YEARBOOK OF ESTONIAN COURTS 2013

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Kujundus ja trükk: Aide Eendra, Ecoprint

FOREWORD

Priit Pikamäe
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The yearbook of the Estonian courts has been published since 2007 on the initiative of the Supreme Court. It not only provides a glimpse behind the scenes of the highest court in Estonia, but also brings an annual overview of topical issues in the judicial and legal system to the desks of anyone interested in the activities of judges and the judicial system of Estonia, also providing some reflections on the quality and problems of the administration of justice. The current yearbook is the first to be published in English, to introduce Estonian courts to our partners, colleagues and friends in neighbouring countries, as well as in other countries all over the world. The yearbook contains overviews of the self-governance system of Estonian courts; some highlights of the case law of the Supreme Court; data on the workload and speed of the courts; as well as some more specific articles about the topical issues of the Estonian court system in 2013.

We hope you enjoy reading the yearbook!

1.

CRITICAL REVIEW OF CIVIL PROCEDURE AND ADMINISTRATION OF COURTS

THE MAIN PROBLEMS OF CIVIL PROCEEDINGS FROM THE POINT OF VIEW OF A JUSTICE OF THE SUPREME COURT AND LECTURER

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Introduction

In 2012, I published an article entitled "Acceleration of Civil Proceedings and Risks Involved" in *Juridica* (*Juridica* IX, 2012) which analysed a survey at the 32nd Estonian Lawyers' Days, conducted with lawyers, judges and other legal professionals dealing with civil proceedings. The survey aimed to determine if proceedings were unreasonably delayed in the opinion of the respondents and, if so, what the main reasons for this were and what could be done to accelerate the proceedings. In addition, I underlined in this article my own ideas about acceleration of proceedings and the risks involved, and the legislative measures and steps taken in order to steer the course of practice. My aim here is not to repeat the contents of the article, but to determine what has changed and to address the current problems arising in the everyday work of a Justice of the Supreme Court. Furthermore, I consider issues related to teaching the law of civil procedure at the University of Tartu and in-house training for judges. As many problems have persisted or become even more acute, some repetition is inevitable. I include issues which I consider to be most important in relation to proceedings, and due to limited space I confine myself to action and an expedited procedure in matters of payment orders.

Unclear division of roles between court and parties to a proceeding

General

I still have the impression that so far there is no clear understanding in practice as to what the duty of the parties and the judge in a proceeding should be. When reading different court files and organising training, it seems more and more that this is actually one of the main problems of our civil procedure. Without understanding what is important when hearing a case and what should be proven, the parties either fail to present the court with facts needed to adjudicate the case or, on the contrary, flood the court with information. This results in the repetition and accumulation of procedural documents, the incomprehensiveness of the materials of the case and the essence of the dispute and, in general, delays in hearing the case and adjudicating it without having a clear understanding of its content (and therefore often incorrectly). All these problems arise from the poor organisation of pre-trial proceedings, which I consider to be the core of problems, which, if addressed, could potentially significantly increase the efficiency of proceedings. It is evident that disputes have become much more complicated and the number and amount of relevant legal provisions and the amount of case-law

have increased, while the legal awareness of the parties and their expectations regarding adjudicating a case have also expanded. In a changing world, all this has to be taken into account. The initial cause of the problems lies in the absence of theory on procedural law and the resulting lack of awareness and uncertainty for both the parties and the court.

How to interpret the principles of *iura novit curia* and competing proceedings

As I expressed in my article in 2012, an unambiguous interpretation of the principles of *iura novit curia* and competing proceedings – which we usually consider to be the basic principles of civil procedure – would contribute to a better understanding of the division of roles between the court and the parties and make proceedings more efficient. In continental law, it is generally acknowledged that the court applies the law by itself and independent of the parties' statements. Thus, the court applies law not as understood by the parties, but rather as foreseen by the legislator. Whereas the court's role is to mediate and interpret the intention of the legislator with regard to a specific case, also adjusting applicable provisions via a constitutional review or justice (the principle of good faith). At the same time, the administration of justice can be efficient only if the court knows the facts which enable it to apply the law. But this is obviously the task of the parties, at least within an action.

Here, numerous obstacles may arise, posing *inter alia* the following questions to a judge:

- Should laws be explained to the parties beforehand, so that they understand what the legal provision underlying the claim of the plaintiff is and what facts the plaintiff should submit and prove in order to satisfy such a claim?
- If the facts presented enable many different claims to be submitted in substantive law, should the party choose a specific claim, can it rely on all provisions underlying the claim or should the court verify all potential provisions of the claim even without the request of the parties?
- Is it possible to submit an action recurrently under the same circumstances and with the same procedural application, relying on different provisions underlying the claim?
- Should the division of the burden of proof and possibilities to adjudicate the case on the basis of the evidence provided be explained to the parties and, if so, to what extent?
- Where does the obligation to explain end and where does unequal treatment of the parties by assisting one party begin?
- How far can the court go in explaining and discussing possibilities of adjudication while directing the parties to a compromise?
- When can we refer to supplementing the legal statements of the parties (which can, in principle, be done throughout the proceeding) and when does it constitute an amendment of the facts, which in the case of a plaintiff means a permitted amendment of the action (albeit to a limited extent)?
- How can it be ensured that, with the recurrent amendment of statements, the parties do not make the proceedings incomprehensible or cause a ping-pong effect with a continuous exchange of procedural documents?
- What happens if the court realises when preparing a judgment that its previous explanation regarding the law and/or the division of the burden of proof was incorrect?
- What is the extent of the obligation to apply the law in the case of simplified proceedings, default judgments, expedited procedures in matters of payment orders, and disputes related to compulsory execution (in the case of execution documents not constituting a court judgment)?

The Supreme Court has, over the last 20 years, sought to explain and limit in its practice the duties of a court to qualify a legal relationship and fulfil its obligation of explaining and the duties of the parties to present and prove facts. Unfortunately, however, it cannot be claimed that these issues have become clear.

What are the object and cause of an action?

We should identify the object and cause of an action, the significance of amending these and when it can be said that the case has been adjudicated as part of another case (i.e. when it constitutes the same object or cause of an action). If these issues are treated incorrectly, the whole proceeding may fail.

The response depends on whether, within the meaning of the object of an action, a "claim" is just a procedural request (i.e. to order the payment of EUR 1,000 from the defendant) or is related to the basis of the claim in substantive law (e.g. to order the payment of EUR 1,000 from the defendant in order to fulfil a contract or indemnify a loss or on the basis of unjustified enrichment). Similarly, there is the question of what constitutes the "cause" of an action, i.e. whether it includes, in addition to actual facts, a connection to a provision underlying a claim in substantive law and whether contract clauses, for instance, form part of the facts or the application of law. Whereas it also depends on what we consider to be an alternative claim or an amendment of an action and how the burden of proof is divided, etc. This is a key question and a clear answer would help us find our way much better in this procedural maze.

I would state that the object of an action should first and foremost be understood as referred to in law, i.e. as a procedural request, without relating it to the provisions in substantive law forming the basis thereof. Thus, a procedural claim and a claim in substantive law are different phenomena. The cause of an action lies in actual facts, not in legal provisions. The obligation of qualification falls on the court, accompanied by the need to identify the potential alternative provisions underlying a claim and to explain to the parties the division of the burden of proof that may arise therefrom. In this way it is also easier to tackle the question o whether an action has been amended, i.e. it should be determined whether the procedural request and/or any accompanying circumstances have been amended. The existence of a contract and agreement on certain terms and conditions and any fact relating to (the violation of) the contract is a fact whereon the parties must rely and which they should present to the court. Whereas interpretation of a contract with regards to whether the agreement on the application of legal remedies differs from the law, and whether it is valid, is a question of the application of the law.

The court's duty of explanation and principle of competing parties

In general, it should be accepted that competing proceedings do not refer to a contest "in the name of better justice", because this would clearly contradict the principle of *iura novit curia*. In order to apply the law, it should be possible to understand what the essence of a dispute between parties is. But as this is often not possible without additional explanations due to the prevalence of unprofessional representation, the court's duty of explanation would in particular mean the obligation of the court to understand the case so well that it is possible to apply the law. If the court does not understand what is being claimed by the plaintiff or on what basis, then the claim is not clear, and if the plaintiff is not able to make it clear (in spite of the fact that the court has drawn attention thereto), such an action should not be subject to a proceeding or a decision on its merits. An action should not be left unsatisfied for the reason that the court does not understand what is being claimed by the plaintiff. In such a case, the action should be refused as having no prospects or, in the case of a proceeding, left unheard.

With the application of the law by the court alone, a number of provisions set forth in substantive law for the protection of consumers and debtors can be realised, e.g. to verify the validity of standard terms or the validity of contracts due to an excessively high interest rate or the lawfulness of collateral claims (fines for delay, contractual penalties, expenses etc.). Application of these provisions, which are sometimes complex (e.g. section 408 of the Law of Obligations Act on incorrect information about the annual percentage rate), is the task of a court, and in most cases consumers are not capable of relying thereon by themselves. At the same time, in practice, in the case of credit relations, judges often continue to be bound by the understanding of the competition of law. Whereas an additional burden on the court arises from the fact that only in a small number of matters within civil proceedings do both parties have a lawyer.

Competing proceedings refer not to the competition of legal provisions, but to that of facts and evidence. Ideally, the legal aspect of adjudicating a case (incl. the court's interpretations of the provisions in substantive law which are central to the dispute) should already be clear to the parties in pre-trial proceedings, i.e. in this respect the court should not surprise the parties. In chambers, the role of the court is, in particular, to assess the evidence submitted to confirm the facts provided and, if necessary, to apply its right of discretion.

Arrangement of pre-trial proceedings

The volume and time of proceedings are often extended by the submission of irrelevant evidence 'just in case' about facts which are neither disputed nor relevant to the case. I believe that in pre-trial proceedings the plaintiff should, in general, not submit any evidence at all, unless this is needed in order to understand the nature of the dispute (i.e. the main contract between the parties). The plaintiff will only learn from the defendant's reply which facts claimed by the plaintiff are objected to by the defendant. Further reasonable arrangement of proceedings would be as follows: if the case is complex and there are many facts or the statements of the parties are unclear (as they often are), the court shall invite both parties to a pre-trial session or discuss in writing in order to determine which facts are relevant to the adjudication of the case and which party should provide evidence thereto, while also analysing the legal side. Only thereafter should the parties receive (in order to ensure equality and competitiveness) a common deadline for the submission of all evidence about all facts to be proven, with explanations regarding which contested fact each piece of evidence is to prove.

Unfortunately, our everyday proceedings are to the contrary: at first, the file is burdened with all kinds of material, and only later is it analysed (or sometimes not) as to whether and what part of the evidence is important. I think that our proceedings culture and habits require principal amendment in this respect. This would contribute to the concentration of proceedings, avoid unnecessary additional work and help to adjudicate matters more quickly and with a higher degree of quality. Of course, one of the preconditions for improving the quality and with a higher speed of the adjudication of matters is an increase in the quality of the representatives of the parties (lawyers) and a better understanding of their role.

Active or passive court

In general, I am convinced that the precondition for faster proceedings with higher quality is the intervention of an active judge in the course of pre-trial proceedings. The law and efficient proceedings require a judge to be active when managing a proceeding. An active judge also needs space to make decisions. The legislator should trust judges more and not try to prescribe all steps to them (in particular, by amending the rules constantly), which cannot be followed in current proceedings and may lead to useless appeal proceedings and wasted time in county courts while strictly trying to stick to the letter of the law. The role of a court in managing proceedings has been defined, in particular, in sections 329–331 of the Code of Civil Procedure (although the legislator has since made this somewhat unclear with the amendment of section 330).

A relatively widespread belief that the court does not have sufficient options arising from the law to restrain the parties to a proceeding is incorrect. If a judge fails to limit the proceedings or to fix clear deadlines for the parties regarding the time and content of submissions, this should not later be attributed to the bad faith of the parties – the judge should instead take a look in the mirror. Without underestimating the role of a court in managing proceedings, there are definitely stages of proceedings which can be accelerated either by standard solutions in law or even by providing guidelines about acts, while such acts shall not necessarily be performed by the judges themselves, e.g. arrangement of serving documents, deciding on the provision of procedural assistance and the identification of procedural preconditions for a default judgment or the establishment of procedural expenses. The (sometimes occurring) understanding of impartiality of a judge, according to which judges cannot make any statements during the session and have to listen in silence to the discussion of the parties, which is often illogical and irrelevant or even has no point at all, is incorrect. It is also wrong to believe that a judge is, in general, able to adequately adjudicate a case at a session without any preparations.

Unclear division of roles between judges and court officials

Just as unclear as the division of roles between the parties to the proceeding and the court is the division of roles in the court itself between a judge and a court official. While traditionally court officials have been regarded as assistants to judges and performers of technical work, in recent years there has been a clear tendency towards expanding the role of court officials in the administration of justice, and in turn towards decreasing the role of judges. This can be seen, in particular, in the increase in the number of court officials and the expansion of their duties via the project of judicial clerks, whose ultimate aim is presumably to transfer at least part of the current work of judges to court officials and to reduce the number of judges.

The Supreme Court *en banc* found in its judgment of 4 February 2014, in constitutional review case no. 3-4-1-29-13, that the Constitution provides that a judicial clerk (and thus any other court official with similar competence) has no right to hear matters related to the administration of justice on merit, i.e. the administration of justice cannot be delegated to them (see section 44.6 of the judgment). The administration of justice is the exclusive right of a judge. The organisation of the administration of justice by a court must also proceed from this principle. Court officials can only assist a judge and prepare matters, whereas decisions on merit must be made by the judges themselves. Judges should not be placed at a distance as simply the persons signing the judgments, with decisions on merit being made by officials.

