contributions which are used to directly fund the state aid categorize under traditional unjust enrichment cases, not damages per se. This is due to the fact that taxes/contributions are charged unlawfully based on illegally distributed state aid. Upon declaring the state aid illegal and abolishing the measure, the harmed third persons will have a clear-cut repayment claim under the national unjust enrichment clauses, which are recognized in every MS.[117]

4.4. Causality in relation to competitors

It is also necessary to point out that in relation to competitors damages, the "exclusionary" damages nor incidental consequences can never be the direct result of the MS infringement. [118] Namely, the causation of damages requires the co-operation of MS and recipient(s).

[114] Käis, L. (2015), *supra nota* 13, p. 616.
[115] *Ibid.*
[116] A good example would be the renewable energy support which is financed by the consumers (even though such state aid is, subject to certain conditions, considered compatible). Käis, L., *supra nota* 13, p. 616.
[117] Zweigert, K., Kötz, H. (1998). *An Introduction to Comparative Law*. (3rd ed.) Oxford: Clarendon Press; Oxford University Press, p. 538-539.
[118] Honore, M., Jensen, N.E. (201*), supra nota* 9, p. 271-272.

To be more specific, the causation chain starts with the MS distributing unlawful and/or illegal state aid but it also entails the recipients use of the state aid to enhance their position in the market.

Michael Jensen and Nanna Eram have dissected this two-level causality chain and named the levels as upstream and downstream causation.[119] Upstream causation entails the distribution of unlawful and/or illegal state aid whereas the downstream causation refers to the link between recipients use of the state aid and the damage(s).

The aforesaid causality chains differs from the causality observable in competition law damage cases.[120] In latter, the exclusionary and overcharge damages are directly connected with the illegal activity of the undertaking(s).[121] This raises, inter alia, the question who should be considered liable for the competitors exclusionary damages.[122] Is it MS or the recipient or both?

4.5. Causality in relation to recipients and third-party damages

In relation to competitors and third persons, the causality chain for the incidental consequences requires, similarly to competitors, also that a) MS distributes the unlawful/illegal state aid and b) the state aid is either recovered on behalf of Commission or national court (together with the illegality interest) or the national court orders only the recovery of illegality interests. This means that the infringement of state aid regulation on behalf of MS alone cannot cause harm directly to recipients and third parties, i.e. the causation for the negative consequences following the infringement of articles 108 (3) and/or 107 TFEU always requires further actors/actions.[123]

[119] *Ibid*.
[120] Goyder, J., Dons, M. (2017), *supra nota* 12, p. 423.
[121] Only exception being the overcharge damages where overcharges levied on purchasers are passed on to another purchaser(s) or consumer(s), in which case the link between infringement and damages is extended and contributed by additional actors.
[122] Kohler, M. (2012), *supra nota* 77, p. 371.
[123] With the exception of situation where state aid is funded from third persons taxes/contributions. However, as we already established, such consequences do not constitute as damages but unjust enrichment.

5. PRIVATE ENFORCEMENT AND LIABILITY BASED ON THE FRANCOVICH

5.1. Francovich in the context of state aid damages

In the eyes of the Commission and academic literature, the Francovich state liability is considered as an EU law instrument based on which individuals could claim compensation for damages caused by the infringement of the article 108 (3) TFEU,[124] whereas Francovich fulfils simultaneously two objectives: a) making it possible to submit the enforcement action and b) establishing the liability of the MS for the damage.

Both the Notice and legal literature on the subject agree, that in relation to state aid damages the Francovich (or rather Brasserie du Pecheur) conditions could be in principle fulfilled based on the infringement of article 108 (3) TFEU, which always precedes the infringement of article 107 TFEU[125]:

a) not only is the intention behind the article 108 (3) TFEU to give individuals rights, but the said provision does give rights to individual to submit an enforcement action;
b) when it comes to the condition requiring that the breach of EU law has to be sufficiently serious, it is considered fulfilled, since MS do not "enjoy a measure of discretion" [126] at deciding if the stand-still obligation should be followed;[127]
c) Commission is on the position that the third condition could be "met in various ways".[128] However, due to the indirect causal chain, even the supporting legal literature seems to have some reservations about the fulfilment of this condition.[129]

[124] Käis, L. (2015), *supra* nota 13, p. 617-618; Goyder, J., Dons, M. (2017), *supra nota* 12, p. 423.
[125] *Ibid.*
[126] ECJ decision, 05.05.1996, Brasserie Du Pecheur, C- 46/93, ECLI:EU:C:1996:79, point 56.
[127] Käis, L. (2015), *supra nota* 13, 619. In addition, AG Teusauro clarified in the Telecom case (ECJ decision, 26.03.1996, British Telecommunication, C- 392/93, ECLI:EU:C:1996:131) that sufficiently serious breach takes place where a) clear, precise obligation has not been complied with, b) there is interpretative guidance from the ECJ on „doubtful legal situations" and c) the national authorities interpretation is „manifestly wrong". Harlow, C. (1996). Francovich and the Problem of the Disobedient State. *European Law Journal*, 2 (3), p. 203.
[128] Notice point 48.
[129] Käis, L. (2015), *supra nota* 13, p. 618; Goyder, J., Dons, M. (2017), *supra nota* 12, p. 423.

The author of this thesis opposes the abovesaid position that Francovich is available/usable in the context of state aid private enforcement. When it comes to the fulfilment of the conditions, the author agrees, that the first condition for the application of the Francovich liability is fulfilled and could, theoretically also apply in relation to article 107 TFEU.[130] However, when it comes to the second condition, then Commission and legal literature have overlooked the fact that notwithstanding the abstract wording of the condition, in practice the "sufficiently serious breach" has only been established in situations where MS has been late in implementing directive.[131] Latter is also evident from the Francovich case.

In addition, academic literature supports the position that Francovich constitutes as a residual EU remedy, reserved only for situations where all else EU law private enforcement options/tools (e.g. direct effect) fail or are not available.[132] This means, that for the Francovich to be available as a private enforcement option/tool in the context of state aid regulation, the pre-requisite would be that articles 108 (3) and 107 TFEU are not directly effective but nevertheless, hold an intention of giving rights to individuals.

Author would also criticize the way in which Commission and supporting authors have chosen to bolster the fulfilment of second Francovich condition, as they have presented the "MS discretion" guideline out of context. The full statement made in Brasserie du Pecheur paragraph 51 states the following:

"The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or (EU) authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a (EU) institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to (EU) law."

As we can see, the guideline established by ECJ is much wider and prescribes a list of factors which the national court should take into account while analysing the "sufficiently serious breach".

[130] See chapter 6 below
[131] Lock, T. (2012). Is Private Enforcement of EU Law through State Liability a Myth: An Assessment of 20 Years after Francovich. *Common Market Law Review*, 49 (5), p. 1694.
[132] Chalmers (2010), *supra nota* 60, p. 302-303; Craig, P., De Burca, G. (2011), *supra nota* 20, p. 252-253.

Author would even claim that in a theoretical situation where the Francovich could be considered as a private enforcement tool for state aid infringements, the infringements of articles 108 (3) and 107 TFEU do not necessarily amount under second condition. First, as we have already established, the infringement of article 108 (3) TFEU is formal and therefore excusable[133] i.e. in its nature it cannot be considered serious breach. In principle, the sufficiently serious breach could be distinguished where MS infringes article 107 TFEU. However, the wide and subjective definition of the notion of state aid excludes the possibility that MS infringements are always intentional.[134] In situations where the MS infringement does not contain the intent, the infringement of article 107 TFEU might be considered escaped from the (sufficiently serious breach).

The third condition can never be fulfilled, as we have already seen that the infringement of state aid regulation (neither article 108 (3) nor 107 TFEU) cannot cause exclusionary damages nor incidental consequences directly. This highlights another flaw of the Francovich which, when applicable, would bluntly disregard the principle of justice[135] and punish only the MS where the exclusionary damages of competitors are more directly connected with the actions of the recipients.

Author would also point out that the Commission theory on the application of the Francovich is most likely due to the simplicity that Francovich offers. Would it be possible to assert MS liability based on the latter, it would be unnecessary to categorize the different state aid damage scenarios, take into consideration the type of damages the infringement of articles 108 (3) and 107 TFEU could cause, elaborate on the interaction between formal and material infringements, categorize individuals who might suffer damages[136], etc. The inapplicability of Francovich is also supported by the fact that all the other remedies described in Notice are predominantly based upon the direct effect of article 108 (3) TFEU.[137]

[133] Buendia, S. (2017), *supra nota* 29, p. 411.
[134] Leigh, H. (2003), *supra nota* 27, p. 365.
[135] Tampuu, T. (2003). Deliktiõiguslik vastutus teise isiku tekitatud kahju eest. *Juridica*, 7, p. 464.
[136] Even though, the Notice itself does not focus on the damage actions of the recipients of the state aid.
[137] Notice makes only a minor reference to „possibility to claim damages based on national rules". Notice point 44.

6. PRIVATE ENFORCEMENT BASED ON THE DIRECT EFFECT

In relation to state aid regulation, it is well established that article 108 (3) TFEU is directly effective.[138] The direct effect of article 108 (3) TFEU was recognized by ECJ in a decision, which is most famous for the establishment of the supremacy of EU law- Costa v. Enel.[139]

As already hinted, the Commission and academic literature perceive only article 108 (3) TFEU directly effective and find that the possibility of submitting private enforcement actions in the context of state aid regulation exists solely because of the former (with the exception of Francovich, which Commission perceives as a route for damage actions[140]). This is due to a) fact that infringement of article 108 (3) TFEU is always the prerequisite for the infringement of article 107 (1), b) the Lornoy and others decision, where ECJ stated that national courts are not competent to assess the compatibility of the state aid, as the latter belongs to the exclusive competence of the Commission[141], and c) ECJ practice which has repeatedly and only focused on the direct effect of the article 108 (3) TFEU.

Author of this thesis disagrees and states that article 107 can also be directly effective.[142] As already shown in chapter 3.1, the ECJ decision on the division of competences does not preclude the possibility that private individual could invoke the infringement of article 107 TFEU where Commission has already issued a decision on the compatibility.