Previous practice in proceedings has confirmed that if the acts of pre-trial proceedings are performed by persons who do not hear the case (court officials), it can lead to a situation where the judge receives the case in a state where it is not clear what is being claimed, on what basis, what the objections are, what the facts being contested are, how the burden of proof will be divided and what should be proven with the pile of evidence provided. Such a situation may instead result in the extension of the duration of the proceeding of court cases (if a judge wishes to bring the proceedings into conformity with the law). Although some judges may dream of a "god-like" role in their work at the head of an army of officials working for them, such a dream is not meant to come true. We cannot hope that people earning half the salary of a judge will be wiser than the judge or work more effectively than the judge. These statements are not meant to criticise judicial clerks who do their work well, but to draw attention to the bottle-necks in the system. It is important that the role of people dealing with a case is clearly and reasonably limited.

Specialisation of judges

One of the ideas in increasing the speed and quality of the proceeding of matters has always been the specialisation of courts, courthouses or at least judges. In a small country, one of the problems is related to the relatively small number of matters in each specialised area, as well as periodic changes in the profile of matters. Still, the allocation of insolvency matters or matters related to building or family law to judges specialising and specially trained in these fields could be considered. In addition, labour dispute committees (whose constitutional basis is questionable) could be reorganised as specialised labour courts. But it would also be a good start if a person applying for the post of a judge knew what work they will be doing. This would give a person confidence with regard to the future and maybe boost their incentive to become a judge. It would be a waste of resources if a person with very good knowledge of private law adjudicated criminal matters or vice versa. Such situations – where judges hear civil matters in parallel with criminal matters – should be discontinued. Taking into account the ever-increasing volume of both legal provisions and case law, it cannot be presumed that a person who already has a very high workload will be able to remain well informed in both areas.

Oral *vs* written proceeding

As I wrote in my article in 2012, the obvious trend of eradicating oral proceedings in county courts cannot be right. In addition to the question of whether, in such a way, the fundamental right to be heard in a court is

ensured after all, it would also make adjudication of matters more complicated and may also cause delays therein. I would consider oral proceedings important in pre-trial proceedings in county courts in particular if the claim of the plaintiff and the statements of the parties are unclear and the duty of explanation must be fulfilled and the burden of proof must be analysed. In addition, in oral proceedings there is a higher possibility of adjudicating a case with a compromise. It remains unclear why the technical capability of courts to hold sessions via videoconference has still not been developed, given it would save everyone's time and money and enable the benefits of oral proceeding.

Let us quit the "hunt" for 100 days

In recent years, the number of appeals filed with the Supreme Court and circuit courts has materially increased, especially with regard to procedural issues. Whereas it has appeared that the judgments are at least sometimes partial, fragmentary and contain critical technical errors (e.g. while preparing the text using the copy-paste function, the procedural expenses are left to be borne by a person who did not participate in a relevant proceeding at all, the names of the parties are incorrect and there are often misprints and calculation errors). Sometimes the conclusions of court judgments are contradictory, unclear and unenforceable, which leads to the dispute being raised again in execution proceedings. I can confidently claim that many of the procedural issues referred to can be attributed to one and the same fact: unreasonable haste.

In county courts, matters are sometimes adjudicated in a hurry, probably as a result of direct pressure (reporting on matters and surveillance) or indirect pressure (performance agreements, rankings of judges and linking the salaries of court officials to the efficiency of judges) from the management of the court and the Ministry of Justice to improve procedural statistics. Whereas in order to "improve" statistics, a number of measures can be taken, e.g. the unjustified omission of the descriptive and reasoning part from a judgment (or reducing it to an empty text), the unjustified failure to arrange oral proceedings, the failure to fulfil the duty of explanation, leaving all substantial work to court officials or a fictitious increase in the number of matters (dividing matters without reason or failing to merge them). It is easy to reproach judges for succumbing to pressure so easily, but within the system many persons still do not succeed in opposing it. An alarming signal about the apparent dissatisfaction of judges with the work of courts is the recent mass participation (compared with previous cases) of judges from Harju County Court in a competition for a judge's post in Tallinn Circuit Court.

Training for judges from county courts clearly shows that the current organisation of work does not leave them sufficient time to delve into matters, which results in procedural errors. Also taking into consideration the fact that the legal environment around us as a whole is becoming more and more complex, a judge lacks sufficient time to keep up to date, and therefore it is not rare that a judge adjudicating a case has heard nothing about amendments to legislation in the respective field or important case law of the Supreme Court, not to mention EU law or the case law of the Court of Justice or the European Court of Human Rights. It should not be hoped that this work will be done by a court official (independent of the name of their position) instead of a judge. It cannot be presumed that a person whose qualifications, experience and income are lower than those of a judge, but whose workload is not smaller, is able to do such a job (incl. to keep up to date on legislation) more effectively than a judge. The bases of proceeding statistics were analysed in the article from 2012.

I believe that civil procedure is not slow in Estonia at present, and instead it should be quickly dealt with to raise the quality of proceedings and judgments. But this should not be done through the establishment of highly general and empty slogan-like regulatory documents, but via the elimination of the actual reasons causing the haste. This does not mean that proceedings cannot be accelerated. The organisation of pre-trial proceedings, which is analysed above, could be made much more efficient – but not by delegating it to court officials.

Service of documents

As traditionally many people (incl. judges) consider the serving of procedural documents to be the main problem of civil procedure, I cannot really ignore this topic in this article either. But I will mention only a couple of keywords, as a more thorough analysis is provided in the 2012 article, and in the meantime no significant changes have occurred.

I believe that the widespread belief that most people to whom court documents cannot be served are intentionally avoiding proceedings is wrong. Such a statement has no verifiable basis at all. Although there are certainly persons who try to postpone a judgment regarding them by avoiding the serving of documents, it is not probable that such persons account for most of the problematic cases. I believe that there are two main reasons behind the problems with the serving of documents. First, for many years the state has been exceptionally inefficient in updating the database of addresses in the population register, failing to establish real and efficient supervision over ensuring the correctness of data or to raise people's awareness of the need to present correct address data. Instead, the bad example of politicians who register their places of residence before elections has sent wrong signals about the population registry to society. The second reason is objective and reflects changes in the housing structure of society, as well as a material increase in the mobility of the population. People do not live their whole lives (or most of their lives) in one place any more, but change their place of residence often, as in the case of places of work. They often use housing under short-term (and also verbal) agreements and then move on again. In addition, many people work away from their main place of residence, and many people work abroad, where there is often no adequate possibility to get information about them. In the case of companies, often the address data are not checked, they have no assets and their board members (if any) are foreigners who cannot be contacted. This is among other things the consequence of the recent national policy of "creating a company in 10 minutes", which also tends to create favourable conditions for shelf companies.

I am convinced that measures for improving the efficiency of the serving of documents by extending different interpretations of serving (i.e. to interpret according to law that sending or publishing a document in a certain way shall be read as its being received), which have from time to time been regarded as the key to solving the problem, would not produce the expected effect, are often unfair and unreasoned, may violate a person's fundamental right to be heard when adjudicating a case and also contradict EU law. Instead, we should consider better ways of reaching persons. Serving of documents should not pose a court any problems related to statistics if the court has made all efforts in this regard. If an action cannot be served, it should not be heard and plaintiffs should be asked to themselves find the defendant at first, as in most cases the plaintiff has nothing to do with the judgment if it cannot be enforced with regard to any person.

Computer as a "miracle cure"

Also in my previous articles, I wrote that we have overestimated the role of a computer system as an accelerator of proceedings, and our contribution to this field is probably disproportionate compared with other fields. Thus, it is unjustified to see KIS2, digital files, etc., as the messiah of our organisation of the administration of justice. A computer is (and at least in the near future must remain) a tool and not a decisive factor in the administration of justice. A bad computer system may be a major obstacle in proceedings. If, for instance, instead of one resolution (signature) on paper, many entries need to be made as an order in an information system, it is not easy to understand what the fastest way of proceeding is. A lawyer may criticise an information system which limits the volume of sending documents or does not ensure the timely confirmation of their receipt. In reality, foreseeing all procedural decisions in a standard form may lead to a situation where the system is so clumsy that it cannot be used at all. A computer system must be designed according to the needs of proceedings, instead of developing the proceedings with regard to the possibilities of a computer, as

sometimes seems to be the case. A computer should not prescribe what kind of solution has to be used. Otherwise people whose problems do not fit into a prescribed format may simply be left without legal protection. At least some of the parties to the proceeding (e.g. debtors of fast loans) may not even be able to communicate with the state via computer until ten years' time.

It cannot be claimed either that using a computer ensures material savings for the state if in fact documents submitted electronically are still printed out. This is actually reasonable in the case of matters with a slightly higher volume. This means that now, and I am afraid also in the future, it is and will be much easier to use a multi-volume paper file when adjudicating a case and to view and compare the documents submitted until than to constantly browse the information system and wait for files to download and then attempt to navigate between 150 open digital documents (i.e. a mix of statements of the parties and evidence). The computer-based processing of a case can only be efficient if the number of proceeding documents is less than ten. In practice, however, the files have become more voluminous. For instance, instead of a one-page document signed manually, three pages must be added to the file upon signing the same document digitally (an e-mail about sending a letter, the letter itself and the page with the signature). The National Audit Office should carry out an analysis about how much the state has contributed to the development of information systems, how many failures there have been and for what reason, and whether the results achieved are worth the expense.

The above statements do not mean that information systems should not be developed at all, as their benefits can be realised as well. In particular, the criticism concerns the potential obligation to implement halfway solutions. Solutions should be developed with the participation of judges and lawyers who are more aware of the proceedings and the systems should undergo sufficient testing before implementation. In addition, their user-friendliness should reach a level where most judges themselves recognise that it is better than working with a paper file.

Judgments without descriptive part or statement of reasons

I also wrote about this issue in my 2012 article and I still think that it is basically wrong to promote judgments without the descriptive part or the statement of reasons as a means of accelerating the proceedings. First, it may not be understood from a judgment without the statement of reasons (and moreover without the descriptive part) what claim was resolved after all (e.g. if the whole text of the judgment is only "to order the payment of EUR 2,000 from B for the benefit of A"). Although this probably causes no problems concerning the compulsory enforcement of a judgment, there arises a question as to what claim was resolved after all and which part of the judgment is binding on the parties, and in which same dispute a new proceeding cannot be started. Such a systematic problem has somehow raised no concerns among the parties amending the Code of Civil Procedure and the judges approving the amendments. Especially unclear is a judgment whose resolution (and the whole content) is just to "leave the action unsatisfied". It is highly questionable whether the action filed and all procedural documents could be regarded as part of the judgment, wherefrom the object of proceedings should be derived. Secondly, such a judgment may raise questions about reinitiating a similar dispute abroad and also about the enforcement of the judgment. Although subsection 448 (3) of the Code of Civil Procedure alleviates this, its implementation and the deadline for providing reasons later on are not clear. In addition, making a judgment without the statement of reasons involves a higher risk of making errors if, later on, when supplementing the judgment, it appears that a decision made in a complicated dispute – perhaps initially based on emotion (without proper analysis of legislation and case law) – cannot be soundly argued.

Even a short legal reasoning should be preferred to the absence of the statement of reasons. A judgment without a statement of reasons often also fails to ensure the parties one of the aims of the proceedings – legal peace and acceptance of the judgment – if the parties do not understand the reasons for making such a decision (which should not be underestimated, either). The above does not mean that the statement of reasons would always contribute to the judgment – an unclear, protracted, contradictory and repetitive statement of reasons of a court judgment may also diminish the authority of the administration of justice. Whereas the descriptive part must at least ensure that we understand, for instance, what type of contract formed the basis of claiming the repayment of a loan.

The parties promoting resolutive judgments have probably relied on similar practice in criminal procedure. Material differences in the goals of the proceeding and the meaning of the judgment have been left without attention. The aim of criminal procedure is to resolve the issues of the guilt and penalising of a person, and in subsequent life the judgment has, in general, no other meaning; while in a civil matter, a dispute between two persons is resolved (often only a part of certain disputes or considering only certain aspects of long-term relations) and it must be clear later on as well what was adjudicated. Perhaps in criminal proceedings a statement of charges, as a public document in a prescribed format, can be read as part of the court judgment if someone wishes to understand what the person has been accused of. By contrast, in civil proceedings - a statement of claim as a private document which is often ambiguous and has no material requirements regarding its format and is also technically separated from the judgment (in a file) - can probably have no such meaning.

In any case, the regulation on the descriptive part and the statement of reasons should be clear in law. As examples of a lack of legal clarity, subsections 444 (2) and 448 (4^1) of the Code of Civil Procedure (both in a wording valid from 1 January 2013) refer to bad legislation, which independently and in conjunction with other provisions provides numerous possibilities of interpretation to suit all tastes.

Simplified proceeding and other "easier" possibilities to obtain execution documents

Simplified proceeding

In my 2012 article I also discussed the problems of simplified proceedings, and since then the situation has not improved. There is still the impression, at least sometimes, that under the cover of simplified proceedings courts may try to "get rid of" a case without going into detail, which results in unclear and contradictory court judgments, often containing simple writing, calculation and logical errors. But all too frequently the circuit courts refuse, without good reason, to hear appeals in such matters, although it appears in further proceedings in the Supreme Court that within the appeal procedure highly important legal problems were raised which the circuit court should not have avoided. A circuit court (unlike the Supreme Court) has no right to refuse to hear a case which has been adjudicated wrongly only because the dispute entails a low material value.

Default judgment

As far as is known from practice, in the event of a default judgment, in general the principle of *iura novit curia* does not generally apply, although it has been set forth in law (subsections 407 (1) and 413 (1) of the Code of Civil Procedure). This means that in reality default judgments in particular are used to unlawfully order credit claims which are not allowed, including loans with excessively high interest, fines for delay on interest and contractual penalties on consumer credit contracts, which are all forbidden by law. In addition, other influences include well-known practice, since the projects of default judgments are not prepared by the judges themselves, and the prevailing attitude (which clearly violates the law) that in the case of making a default judgment, the statements of the plaintiff and the law do not have to be compared extensively.