To determine if article 107 TFEU is directly effective, it is necessary to assess it against established conditions, i.e. is it clear, negative, unconditional, contains no reservation on the part of the MS and not dependant on any national implementation measure.

From the outset it is clear that the article 107 TFEU is negative, as it forbids a certain action, contains no reservation on the part of the MS as MS has no discretion to deviate from the obligation and not dependant on any national implementation measures.

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[138] Pastor-Merchante, F. (2017). *The Role of Competitors in the Enforcement of State Aid Law*. Oxford: Hart Publishing, p. 59.
[139] *Ibid*., p. 59.
[140] Regardless, the Commission and academic find that Francovich could also be applied only in relation to the infringement of article 108 (3) TFEU.
[141] ECJ decision, 16.12.1992, Lornoy and Others, C-17/91, ECLI:EU:T:1992:514, point 30. Vajda, C., Stuart, P. (2010), *supra nota* 34, p. 631.
[142] Indication to the latter can be seen from „State Aid Manual of Procedures", where the Commission has referred to article 107 TFEU as „directly applicable in all Member States". DG Competition. (2013). State Aid Manual of Procedure, section 1-3. Retrieved from: https://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf , 15. October 2019.

However, the said article raises questions in the light of clarity and unconditionality requirements. As already stated, the article 107 (1) does contain several arbitrary conditions and the definition of state aid is everything else than clear. Irrespective, author of this thesis finds that the clarity requirement is fulfilled since a) referred conditions are not more abstract than conditions lied out in articles 101 and 102 TFEU, which are directly effective[143] and b) the article 108 (3) TFEU, which requires MS to notify Commission about state aid (i.e. MS has to be able to distinguish state aid)[144], is directly effective.

The fulfilment of conditionality condition seems questionable since the paragraphs 2 and 3 of the article 107 TFEU do create certain exceptions from the 1-st paragraph. However, this structure is identical with article 101, which also lists a variety of exceptions but is nevertheless, directly effective.

To conclude, the author finds that article 107 TFEU is directly effective. However, it is necessary to remind that:

a) the direct effect only creates a route for the private enforcement action and in relation to article 107 TFEU, this route is available only after Commission has determined the infringement; and
b) the availability of specific remedies and that it is possible to successfully achieve the awarding of the remedy depends on the national procedural rules (with certain exceptions).

[143] Lang, J.,T. (1985), *supra nota* 5, p. 29.
[144] Goyder, J., Dons, M. (2017), *supra nota* 12, p. 420.

7. SUCCESSFUL STATE AID DAMAGE ACTIONS IN ESTONIA

To assess the successfulness of state aid damage actions, it is necessary to perceive the state aid damage actions in the context of specific MS because of the decentralized private enforcement mechanism and national procedural autonomy, according to which EU law based private enforcement actions are at the discretion and subject to the MS legal systems. In the context of this thesis, the author focuses its attention to the state aid damage actions in the context of Estonian legal system. More specifically, and due to the examples set by the damage´s directive, the author focuses on the rules regarding establishment of liability, evidence and limitation periods.

Author attempts to prove that in the context of Estonia, it is impossible to receive compensation for any of the negative consequences which are caused by the infringement of state aid regulation.

It is also necessary to note that the national procedural autonomy as such is not absolute, as ECJ has in several occasions limited and guided national procedural autonomy and also created specific EU law rules for specific infringements. This means that in addition to applicable Estonian rules, it is also necessary to consider the EU law-based limitations/guidance´s and rules.

7.1. State aid damage actions and principle of effectiveness and equivalence

First and foremost, it is necessary to consider how principle of equivalence and effectiveness limit the national procedural autonomy and indicate what Estonian national rules and how would apply to state aid damage actions.

7.1.1. Principle of equivalence

The principle of equivalence is essentially aimed at combating discrimination at national level, stating that individuals "EU rights" cannot be "less favourable than those relating to the similar domestic actions" .[145]

[145] ECJ decision, 16.12.1976, Rewe, C-33/76, ECLI:EU:C:1976:188, point 5. Petit, N. (2014). The Principles of Equivalence and Effectiveness as a Limit to National Procedural Autonomy. Retrieved from: https://antitrustlair.files.wordpress.com/2014/07/the-principles-of-equivalence-and-effectiveness-n-petit-final.pdf , 15. October. 2019

The key in applying the said principle is identifying the similar action(s) in national law[146], whereas "similar action " as such should be perceived in the light of the purpose of the claimed remedy, the cause of action and essential characteristics.[147]

Estonian legal system does not prescribe, nor does it have practise with a private enforcement actions, which could be considered identical with state aid damage actions. This means that in Estonian law, the applicable legal rules should be searched from general provisions of liability, access of evidence and limitation periods whereas such provisions cannot be applied in discriminating manner.

7.1.2. Principle of effectiveness

Principle of effectiveness entails that the MS national law "must not render practically impossible or excessively difficult the exercise of EU law".[148] In applying the said principle, the main question is, what is the content of EU right? [149]

Whereas it is generally possible to determine the content of primary EU right, the extent of secondary rights depend on the national procedural autonomy and on specific ECJ decisions. Only the latter can create the threshold, which the national court is obliged to follow in the light of principle of effectiveness.

However, the principle of effectiveness could also be applied through analogy by perceiving how ECJ has limited and guided certain national rules in the context of similar EU-law based private enforcement actions.[150]

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[146] Laenarts, K. (2011), *supra nota* 59, p. 16.
[147] *Ibid.*
[148] C- 261/95. Petit, N. (2014). The Principles of Equivalence and Effectiveness as a Limit to National Procedural Autonomy. Retrieved from: https://antitrustlair.files.wordpress.com/2014/07/the-principles-of-equivalence-and-effectiveness-n-petit-final.pdf , 15. October. 2019. It is relevant to note that the legal literature also distinguishes principle of effective judicial protection, which derives from the Article 19 (1) TEU. Engstrom, J. (2011). The Principle of Effective Judicial Protection After the Lisbon Treaty Case Law. *Review of European Administrative Law*, 4 (2), p. 53. Even though the principle of effectiveness seems to entail the principle of effective judicial protection there is a difference. Aim of the principle of effectiveness is to ensure effective enforcement of EU law. Aim of the effective judicial protection is ensure that individuals EU rights are effectively protected. The two objectives of these somewhat similar EU law principles do not have to coincide.
[149] Laenarts, K. (2011), *supra nota* 59, p. 14.
[150] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 233-237. It is also interesting to note that whereas the principle of equivalence combats discrimination that can arise on behalf of MS legal system, the principle of effectiveness can create a "reverse discrimination" situation, where the infringement of EU rights can be treated more favourably than infringements of MS national law. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 240.

In the narrow context of state aid damage actions, the ECJ has not made any profound statements. However, it is worth to elaborate on the Transalpine Ölleitung and SFEI cases, as both remotely mention state aid damage actions.

7.1.3. Transalpine Ölleitung and SFEI

Transalpine Ölleitung[151] concerned the implementation of selective tax regime. Even though the subject of the case was not damage claim, the ECJ held that "A national court may be required to rule on an application for compensation for the damage caused by the unlawful nature of the aid".[152]

Transalpine, like any other ECJ decisions on the private enforcement of state aid, focuses narrowly only on the infringement of article 108 (3) TFEU. In addition, the judgement does not do more than just plays with the idea that MS national courts **might** be required to uphold damage actions. In another words, the judgement fails to give a definitive indication on when and how are MS national courts required to uphold article 108 (3) TFEU based damage actions, who is claimant, defendant and what is the scope of damages. The judgment does however give off a vague hint/threat, that when MS national court refuses to award damages based on the infringement of article 108 (3) TFEU and the decision is appealed and submitted to preliminary ruling, the ECJ might overturn the judgement of the first/second instance.

In SFEI[153], a postal company sought private actions (including a considerable damage claim[154]) against its competitor SFMI, who allegedly was (continuously) receiving state aid.[155] One of the questions which was referred to ECJ, essentially asked if competitors could be considered liable under EU law for damages caused by the infringement of stand-still obligation.

[151] ECJ decision, 06.10.2006, Transalpine Ölleitung, C-368/04, ECLI:EU:C:2006:644
[152] ECJ decision, 06.10.2006, Transalpine Ölleitung, C-368/04, ECLI:EU:C:2006:644, point 56, see also, ECJ decision, 12.02.2008, CELF, C-199/06, ECLI:EU:C:2008:79 point 53 and 55, ECJ decision, 11.07.1996, SFEI, C-39/94, ECLI:EU:C:1996:285 point 75, ECJ decision, 11.12.2008, Freistaat Sachsen, C-334/07, ECLI:EU:C:2008:709. point 54, ECJ decision, 18.12.2008, Wienstrom, C-384/07, ECLI:EU:C:2008:747. Honore, M., Jensen, N.E. (201*), supra nota* 9, p. 265.
[153] ECJ decision, 11.07.1996, SFEI, C- 39/94, ECLI:EU:C:1996:285
[154] *Ibid*., point 4.
[155] Goyder, J., Dons, M. (2017), *supra nota* 12, p. 429. To be more specific, SFEI sought the injunction to end the distribution of state aid, repayment of state aid and damages. ECJ decision, 11.07.1996, SFEI, C- 39/94, ECLI:EU:C:1996:285, point 12.

The ECJ answered that EU law does not foresee liability on the recipient since the latter is not the addressee of stand-still obligation.[156] ECJ also clarified that the lack of EU law basis does not preclude the possibility that the recipient might bear liability based on national non-contractual liability laws/practises.[157]

Similarly to Transalpine Ölleitung, the ECJ decision in SFEI does not have a considerable impact on state aid damage actions. However, the ECJ decision could be interpreted so, that while the EU law does not foresee the liability of competitors, it might do so in relation to MS. Nevertheless, the referred basis of liability requires further clarification on behalf of ECJ.