If the court realises in making a default judgment that the facts presented are not sufficient for adjudicating the case or are unclear, or that the terms and conditions of

the contract on which the claim is based are void, the action cannot be satisfied with a default judgment – at least not as a whole. Therefore, it is wrong to think that default judgments are extremely simple, and thus, as an open secret, their preparation has in many cases been delegated to court officials, with judges merely signing them. This would mean a devaluation of the application of law (and therefore also the administration of justice) and unlawful delegation to court officials. In addition, there is the problem of failing to provide the reasoning behind a default judgment, which among other things makes it difficult to verify them in a higher court.

Expedited procedure of payment order

There are even more serious problems with the expedited procedure of a payment order, where essentially no law applies and it is very simple to enforce usurious and unlawful credit claims. Probably here the law should limit and check the enforcement of collateral claims even more. So far, it is not clear what the scope of the administration of justice is under clause 489[1] (2) (3) of the Code of Civil Procedure in the case of a clear absence of reasoning of a claim, which according to Article 11 (1) (b) of the EU regulation on creating a European order for a payment procedure shall be verified upon preparing a payment order (and where the Estonian expedited procedure of payment order differs in principle from that of the EU). It should be decided whether the judgment of 14 June 2012 of the Court of Justice on the necessity of verifying unfair contract terms on the initiative of the court enables the continuation of the expedited procedure of a payment order in its current form. The confirmation of compromises in the expedited procedure of a payment order is highly questionable, as in such cases it often occurs that a usurious creditor forces the debtor to follow unlawful terms and conditions which nobody checks.

Immediate compulsory enforcement under contracts

A particularly problematic way of reducing the workload of courts is to transfer claims to immediate compulsory enforcement. At the moment, this is possible mainly in the case of claims secured with a mortgage, but especially notaries (probably in their own interests especially) have expressed their will to extend it to other claims as well. In principle, it is an unacceptable tendency that all creditors try to quietly "sneak" into the list of section 2 of the Code of Enforcement Procedure in order to avoid the burden of filing claims to the court, and take immediate measures as regards the assets of the debtor. This also raises doubts about conformity with section 146 of the Constitution, which provides that justice shall be administered only by the courts. A bailiff cannot assess within a formal enforcement procedure whether a claim filed for enforcement actually exists, whether it has been calculated lawfully or, what the objections of the debtor are, etc. This cannot be compensated either with the debtor's possibility to file an action for declaring the enforcement procedure as unallowable, which has by now become an important way of resolving disputes in substantive law combined with an appeal on the activities of a bailiff. Such filing of an action presumes that the debtor has a higher level of awareness, may actually place an unfavourable burden of proof on the debtor, may be costly and, finally, such a procedural action is in essence unsuitable for resolving issues in substantive law.

While extending the possibility to make claims arising, for instance, from a credit agreement (incl. a fast loan) subject to immediate compulsory enforcement, the currently limited possibilities of such debtors in terms of legal protection would be reduced further and the danger of usurious activities would increase. Current practice of notarial deeds raises doubts that in many cases notaries have not been able to (or perhaps have not wanted or known how to) explain to debtors what dangers accompany immediate compulsory enforcement and fail to adequately verify the lawfulness of contract terms, i.e. to perform the central task basically justifying the requirement of the notarial certification of contracts. The exception of the immediate compulsory enforcement of a mortgage might not have a final convincing justification either, but in extending the immediate compulsory enforcement, debtors would be put under even more pressure. Prior to 2006, a formal objection of a debtor was sufficient to avoid immediate compulsory enforcement, whereas currently the same has been set forth in an expedited procedure of a payment order, which is sufficient for enforcing undisputable claims.

Procedure for compensation and determination of procedural expenses

The next projected amendments to the Code of Civil Procedure concern the procedure for the determination of procedural expenses, with the aim of returning at least partially to the procedure for determining the expenses within the same proceeding valid prior to 2006. Here I will not repeat the objections already submitted during the proceedings of this draft that – especially in the case of proceedings via many instances of court it obstructs and complicates proceedings, the parties must be constantly ready to present lists of expenses (incl. the party who loses and whose expenses would not be compensated in any event), the volume of appeals with regard to the main judgments would be higher, the workload of circuit courts and the Supreme Court would increase, etc. We will see what, if anything, happens and how such selective proceeding of expenses actually functions.

But here I would still like to draw attention to the fact that the biggest problem with the 2006 procedure of determining expenses was the activity of the courts themselves, as they failed to make it function. When distancing judges (for example in Harju County Court) from determining expenses and employing only a couple of judicial clerks to cover all matters, it is no wonder that such proceedings met with delays of many years. But there is no reason to blame the law for this long-lasting chaos – we should ask instead how such organisation of work was possible and who was liable for it. Fortunately it has since been understood that expenses should be determined by judges. This is also confirmed by the abovementioned judgment of the Supreme Court *en banc* regarding the declaration of the competence given to judicial clerks to determine expenses as unconstitutional.

There persists a major substantive problem, i.e. what the criteria and extent for compensating the expenses of the winning party should be. It is clear that the other (or losing) party should also be able to foresee the risks it has to take into consideration when initiating a proceeding. The Government of the Republic regulation that is currently meant to mitigate this risk is in principle unsuccessful and has not fulfilled its task. It has been wrong to connect the compensation of expenses with the value of the case, which has caused at least hundreds (if not thousands) of disputes over the value of the case, which would otherwise not have occurred. In addition, upon determining value, situations which involve many parties to the proceeding and appeals via many instances of court are almost unsolvable, whereas there have been different values for calculating the fee and compensating the expenses. In addition, this regulation is so generic and usually the limits are so high that it does not provide any substantive help. The new wording of subsection 175 (1) of the Code of Civil Procedure, which entered into force on 1 January 2013, is especially problematic (likewise, most of the other amendments to the CCP which entered into force on 1 January 2013 are at least questionable), which sets forth that upon failing to file objections to the list of expenses, the court does not have to verify costs not exceeding the limit. In many cases this is analogous to the claim for compensation of loss and therefore similar criteria should be applied. I would underline that the Supreme Court *en banc* is currently adjudicating the constitutionality of this regulation as a whole (see the ruling of 26 February 2014 of the Civil Chamber of the Supreme Court in civil case no. 3-2-1-153-13 regarding delivery of the case to the Supreme Court *en banc*). It is high time to analyse properly, in cooperation with lawyers and judges, what the extent of compensating the costs of legal assistance should be, and thereafter to provide it in legislation as clearly as possible. At least in major cases it would be sensible to determine compensation on the basis of acts, which would also allow the use of court officials to determine the amount of legal expenses.

Extreme instability of procedural rules and its consequences

This is again one of the issues I analysed in greater detail in the article from 2012, and here I will only underline the main concern. In essence, amending legislation is the easiest and cheapest way for the state to try to change something in reality. Therefore, the Ministry of Justice and the legislator have probably also regarded this as

the most efficient method (as they understand it) for resolving issues causing problems. Unfortunately, procedural practice and people's procedural habits do not change overnight and often many amendments to procedural legislation are not even acknowledged. Taking into account how easily many amendments have been made in recent years and the unconstitutionality of a number of new procedural provisions, such criticism towards the amendments is justified. One of the negative effects of the instability of procedural legislation has also been the fluctuation and unpredictability of case law. It is difficult to compare the assessments given of procedural provisions at different times and to try to guess whether the new provision might be interpreted differently from the previous one or even the one before that. In addition, it is difficult to identify the opinions of the Supreme Court about provisions valid at different times. An important side-effect of the instability of procedural legislation is also the absence of procedural theory. In Estonia, there is no adequate commented issue of procedural legislation or a national general study book on civil procedure, not to mention potential alternative views. In fact, while laws are constantly amended, there is no point in commenting on the law in detail, as by the time the comments are prepared there may be a new law or at least the existing law may have been materially amended. In addition, the constant amendment of procedural legislation and the absence of procedural theory make it difficult to teach civil procedure in universities. Often it must be said to students that by the time they graduate the bulk of what they have studied may already have become obsolete. Because of amendments to legislation and case law, almost every year all study materials have to be updated.

All of this has a direct impact on the speed and quality of proceedings. If the court and the parties to the proceeding are not confident regarding procedural rules, the implementation of law will also become uncertain, the parties will not be able to foresee the reaction of the court to different procedural acts and there may be a large amount of useless additional work. The instability of procedural laws diminishes the foreseeability of proceedings and increases its randomness, while probably also extending the time of proceedings, should there be even slightly more complicated procedural problems. Thus, in order to accelerate proceedings, it would be good to stabilise procedural law and amend it only in well-substantiated cases accompanied by previous and further analysis and explanations and as great a consensus among lawyers as possible, as well as with a sufficiently long period for implementation and clear transitional provisions.

Summary

I am convinced that it is possible to improve the efficiency of proceedings, but this cannot be done with the tools currently used. In particular, there is room to improve the efficiency of pre-trial proceedings. Such improvement should involve the theoretical bases of proceedings, which should also be followed when preparing and amending legislation, in order to avoid controversies and misunderstanding. Court proceedings cannot be based on the randomness incurred in case law, as is currently often the case. Upon accelerating proceedings it would also be important to have proper comments on procedural law – including a systematic analysis of current case law at the very least – in order to avoid a general lack of awareness and uncertainty in arranging proceedings. Whereas as already stated, this could be done only provided that the constant amendment of procedural legislation ceases. Certainly there is room for development in improving the systematised availability of the case law of the Supreme Court (as well as of circuit courts) and finding relevant judgments, which at present can be complicated. If the Supreme Court issues its opinion about an important procedural issue, it should be more effectively and more broadly notified to the relevant parties. Overall improvement in the legal awareness of the population would definitely contribute to the acceleration and quality of proceedings. We should aim to improve the general legal awareness of the population from the ground up.

REMARKS ABOUT THE PERFORMANCE AGREEMENTS OF COURTS IN LIGHT OF FOREIGN COUNTRIES' EXPERIENCE AND THE CONSTITUTION OF THE REPUBLIC OF ESTONIA

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Introduction

The Ministry of Justice changed the principles of the financing of the courts of the first and second instance and started to finance them on the basis of performance under a pilot project in 2008. The agreements on the development goals of courts or the so-called performance agreements between the Ministry of Justice and the Chief Justice of the Supreme Court became the main element of the project. The then Chief Justice of the Supreme Court named these in a report presented to the Riigikogu in the 2012 memoranda of understanding.[1] The content of the agreements was the allocation of additional funds to courts in order to cope with an increased workload. According to the State Budget Act, the relevant finances should have been spent on the specific purpose of fulfilling the posts of judges. Instead, the courts were able to use the additional funds allocated, in particular, for hiring assistant staff for judges.

Currently, there is the second review of the so-called performance agreements. On 2 January 2013, the Ministry of Justice and the Chairman of the Harju County Court signed a document "Memorandum of Understanding for Implementing a Project of More Efficient Administration of Justice in the Harju County Court". The document specifies that according to subsection b of section 16 "Improvement of the functioning of the rule of law and the legal system and the business environment" of the Activity Programme 2011–2015 of the Government of the Republic, the judicial system must be developed with the aim of making the administration of justice faster and cheaper for citizens and that the proceedings of court cases should not last more than 100 days in each instance. The main goal of the agreement is that "by the end of 2014, the administration of justice in a county court should in general not last longer than 100 days on

[1] A regular report by the Chief Justice of the Supreme Court at the Riigikogu 2012 Spring Session on 07.06.2012 "Overview of courts administration, administration of justice and uniform application of Acts", p. 3, available at: http://www.riigikohus.ee/vfs/1354/Riigikohtu%20esimehe%20ettekanne%20parlamendile_07%2006.pdf.

average in any type of proceedings". Thus, regarding the aspect of allocating additional funds, the main focus is on the speed of the proceedings. In 2013, the Ministry of Justice signed agreements with a similar main objective, but set somewhat less strict terms for proceedings and provided for significantly fewer benefits, with all remaining courts of the first and second instance.

Mutual connection between the courts' quality management reform and the so-called performance contract – two sides of a coin or two different coins?

In Estonia, the issue of the so-called performance contract has become topical due to the quality management reform of the court system. Should the performance contract be treated as part of quality management, which shares the goal of achieving quality in the administration of justice, or is it rather a separate phenomenon? For instance, in Germany and Austria, the reform of quality management and control has been introduced in the judicial system, but there are no analogous performance agreements between the Ministry of Justice and courts in those countries. In Germany, the court officers and officials are being motivated via performance interviews created specifically for the judicial system.[2]

At the plenary meeting of judges held on 14 February 2014, Külli Taro stated in her report "Performance Financing in Public Sector: an Attractive Idea with Sharp Reefs" that the classical model of quality control has been successfully implemented, for instance, in hospitals of other countries, but as regards the quality management and performance financing of the administration of justice there is less information. The same is claimed by Brian Forst, Professor of Criminology, who is still focusing on the aspects of evaluating the quality of the settlement of criminal cases.[3] This book reveals an opinion that it is not reasonable to formulate a general model for the quality control of the administration of justice. In order to increase the efficiency of the administration of justice, at first the bottlenecks should be identified and for that purpose it is necessary to focus as accurately as possible on differentiating between the various types of court cases.[4]

The ideas of Prof B. Forst have been followed, for instance, in the case of quality management and control of the Austrian judicial system, where a thorough manual on the controlling of courts with control and performance tables and supervision rules has been prepared. However, this system is not perfect, either. As commented by one Austrian judge in a private conversation – on paper, detailed rules seem nice and well planned, but actually it is a resource-demanding bureaucracy of tables and analyses.

The basis of a classical quality management process, whereto Prof. B. Forst also draws attention, is a thorough (or even bureaucratic) analysis for identifying bottlenecks before requesting any results. Preparation of quality management assumes, for instance, finding out problems with the help of check-lists and questionnaires. At least currently it seems that, in Estonia, entry into performance agreements between the Ministry of Justice and the courts, so far, refers to an *a priori* opinion about the essence of the problem: judges and judicial clerks must be motivated (or put under slight pressure) in order to make more decisions in a shorter period of time. Does The Ministry of Justice have any grounds to believe that the current financing is not efficient and motivating?

[2] In Germany, the term *Personalentwicklungskonzept* indicates, in essence, a performance interview and its main aim is to motivate a person.

[3] B. Forst, Errors of Justice: Nature, Sources and Remedies, Cambridge University Press, 2004.

[4] "In the standard approach for managing errors in both production processes and service delivery settings (hospitals are a prime example) is the use of check sheets that record and organize data on errors. [---] In a criminal justice setting, the use of such a tool to manage errors might be specifying the dimensions of the check sheets, following the consideration of these sorts of questions: What are the major sources of errors in a department or office (police, prosecution, adjudication, sentencing, and corrections)? How do these vary by crime situation, type [---], and so on? How can we more systematically obtain information documenting errors in each major category of these dimensions? An analysis of these check sheets over a period of, say, a year could help to establish how resources might be redeployed to reduce the most frequent and costly types of errors." B. Forst, Errors of Justice: Nature, Sources and Remedies, Cambridge University Press, 2004, pp. 42-43.

Is the reinterpretation of financing accidentally overlapping with the reform on quality management?

If most of the judges and court officers are in all ways making their best efforts, the motivational package of performance financing might not bear fruit. For instance, if the aim is to adjudicate an administrative case within 100 days, it must be admitted that, when following the current rules on administrative court proceedings, it would still take, even with the utmost effort, at least 178 days, as calculated by Virgo Saarmets at the plenary meeting of judges of 14 February. The aim of reaching faster-further-higher is, in essence, sportive, but sometimes the organisation of court proceedings according to the requirements of the Constitution sets with weighty reasoning its limits on achieving it.

While the essential part of classical quality management is to identify at first the bottlenecks, in order to liquidate (if possible) thereafter the obstacles, the so-called performance agreements as they are seem not to match with the reform of the quality management and control of the judicial system, but are a separate phenomenon. At the same time, it cannot of course be excluded that a so-called performance contract would sometime in the future become a measure which helps to liquidate a certain obstacle identified, becoming thus part of quality management.

Experience of foreign countries and analogous bottlenecks

Outcome-oriented public administration with the example of Switzerland

As Switzerland is regarded to be one of the strongest introducers of performance agreements in the public sector in Europe, the following review would focus on the essence and impact of the so-called performance agreements in Switzerland. In 2007, Isabella Proeller, an independent academic scholar, surveyed the performance agreements of local governments in Switzerland. According to the survey results, in Switzerland the local governments employ four types of performance agreements, whereof according to Proeller the worst was a performance contract which listed tasks and responsibilities without specifying the expected output or outcome. Proeller considered the best a performance contract which contained clearly expressed aims of activity and the ways of measuring the achievement of aims or the outcome.[5]

Proeller warned that the indicators which measure the outcome should be "robust"[6], i.e. easily implementable in practice – such that the person from whom the result is expected can directly influence them with his or her work. Many indicators which were by mistake used in the Swiss performance agreements were measures of satisfaction, equity or legality.[7] The same problem seems to exist in Estonian courts' performance agreements. For example, Proeller states that the satisfaction of the parties to the proceeding with the decision can be seen from the fact that no appeal is filed against a decision. The legal correctness of a decision may, at least partially, be indicated by the fact that the following instance leaves the decision in force. But according to Proeller, none of these indicators is suitable in the context of performance agreements, as achieving the result is rather complicated and depends on many circumstances.[8]

[5] 1. The performance contract lists tasks and responsibilities without specifying the output or outcome. 2. The performance contract lists the products and services to be provided, but contains, for instance, no aim determined to a product group. 3. The performance contract specifies the goals of input and output, but contains no data about measuring the outcome. 4. The performance contract specifies clearly the expected aims of activity and how to measure the achievement of the aim or the outcome. I. Proeller, Outcome-orientation in performance agreements: empirical evidence form Swiss local governments. – International Review of Administrative Sciences, 19.03.2007, p. 102.

[6] "Outcome indicators should be robust and suitable to be used for control purposes and therefore should meet certain criteria like validity, timeliness, measure something the provider can influence, etc." I. Proeller (2007), p. 104; Audit Commission, On Target. The Practice of Performance Indicators, London, 2000.

[7] "Many of the indicators actually are measures of satisfaction or measures of equity or legality (for example, number of rejections of next hierarchical level)." I. Proeller (2007), p. 104.

[8] In addition, I. Proeller also critically found that the performance agreements on the basis whereof it was possible to assess the performance of a person with some indicators were insufficient, as the evaluation was oriented rather towards input, throughput or output, than towards the real outcome. This means that productivity and performance were measured instead of efficiency or impact. I. Proeller (2007), p. 103.

Finally, Proeller warns that focusing on a certain result may artificially create a degenerated world of values, where only certain results are evaluated and other results are of no importance.[9] For example, the rules set forth in procedural codes may become less important, if a performance fee is paid only under the rules focused on speed. (As a self-ironic remark about this article, it should be mentioned that under a performance contract the authors do not contribute with this article to the work of the Estonian judicial system either on the level of input, throughput, output, or outcome set forth in the performance contract. Therefore, the only possible conclusion is that the result remains unachieved.)

But with the position that the outcome expected from the judicial system is a decision of good quality made within a reasonable time, then what are the input, throughput and output? Are the resources used for preparing the decision an input when formulating a judicial decision? Throughput remains somewhat unclear, and therefore the article contains no speculation with potential variants. If a good output would mean as many decisions as possible, even those of bad quality, the outcome expected with a so-called performance contract could be as many decisions of good quality made within the most reasonable time of proceeding as possible. But how to adequately assess this outcome is already a more complicated question, a reply to which is fortunately not the aim of this free-form remark.

A speed-oriented judicial system with the example of Austria

The Federal Ministry of the Justice of Austria emphasizes that speed is important while resolving court cases, as prolonged proceedings place a financial and psychological burden on the parties to the proceeding.[10] However, the Austrian judges do not consider the pressure by the Ministry of Justice to make court proceedings faster to be a good practice and do not accept this rhetoric in the communication between the executive and judiciary branches. Traditionally, attention is drawn to the fact that the inevitable result of promoting the general mentality of speeding up by the Ministry of Justice may be a decrease in the quality of decisions.[11] Whereas there is no doubt that resolving a court case within a reasonable amount of time for proceedings is in the interests of the judicial system. The judicial system is constantly working towards this goal, as time-consuming proceedings are a burden both on the parties to the proceedings, as well as on the judicial system itself.

In 2013, the Austrian judicial system has been described as one of the fastest and most economical in the European Union,[12] and therefore the Austrian judges find that the pressure by the Ministry of Justice on the judicial system is excessive, violating thus in part also the separation of powers. Matthias Neumayr, Justice of the Austrian Supreme Court, wrote last year that monitoring the work of judges and preparing various comparative tables about their work is part of evaluating the judges, but the independence of a judge should include their internal certainty to refuse unnecessary concessions in the quality of work as a result of pressure from quantitative comparative tables and statistics.[13] This idea was also agreed to by Priit Pikamäe, Chief Justice of the Supreme Court, at the plenary meeting of judges held on 14 February 2014.

In Austria, an understanding has started to emerge that the so-called rushing of judges and post-statistics is a one-sided approach to a complex issue. There is comprehensive concentration on the work environment of

[9] I. Proeller (2007), pp. 104-105.

[10] An official publication of the Austrian Federal Ministry of Justice, *Die Österreichische Justiz*, 2013, p. 38. A remark on the speed of court proceedings has also been published at the webpage of the Austrian Federal Ministry of Justice: http://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a93207ad63cc.de.html.

[11] M. Neumayr. Richterliche Praxis der Zivilgerichtsbarkeit. – Wandel in der Justiz, Wien, 2013, p. 118. *"Ein Nebeneffekt der Liste ist aber zweifellos, dass das kompetitive Element in der Richterschaft zunimmt und sich die Richter/innen selbst unter „Prüflisten-Druck" setzen, der wiederum die Tendenz verstärkt, die quantitativen Anforderungen des Berufs eher in der Vordergrund zu rücken."*

[12] See, for example, Österreich bei Verfahrensdauer unter den Schnellsten – Der Standard. In the web: http://derstandard.at/1363706199588/Oesterreich-bei-Verfahrensdauer-unter-Schnellsten.

[13] M. Neumayr. Richterliche Praxis der Zivilgerichtsbarkeit. – Wandel in der Justiz, Wien, 2013, p. 118: *„Zur Unabhängigkeit gehört auch die Gelassenheit, sich bei der Arbeit nicht nur von Prüflisten leiten zu lassen."*

the judicial system, as the main focus should be on how to create a system which supports fast and procedurally economic resolution of court cases.[14] It is possible to resolve court cases quickly; if the regulation on court proceedings supports fast resolution of cases, information required for resolving a case can be quickly found (e.g. explanatory memoranda of acts have been made easily accessible in Austria via an electronic judicial information system[15]) and the court does not have to deal with formalities which place a burden on a resolution on the merits of the case.

Legal nature and constitutionality of the so-called performance agreements in Estonia

It is evident that a so-called performance contract is not an administrative contract and definitely not a contract in private law, either. Thus the document signed has no legally binding force characteristic of a contract. In addition, there arises no obligation of the head of the court to sign such an agreement. It can be claimed that it would be unconstitutional to compel or force with any kind of means of influence the judiciary branch to sign any agreements with the executive branch. Such pressure would not be in conformity with the independence of the court. But if the chairman of a court signs with the Ministry of Justice in good faith a memorandum of understanding which is not legally binding, it is in essence not problematic from the point of view of the Constitution.

Still, it cannot be summed up with the above conclusion. If we look into the content of performance agreements, some questions arise. From the point of view of the Constitution, it is problematic if the Ministry of Justice may refuse to grant the court a benefit foreseen in the budget or amends the budget plan of the following year on the basis of non-fulfilment of the performance contract by the court. This is a sanction that does not fit in the background of good intentions and raises doubts regarding the efficient functioning of the separation of powers. Direct pressure with financial means is not a mild means of influence, where the legislative branch could treat the memorandum of understanding as non-binding.

Use of the criterion of the number of cases resolved as the only measure when assessing the work of a judge can also be problematic. In the above, there was a brief overview of the example of Austria, where speed is also the main goal, but their approach is still a bit more differentiated. Even more problematic is making the personal benefits of the assistant employees of a judge dependent on the parameters set for the judge. When summarising the experience from the pilot project of the Harju County Court, an official of the Ministry of Justice has written: "When evaluating the results of the work of the proceeding group, the contribution of all officials belonging to that group to the proceeding of court cases is taken into account and the amount of the performance fee of court officials would also depend thereon."[16] Although it does not arise directly from any legal act, this sentence would show that the salary of co-workers closer to judges has been made dependent on a measure set for a judge – the number of cases resolved. Whereas, this would mean crossing the "red line". A judge cannot be made to choose whether to sign a draft decision on his or her table and ensure thereby as large personal benefits to his or her closer colleagues as possible, or to look deeper and correct or return the draft for improvements, risking thereby a material sanction accompanying non-fulfilment of the measure and damage to the work environment inevitably following it. In such a situation, a judge has not been subjected only to his or her conscience when signing the decision, but to considerations which are not at all related to the case, while being at the same time very human. Such a judge is not independent any more when making the decision. Külli Taro also warned at the plenary meeting of judges in the report referred to above, "Performance Financing in Public Sector: an Attractive Idea with Sharp Reefs", that performance agreements must not place anyone in

[14] Recently, the main focus in Austria has been on the development of communication tools and IT-possibilities.

[15] Austrian legal information system RIS is available at: https://www.ris.bka.gv.at/.

[16] M. Saankülll. Õigusemõistmise tõhustamise projektist Harju Maakohtus. – Kohtute Infoleht 1/2014, p. 6.

a situation where they should choose between personal and public interests. This is just the place where these interests seem to interlink. In addition, such a practice may cause inefficiency from the point of view of the system as a whole, as it may motivate a judge of the first instance to delegate the obligation of focusing and the responsibility of deciding to the circuit court, which would in turn cause unnecessary costs on resources in the second instance.

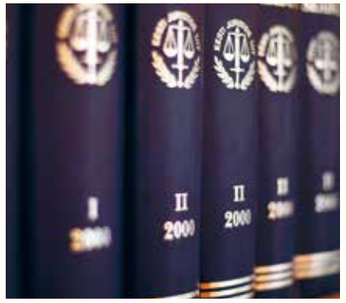
Summary

To the extent where the Ministry of Justice wishes to apply a soft version of the agreement, contributing to the legitimate goal (court proceedings within a reasonable amount of time), which is also in the interests of courts, the signing of performance agreements does not cause a legal or a substantial problem. As far as such a memorandum of good intentions or understanding is not legally binding, its signing cannot be forbidden with the Constitution. Whereas any pressure on the head of a court to sign a performance contract must be regarded to be problematic.

As a performance contract is only a legally non-binding memorandum of mutual intentions or understanding, no legal or financial sanctions may arise therefrom to a court, a judge or the assistant employees of a judge, if any goals set in the memorandum remain unachieved. According to the Government of the Republic Act and the Courts Act, the Ministry of Justice is responsible for the administration of courts, and therefore the Ministry of Justice shall be obliged to ensure due functioning of the courts of the first and second instance, independent of signing or fulfilling so-called performance agreements.

When fantasizing a little without any intention of making forecasts, the consequences of violating the above requirements could theoretically be discussed. How should the judicial branch react if the Ministry of Justice would put pressure on signing the performance agreements or apply a legal or financial sanction for not fulfilling such an agreement? Maybe in such a case a provision of the Constitution has fallen asleep like Sleeping Beauty and should be woken up. In particular, subsection 15 (2) of the Constitution specifies that the courts observe the Constitution and declare unconstitutional any law, other legislative instrument, administrative decision or *measure* (the authors' emphasis) which violates any rights or freedoms provided in the Constitution or which otherwise contravenes the Constitution. As a measure should first and foremost be in compliance with law, in general there would arise no questions regarding the constitutionality of any measure of the executive branch. Whereas in this case there is no act on the basis of which the legitimacy of the measure of the executive branch could be evaluated. At the same time, such a measure may be unconstitutional in some other way – being in contradiction with the principles of the independence of the court and the judges. This idea could be a so-called seed for initiating a vivid discussion between our constitutional law specialists.