In addition, the SFEI decision deserves some obvious criticism.[158] At the time of deciding the referred case, the ECJ had already expressed in several state aid repayment cases that the recipients of the state aid cannot rely (on their defences) on legitimate expectations since the "diligent businessman" should be able to make sure if the prior notification has made and if the stand-still obligation has been duly followed.[159] The next logical step from that statement would have been to assert the recipients EU law based liability. ECJ current position can be characterized as somewhat controversial since it is presumes that the recipient of the aid is always aware if the stand-still obligation is followed or not, but the EU law does not prescribe a liability for the use of the unlawful aid.

7.2. Establishment of liability

Possibility to establish liability for the infringement/use of the unlawful/illegal state aid plays a key role in the successfulness of the damage claim. In addition, the rules applicable for the establishment of liability also provide an answer to who is/could be a defendant in state aid damage actions and what is the scope of potential compensation.

[156] ECJ decision, 11.07.1996, SFEI, C- 39/94, ECLI:EU:C:1996:285, point 74.
[157] *Ibid*., point 75.
[158] The SFEI judgement has been criticised in legal literature for ECJ failure to decisevly assert the recipients EU law based liability, which would have undoubtedly affected the principle of effectiveness and effective judicial protection in a positive direction. Struys, M., L. (1997). SFEI- A Missed Opportunity. *Irish Journal of European Law*, 6 (2), p. 185.
[159] ECJ decision, 20.03.1997, Alcan, C-24/95, ECLI:EU:C:1997:163, point 25, ECJ decision, 4.04.2001, Giulia, T-288/97, ECLI:EU:T:2001/115, point 107, ECJ decision, 14.01.2004, Fleuren, T-109/01, ECLI:EU:T:2004:4, point 135. Jaros, K., Ritter, N. (2004). Pleading Legitimate Expectations in the Procedure for the Recovery of the State Aid. *European State Aid Law Quarterly*, 2004 (4), p. 574.

In relation to competition law damages and up until the Courage and Manfredi case law, the establishment of liability remained solely in the competence of national procedural autonomy, i.e. there were 28 unharmonized rules in relation to liability and it was unclear, if it was possible to establish the culprit´s liability in all the MS-s. This situation was changed by the referred two judgements, which established the EU law-based principles which allow to hold undertakings accountable for damages caused by the infringement of articles 101 and/or 102 TFEU.

Today, the legislator has moved further from the Courage and Manfred as the basis for the liability of competition law damages can be found in the damage´s directive. In Estonia, the respective damages directive provision is implemented into Competition Act, stating quite laconically that everyone has the right to receive a compensation for proprietary damage caused to them by the commitment of prohibited act. [160]

Neither EU law nor Estonian law contain specific provisions for liability in a situation where MS has infringed the state aid regulation. This means, that the establishment of liability has to be assessed a) in EU level against Courage and Manfredi and b) in Estonian level against general liability principles deriving from Estonian legislation.

7.2.1. EU law rules for liability (Courage and Manfredi)

Courage[161] concerned a case where Mr (Courage) Crehan agreed to take a lease of a pub, subject to a condition that Crehan was also obliged to buy beer from the lessor. Two years after signing the lease, Mr Crehans business failed since he was unable to compete with nearby pubs, who were able to obtain beer without restrictions and at a cheaper price.

Lessor sought payment for delivered beer, to which Mr Crehan submitted counterclaim for damages since the agreement to buy beer only from the lessor constituted as an infringement of article 101 TFEU.

It is also interesting to note that the UK law forbid the awarding of the damages to an individual who himself was a part of such illegal agreement.

[160] (Estonian) Competition Act[1]. RT I 2001, 56, 332 § 78 (1). Prohibited act as such refers to the infringement of articles 101 and/or 102 TFEU)
[161] ECJ decision. 20.09.2001, Courage and Crehan, C-453/99, ECLI:EU:C:2001:465

Case was referred to ECJ who decided in that "the full effectiveness of Article 85 of the Treaty (now 101 TFEU) and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by contract or by conduct liable to restrict or distort competition".[162]

Notwithstanding the vague wording, the Courage entails a liability of an undertaking who, by infringing article 101 TFEU, causes damages to another individual, whereas the amount of compensation is **commensurate with the actual harm**, irrespective if it materialises as direct damage or loss of profit.[163] In addition, infringer itself could claim such damages, as in Courage the ECJ dismissed the Mr Crehans own participation in the illegal agreement, reasoning that he did not "bear significant responsibility for the distortion of competition".[164]

Manfredi[165] had somewhat similar background to Courage, concerning the illegal agreement between insurers, as a result of which latter asked 20% higher premiums from customers. ECJ upheld the Courage judgement and awarded damages to customers by clarifying that "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC (now 101 TFEU)."[166]

ECJ-s elaboration in Manfredi has been interpreted that the establishment of liability requires only causal link between the infringement and damages, whereas other ancillary prerequisites which might arise in the context of national law (e.g. the requirement of fault), are dismissed.[167]

It is necessary note that Courage and Manfredi followed Francovich ruling and it was hoped that they would extend the Francovich jurisprudence by creating an EU horizontal liability principle.[168] Notwithstanding the aforesaid, it is clear that referred cases fall in the direct effect jurisprudence.[169]

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[162] *Ibid.*, point 26.
[163] Frese, M. (2011). Fines and Damages under EU Competition law: Implications of the Accumulation of Liability. *World Competition*, 34 (3), p. 403.
[164] ECJ decision. 20.09.2001, Courage and Crehan, C-453/99, ECLI:EU:C:2001:465, point 31.
[165] ECJ decision, 13.07.2006, Manfredi, C-295/04, ECLI:EU:C:2006:461
[166] *Ibid.*, points 60-61.
[167] De Smijter, E., O`Sullivan, D. (2006). The Manfredi judgement of the ECJ and how it relates to the Commission´s initiative on EC antitrust damages actions.- *Competition Policy Newsletter*, No. 6, p. 24. Retrieved from: https://ec.europa.eu/competition/speeches/text/2006_3_23_en.pdf , 15 October. 2019
[168] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 246.
[169] *Ibid*., p. 247.

The possibility, that Courage and Manfredi could be used in the context of state aid damage actions for the establishment of MS liability is supported by the fact that both of the referred cases concern competition law damages. We have already established that state aid regulation forms part of a competition law.

If Courage and Manfredi could be applied in relation to state aid damage actions, it would be in principle possible to establish MS liability in relation both the exclusionary state aid damages and for the incidental consequences suffered by recipients and third persons since:

a) the only prerequisite for the establishment of liability would be the establishment of causal relationship between the infringement and the damages/incidental consequences; and
b) the Courage indicated that the damages that can be claimed do not necessarily have to be damages which the regulation aims to prevent.

It is necessary to remind that the exclusionary state aid damages and incidental consequences are not the direct cause of the infringement of state aid regulation, meaning that the question if causation is met remains nevertheless at the discretion of MS.[170] Also, the application of Courage and Manfredi would mean that only the **MS could be held liable** for the state aid damages/incidental consequences, as only MS can infringe the statutory duty.

Position that only MS could be held liable under EU law is supported by the ECJ decision in SFEI which gives a vague hint that EU law can only prescribe the liability of MS in the context of state aid damage actions.

However, the author finds that it is unlikely that Courage and Manfredi jurisprudence could be applied in the context of state aid damage actions as ECJ has emphasized in the said case law that the liability can arise for the **infringements of articles 101 and 102 TFEU**. In addition, ECJ has not applied the case law in relation to any other EU law infringements.[171] In another words the Courage and Manfredi are applicable exclusively in the context of competition law damages.[172]

[170] As already indicated above, Manfredi does not prescribe that the causal relationship has to be direct. It just has to exist.
[171] Havu, K. (2012), *supra nota* 58, p. 416.
[172] *Ibid.*

Another potential aspect, which might be perceived as an obstacle, is the fact that Courage and Manfredi concern the establishment of horizontal liability, i.e. for the infringement of individuals, whereas state aid damage actions concern the infringement of MS. Author does not however, see a problem in that. Unlike Francovich, which is applicable only in relation to MS infringements, the ECJ has not emphasized in Courage and Manfredi that the establishment of liability can only be horizontal.

7.2.2. Estonian rules for liability

In the context of Estonian law, it is possible to consider:

a) If Estonia could be considered liable for the state aid damages/incidental consequences; and
b) In relation to competitors exclusionary damages, the recipient could be considered liable (either jointly or alone).

Potential liability of Estonia can arise from:

a) State liability Act[173];
b) Law of Obligations Act[174].

The State Liability Act[175] regulates Estonia`s liability where Estonia has caused damages in the public relationship. In addition, the State Liability Act is supplemented by the Law of Obligations Act[176] in questions former lefts unanswered. [177] However, Estonia and/or recipient could also be held liable solely based on the Law of Obligations Act (prerequisite for Estonia is that damages/incidental consequences are caused in the private relationship).

This means that for the establishment of Estonia`s liability, it is necessary to determine, whether the state aid was distributed in private or public relationship. However, it has to be kept in mind that in a situation where national law provides alternative routes for the establishment of Estonia`s liability, the ECJ might choose one set of applicable rules for state aid damage actions (in the context of preliminary ruling). Good example would be the Transportes Urbanos case[178], where in similar situation, the ECJ found that more favourable rules should apply.[179]

[173] Käis, L. (2015), *supra nota* 13, p. 615.
[174] It is interesting to note that whereas Estonia, which generally follows the example of Germany, has chosen the dual legislation approach whereas in Germany, the MS liability in the context of public relationships derives from BGB. Lock, T. (2012), *supra nota* 131, p. 1679.
[175] State Liability Act. RT I 2001, 47, 260
[176] Law of Obligations Act. RT I 2001, 81, 487
[177] Käis, L. (2015), *supra nota* 13, p. 621.
[178] ECJ decision, 26.01.2010, Transportes Urbanos, C-118/08, ECLI:EU:C:2010:39
[179] Craig, P., De Burca, G. (2011), *supra nota* 20, p. 253.

Liina Käis finds that the Estonia`s liability in relation to state aid damage cases[180] can only derive from the State Liability Act (with supplementary Law of Obligations Act) due to the fact that state aid could be distributed only in the context of public relationship.[181]

Author of this thesis disagrees with Liina Käis. The distribution of state aid can and most likely does take place in the context of public relationship. However, the state aid can also be successfully distributed within private relationship due to the wide and flexible definition of state aid. Good example from the ECJ practice is the Stardust Marine case[182], where MS-s actions as a shareholder in private company (i.e. private relationship) amounted to a state aid.[183] Indication about state aid being distributed in private relationship could also be found in the recent Estonian Court case which concerned Tootsi wind park[184]. In the latter, the Estonian administrative court was asked to determine if Estonian governments decision to sell a land (which was designated for wind park) constituted as administrative act (i.e. action under public law) or not.[185]

Author does not focus separately on distinguishing private- and public relationship, as it packs a considerable amount of court practice.[186] It is however necessary to emphasize that besides the applicable basis of liability, the private or public relationship also respectively determines a) the court who has the jurisdiction to hear the claim and b) the applicable rules of evidence.

7.2.3. State Liability Act

When unlawful/illegal state aid is distributed within the public relationship, the **Estonian state could, in principle, considered liable** for state aid damages/incidental consequences based on the paragraph 7 (1) of the State Liability Act, which states that "a person whose rights are violated by the unlawful activities of a public authority in a public law relationship (hereinafter injured party) may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in § 3, 4 and 6 of this Act".[187]

[180] In addition, Liina Käis only consider MS potentially liable.
[181] Käis, L. (2015), *supra nota* 13, p. 615.
[182] ECJ decision, 16.05.2002, France v Commission, C-482/99, ECLI:EU:C:2002:294
[183] Ezrachi, A. (2018), *supra nota* 24, p. 673.
[184] Tallinn administrative court decision, 06.06.2017, 3-16-2635/86
[185] Unfortunately, the administrative court did not provide answer to that question. However, state aid can be distributed in private relationship where MS is fulfilling its shareholder responsibilities or makes transactions in the market which are (or at least should be) aimed at receiving profit.
[186] Käis, L. (2015), *supra nota* 13, p. 615.
[187] Käis, L. (2015), *supra nota* 13, p. 618.

§ 8 (1) of State Liability Act states that the extent of damages which could be claimed based on the paragraph 7 (1) is the sum which would place the claimant into the position where he/she would have been, had the infringement not taken place, i.e. similarly to Courage and Manfredi, the **compensation is commensurate with the actual loss**.

The potential claimants will have to consider the prior exhaustion rule in the § 7 (1) of State Liability Act, which essentially states that liability can be established only where all the other options to prevent the damage were, similarly to Transportes Urbanos case, exhausted.

Potential claimants will have to also consider the limitations derived from § 13 of the State Liability Act where section 1 lists a variety of aspects which Estonian court could take into account while determining the amount of compensation. Such aspects include, without limitation, the foreseeability of damages, objective obstacles to prevent the damages, gravity of violation of rights etc. In another words, the Estonian court has variety of arguments to upon which it is possible to limit the scope of compensation even where the court recognizes Estonian liability. The limitation of compensation could arise, inter alia, in situations where it was impossible for Estonia to foresee, due to the wide and flexible notion of state aid, that the measure under question is declared state aid or where the claimant is the recipient, as it is well established that recipients should always be aware if the standstill obligation is complied with or not[188].

§ 13 (2) of State Liability Act essentially excludes the liability of Estonia for the loss of profit where Estonia proves that it was not at fault. In principle, the Estonia might use this justification to once again limit the scope of compensation where it was impossible for Estonia to foresee that the measure constitutes state aid.[189]

However, as we have established that the infringement of state aid regulation on behalf of MS cannot cause damages/incidental consequences directly to competitors/recipients/third parties, the important question which has to be asked is- do state aid damages/incidental consequences have to be the direct consequence of the Estonia`s infringement or is it possible to establish liability also in situations, where the causation is indirect?

[188] Frese, M. (2011), *supra nota* 163, p. 403.
[189] Liina Käis is on the opposite position and finds that the fault requirement is always fulfilled. Käis, L. (2015), *supra nota* 13, p. 619.

State Liability Act itself nor the Law of Obligations act does not provide an answer to this question. Nevertheless, the Estonian Supreme Court has found in two occasions[190], that the establishment of liability under State Liability Act requires direct causation.[191] Adhering to the Supreme Court practise, it could be stated, that where Estonia causes damages/incidental consequences to competitors/recipients/third parties by distributing unlawful and/or illegal state aid **in the context of public relationship, it is impossible to hold state of Estonia liable for such damages/incidental consequences**.

It is also necessary to stress that the state liability act does not foresee a possibility of holding the recipient liable for the exclusionary state aid damages caused to competitor, nor does it prescribe the establishment of joint liability for Estonia and recipient, since the collaboration of latter is not innate to public relationship (except in a situations were public authority is vested into the private entity[192]).

7.2.4. Law of Obligations Act

As already noted, the Law of Obligations Act is relevant in two situations:

a) where State Liability Act fails to answer a specific question, which is regulated by Law of Obligations Act; and
b) where the unlawful/illegal state aid is distributed in the private relationship.

Since we have already established that State Liability Act does not provide the basis for liability, it is necessary to consider, if potential claimants could claim state aid damages/incidental consequences in a situation, where they have been caused by the unlawful/illegal state aid which is distributed in the private relationship.

The basis for the liability in Law of Obligations Act derives from the § 1043 which states that:

"§ 1043- A person, (tortfeasor) who unlawfully causes damages to another person (victim) shall compensate the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law."

[190] Supreme Court of Estonia decision,16.03.2005, 3-3-1-93-04 and Supreme Court of Estonia decision, 30-11-2004, 3-3-1-64-04
[191] Andresen, E. (2006). Õigusvastaste tagajärgede kõrvaldamine ja kahju hüvitamine riigivastutusõiguses. *Juridica*, 3, p. 168.
[192] Pilving, I. (1998). Riigivastutuse dogmaatika ja Eesti kehtiv Riigivastutus. *Juridica*, 8.

In essence, for the establishment of liability, it is necessary to determine a) that the action under question was unlawful, and that b) tortfeasor was at fault (culpability) or the that the liability is specifically prescribed by law.

Even though it is clear that the Estonia`s action at distributing unlawful/illegal state aid constitutes as unlawful action, it is not possible to assert the unlawfulness to recipient´s actions (in relation to competitors exclusionary damages). The § 1045 (1) of Law of Obligations Act lists a variety of different results which are considered as consequences (and prerequisites) for the unlawful actions[193], including, inter alia, the causing of the death of victim, violation of personality right of the victim, behaviour which is contrary to good morals etc. However, the recipient´s actions at using the unlawful and/or illegal state aid in general cannot cause any of the listed actions directly.

The closest result which could be considered is the § 1045 (1) p 6 of Law of Obligations Act- interference with the economic or professional activities of a person. Nevertheless, the content of unlawful actions which could cause such result is elaborated in § 1049 Law of Obligations Act, precluding that the use of the unlawful and/or illegal state aid on behalf of recipient could be considered as unlawful action.

Aforesaid means, that **in Estonia, the recipients of the state aid cannot be considered liable for the damages/incidental consequences which are caused by the use of the unlawful and/or illegal state aid.**

The said liability could theoretically raise in a specific situation where the recipients use of the state aid benefits to the achievement of any of the results listed in the § 1045 (1) of Law of Obligations Act. However, in a situation like such, the recipient´s action would amount a separate breach, unrelated to the infringement of state aid regulation.

In relation to the Estonia`s infringement, it was already established that MS does not have to be at fault when distributing unlawful/illegal state aid, meaning that the liability for damages/incidental consequences could arise only in situations, where it is possible to determine the fault in Estonia`s actions (e.g. for diligent person, it was possible to foresee, that the action is considered state aid).

[193] Varul, P., Kull, I., Kõve, V., Käerdi, M. (2009). *Võlaõigusseadus III kommenteeritud väljaanne*, Tallinn: Juura, p. 626.

Further on, it is also necessary to consider the limitation deriving from the § 1045 (3) of Law of Obligations Act which states that "The causing of damage by the violation of a duty arising from law is not unlawful if the objective of the provision which the tortfeasor violates is other than to protect the victim from such damage". This limitation **effectively precludes the possibility, that state of Estonian could be held liable for the incidental consequences** of the infringement of state aid regulation, as the objective of neither article 108 (3) nor 107 TFEU is to avoid the incidental consequences. Since it is impossible to establish Estonia`s liability for the incidental consequences (in the context of both public and private relationship), the author focuses here on out on the analysis of the exclusionary competitors damages.

In relation to the exclusionary damages, it is necessary to analyse if the establishment of Estonia`s liability requires direct causation or is it sufficient, if the causation is indirect. Similarly to State Liability Act, the law itself does not provide the answer. However, Estonian Supreme Court has stated in 18.06.2008 decision 3-2-1-45-08 that the causality is regulated by § 127 (4) of Law of Obligations Act, which states that person must compensate only damages which are a consequence of the liable action.[194]

In referred decision, the Estonian Supreme Court also elaborated, that the causation does not have to be direct, i.e. it is sufficient, if it is possible to determine indirect causal chain. This means, that **state of Estonia could in principle be held liable for the exclusionary state aid damages born to competitors, provided that the state aid is distributed in the private relationship and it is possible to determine that Estonia was at fault in distributing illegal state aid.**

In relation to the scope of damages, the Law of Obligations § 127 (1) states that the purpose of the compensation of damages is to place the harmed person in a situation, which existed before the damaging action i.e. the scope of compensation is once again commensurate with the actual loss. This means that the competitor who suffers exclusionary damages can claim compensation for both direct damages and loss of profit, depending on the actual harm borne.

[194] Vutt, M. (2009). Kahju hüvitamise normide kohaldamine kriminaalkohtute praktikas. *Juridica*, 2, p. 134.