In order to sum up in a more positive tone, it would be relevant to refer to the positive effect of the statistical overviews accompanying the performance agreements. These overviews would without doubt give an impulse to the courts and colleges of the first and second instance to deal with reasonable frequency self-critically within their statistical measures. It is human and progressive to aim at not showing significantly worse indicators than colleagues. Thus, the statistics made for performance agreements still have a mild positive effect which is not at all unwanted.



2.

OVERVIEWS OF THE MOST RELEVANT JUDGMENTS OF THE SUPREME COURT

OVERVIEW OF THE CASE LAW OF THE CRIMINAL CHAMBER OF THE SUPREME COURT IN 2013

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The case law of 2013 of the Criminal Chamber of the Supreme Court is characterised by a focus on the issues of procedural law. Thus, the subject of this overview is mainly the decisions dwelling upon the application of criminal procedural law. In addition, it makes reference to some cases in substantive law, where the Supreme Court explained the interpretation of various elements of the Special Part of the Penal Code. As the number of offences adjudicated last year in the Supreme Court is large and the volume of the overview is limited, this article contains a choice of decisions that the author considers more important and interesting and which therefore deserve highlighting the most. The choice is, of course, subjective and does not reflect the whole range of problems. Decisions concerning seizure and confiscation of property have intentionally been left out of the overview. As there are numerous implementation problems in this area, an overview of such issues would presume a separate article. In addition, taking into account the topicality of the subject, the training calendar of 2014 of the Supreme Court foresees comprehensive training on the bases, procedure and securing of confiscation of property.

Reasonable timeframe for criminal proceedings

In several instances, the Criminal Chamber had to adjudicate matters that dealt with a person's right to having the proceedings of his or her case occur within a reasonable timeframe. In addition to offering a reminder about the criteria for evaluating the reasonableness of the timeframe of proceedings, the Chamber underlined that the identification of a violation of the reasonable timeframe of proceedings does not automatically refer to a termination of proceedings. According to law, criminal procedure is terminated only in the event that the violation of the right of the accused to a hearing of the criminal case within a reasonable period of time cannot be resolved in any other manner. Thus, in the ruling on the termination of criminal proceedings, the court cannot confine itself to stating that the requirement of proceedings within a reasonable timeframe has been violated. Whereas among other possible remedies, both alleviation of the punishment as well as a person's right to request from the state indemnification of non-proprietary loss caused by an unreasonably long pre-trial procedure must be taken into account. In order to decide

which measure should be applied to exceeding the reasonable timeframe of proceedings, the court must, on the one hand, consider in particular to what extent has the right of the accused been violated, and on the other hand, the public interest in the proceedings, including the severity of the criminal offence. The more severe the criminal offence is, the stronger the violation of the requirement for a reasonable timeframe of proceedings must be, in order to justify therewith the termination of criminal proceedings.

In criminal case no. 3-1-1-53-13, the Chamber reiterated its earlier position that, in a situation where a higher court ascertains a material violation of procedural law justifying sending the criminal case to a new hearing, but on the other side it constitutes a violation of the principle of a reasonable timeframe, the requirement of hearing the criminal case within a reasonable timeframe shall prevail (see judgment of the Criminal Chamber of the Supreme Court in case no. 3-1-1-14-11, cl. 10). Thus, in such a case criminal proceedings must be terminated. Whereas in this court case the decision of the Supreme Court with regard to a civil action deserves more attention than the above. If a court makes a judgment of acquittal, the civil action shall not be heard and the right to file the same action pursuant to civil procedure shall be explained to the victim. In general, a civil action is treated similarly upon the termination of criminal proceedings. Admitting that in such a case the timeframe of proceedings would significantly be extended with regard to one part of the object of dispute, the Chamber took the position that, upon termination of the proceedings, the right of the victim to achieve adjudication of his or her civil claim within a reasonable timeframe must be taken into account, as well. The Supreme Court has also had such a position earlier, when making a judgment in court case no. 3-1-1-6-11. While in this case the Criminal Chamber found that the timeframe which would presumably be required for hearing the claim of the victim in civil procedure should be taken into account when choosing the way of responding to the violation of the reasonable timeframe of proceedings, in case no. 3-1-1-53-13 the Supreme Court went further. The Chamber found that when terminating the criminal proceedings, the court should also consider the possibility of adjudicating a civil action. Thus, the termination of criminal proceedings does not necessarily mean refusal to hear a civil action. In the event that the facts have been duly established, the court may upon terminating the proceedings because of expiry of the reasonable timeframe of proceedings also have a position about the civil action.

The changing of current case law with regard to interpretation of § 337 of the Code of Criminal Procedure

From the point of view of changing the previous case law of the Supreme Court, the decision of the Criminal Chamber in case no. 3-1-1-38-13 deserves attention. In this case the Supreme Court analysed a situation in which a circuit court annulled a judgment of a county court as regards satisfaction of one civil action and refusal to hear another and sent the annulled part of the criminal case to the court of first instance for making a new judgment. In the remaining part, the circuit court refused to amend the judgment and dismissed the appeals. The circuit court made its decision as a ruling, acting in accordance with the judgment of the Supreme Court in case no. 3-1-1-27-08. In this judgment the Supreme Court found that even if a judgment of a county court is partially annulled and the criminal case is returned to the court of first instance for a new hearing, under clause 337 (2) 2) of the Code of Criminal Procedure (CCP) the decision must be made as a ruling. When discussing in case no. 3-1-1-38-13 an appeal against a court ruling of the defender of the accused, the Criminal Chamber considered it necessary to change its current interpretation.

The Chamber noted that the wording of § 337 of the CCP is contradictory. Under clause 1 of the first sub-section of that section, a circuit court may, by a judgment, refuse to amend a judgment of a court of first instance, and dismiss the appeal. Whereas under clause 2 of the second subsection of the same section, a circuit court may, by a ruling, annul a judgment of a county court in part and return the criminal case for a new hearing.

Thus, in a situation where the circuit court dismisses the appeal and refuses to amend the judgment of a county court in its main part, but partially annuls the judgment of the court of the first instance and sends this part to a new hearing, there is no clear provision in law wherefrom to proceed.

The Supreme Court agreed with the position of the defender that if a circuit court dismisses by a ruling the appeal of the defender and refuses to amend the judgment of a county court, it limits significantly the right of appeal of a party to a court proceeding. Thus, the Code of Criminal Procedure provides for filing an appeal against a court ruling with a much shorter deadline than in the case of appeal in cassation (30 days instead of 10 days) and a more limited range of issues which can be raised in the appeal (the issue of guilt cannot be appealed, only relatively more simple single issues arisen in the criminal proceedings can be appealed). Thus, making a judgment of a circuit court as a ruling limits the right of appeal of the accused with regard to the issue of his or her guilt and imposing a punishment to only one court instance. Such limitation places without any grounds the accused, whose judgment of conviction was, by a ruling of a circuit court, refused to be amended in a worse situation than persons whose appeal is adjudicated by a court judgment. Such a decision would restrict without grounds the basic right to legal remedies as set forth in subsection 24 (5) and sections 148–149 of the Constitution. Therefore, the Chamber found that clause 337 (1) 1) and (2) 2) of the CCP must be interpreted in conformity with the Constitution and in a situation described above it must be proceeded from clause 337 (1) 1) of the CCP, according to which a circuit court shall upon refusal to amend a judgment of a court of first instance and dismissal of the appeal adjudicate a criminal case by a judgment. But in the event that a judgment of a county court is annulled in full and a criminal case is sent to a new hearing to the court of first instance, it must be done by a ruling (clause 337 (2) 2) of the CCP).

In addition, the Chamber noted that such an interpretation does not exclude the application of clause 337 (2) 2) of the CCP, in the event that a judgment of a county court would in fact be contested, for instance, only as regards a civil action or procedural costs and a circuit court refuses to amend the judgment of the county court in the remaining part. In such a situation, the parties to the proceeding shall have no right of appeal in cassation under clause 344 (1) 1) of the CCP and a circuit court shall send the criminal case to a county court by a ruling for a new partial hearing.

Temporal applicability of criminal procedural law

The Criminal Chamber also relied on constitutional consideration when adjudicating case no. 3-1-1-24-13. The central legal problem of this proceeding was an amendment of the regulation on acceptance as evidence of the testimony given earlier by a witness if the witness refuses to give testimony in the course of examination by the court (§ 291 of the CCP) from 1 September 2011, so that it would not exclude acceptance as evidence of the testimony given by the persons listed in § 71 of the CCP (refusal to give testimony for personal reasons) any more. This means that as of 1 September 2011 these persons must take into account that they must already make a final decision regarding giving testimony or refusal to give testimony in pre-trial proceedings. If a person then fails to use the privilege of proving his or her innocence, he or she cannot, while refusing to give further testimony in the court, rely any more on the fact that the testimony given in pre-trial proceedings is not disclosed. In this criminal case there arose a question regarding the fact from which the wording of § 291 of the CCP should be proceeded in a situation where the initial hearing of the criminal case was held according to the law valid before 1 September 2011, but by the time of the new hearing of the criminal case the new wording of the act had taken effect.

According to the main rule of the temporary application of procedural law, in criminal proceedings the law valid at the time of a procedural act shall be applied. Deviating from this rule, the Chamber stated that both in procedural theory as well as in case law there is a general understanding according to which it is reasonable and logical to hear a case in different court instances

according to the same procedural rules, and that this also applies in the event a higher court sends a criminal case to a new hearing. The legislator has also shared this understanding in most cases, and therefore an implementing act would be added to major amendments of procedural law, which adjusts to the extent necessary the impact of the main rule of temporary applicability of procedural law and ensures hearing of one and the same criminal case as a whole according to the same rules. At the same time, the Supreme Court also referred to its judgment of 16 November 2012 in criminal case no. 3-1-1-83-10, where it found that, if upon sending the case to a new hearing, it has not been proceeded from the implementing act, but instead the main rule of temporal applicability of criminal procedural law has been followed, it is not automatically treated as a serious violation of procedural law. It is important to assess whether such an action has violated the procedural rights of the accused. Thus, when resolving the question of the temporal applicability of procedural law it is not right to proceed only from the main rule or the implementing act, but it is important to ensure efficient protection of the rights of the accused.

In the said court case, the above meant the refusal to give testimony in pre-trial proceedings by the previous joint suspects. The Supreme Court found that if the suspect was, upon giving testimony in a pre-trial proceeding, able to rely on the fact that if he or she would in the future be a witness in some criminal proceedings and such testimony would potentially cause harm to him or her, he or she would be able to exercise the right to remain silent, and such a procedural guarantee cannot be revoked retroactively at a new hearing of the case. The Criminal Chamber had to resolve the same problem also in its judgment of 13 June 2013 in criminal case no. 3-1-1-64-13, where the court took the same position.

Specific features of examination by the court in alternative proceedings

The judgment of 18 November 2013 of the Criminal Chamber of the Supreme Court in criminal case no. 3-1-1-98-13 stands out as regards the opinions guiding legislative work. When dealing with the question of whether and how much should the phrase "on the basis of the materials in the criminal file" within the context of alternative proceedings be adjusted as regards the right of the accused to a hearing by a court, the court submitted in addition to the interpretation of valid law a vision of how the regulation of an examination by a court in alternative proceedings could look. In particular, the Criminal Chamber found that the benefit offered to the accused in alternative proceedings (a reduction of the punishment by one-third) is so weighty, that annulment of the exceptional regulation regarding *de lege ferenda* testimony of the accused as evidence and resolving the court case in alternative proceedings without exceptions proceeding only from the materials of the criminal file would not be treated as waiving fair court proceedings. According to the Chamber, it would also suffice for ensuring the latter if the accused would have the same rights in the court proceeding as the victim or the civil defendant and would be able to waive the alternative proceedings until the end of examination by the court. Taking into account the lack of competence of the Prosecutor's Office to exit from the alternative proceedings within court proceedings, the Chamber thinks that such a regulation could be considered justified in a case where the accused would like to deviate from the testimony given in pre-trial proceedings, when giving testimony in the court could be treated by the Prosecutor's Office as the non-existence of the bases for applying the alternative proceedings.

But the Chamber thinks that the current regulation does not enable an interpretation according to which the testimony given by the accused in the court has no meaning and cannot prejudice the resolution of the criminal case only on the basis of the materials of the file. Thus, the law foresees that when interrogating the accused in alternative proceedings the rules of general procedure are followed. In particular, it means cross-examination of the accused, verifying the reliability of his or her testimony given in the court, if necessary, and therefore the possibility that the accused will be declared an unreliable source of evidence and his or her testimony would be left out of the set of evidence. Thus, giving testimony by the accused in the court in alternative proceedings could have twofold consequences. First, the court may declare the testimony given in the court reliable and rely on it when making the court judgment and leave the testimony given in pre-trial proceedings out of the admissible evidence. Secondly, the court may declare the accused to be a fully unreliable source of evidence and leave all his or her testimony out of the admissible evidence. The current regulation on alternative proceedings does not provide for the possibility to rely in a judgment made in alternative proceedings only on the testimony given by the accused in pre-trial proceedings, leaving the testimony given at cross-examination aside. However, the latter does not prejudice the right of the court to return the criminal file to the Prosecutor's Office if the court believes that there are no grounds for applying the alternative proceedings or if the materials of the criminal file are not sufficient for resolving the criminal case in alternative proceedings.

Term for the indemnification of court expenses

Although the Code of Criminal Procedure does not provide directly for the possibility that, when making a judgment, the court could determine a deadline longer than one month set forth in subsection 417 (2) of the CCP for voluntary indemnification of court expenses, the Supreme Court found in case no. 3-1-1-110-13 that such a possibility should still be approved. Whereas the Chamber proceeded from the fact that the court may determine payment of court expenses in instalments. According to the Chamber, the regulation where the court would be able to determine the indemnification of court expenses in instalments only within the general one-month deadline cannot be regarded as securing the aim of indemnification in instalments. The Supreme Court had earlier been of the opinion that, when making a judgment, the court is also still competent to consider the circumstances of executing the judgment and is entitled to determine a deadline longer than one month for voluntary indemnification of court expenses (see ruling of the Criminal Chamber of the Supreme Court in case no. 3-1-1-2-12, cl. 7). But as a longer deadline proceeding from the interests of the accused may harm other persons' interests, the Chamber finds that it would be justified if the extension of the deadline would not mean postponing the indemnification of court expenses, but payment thereof in instalments. As such, it would already be clear after the expiry of the deadline of the first instalment whether the person has started to indemnify the expenses or not.