7.3. Rules on access to evidence

Similarly to competition law damage actions, the rules of access to evidence can impede the successfulness of the state aid damage actions. This is mainly due to the nature of the infringement and causation of damages in the context of both competition and state aid regulation, as both are likely to entail an information asymmetry.[195]

Information asymmetry as such refers to the competition law private enforcement claimants uneven possession/access to evidence as latter is usually at the confidential reach of an unlawfully acting undertaking.[196] The situation is identical with the state aid exclusionary damages scenario, where the claimant has to prove a) that state of Estonia infringed state aid regulation and b) that recipient used the state aid to cause the claimed damages. In relation to state of Estonia, it could be presumed that the actions are transparent and it is possible to obtain the evidence about the infringement quite easily. However, in relation to recipients, the potential claimant is most likely unable to show when and how the state aid was used.

7.3.1. EU rules on access to evidence

When it comes to the burden of proof, the EU law in general adheres to the principle that parties are equal, i.e., the one who brings the claim must be able to prove its circumstances.[197] In relation of providing access of evidence, the EU law remains vague.[198]

However, it is possible to distinguish two situations where EU law has modified the rules relating to burden of proof: a) proof-proximity principle in which the burden of proof has been shifted in material part to the individuals who are subject to antitrust (public) proceedings[199] and b) damages directive article 17 (2) which creates a presumption that the antitrust infringement causes harm to individuals.

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[195] Bentley, P. (2014). Antitrust Damages Actions: Obtaining Probative Evidence in the Hands of Another Party. *World Competition*, 37 (1), p. 271.
[196] Volpin, C. (2011). Ball is Your Court: Evidential Burden of Proof and the Proof-Proximity. *Common Market Law Review*, 51 (4), p. 1161.
[197] *Ibid.*
[198] It is relevant to mention Boiron case (ECJ decision, 07.09.2006, Boiron, C- 526/04, ECLI:EU:C:2006:528), which concerned the infringement of state aid regulation and where one of the questions was, if the national rules which place the burden of proof to competitors, is in line with the principle of effectiveness. Unfortunately, the ECJ did not produce a clear answer on the subject, leaving the question at the discretion of national courts. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 235.
[199] *Ibid.*

Unfortunately, neither of the competition law exceptions are applicable to state aid damage actions. The proof-proximity principle is recognized in public enforcement actions which take place in relation to antitrust infringements. The damage directive, as already indicated, applies strictly in relation to competition law damage action. Therefore, EU law does not provide instruments, which could help to overcome the information asymmetry.

7.3.2. Estonian rules on access to evidence

Estonian rules on access to evidence which are applicable in civil claims, can be, similarly to rules of liability, divided in two- rules which apply when unlawful/illegal state aid is distributed in public relationship and rules which apply when unlawful/illegal state aid is distributed in private relationship. For the former, the respective rules derive from the Code of Administrative Court Procedure. For the latter- Code of Civil Procedure.

We have already established that it is impossible for claimants to establish Estonia`s liability where the state aid is distributed in public relationship. Nevertheless, the author will stop on both types of rules of evidence.

If the state aid is distributed within public relationship, the national court is obliged to "make sure the facts material for deciding the matter" and "where necessary by gathering evidence"[200]. This obligation in the public relationship proceedings, which is also known as investigation principle also entails the administrative courts right to shift the burden of proof[201]. This means that the where it would be possible to establish Estonian state liability for the public relationship state aid damage actions, the Estonian law provides rules which make it possible to overcome the information asymmetry.

In the context of private relationship state aid damages, the burden of proof remains in equilibrium.[202] As an exception, the damaged party has the right to apply from the national court that latter would collect the necessary evidences, but the decision to do so remains at the discretion of national court.[203]

[200] (Estonian) Code of Administrative Court Procedure. RT I 23.03.2011, 3, § 2 (4).
[201] (Estonian) Code of Administrative Court Procedure. RT I 23.03.2011, 3, § 59.
[202] Unless parties have previously agreed otherwise. (Estonian) Code of Civil Procedure[1]. RT I 2005, 26, 197, § 230 (1).
[203] (Estonian) Code of Civil Procedure[1]. RT I 2005, 26, 197, § 239.

This means, that in the context of private relationship, the state aid damage actions are in unfavourable position when compared to public relationship state aid damage actions and it might very well be, that the information asymmetry precludes the possibility of submitting successful state aid damage actions.

7.4. Rules on the limitation periods

Similarly to rules relating to liability and evidence, the successfulness of state aid damage actions can be precluded by a rules of limitation periods, which are generally tied with the moment the claimant knew or ought to have known about the damaging action. In relation to competition law damages, the infringing conducts can last years, if not decades and due to information asymmetry, it is debatable, when the claimant knew or ought to have been known about the infringement. [204] This gives infringing party a chance to appeal that the individual who suffered harm should have known about the harmful conduct earlier and the limitation periods for claiming damages are exhausted.

In the context of state aid damages, the potential claimants can find out (or express doubts) about the infringement of state aid regulation on behalf of Estonia, as being a democratic state, Estonia`s actions are transparent. However, in relation to competitors exclusionary damages, the harmful conduct as such refers to recipient´s actions, which are more directly connected with the causation of exclusionary damages. In another words, the limitation periods could start to run where the recipient uses the state aid to cause the exclusionary damages, whereas such use can, similarly to competition law infringements, take place during a continuous time period. Since the potential claimants in state aid damage actions are also subject to information asymmetry, the successfulness of state aid damage actions is also impeded by the uncertainty, when did claimants knew or ought to have been known about the harmful conduct.

[204] Buiten, M. (2016). Piecemeal Harmonization of European Civil Law. The Case of Limitation Periods in the Antitrust Damages Directive. *Hungarian Yearbook of International Law and European Law*, 2016, p. 621.

In damages directive, the problem with limitation periods was solved by setting the limitation periods for five years from the moment when the individual knew or ought to have been known about the a) harmful conduct and b) the identity of the liable person whereas the limitation period does not start running before the competition law infringement has been brought to an end.[205]

7.4.1. EU rules on limitation periods

Apart from the damages directive and other specific pieces of legislation, the EU law itself does not prescribe a limitation periods and generally accepts the length of national limitation periods.[206]

However, national limitation periods have been declared incompatible in situations where a) it is unclear when the limitation period starts running, b) limitation period starts running before the claimant knew or ought to have been know about the violation, c) limitation period is applied retroactively and d) where national court has too much interpretation room to decide if the private action has brought in time.[207]

In the context of competition law, the ECJ has also touched the subject on limitation periods in Manfredi case[208], where it held that that national limitation periods might constitute as contrary to principle of effectiveness where the limitation period starts to run at the moment competition law infringement first took place, especially where the limitation period is too short and/or it not possible to suspend it.[209]

Notwithstanding the fact that the ECJ has reserved the establishment of liability based on Manfredi (and Courage) specifically for the traditional competition law damage cases, the referred statement about the limitation periods seems to be an exception, as ECJ has reiterated also in an cases unrelated to a Manfredi.[210] This means that the ECJ indication about limitation periods in Manfredi could also be used in relation to state aid damage cases.

[205] Article 10 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014
[206] Raitio, J. (2008). Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law. *Legisprudence*, 2 (1), p. 21-22.
[207] Craig, P., De Burca, G. (2011), *supra nota* 21, p. 235.
[208] Havu, K. (2012), *supra nota* 58, p. 418.
[209] Craig, P., De Burca, G. (2011), *supra nota* 21, p. 235.
[210] For example in ECJ decision, 24.03.2009, Danske Slagterier, C- 445/06, ECLI:EU:C:2009:178. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 235.

7.4.2. Estonian rules on limitation periods

Estonian General Part of the Civil Code Act § 150 (3) prescribes a universal limitation period of three years for bringing the claim for unlawfully caused damages, (irrespective if state aid is distributed within public or private relationship). The said limitation period starts from the moment harmed individual discovered or ought to have discovered the damage and the identity of the person who caused the damage. Based on the General Part of the Civil Code Act § 150 (3), the upper limit for the limitation period is 10 years from the moment that the event that caused damage took place. In addition, the Estonian General Part of the Civil Code Act also recognizes the possibility of suspending a limitation period upon filing of a private enforcement action in national court.[211]

It is necessary to clarify that in context of § 150 (1) of General Part of the Civil Code, the phrase "discovered or ought to have discovered the damage" entails that the harmed individual knows (or ought to have known about the damage itself and also about the action which caused the damage[212], whereas it is irrelevant, if the action as such is already declared unlawful/illegal by a public authority or court. This means that in the context of exclusionary state aid damage actions, the competitor discovered the damage where he/she is aware (or should be aware) about the a) MS distribution of potentially illegal state aid, b) recipients use of the state aid and c) the damage.

Reminding that the national court is not competent to assess the infringement of article 107 TFEU, the author sees a potential obstacle in the Estonian limitation period. In a situation where the claimant is aware about the a) fact that Estonia distributed potentially illegal state aid and b) the recipients use of the aid and damage is already done, the claimant **cannot lodge a private enforcement action in national courts before the Commission has issued a decision on the nature of the MS action.** In its proceedings the Commission assesses if MS action under question amounts to a state aid, if it is unlawful and if it is illegal. To do so, the Commission has two different proceedings- preliminary investigation and formal investigation procedure.[213]

[211] (Estonian) General Part of the Civil Code Act. RT 2002, 35, 216 § 160 (1).
[212] Supreme Court of Estonia decision, 1.06.2016, 3-1-1-41-16, point 21.
[213] Craig, P., De Burca, G. (2011), *supra nota* 21, p. 1101.

While the answer to the first two questions is found within the former, the compatibility assessment takes place within the formal investigation procedure, whereas the preliminary procedure is limited with two month deadline[214], the Commission is not bound by any time limits to conduct the formal investigation procedure.[215] This means that the Commissions decision-making process could effectively exhaust the Estonian limitation periods, rendering it impossible for the harmed individual to bring a damage action in national court. The possibility to suspend the limitation periods exists only were the private enforcement action is brought to a national court and does not apply to Commission proceedings. In addition, the Commission might not start public enforcement proceedings at all, precluding the possibility of bringing the damage action.

Nevertheless, since the start of the limitation period in Estonia is not connected with the start of the infringement of state aid regulation on behalf of state of Estonia but with the claimants awareness about the damages, the Estonian limitations periods do not satisfy the conditions established in Manfredi, meaning that the Estonian limitation periods applicable to state aid damage actions are most likely in line with the principle of effectiveness. Instead, the problem with the impeding limitation period lies within a fact that national court is not competent to assess the infringement of article 107 TFEU.

[214] The preliminary procedure can be further dividend as a) usual procedure and b) simplified procedure. Latter is used in clear-cut cases, where Commission issues the decision within 20 days from the notification. Craig, P., De Burca, G. (2011), *supra nota* 20, p. 1101.
[215] Article 9 (6) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248/9, 24.9.2015

CONCLUSION

It is possible to conclude that the infringement of article 108 (3) TFEU has a potential to cause negative consequences to:

a) competitors of the state aid recipient due to the timely advantage, i.e., if MS had followed the stand-still obligation, the state aid would have been distributed later;
b) state aid recipients, who might be required to pay the illegality interest for the time of unlawfulness and who might lose a specific business opportunity due to the temporary recovery of the unlawful state aid.

Infringement of article 107 TFEU (which is always preceded by the infringement of article 108 (3) TFEU) has a potential to cause:

a) exclusionary damages to competitors of the state aid, where the state aid is used by the recipient to exclude the competitors from the market;
c) negative consequences to the state aid recipient, as recipient is most likely required to pay back the illegal state aid together with the illegality interest which can lead to a situation where recipient is unable to fulfil its obligations to creditors;
d) negative consequences to third persons, e.g. the creditors of the recipient who issued the credit based on the illegal state aid and whose recovery of the credit is impeded by the recovery of state aid.

The author considers only the exclusionary damages caused to competitors of the state aid recipient through the infringement of article 107 TFEU as true state aid damages since the objective of the state aid regulation is to prevent such damages. Listed negative consequences of article 108 (3) and 107 TFEU are not connected with the objective of the state aid and therefore from legal perspective, constitute as incidental consequences.

What must be kept in mind is, that the distribution of state aid on behalf of MS alone cannot cause any of the referred damages nor negative consequences directly, as the causation requires always additional actors/activities. In relation to competitors exclusionary damages, the causation requires that in addition to MS infringement (upstream causation) the aid recipient uses the state aid to bolster its position in market (downstream causation). The two-level causality makes it theoretically possible to submit "exclusionary" damage claim against MS and/or state aid recipient.

The submission of damage claim for the infringement of both article 108 (3) TFEU and 107 TFEU is possible only through the direct effect jurisprudence, not through Francovich state liability principle as Commission claims. This is because both article 108 (3) and 107 TFEU are directly effective and Francovich constitutes as a residual remedy, which is usable/applicable only where the direct effect is not present. Nevertheless, in relation to the direct effect of article 107 TFEU, one must consider the constraint, that only the Commission is competent to assess the infringement of the said article. This means that to bring a private enforcement action (including damage action) based on the article 107 TFEU, the potential claimant must first obtain a Commission decision that infringement took place.

In the hypothetical scenario where Estonia infringes articles 108 (3) and/or 107 TFEU and causes exclusionary damages/incidental consequences for which individual wants to claim compensation, it is necessary to consider if the unlawful/illegal state aid was distributed within the private or public relationship, as latter determines the court which is competent to hear the claim as well as applicable rules of liability and evidence.

However, based on Estonian law, it is possible to establish **only Estonia`s liability** and only in a situation where:

a) state aid is distributed within a private relationship, since only in latter the causality between infringement and damage can remain indirect for the establishment of liability (Estonian Supreme Court decision 3-2-1-45-08); and
b) the claim concerns the compensation for exclusionary damages born to competitors (i.e. damages caused by the infringement of article 107 TFEU) due to the limitation deriving from the § 1045 (3) of Law of Obligations Act, which precludes the possibility of obtaining compensation for harm which the infringed norm was not aimed at preventing;
c) it is possible to establish that Estonia was at fault distributing state aid (§ 1043 of Law of Obligations Act).

Based on the § 127 (1) of Law of Obligations act, the state of Estonia can only be held liable for the compensation which is **commensurate with the actual harm borne**. To be more specific, the potential claimant could in principle, claim compensation for both direct damages and loss of profit but not exemplary nor punitive damages.

Potential damage claim may also be impeded by the information asymmetry, for which the Estonian law provides solution only where the state aid is distributed in public relationship. In the context of private relationship state aid damage actions, the potential claimant might be unable to bring the damage claim because claimant cannot access the information nor prove how the state aid was used on behalf of the recipient.

Three-year limitation period, which is found in the Estonian law is most likely in line with the principle of effectiveness and does not necessarily preclude the successfulness of damage actions, which are based on the article 108 (3) TFEU. However, in relation to infringement of article 107 TFEU, the potential claimant is required to wait out the Commission decision on the infringement (if any) to bring the damage claim, whereas the Commission proceedings might effectively exhaust applicable limitation period.

Author finds that the hypothesis was partially proven. In the context of Estonia and in the light of the applicable rules of liability, evidence and limitation periods, it is possible for competitors to successfully claim compensation for exclusionary state aid damages from the state of Estonia where:

a) the Commission has issued a decision on the infringement of article 107 TFEU and the respective proceedings have not caused the expiry of three-year limitation period;
b) abovesaid conditions for the establishment of Estonia`s liability are fulfilled; and
c) the claimant can prove the two-level causality;

Nevertheless, from the abovesaid analysis, it is clear, that the potential state aid damage actions are both in EU and Estonian national law level in unfavourable position when compared to a competition law damage actions. To make it possible to obtain compensation also a) for the negative consequences, b) for damages caused by unlawful/illegal state aid which is distributed within the public relationship, c) from the recipient of the state aid, it is necessary to regulate the specific scenarios at either EU or Estonian level.

KOKKUVÕTE

INSTRUMENT RIIGIABI REGULATSIOONI RIKKUMISEGA TEKITATUD KAHJU HÜVITAMISE NÕUETE ESITAMISEKS JA SELLISTE NÕUETE EDUKUS EESTIS

Kaarel Tammiste

Käesoleva magistritöö eesmärgiks on vastata küsimustele a) milline EL õiguse instrument (kas vahetu õigusmõju või Francovichi riigivastutus) on sobiv EL riigiabi regulatsiooni rikkumisega eraisikutele tekitatud kahjude hüvitamise nõudmiseks ja b) kas Eestis on võimalik nimetatud kahjude hüvitamist edukalt nõuda.

Magistritöö uurimisküsimused on järgmised:

1. milliseid kahjusid võib artikkel 18 (3) ja/või 107 ELTL rikkumine eraisikutele tekitada ja täpsemalt kellele?
2. läbi millise EL instrumendi on võimalik viidatud kahjude hüvitamist nõuda?
3. millised on Eesti kontekstis kohalduvad reeglid (mh ka EL õiguse reeglid), mis reguleerivad;
   3.1. vastutust (mh vastates ka, kes vastutab viidatud kahjude tekitamise eest ja milline on potentsiaalse kahju hüvitise suurus)?
   3.2. tõendite omandamist?
   3.3. nõuete aegumist?
4. kuidas punktis 3 viidatud reeglid (või asjakohaste reeglite puudumine), toetavad/takistavad edukate kahju hüvitamise nõuete esitamist?

Magistritöö hüpoteesiks on, et EL riigiabi regulatsiooni rikkumisega tekitatud kahjude hüvitamist on võimalik nõuda üksnes läbi vahetu õigusmõju, mitte Francovichi riigivastutuse, nagu Komisjon ja mõned autorid (sh Eestis õiguskirjanduses Liina Käis) on leidnud. Lisaks leiab autor, et Eestis ei ole võimalik riigiabi regulatsiooni rikkumisega tekitatud kahjusid edukalt nõuda tulenevalt reeglitest, mis reguleerivad vastutuse tekkimist, nõuete aegumist ja tõendite omandamist.

Autor kasutab kvalitatiivset uurimismeetodit.

Analüüsi tulemusena on võimalik öelda, et artikkel 108 (3) ELTL rikkumine võib tuua kaasa negatiivseid tagajärgi:

a) riigiabi saaja konkurentidele ajalise eelise tõttu, ehk kui LR oleks järginud stand-still kohustust, oleks riigiabi väljastatud hiljem, peale Komisjoni otsust;
b) riigiabi saajatele, kellelt võidakse nõuda riigiabi ebaseaduslikkuse eest intressi ja kes võivad kaotada ajutiselt tagasinõutud riigiabi tõttu spetsiifilise ärivõimaluse.

Artikkel 107 ELTL rikkumine LR (mis eeldab alati ka artikkel 108 (3) ELTL rikkumist), võib tekitada:

a) välistavaid kahjusid riigiabi saaja konkurentidele olukorras, kus riigiabi kasutatakse riigiabi saaja poolt eesmärgiga oma positsiooni turul parandada/konkurente turult tõrjuda;
b) negatiivseid tagajärgi riigiabi saajale, kuna artikkel 107 ELTL rikkumisega kaasneb riigiabi saajale üldjuhul alati kohustus riigiabi koos intressidega tagastada. Riigiabi tagastamine kui selline võib viia olukorrani, kus riigiabi saaja ei ole võimeline täitma oma kohustusi võlausaldajate ees;
c) negatiivseid tagajärgi kolmandatele isikutele, nt. võlausaldajatele, kes on väljastanud riigiabi saajale riigiabi alusel krediiti/laenu ja kelle võimalused võlga riigiabi saajalt kätte saada saavad riigiabi tagasinõudmisega kahjustatud.

Käesoleva töö autor leiab, et ainult artikkel 107 ELTL rikkumisega konkurentidele tekkivaid välistavaid kahjud on tõelised riigiabi regulatsiooni kahjud, kuna riigiabi regulatsiooni eesmärgiks on just vältida viimaste tekkimine. Kõik ülejäänud negatiivsed tagajärjed on oma iseloomult pigem juhuslikud tagajärjed.