Representative of a legal person in bankruptcy in misdemeanour proceedings

A suspect or an accused who is a legal person participates in criminal proceedings via a member of its management board or a body replacing that, who has all rights and obligations of a suspect or an accused, including the right to give testimony in the name of the legal person. In court case no. 3-1-1-136-13, the Supreme Court had to verify who represents a legal person in the event that it has been declared bankrupt. Based on clause 35 (1) 2) of the Bankruptcy Act, the Criminal Chamber found that only the trustee in bankruptcy can be such a person. According to this provision, with the declaration of bankruptcy, the right to the disposal of the property of the debtor and the right to participate instead of the debtor as a party to the proceeding in court proceedings in the case of a dispute which concerns the bankruptcy estate or property which could be considered to be part of bankruptcy estate, shall be transferred to the trustee. In addition, the Bankruptcy Act sets forth that the trustee participates *ex offico,* instead of the debtor, as a party in the court in disputes related to a bankruptcy estate. The Chamber found also that adjudicating a criminal case of a company in bankruptcy who is the accused shall be treated as a dispute concerning the bankruptcy estate, as far as the decision made as a result thereof may have a direct influence on its proprietary interests, the composition of the bankruptcy estate and claims arising against the person in bankruptcy. The hearing of a criminal case without the participation of the trustee in bankruptcy as the representative of the legal person can be regarded to be a serious violation of procedural law.

Unlawfulness as an objective element necessary to constitute a criminal offence

In many cases, the Criminal Chamber had to discuss, in various criminal offences, unlawfulness as an objective element necessary to constitute an offence. When adjudicating the court case no. 3-1-1-106-13, the Court explained that the element "unlawful" shall constitute an element of an offence in two different meanings. First of all, it may concern such a blank element, which must always be explained with legal provisions outside the Penal Code, indicating what constituted the unlawfulness of an act in a certain case. On the other hand, there are offences in the case of which the behaviour described in the disposition arising from a certain provision is presumably always unlawful. In the case of such elements of a criminal offence, there is no need to refer to the legal provision explaining unlawfulness neither in the accusation nor in the judgment.

In the above court case, the Supreme Court had to take a position whether conviction of a person according to the third alternative element of abuse of authority, i.e. "unlawful use of violence" presumes in every single case a reference to the legal provisions explaining the unlawfulness of violence. The Criminal Chamber had also dealt with this before, having stated in court case no. 3-1-1-31-10 that in order to qualify an offence as abuse of authority, the existence of at least one element described in the disposition must be identified in the behaviour of the offender and in every single case it should be indicated in the accusation what constituted unlawfulness in the act of the offender. Whereas it is not important which alternative of the act the accused is reproached for. In addition, the Chamber explained that the use of direct coercion, incl. violence by an official when performing professional duties is subject to special regulation. In such a situation, the use of violence cannot be already regarded as presumably always unlawful. In order to convict an official of an unlawful use of violence, it must be verified whether, and if yes, then which provisions governing the application of direct coercion he or she violated when using violence. Thus, in addition to the violence used by an official, it must both in the accusation and in the judgment always be separately indicated that in the relevant case no prerequisites for the provision allowing the use of violence were fulfilled or that the violence used exceeded the limits allowed with the provision.

In the court case no. 3-1-1-129-12 the Supreme Court also analysed anyone's right of detention set forth in subsection 217 (4) of the CCP and its differentiation from the arbitrary action set forth in § 257 of the Penal Code, i.e. unlawfulness of the performance of the right of detention. According to subsection 217 (4) of the CCP, a person who is apprehended in the act of committing a criminal offence or immediately thereafter in an attempt to escape may be taken to the police by anyone for detention. As exercising the right of detention is in essence related to using force, if necessary, against the suspect and deprivation or limitation of his or her liberty, such activity cannot be regarded as unlawful. In the said judgment the Chamber explained that exercising the right of detention of an offender may be arbitrary in the event when the accused started to deter as an offender a person in the case of whom there were no grounds for regarding him or her to be the offender or by exercising that right exceeded the limits set on violence or exercised the right of detention of an offender with some other aim than delivering the offender to the police. Only in the event of a violation of the conditions listed above can unlawfulness of exercising of the right of detention of an offender be talked about.

The topic of the unlawfulness of an activity also arose in court case no. 3-1-1-95-12, which discussed under subsection 298[1] (1) of the Penal Code an accusation in influence peddling. The Chamber noted that, via the element "unlawful", the permitted influencing of an official (e.g. legal lobbying, activity of a representative, including a defender in the court or administrative proceedings, etc.) is differentiated from unlawful activity. Lawfulness of influencing an official excludes the elements of influence peddling. Thus, identification of influence peddling as an objective feature of a criminal offence presumes that both in the accusation and in a convicting judgment it has been indicated which legal provisions have been violated when influencing an official in a specific case. At the same time, the Chamber also referred to the fact that, so far, the legislator has not established a clear primary provision for differentiating between lawful and unlawful lobbying.

Unlawful disclosure of information concerning pre-trial proceedings in criminal matters and surveillance proceedings (§ 316[1] of the Penal Code)

In criminal case no. 3-1-1-30-13 the Criminal Chamber dealt with the accusation of unlawful disclosure of information concerning pre-trial proceedings. The Chamber explained that it is not an action delict, but a result delict. This means that unlawful disclosure of information concerning pre-trial proceedings in criminal matters and surveillance proceedings is punishable only in the event that it results in the impossibility or significant complication of the establishment of the existence or absence of an act subject to punishment as a criminal offence, or establishment of other facts of the subject of proof, or achievement of the aim of surveillance activities. In order to ensure a logical link to the description of the criminal offence, the Chamber found that either the impossibility or significant complication of achieving the aim of pre-trial proceedings as a whole or, as an alternative, the impossibility or significant complication of achieving the aim of surveillance proceedings can be regarded as its consequence.

The Chamber underlined that the fact whether and to what extent has the disclosure of information concerning pre-trial proceedings made impossible or significantly complicated the establishment of the facts relating to the subject of proof, is a question of fact whose resolution must not be too loose. Considering a consequence (in particular, the total exclusion of the further collection of evidence information) as established too easily may in the practice of pre-trial proceedings result in a situation that the unlawful disclosure of any information concerning the pre-trial proceedings could be used as a pretext for the unjustified termination of criminal proceedings. But such an approach may in turn limit without grounds the impact of the principle of compulsoriness of criminal proceedings. If collection of evidence has been impeded or made materially complicated with unlawful disclosure of information concerning the pre-trial proceedings, it should be clearly indicated in order to establish the exclusion of further collection of evidence data as a consequence, that evidence has also been tried to be collected in other ways, but it has turned out to be impossible and such an impossibility has been caused by the said act. The Court underlined that it should be particularly condemnable if in response to significantly complicating the collecting of evidence data the proceedings are terminated without trying to continue the collection of data in spite of significant difficulties. Thus, the difficulties need not refer to impossibility.

Physical abuse (§ 121 of the Penal Code)

Beating as an alternative element of physical abuse has been analysed by the Criminal Chamber in court case no. 3-1-1-50-13. The College found that although the law does not require it expressly, a certain intensity of beating is required for the elements of the offence. Whereas the court also took into account other alternatives (damage to health, battery, other physical abuse which has caused pain) in light whereof it was not probable according to the court that the legislator considered it necessary to punish as beating even a behaviour prejudicing to a very small extent the physical integrity of the victim. Therefore, the Criminal Chamber found that in the case of beating, causing pain would be a suitable criterion in order to differentiate an act punishable under criminal law from behaviour outside the regulation of penal law. The Chamber also analysed the identification of pain, underlining that the fact whether the victim really felt pain must be established separately. Feeling pain cannot rely just on the personal specificities of the victim. In order that causing pain would be attributable to the accused as a consequence of the act, it must also be foreseeable for an average reasonable bystander. Such interpretation should ensure that criminal punishment follows only such acts that really attack the legal rights protected, i.e. a person's health.

Summary

As admitted in the introduction, this overview contains only a fragment of all legal problems which the Criminal Chamber of the Supreme Court had to resolve last year. A more thorough overview of the topical problems of penal law and criminal proceedings was given by the Justice of the Supreme Court, Eerik Kergandberg, in January this year, at the traditional training of judges, whose materials are available from the webpage of the Judicial Training Department of the Supreme Court.

OVERVIEW OF THE CASE LAW OF THE CIVIL CHAMBER OF THE SUPREME COURT IN 2013

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The Civil Chamber of the Supreme Court adjudicated a total of 181 civil cases in 2013. The largest part of them included disputes under the law of obligations and most of these disputes arose from contract law. Decisions related to the securing of an action and enforcement proceedings also formed a significant proportion. In the field of family law, issues associated with support were mainly analysed and several decisions solved the proprietary relations of spouses. In cases of insolvency proceedings, the Civil Chamber primarily had to adjudicate disputes arising from bankruptcy proceedings. The Civil Chamber also analysed debt restructuring proceedings in one of the decisions. In the field of property law, disputes that had arisen from the possession and use of common ownership formed the majority.

The objective of this overview is to review some of the significant decisions of the Civil Chamber made in 2013. Due to the large quantity of decisions made in 2013, it is obvious that all of the important decisions cannot be addressed here. Thus, the selection below is based on the personal and slightly subjective choice of the author of this article.

Determination of the applicant's financial situation upon deciding on the granting of state legal aid

First, the ruling of the Civil Chamber of the Supreme Court of 13 February 2013 in civil case no. 3-2-1-152-12 is highlighted. This ruling is important because it thoroughly dealt with several important issues related to the granting of procedural assistance. One of the central points of dispute was which assets and income must be taken into account upon determining the financial situation of a person in granting state legal aid.

When adjudicating the application for state legal aid of the defendant, the circuit court had held that pursuant to subsection 14 (2) of the State Legal Aid Act (SLAA) and clauses 131 (1) 3) and 10) of the Code of Enforcement Procedure (CEP) the state pension and state social benefit cannot be considered the income of the defendant upon assessing the defendant's financial situation. As the defendant had nearly EUR 5,000 in bank accounts, the circuit court took a position that pursuant to subsection 6 (1) of the SLAA the defendant had no

right to receive state legal aid because the defendant was able to pay for the legal aid on account of the collected assets.

The Civil Chamber of the Supreme Court did not agree with the position that in deciding on the granting of state legal aid the state pension and state social benefits cannot be taken into account as income upon assessing the applicant's financial situation. Both subsection 14 (1) of the SLAA and subsection 186 (1) of the Code of Civil Procedure (CCP) differentiate income and other assets upon determining the financial situation of the person applying for procedural assistance. Assets on which a claim for payment cannot be made are primarily movables specified in section 66 of the CEP and income is not subject to these provisions. The Chamber held that the interpretation according to which income is not taken into account upon granting state legal aid or other procedural assistance to the extent to which a claim for payment cannot be made on it would be contrary to the spirit of the law, because in such an event the pension of a pensioner receiving minimum wage or a pension below the minimum wage cannot be taken into account at all upon granting procedural assistance, as based on subsection 47 (3) of the State Pension Insurance Act and subsection 132 (1) of the CEP a claim for payment cannot be made on the pension under the enforcement procedure. This means that such persons should not use their income to cover current expenses.

In order to establish whether due to his or her financial situation a person actually needs procedural assistance from the state upon paying for legal aid or other procedural expenses, in addition to circumstances clearly specified in law, other relevant circumstances must also be taken into account. For instance, the following can be taken into account: someone else pays the current expenses for the person applying for procedural assistance, the person has a single irregular income, the assets have been acquired for a definite purpose or are needed for unforeseeable expenses, or further possibilities of earning income have considerably decreased, etc. The advanced age of the applicant, limitation on possibilities to earn additional income and the need to raise money to cover potential future maintenance and funeral expenses can also be considered. In summary, the Chamber held that it is unreasonable to presume that a person has to pay the attorney for the provision of legal aid on account of such savings.

Upon determining the financial situation of the person applying for procedural assistance, in addition to the assets and income of the applicant, the assets and income of family members living together with the applicant as well as their common expenses must also be taken into account. Pursuant to the second sentence of subsection 182 (2^1) of the CCP, upon determining the financial situation of the applicant, joint property is taken into account to the extent that it may be presumed that the joint owners might reasonably use it to cover procedural expenses. The extent of the joint property that may be taken into account depends on the situation. For example, if a dispute deals with obligations for which both spouses are liable with their joint property in full, the whole joint property can be taken into account. In summary, the Civil Chamber maintained that, depending on the type of the dispute or other circumstances, it may still be presumed that other family members also contribute to the payment of procedural expenses to some extent.

Liability of a possessor of a motor vehicle in a traffic accident involving several motor vehicles

The judgment of the Civil Chamber of the Supreme Court of 19 March 2013 in civil case no. 3-2-1-7-13 is also an important one developing the law. In this judgment, the Civil Chamber explained the liability of possessors of motor vehicles and the division thereof in a situation where several motor vehicles are involved in a traffic accident. As the liability of a possessor of a motor vehicle is a strict liability, i.e. a no-fault liability, a question arises whether and to which extent the fault of drivers participating in a traffic accident has any meaning at all.