Tähelepanu tuleb pöörata ka asjaolule, et riigiabi kui sellise väljastamine üksi ei too otseselt kaasa ühtegi eelpool viidatud negatiivset tagajärge/kahju, kuna viidatud tagajärje põhjustamine nõuab alati täiendavaid isikuid ja tegevusi. Konkurentide välistavate kahjude kontekstis nõuab kahju põhjustamine lisaks LR-i poolt riigiabi regulatsiooni rikkumisele (ülemine põhjuslikkus) täiendavalt ka riigiabi kasutamist riigiabi saaja poolt viimaste huvides (alumine põhjuslikkus). Viidatud kahe-tasandiline põhjuslikkus muudab teoreetiliselt võimalikuks „välistava“ kahjunõude esitamise LR ja/või riigiabi saaja vastu.

Riigiabi regulatsiooni rikkumisega tekitatud kahjude ja juhuslike tagajärgede eest on võimalik nõuda kompensatsiooni üksnes läbi vahetu õigusmõju, mitte Francovichi riigivastutuse nagu Komisjon on väitnud.

Viimane tuleneb asjaolust, et nii artikkel 108 (3) kui 107 ELTL-il omavad vahetut õigusmõju ja Francovichi riigivastutuse näol on tegemist EL õiguse instrumendiga, mis tuleb mängu üksnes vahetu õigusmõju puudumisel. Artikkel 107 ELTL-l vahetu õigusmõju puhul tuleb aga silmas pidada asjaolu/piirangut, et ainult Komisjon omab pädevust otsustada riigiabi kokkusobivuse üle, mis tähendab, et eraõiguslik jõustamine artikkel 107 ELTL-i pinnalt (sh kahjunõude esitamine) on võimalik üksnes juhul, kui Komisjon on rikkumise tuvastanud (kui üldse).

Hüpoteetilises olukorras, kus Eesti riik rikub artikkel 108 (3) ELTL-i ja/või 107 ELTL-i, mille tagajärjel tekib isikutele välistavaid kahjusid/juhuslike tagajärgi ja mille eest nimetatud isik soovib nõuda kompensatsiooni, on eelnevalt vaja välja selgitada, kas ebaseaduslik/kokkusobimatu riigiabi väljastati eraõigusliku või avalik-õigusliku suhte raames, kuna viimasest sõltub nii kohus, kes omab kompetentsi vaidlust lahendada kui ka kohalduvad reeglid vastutuse ja tõendite kogumise osas.

Eesti õiguse kontekstis on võimalik tuvastada kahjude eest ainult **Eesti riigi vastutus** ja seda üksnes olukorras kus:

a) riigiabi on väljastatud eraõiguslikus suhtes, kuna üksnes eraõiguslikus on võimalik kahju hüvitamist nõuda, kui põhjuslik seos rikkumise ja kahju vahel on kaudne (Riigikohtu otsus, 18.06.2008, 3-2-1-45-08);
b) kahju hüvitamise nõue puudutab konkurentide välistavaid kahjusid (ELTL 107 rikkumise tagajärjel tekkinud konkurentide kahjusid), kuna Võlaõigusseaduse § 1045 (3) alusel on võimalik nõuda üksnes selliste kahjude hüvitamist, mille vältimine oli rikutud normi eesmärgiks;
c) riigiabi väljastamise osas Eesti riigi poolt on võimalik tuvastada viimase süü (Võlaõigusseaduse § 1043).

Lähtudes Võlaõigusseaduse § 127 (1)-st, on võimalik tuvastada Eesti riigi **vastutus üksnes reaalselt tekitatud kahju ulatuses**. Viimane sisaldab nii otsest varalist kahju kui ka saamata jäänud tulu. Küll aga puudub Eesti õiguses võimalus nõuda karistava iseloomuga kahjusid.

Potentsiaalne kahju hüvitamise nõue võib olla takistatud informatsiooni asümmeetriaga, millele Eesti õigus tagab lahenduse ainult olukorras, kus riigiabi on väljastatud avalik-õiguslikus suhtes. Eraõiguslikus suhtes väljastatud riigiabi puhul võib kahju nõude esitamisele saatuslikuks saada asjaolu, et kahjustatud isikul puudub ligipääs informatsioonile/tõenditele selle kohta, kuidas riigiabi saaja riigiabi kasutas.

Eesti õiguses sisalduv kolme aastane nõude aegumisperiood on eelduslikult efektiivsuse põhimõttega kooskõlas ja nimetatud tärmin ei välista eduka kahjunõude esitamist artikkel 108 (3) ELTL kontekstis. Küll aga võib viidatud aegumisperiood saada saatuslikuks artikkel 107 ELTL-l põhineva kahjunõude esitamisele, kuna kannatanud peab enne kahjunõude esitamist ära ootama Komisjoni otsuse artikkel 107 ELTL rikkumise kohta (kui Komisjon üldse väljastab otsuses). Komisjoni menetlused otsuseni jõudmisel võivad põhjustada potentsiaalse kahjunõude aegumise.

Käesoleva töö autor leiab, et seatud hüpotees leidis kinnitust ainult osaliselt, kuna Eesti kontekstis on konkurentidel siiski võimalik edukalt nõuda Eesti riigilt välistavate kahjude (artikkel 107 ELTL rikkumisega konkurentidele tekitatud kahjude) hüvitamist kui:

a) Komisjon on väljastanud otsuse riigiabi kokkusobivuse/kokkusobimatuse kohta ja vastavad menetlused ei ole põhjustanud potentsiaalse kahjunõude aegumist;
b) eelpool viidatud Eesti riigi vastutuse eeltingimused on täidetud; ja
c) konkurendil on võimalik tõendada kahe tasandilist põhjuslikku seost rikkumise ja kahju tekkimise vahel;

Ülaltoodud analüüsile toetudes on võimalik öelda, et potentsiaalsed riigiabi kahjunõuded on nii EL kui ka Eesti siseriiklikus õiguses märgavalt ebasoodsamas positsioonis kui konkurentsiõiguse kahjunõuded. Tagamaks, et Eestis oleks võimalik nõuda edukalt kompensatsiooni a) riigiabi regulatsiooni rikkumisele järgnenud juhuslike tagajärgede eest, b) välistavate kahjude/juhuslike tagajärgede eest, mis on tekkinud avalik-õiguslikus suhtes väljastatud riigiabi kontekstis, c) riigiabi saajalt, on vajalik nimetatud spetsiifilisi olukordi reguleerida kas EL või Eesti tasemel.

LIST OF REFERENCES

Books

1. Bacon, K. (2017). *European Union Law of State Aid*. (3rd ed.) Oxford: Oxford University Press.;
2. Bergh, V. D. R. (2017). *Comparative Competition Law and Economics*. Northampton: Edward Elgar Publishing.;
3. Chalmers, D., Davies, G., Giorgio M. (2010). *European Union Law*. (2nd ed.) Cambridge: Cambridge University Press.;
4. Craig, P., De Burca, G. (2011). *EU Law Text, Cases and Materials*. (5th ed.) New York: Oxford University Press.;
5. Ezrachi, A. (2018). *EU Competition Law, An Analytical Guide to the Leading Cases*. (6th ed.) Oxford: Hart Publishing.;
6. Hofmann, Herwig, C. H., Micheau, C. (2016). *State Aid Law of the European Union*. Oxford: Oxford University Press.;
7. Novitz, T., Kilpatrick, C., Skidmore, P. (2000). *The Future of Remedies in Europe*. North America: Hart Publishing.;
8. Pastor-Merchante, F. (2017). *The Role of Competitors in the Enforcement of State Aid Law*. Oxford: Hart Publishing.;
9. Piet, J. S., Farley, M. (2017). *An Introduction to Competition Law*. North America: Hart Publishing.;
10. Pesari, N., Casteele, V. D. K., Flynn, L., Slaterly, C. (2016). *EU Competition Law*. (2nd ed.) Deventer- Leuven: Claeys & Casteels Law Publishers.;
11. Varul, P., Kull, I., Kõve, V., Käerdi, M. (2009). *Võlaõigusseadus III kommenteeritud väljaanne,* Tallinn: Juura.;
12. Zweigert, K., Kötz, H. (1998). *An Introduction to Comparative Law*. (3rd ed.) Oxford: Clarendon Press: Oxford University Press.

Law Journals

13. Andresen, E. (2006). Õigusvastaste tagajärgede kõrvaldamine ja kahju hüvitamine riigivastutusõiguses. *Juridica*, 3, 159-171.;
14. Baghrizabehi, D. (2016). The Current State of National Procedural Autonomy: A Principle in Motion. *Journal for International and European Law, Economics and Market Integrations*, 3 (1), 13-30.;
15. Bentley, P. (2014). Antitrust Damages Actions: Obtaining Probative Evidence in the Hands of Another Party. *World Competition*, 37 (1), 271-292.;
16. Biondi, A. (2007). Some Reflections on the Notion of State Resources in European Community State Aid Law. *Fordham International Law Journal*, 30 (5), 1426-1448.;
17. Buendia, S. (2017). State Aid Assessment, What National Courts Can Do and What They Must Do. *European State Aid Law Quarterly*, 2017 (3), 408-417.;
18. Buiten, M. (2016). Piecemeal Harmonization of European Civil Law. The Case of Limitation Periods in the Antitrust Damages Directive. *Hungarian Yearbook of International Law and European Law*, 2016, 613-636;
19. Dougan, M. (2000). The Disguised Vertical Direct Effect or Directives. *Cambridge Law Journal*, 59 (3), 586-612.;

20. Dunne, N. (2013-2014). Role of Private Enforcement within EU Competition Law. *Cambridge Yearbook of European Legal Studies,* 16, 143-188.;
21. Durand, A. (1987). Enforceable Community Rights and National Remedies. *Denning Law Journal*, 2, 43-64.;
22. Elias, S. (2014). Ebaseadusliku riigiabi saaja usalduse kaitstavus riigiabi tagasinõudmise korral. *Juridica,* 6, 433-442.;
23. Engstrom, J. (2011). The Principle of Effective Judicial Protection After the Lisbon Treaty Case Law. *Review of European Administrative Law*, 4 (2), 53-70.;
24. Faure, M., Weber, F. (2017). The Diversity of the EU Approach to Law Enforcement- Towards a Coherent Model Inspired by a Law and Economics Approach. *German Law Journal,* 18 (4), 823-880.;
25. Frese, M. (2011). Fines and Damages under EU Competition law: Implications of the Accumulation of Liability. *World Competition*, 34 (3), 397-432.;
26. Ghazarian, P. (2017). Recovery of State Aid. *European State Aid Law Quarterly*, 2016 (3), 228-234.;
27. Goyder, J., Dons, M. (2017). Damages Claims Based on State Aid Law Infringements. *European State Aid Law Quarterly*, 2017 (3), 418-430.;
28. Harlow, C. (1996). Francovich and the Problem of the Disobedient State. *European Law Journal*, 2 (3), 199-225.;
29. Havu, K. (2012). Horizontal Liability for Damages in EU Law- The Changing Relationship of EU and National Law. *European Law Journal*, 18 (3), 407-426;
30. Honore, M., Jensen, N.E. (2011). Damages in State aid Cases. *European State Aid Law Quarterly*, 2011 (2), 265-286.;
31. Huschelrath, K., Peyer, S. (2013). Public and Private Enforcement of Competition Law: A Differentiated Approach. *World Competition*, 36 (4), 585-614.;
32. Jaros, K., Ritter, N. (2004). Pleading Legitimate Expectations in the Procedure for the Recovery of the State Aid. *European State Aid Law Quarterly*, 2004 (4), 573-584.;
33. Käis, L. (2015). Euroopa Liidu riigiabireeglite rikkumisest tulenev kahju hüvitamise nõue. *Juridica,* 9, 613-623.;
34. Kohler, M. (2012). Private Enforcement of State Aid Law- Problems of Guaranteeing the EU Rights by Means of National (Procedural) Law. *European State Aid Law Quarterly*, 2012 (2), 369-388.;
35. Laenarts, K. (2011). National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness. *Irish Jurist,* 46, 13-37.;
36. Lang, J.,T. (1985). Injunctions and Damages in National Courts Under European Community Competition Law. *International Legal Practioner*, 10 (1), 29-32.;
37. Lock, T. (2012). Is Private Enforcement of EU Law through State Liability a Myth: An Assessment of 20 Years after Francovich. *Common Market Law Review*, 49 (5), 1675-1702.;
38. Lucey, M. C. (2018). EU competition law Damages Directive: recalibrating the equilibrium between private and public enforcement? *Journal of Business Law,* 2018 (5), 390-403.;
39. Nordberg, C. (1997). Judicial Remedies for Private Parties under the State Aid Procedure. *Legal Issues of European Integration*, 24 (1), 35-78.;
40. Piernas, L., Juan, J. (2010). The Notion of State Aid and Regulation in the EU: Drawing the Shape of a Moving Target. *Cuadernos de Derecho Transnacional*, 2 (2), 173-201.;
41. Pilving, I. (1998). Riigivastutuse dogmaatika ja Eesti kehtiv Riigivastutus. *Juridica,* 8, 382-389;

42. Raitio, J. (2008). Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law. *Legisprudence*, 2 (1), 1-24.;
43. Soltesz, U. (2013). Effet Utile Taken to Extremes: Does an Opening Decision Already Trigger the Stand-Still Obligation. *European State Aid Law Quarterly*, 2013 (4), 643-645.;
44. Struys, M., L. (1997). SFEI- A Missed Opportunity. *Irish Journal of European Law*, 6 (2), 181-189.;
45. Tampuu, T. (2003). Deliktiõiguslik vastutus teise isiku tekitatud kahju eest. *Juridica*, 7, 464-474.;
46. Vajda, C., Stuart, P. (2010). Effects of the Standstill Obligation in National Courts- All Said after CELF- An English Perspective. *European State Aid Law Quarterly*, 2010 (3), 629-636.;
47. Vlaicu, A. M. (2011). Effectiveness of EU Law in Member States. *Lex ET Scientia International Journal*, 18, 162-173.;
48. Volpin, C. (2011). Ball is Your Court: Evidential Burden of Proof and the Proof-Proximity. *Common Market Law Review*, 51 (4), 1159-1186.;
49. Vutt, M. (2009). Kahju hüvitamise normide kohaldamine kriminaalkohtute praktikas. *Juridica*, 2, 124-135.;
50. Vutt, M. (2011). Hagi ese ja alus ning hagi muutmine kohtupraktikas. *Juridica*, 5, 333-343.

Electronically Available Sources

51. Petit, N. (2014). The Principles of Equivalence and Effectiveness as a Limit to National Procedural Autonomy. Retrieved from: https://antitrustlair.files.wordpress.com/2014/07/the-principles-of-equivalence-and-effectiveness-n-petit-final.pdf , 15. October. 2019.
52. DG Competition. (2013). State Aid Manual of Procedure. Retrieved from: https://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf , 15.October.2019.
53. De Smijter, E., O`Sullivan, D. (2006). The Manfredi judgement of the ECJ and how it relates to the Commission´s initiative on EC antitrust damages actions.- *Competition Policy Newsletter*, No. 6. Retrieved from: https://ec.europa.eu/competition/speeches/text/2006_3_23_en.pdf , 15 October. 2019.

Case Law

54. ECJ decision, 27.03.1974, BRT v Sabam, C-127/73, ECLI:EU:C:1974:25.;
55. ECJ decision, 05.02.1963, Van Gend en Loos, C- 26/62, ECLI:EU:C:1963:1.;
56. ECJ decision, 15.07.1964, Flaminio Costa v E.N.E.L, C- 6/64, ECLI:EU:C:1964:66.;
57. ECJ decision, 16.12.1976, Rewe, C-33/76, ECLI:EU:C:1976:188.;
58. ECJ decision, 06.10.2006, Transalpine Ölleitung, C-368/04, ECLI:EU:C:2006:644.;
59. ECJ decision, 04.04.2014, Lübeck, C- 27/13, ECLI:EU:C:2014:240.;
60. ECJ decision, 21.11.2013, Deutsche Lufthansa, C-284/12, ECLI:EU:C:2013:755.;
61. ECJ decision, 02.09.2015, SEA, T-674/14, ECLI:EU:T:2015:590.;
62. ECJ decision, 02.09.2015, Airport Handling, T- 688/14, ECLI:EU:T:2015:588.;
63. ECJ decision, 05.05.1996, Brasserie Du Pecheur, C- 46/93, ECLI:EU:C:1996:79.;
64. ECJ decision, 19.06.1990, Factortame, C-213/89, ECLI:EU:C:1990:257.;
65. ECJ decision, 13.06.2006, Traghetti, C-173/03, ECLI:EU:C:2006:391.;
66. ECJ decision, 30.09.2003, Köbler, C-224/01, ECLI:EU:C:2003:513.;

67. ECJ decision, 26.03.1996, British Telecommunication, C- 392/93, ECLI:EU:C:1996:131.;
68. ECJ decision, 12.02.2008, CELF, C-199/06, ECLI:EU:C:2008:79.;
69. ECJ decision, 11.07.1996, SFEI, C- 39/94, ECLI:EU:C:1996:285.;
70. ECJ decision, 11.12.2008, Freistaat Sachsen, C-334/07, ECLI:EU:C:2008:709.;
71. ECJ decision, 18.12.2008, Wienstrom, C-384/07, ECLI:EU:C:2008:747.;
72. ECJ decision. 20.09.2001, Courage and Crehan, C-453/99, ECLI:EU:C:2001:465.;
73. ECJ decision, 13.07.2006, Manfredi, C-295/04, ECLI:EU:C:2006:461.;
74. ECJ decision, 14.06.2011, Pfleiderer, C-360/09, ECLI:EU:C:2011:389.;
75. ECJ decision, 16.05.2002, France v Commission, C-482/99, ECLI:EU:C:2002:294.;
76. ECJ decision, 26.01.2010, Transportes Urbanos, C-118/08, ECLI:EU:C:2010:39.;
77. ECJ decision, 07.09.2006, Boiron, C- 526/04, ECLI:EU:C:2006:528.;
78. ECJ decision, 24.03.2009, Danske Slagterier, C- 445/06, ECLI:EU:C:2009:178.;
79. ECJ decision, 19.11.1991, Francovich, C- 6/90 and C 9/90, ECLI:EU:C:1991:428.;
80. ECJ decision, 20.03.1997, Alcan, C-24/95, ECLI:EU:C:1997:163.;
81. ECJ decision, 4.04.2001, Giulia, T-288/97, ECLI:EU:T:2001/115.;
82. ECJ decision, 14.01.2004, Fleuren, T-109/01, ECLI:EU:T:2004:4.;
83. ECJ decision, 16.12.1992, Lornoy and Others, C-17/91, ECLI:EU:T:1992:514;
84. Supreme Court of Estonia decision, 23.11.2012, 3-3-1-37-12.;
85. Supreme Court of Estonia decision,16.03.2005, 3-3-1-93-04.;
86. Supreme Court of Estonia decision, 30-11-2004, 3-3-1-64-04.;
87. Supreme Court of Estonia decision, 18.06.2008, 3-2-1-45-08.;
88. Supreme Court of Estonia decision, 1.06.2016, 3-1-1-41-16.;
89. Tallinn administrative court decision, 06.06.2017, 3-16-2635/86.

Legal Acts

90. Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), OJ C 85/1, 9.4.2009.
91. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014.;
92. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.;
93. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ L 248/9, 24.9.2015.;
94. Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 10 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352/1, 24.12.2013.;
95. Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest.;
96. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 114/8, 26.4.2012.;
97. Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service

compensation granted to certain undertakings entrusted with the operation of services of general economic interests (2012/21/EU), OJ L 7/3, 11.1.2012.;
98. Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02), OJ C 8, 11.1.2012.;
99. (Estonian) Competition Act[1]. RT I 2001, 56, 332.;
100. (Estonian) State Liability Act. RT I 2001, 47, 260.;
101. (Estonian) Law of Obligations Act. RT I 2001, 81, 487.;
102. (Estonian) Code of Civil Procedure[1]. RT I 2005, 26, 197.;
103. (Estonian) Code of Administrative Court Procedure. RT I 23.03.2011, 3.;
104. (Estonian) General Part of the Civil Code Act. RT 2002, 35, 216.