According to the circumstances of the accident, a motorcycle driving forward and a vehicle that had started a left turn collided. Both the vehicle and motorcycle were damaged and the motorcyclist was injured. To investigate the accident, criminal proceedings were also instituted and the driver was prosecuted but was later acquitted. The plaintiff in the civil case reviewed was the owner of the vehicle who filed a claim against the insurer of the motorcycle. The plaintiff demanded compensation for traffic damage caused, relying on the provisions of strict liability. The plaintiff found that since the motorcyclist was the direct possessor of the motorcycle as a major source of danger, who under section 1057 of the Law of Obligations Act (LOA) is liable for any damage caused upon the operation of the motorcycle and as the defendant is the liability insurer of the motorcycle, the defendant must also be liable for damage caused by the motorcyclist.

The Supreme Court explained in its decision that pursuant to section 1057 of the LOA a direct possessor of a motor vehicle shall in principle always be liable for any damage caused upon the operation of the motor vehicle, incl. for damage caused to a person who was the administrator of the other motor vehicle as a major source of danger. A motor vehicle is a major source of danger and damage caused by a motor vehicle is primarily damage caused upon the operation thereof, if the damage is caused upon the intended use of the motor vehicle as a motor vehicle in traffic. In the event of strict liability, the unlawfulness of causing damage or the fault of the person causing damage generally have no meaning and the administration of risk and causing damage in the course of the latter is only important. Situations where the liability of the direct possessor of a motor vehicle is excluded are provided for in section 1057 of the LOA (e.g. if damage is caused by *force majeure* or by an intentional act of the victim). Nevertheless, sections 139 and 140 of the LOA can also be applied to strict liability and the compensation for damage can be limited by considering the part of the victim or using general arguments of fairness.

Thus, section 139 of the LOA enables the court to assess whether and to which extent one or the other driver involved in the accident caused the damage. Upon determination of the amount of compensation, circumstances proceeding from the risk as well as characterising the conduct of drivers can be taken into account. All of the reasons in aggregate must be assessed in establishing the participation of the direct possessor of each motor vehicle. Circumstances proceeding from the risk include, for instance, the size of danger objectively and potentially arising from the vehicle involved in the accident which depends on the mass, dimensions, speed, technical condition, safety equipment, etc. of the vehicle. Particular manoeuvres and danger thereof can also be assessed.

The conduct of drivers of motor vehicles involved in causing the accident, primarily the failure to exercise necessary care and disregarding of traffic requirements, can also be taken into consideration. If vehicles collide, it is possible to determine who caused the accident within the meaning of the Traffic Act. In deciding on the part of the victim, it must be taken into account, among other things, which one of the drivers failed to exercise necessary care in traffic to a greater extent.

The Supreme Court emphasised that consideration of circumstances characterising the conduct of drivers in determining the amount of compensation and reducing the compensation for that reason may not distort the essence of strict liability or lead to the exclusion of the application of section 1057 of the LOA, i.e. the fault of one driver in causing the accident cannot, at least generally, fully exclude the liability of the other driver.

The Supreme Court also explained the principles of the functioning of the motor third party liability insurance in this case. The law differentiates the notification of a traffic accident and the filing of a claim for compensation for damage. It is important to keep in mind that the notification of a traffic accident does not suspend the limitation period of the claim. This is only caused by filing a claim for compensation for damage. However, such a claim must be filed with the insurer who is required to compensate for damage.

Liability of a member of the management board to a creditor for providing false information during pre-contractual negotiations

The Civil Chamber provided a position of principle in its judgment of 5 June 2013 in civil case no. 3-2-1-62-13 regarding whether a member of the management board of a company may be personally liable to a creditor of a company in a situation where the company has violated obligations arising from pre-contractual negotiations provided for in section 14 of the LOA.

In this civil case the plaintiff was a creditor being a lessor who blamed the contractual partner for knowingly providing false information during pre-contractual negotiations and for leaving an impression on the lessor that the lessor would acquire from the partner as a seller an object of lease under a sales contract. Actually the seller could not transfer the ownership of the object of lease to the lessor, because the object of the contract was already transferred in the ownership of a third party. The plaintiff found that a member of the management board of the company from whom the lessor purchased the object of lease must personally bear the *culpa in contrahendo* liability, as the member was the one who deceived the lessor in entering into the contract.

Both the county court and circuit court dismissed the action, holding that such a claim for compensation for damage can only be filed against a legal person being a party to the contract and not against a member of the management board thereof.

The Supreme Court did not agree with this position and maintained that the obligations specified in subsections 14 (1) and (2) of the LOA do not only extend to persons in whose name negotiations are held, but also to their representatives or other persons who personally participate in pre-contractual negotiations. Thus, a member of the management board holding pre-contractual negotiations on behalf of the company must do that in good faith and inform the potential party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest.

The Civil Chamber explained that the liability of the person who participated in the negotiations as a representative of the party for the violation of the foregoing obligations was not based on section 115 of the LOA, but on section 1043 and clause 1045 (1) 7) of the LOA, and, therefore, it is presumably slightly more lenient than the liability of a party to the contract. The liability of the representative is primarily eligible if the other party has a particular trust in the person holding negotiations that may arise, for example, from the person's official position in the company participating in negotiations or from the fact that the person's economic interests overlap with the interests of the company.

In addition, the Supreme Court pointed out that, in terms of the disclosure of or failure to disclose information during pre-contractual negotiations, the liability for the violation of provisions set out in the Penal Code as protective law, e.g. upon committing fraud provided for in section 209 of the Penal Code (PC), may also be eligible. In such a case the prerequisites for liability are more strict that in the event of a violation of obligations arising from subsections 14 (1) or (2) of the LOA, because fraud is an intentional act that knowingly creates an untrue image of actual circumstances and the purpose of which is to gain proprietary benefits. The prerequisites for liability are also more strict in the event of intentional behaviour contrary to good morals within the meaning of clause 1045 (1) 8) of the LOA. To this end, it must be evidenced that the defendant intended to damage the plaintiff from the start. In the case of both section 209 of the PC and clause 1045 (1) 8) of the LOA the plaintiff must evidence the intent of the defendant.

Relations between and liability of apartment owners

The judgment of 11 December 2013 in civil case no. 3-2-1-129-13 is also significant. In this judgment the Civil Chamber addressed in detail the relations between apartment owners and potential claims for compensation for damage arising from these relations. The object of the dispute included, among other things, the question about who is liable if damage was caused to the apartment owner by water leakage and the water leakage was caused due to the broken sewer pipe located in the elevator shaft, i.e. in the part of the building in common ownership.

First, the Supreme Court explained the essence of the obligations between apartment owners and noted that irrespective of whether or not an apartment association has been founded, the apartment owners as co-owners have a special legal obligation within the meaning of clause 3 6) of the LOA that, pursuant to subsection 1 (1) of the LOA, is subject to the Law of Obligations Act to the extent not regulated by special provisions.

An apartment owner may generally use a physical share of the apartment ownership at his or her own discretion, unless such use is in conflict with the law or with the legitimate interests of a third person. A physical share and the object of common ownership must be used pursuant to law and the agreements and decisions of the apartment owners, or in the absence of the latter, pursuant to the interests of the apartment owners. According to clause 11 (1) 1) of the Apartment Ownership Act (AOA), an apartment owner is required to maintain the physical share of the apartment ownership and upon use of the physical share and the object of common ownership refrain from any activities of which the effect on other apartment owners exceeds the effects caused by normal use of the property. In addition, apartment owners as co-owners must behave on the basis of the principles of good faith towards one another and primarily refrain from damaging the rights of other co-owners. Arising from the principles of good faith the apartment owner may, among other things, have the obligation not to cause damage to the community and contribute to the management thereof.

In terms of legal remedies for apartment owners, the Civil Chamber noted that upon non-performance the apartment owners (co-owners) who have suffered damage may resort to legal remedies specified in subsection 101 (1) of the LOA, unless they are in conflict with the essence of the community, e.g. require the performance of an obligation under section 108 of the LOA and compensation for damage under subsection 115 (1) of the LOA. If an apartment owner causes damage to another apartment owner by using the object of apartment ownership, compensation for damage cannot generally be demanded from the other apartment owner under the tort law, but under subsection 115 (1) of the LOA. If several apartment owners are liable for damage caused to an apartment owner, they shall be solidarily liable for payment of compensation pursuant to subsection 137 (1) of the LOA. If partial damage is caused by circumstances dependent on the injured party or due to a risk borne by the injured party, pursuant to subsection 139 (1) of the LOA the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage. The liability of apartment owners for non-performance of their obligations is not affected by the potential liability of an apartment association or administrator managing the building for non-performance of obligations thereof or the liability of another person. These persons may be solidarily liable for the compensation for damage.

In addition, the Civil Chamber pointed out that it is not important whether the damage caused to the apartment owner originated from the physical share of another apartment ownership or a part of common ownership. Public utilities (e.g. public pipelines) required for common use of the residential building are included in the common ownership of apartment owners, even if they pass through a physical share of some apartment ownerships. Within the meaning of subsection 55 (1) of the General Part of the Civil Code Act (GPCCA) a sewer pipeline is generally an essential part of a building which is permanently attached thereto and which cannot be severed without substantial damage to the building or pipeline.

Pursuant to clause 11 (1) 1) of the AOA, when using the object of apartment ownership, an apartment owner is also required to refrain from any activities of which the effect on other apartment owners exceeds the effects caused by normal use of the property. Pursuant to subsection 11 (2) of the AOA, an apartment owner is required to ensure compliance with the foregoing provisions by his or her family members, temporary residents and persons who use the apartment ownership. It follows from subsection 10 (1), subsection 12 (3) and subsection 15 (5) of the AOA (but also from the first sentence of

subsection 72 (5) of the Law of Property Act (LPA)) that the object of common ownership must be used pursuant to law and the agreements and decisions of the apartment owners and, in the absence of the latter, pursuant to the interests of the apartment owners.

Thus, all of the co-owners have in principle an obligation to use the common ownership in the manner that the rights of one another are not violated. The provisions referred to above also provide that apartment owners have a common general obligation to ensure that the object of common ownership is in a condition that does not damage anyone. This obligation also includes the due diligence to inspect the condition of utility systems of a residential building on a regular basis. An apartment owner who has a pipeline passing through the physical share of the apartment ownership also has an obligation to notify other apartment owners (e.g. via the administrator or apartment association) of risks arising from the pipeline, e.g. amortisation and leakage of the pipeline.

The apartment owners have a common obligation to ensure the good condition of utility systems of the residential building. Due to the foregoing, the apartment owners are required to inspect the condition of utility systems and, if defects emerge, apply necessary means to eliminate the risk or defects. If apartment owners fail to perform these obligations and any apartment owner suffers damage due to this, all the apartment owners who have not performed their obligations and whose non-performance is not justifiable may be liable for compensation for damage. The liability can be based on subsection 115 (1) of the LOA and the liability of the apartment owner is not precluded by the fact that an apartment owner has granted the use of the apartment to a lessee.

If obligations have not been performed by several or all of the apartment owners, all of the apartment owners whose non-performance is not justifiable shall be solidarily liable for compensation for damage caused to the owner of the object of apartment ownership pursuant to subsection 137 (1) of the LOA. If the owner of the damaged apartment as a co-owner is also liable for damage caused, because the owner also failed to perform the obligation to maintain the common ownership, subsection 137 (2) of the LOA applies instead of the solidary liability of apartment owners. The said provision stipulates that in relations between the persons causing damage, the solidary liability shall be divided taking into account all circumstances, in particular the gravity of the non-performance or the unlawful character of other conduct and the degree of risk borne by each person. If no other grounds exist (e.g. a contract), the size of the legal shares of common ownership of apartment owners can be followed upon dividing the compensation pursuant to provisions of subsection 75 (1) of the LPA and subsections 13 (1) and (2) of the AOA.

The Civil Chamber also emphasised that, in addition, the apartment association or administrator managing the building may also be liable for damage caused to an apartment owner, if the apartment association or administrator has not inspected the condition of utility systems or organised repair work.

Expiry of claims against a member of the management board of a company

In addition to the aforementioned decisions, the judgment of 29 May 2013 in civil case no. 3-2-1-40-13 and the judgment of 8 May 2013 in civil case no. 3-2-1-191-12 should be highlighted. In these judgments the Supreme Court took a position in principle concerning whether a longer limitation period than the general five-year period specified in subsection 187 (3) and subsection 315 (3) of the Commercial Code (CC) can extend to a claim for compensation for damage filed against a member of the management board of a company. Subsection 146 (3) of the GPCCA prescribes that if the obligated person intentionally violated the person's obligations, the limitation period for a claim arising from a transaction shall be longer than usual, i.e. ten years. A question about whether this provision similarly extends the limitation period of a claim filed against a member of the management board caused debates in the Civil Chamber and, as a result, the full Civil Chamber adjudicated civil case no. 3-2-1-191-12.

In the decision referred to above, the Civil Chamber finally reached a conclusion that, although being a member of the management board is a transactional legal relationship between a public limited company and a member of the management board, subsection 146 (4) of the GPCCA does not apply and the claim for compensation for damage filed against a member of the management board of a company is only subject to a five-year limitation period pursuant to subsection 315 (3) of the CC in the case of a public limited company and subsection 187 (3) of the CC in the case of a private limited company as special provisions. This solution has already been criticised[1] in Estonian legal literature and the author of the article finds that the criticism is not entirely unfounded. Justice Henn Jõks wrote a dissenting opinion to the judgment stating that the ten-year limitation period set out in subsection 146 (4) of the GPCCA should also extend to a claim against a member of the management board. The Justice pointed out in the dissenting opinion that this would also ensure an integral approach to limitation periods of transactional claims and a longer limitation period for violations committed in bad faith. As the area of application of 146 (4) of the GPCCA is not very extensive according to the case law of the Supreme Court and is usually limited to claims arising from the intentional act of a party contrary to good morals, when the latter wants the arrival of an unlawful consequence, the longer limitation period should not intimidate careful and honest members of the management board. The author agrees with this position.

Compensation for non-patrimonial damage upon violation of privacy law

The author also would like to draw attention to a decision where the Civil Chamber analysed for the first time subsection 134 (6) of the LOA that entered into force on 31 December 2010 and that granted a court, upon determining the compensation for non-patrimonial damage for breaching personality rights, a possibility to take, in addition to the gravity of the violation and the conduct and attitude of the person who caused damage and other such circumstances, into consideration the need to exert influence upon the person who caused the damage to avoid causing further damage, taking into account the financial situation of the person who caused the damage.[2] The legal literature associates this amendment with the addition of punitive damages to the Estonian law of obligations[3] and, therefore, a question of whether the punitive damages are suitable in our legal framework can again be raised.[4]

In the civil case in question, relying on the foregoing provision the county court had ordered from a periodical the payment of compensation for non-patrimonial damage for the benefit of the aggrieved person as a percentage of one month's sales revenue of the periodical. The circuit court upheld the judgment of the county court. The Supreme Court changed the legal reasons of the judgment of the circuit court by its judgment of 26 June 2013 in civil case no. 3-2-1-18-13 and noted that subsection 134 (6) of the LOA does not mean that, taking into account the preventive function, the court should order from the person who caused the damage the payment of profit received by the latter, but that the court may take into consideration additional circumstances upon ordering payment of compensation upon the breach of personal rights.

The Civil Chamber also stated that the victim can claim the payment of revenue received as a result of breaching personal rights on the basis of the provisions of unjustified enrichment. Pursuant to subsection 1037 (1) of the LOA, a person who violates the right of ownership, another right or the possession of an entitled person by disposal, use, consumption, accession, confusion or specification thereof without the consent of the entitled person or in any other manner shall compensate the usual value of anything received by the violation to the entitled person. Section 1039 of the LOA stipulates the liability of a violator in bad faith and provides

[1] Kärt Pormeister. Exclusive 5-year Limitation on Claims against Management Board Members: A Justifiable Anomaly or Unreasonable Deviation? – Juridica 2013, no. 5.

[2] See the Act on Amendments to Broadcasting Act, Code of Criminal Procedure, Code of Civil Procedure and Law of Obligations Act (656 SE III). Explanatory memorandum to the draft Act. Computer network: http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=886980&u=20140320162236.

[3] Janno Lahe. Punitive Damages in Estonian Tort Law? – Journal of European Tort Law 2011, no. 2.

[4] See also Karin Sein. Should Punitive Damages Be Permissible under Estonian Law? – Juridica 2008, no. 2.

a possibility to demand that a violator who is or should be aware of the lack of justification for the violation transfer any revenue received as a result of the violation in addition to the usual value of that which is received. The Civil Chamber holds that the breaching of personality rights, including the breaching of inviolability of private life, may be regarded as another right within the meaning of sections 1037 and 1039 of the LOA and in the event of a delict by the press the victim can demand the transfer of any revenue received as a result of the violation in addition to the usual value of that which is received.

Thus, it follows from the position of the Supreme Court that if a periodical has violated the privacy of a person and has earned revenue as a result of the violation, the court cannot justify the amount of the compensation for non-patrimonial damage only by economic indicators of the periodical as a business operator. It is also noteworthy that the Supreme Court did not express a clear position in the decision regarding whether or not subsection 134 (6) of the LOA represents a possibility to order payment of punitive damages.

OVERVIEW OF THE CASE LAW OF THE ADMINISTRATIVE LAW CHAMBER OF THE SUPREME COURT IN 2013

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The aim of this article is to provide an overview of the most important decisions of the Administrative Law Chamber of the Supreme Court in 2013. Due to the limits on the volume, this article is focused on the novelties in the case law of the chamber, excluding any decisions which only repeat earlier statements. In addition, some very specific topics (e.g., prevention of money laundering) have been left out, as the author believes that there is no need for a wider introduction to these in the given context. First, the general issues of administrative court procedure are discussed, followed by an overview of some of the more relevant issues in the area of administrative law.

General issues of administrative court procedure

Competence of administrative courts

During the year, the issue of the competence of administrative courts arose in a number of matters. Two decisions made by a Special Panel consisting of the Administrative Law Chamber and the Civil Chamber dealt with disputes concerning relations between prisoners and prisons. In case no. 3-3-1-48-12, the Special Panel specified its earlier position that the public law obligation of prisons to allow prisoners to make purchases must be distinguished from the rights and obligations arising from a contract of sale, which is governed by private law and whose disputes are in the competence of county courts. The Special Panel found that the public law obligation of a prison also involves a mark-up on the wholesale purchase price of goods. In case no. 3-3-4-1-13, the Special Panel adhered to a position already stated in earlier case law, that upon the provision of health services by a medical officer of a prison, a contractual relation in private law shall arise between the prison and the prisoner, and this shall not be affected by a written application made by an appellant to the medical department of the prison.

In administrative matter no. 3-3-1-49-12, the Chamber explained that the fact that the activities of an undertaking are also governed by the provisions of public law, does not by itself transform legal relations into public law relations. Creation of a public law relationship presumes that at least one of the parties performs a public duty. Performance of a public duty is also the case where a competent authority has authorised or obligated a private body to provide in public interests such a service whose functioning is according to law in the responsibility of the state or another legal person in public law. Unless a public duty is accompanied by the powers of

state authority and a law governing the specific field provides otherwise, a public duty can also be performed in the context of private law. Resolving disputes arising from such a relationship is not in the competence of an administrative court.

In administrative case no. 3-3-1-2-13, the Chamber had to take a position on whether the decisions of a joint monitoring committe of Estonia and Latvia established for the implementation of EU law can be contested in the administrative courts of Estonia. The Chamber found that the fact that, in addition to Estonian governmental authorities, those of another country participate in the establishment and work of a committee, does not make the committee a foreign authority within the meaning of subsection 4 (3) of the Code of Administrative Court Procedure (hereinafter: CACP). The competence of an administrative court does not depend on whether the body exercising public authority corresponds to the definition of an administrative authority set forth in the Administrative Procedure Act. If the monitoring committee makes decisions about the financing of the projects of Estonian persons, it exercises public authority on the territory of Estonia and with regard to the persons of Estonia. If the monitoring committee is not an EU body, a dispute over its activities lies within the competence of the administrative court.

In case no. 3-3-1-11-13, the Chamber's interpretation of subsection 4 (1) of the CACP found that it is not in an administrative court's competence to ascertain a fact which is being investigated in criminal proceedings. In this case, the appellants wanted to contest the acts of the Prosecutor's Office in pre-trial criminal proceedings, and the Chamber found that a different procedure has been provided for adjudicating the claims of the appellants – before preparation of a statement of charges, a person has the right to file an appeal with the Prosecutor's Office against an order or procedural act of the Prosecutor's Office and further address, if necessary, the preliminary investigation's judge in a county court. The limitation of disputes adjudicated within administrative court procedure and criminal procedure does not depend on the aim of contesting an order or procedural act of the Prosecutor's Office.

In administrative case no. 3-3-1-68-12, which has caused much dispute, the Chamber took the position that the results of university examinations can to a certain extent be contested in an administrative court. In previous case law, the Supreme Court has found that educational decisions which limit a person's access to education or options for continuing their education or starting employment in a desired area can be contested. The Chamber stated that passing classes at the Bachelor's level may be a necessary precondition for completing Bachelor's studies and starting Master's studies, finding that even a second negative exam result has a direct influence on the rights of students (the time of study is extended, and a student who does not receive financing from the state budget may incur additional fees). According to the majority decision of the Chamber, such decisions have the features of a preliminary administrative act and can be contested with an annulment action. The court's evaluation of these kinds of subjective decisions is only possible to a certain extent – the court must be able to evaluate the procedural facets of making such decisions, as well as any obvious substantive errors. Two dissenting opinions are attached to the decision – Supreme Court justices Indrek Koolmeister and Tõnu Anton had doubts about the conclusions of the Chamber, finding that the study process is an administrative procedure and an examination mark is a (preliminary) administrative act.

Pre-trial proceedings

As regards the judgment of the European Court of Human Rights (ECHR) in the case of Julin v. Estonia, the Chamber took the position in administrative matters no. 3-3-2-2-12 and no. 3-3-1-34-13 that conclusion of obligatory pre-trial proceedings cannot be assessed formally – the court must make a substantive analysis on whether the return of a challenge is founded, instead of returning the appeal in all cases. The Chamber stated that the return of a challenge shall not necessarily be justified by omissions which do not obstruct proceedings of the application – more specific circumstances can be clarified in the course of the administrative procedure. The Chamber underlined in administrative matters no. 3-3-1-34-13 and no. 3-3-1-63-13 that, independent of whether the challenge proceedings before having recourse to the court are obligatory or voluntary, an unlawful refusal to hear the challenge does not obstruct judicial control of the administrative act contested.

Panel of the court

In 2013, numerous appeals in cassation were filed to the Supreme Court against circuit court decisions which had been signed by a different panel than that noted to parties of the proceeding (see, for instance, 3-3-1-38-13, 3-3-1-58-13, 3-3-1-67-13 and 3-3-1-69-13). The Chamber referred to subsection 11 (5) of the CACP, which in the case of a change in the panel enables not repeating the part of procedural acts performed by the previous panel only with the consent of the parties to the proceeding. The parties to the proceeding must be notified of the change in the panel hearing the matter, so that they are able to give their opinions regarding the need for performing procedural acts and exercising other rights set forth in the codes of procedure. The Chamber explained that it constitutes one of the guarantees of impartial administration of justice. The file must indicate when and for what reason the panel has been changed. Any failure to comply with the above constitutes a significant infringement of a rule of court procedure, resulting in an inevitable annulment of the court judgment and referral of the case for new hearing to the same court.

The court's obligation of clarification

In many cases, the Chamber underlined the court's obligation, established by previous case law and arising from the principle of investigation, to ascertain the aim of the appellant having recourse to the court and to draw the appellant's attention to an option for filing an application that would be more efficient for achieving the appellant's aim. In a new opinion, the Chamber found in administrative case no. 3-3-1-62-13 that fulfilment of the obligation of clarification might be necessary in a dispute between two public authorities with regard to a "weaker" party to the proceeding (in the case referred to above, a local self-government authority as an appellant). There is no such need if an appeal is related to the main activities of the respective administrative authority.

Procedure expenses

The Chamber has constantly emphasised in its case law that payment of only necessary and justified procedural expenses can be claimed from the adverse party. In spite of that, a gradual increase in legal expenses can be noticed in practice. In administrative case no. 3-3-1-35-13, the College found that the approximate amount of procedural expenses claimed must be foreseeable by the parties to the proceeding. Although the Government of the Republic Regulation No. 137 of 4 September 2008 ("Maximum amounts to the extent of which payment of expenses of contractual representatives can be claimed from other participants in the proceeding"), established on the basis of subsection 175 (4) of the Code of Civil Procedure, does not govern claiming payment of legal expenses in administrative matters, the Chamber still found that, in general, it is not justified to claim, within administrative court procedure, payment from the adverse party of the expenses of a contractual representative in a higher extent than possible in civil cases.

State liability

In case no. 3-3-1-55-12, concerning unjust deprivation of liberty, the Administrative Law Chamber explained that the compensation arising from the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act aims to cover both proprietary and non-proprietary damage caused, whereas it is presumed that the compensation is divided equally between two parts. According to the general principle of state liability, the compensation must aim to create a situation which is as similar as possible to the situation of the aggrieved party that would have been if his or her rights were not violated. The Act does not require ascertaining of the unlawfulness of causing the damage. Upon compensating any damage caused unlawfully, the amount of the compensation must be just. In the event that the compensation determined based on the Act does not cover in full the amount of damage calculated by the court, such compensation shall be deemed just, provided that letting the aggrieved party bear the difference between the loss of profit and the compensation received is not unreasonably burdensome or unjust. Any

potential expenses saved due to being held in custody cannot be deemed a profit to be deducted – it would be in contradiction with the aim of compensating damage.

In addition, in administrative matter no. 3-3-1-80-12, the Chamber found that it would not be correct to associate the amount of compensation claimed to pay for non-proprietary damage, in accordance with subsection 9 (1) of the State Liability Act, with the maximum amounts of compensation set out by the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act. When determining the amount of compensation for non-proprietary damage under the State Liability Act, an individual decision will be made which ensures a just compensation, while taking into account the criteria set forth in subsection 9 (2) and section 13 of the Act. Non-proprietary damage shall be compensated in proportion to the gravity of the offence and taking into consideration the form and gravity of the fault.

In administrative matter no. 3-3-1-38-13, an imprisoned person claimed compensation for being held in custody in unlawful conditions. Based on the case law of the ECHR, the Chamber explained that when determining the amount of compensation, one of the main factors is the duration of the mistreatment – this defines the gravity and intensity of the offence. Considering the cumulative effect of the conditions of being held in custody, the negative consequences of keeping a person in custody in a cell which is not in conformity with the requirements can be at least equal to those of additional limitation of liberty in a cell which is in conformity. The circumstances and gravity of each offence, as well as the cumulative effect of the conditions, must be taken into account, instead of proceeding based on the general daily rate that has been developed. The compensation determined shall not be unreasonably low when compared with the amounts of compensation determined by the ECHR in analogous cases.

In case no. 3-3-1-84-12, the Administrative Law Chamber analysed compensation for damage caused by the issuing of or failure to issue legislation of general application. The Chamber stated that, while subsection 14 (1) of the State Liability Act is a national provision, the case law of the Court of Justice can also be used as an aid in the interpretation thereof. To satisfy the claim, all of the following terms and conditions must be fulfilled: legislation of general application has been issued or has failed to be issued; a person has suffered damage; damage was caused by a significant violation of the obligations of a public authority; there is a causal relationship between the violation and the damage suffered by the person; the legal provision forming the basis of the violated obligation is directly applicable (sufficiently clear and precise so that the person can rely on this in court); the person belongs to a group of persons who have been specially injured due to the legislation of general application or by failure to issue legislation of general application. The legal provision violated must at least, among other things, entail the protection of the rights of the appellant and the aim of the obligation violated must be to avoid such damage. The type of legislation of general application is not relevant.

Civil service

As regards civil service, in 2013, in particular the decisions about disciplinary proceedings deserve attention.

In administrative matter no. 3-3-1-76-12, the Chamber unified the case law concerning the right to be heard. An official has the right to be heard and, for that purpose, it must be clear to him or her, what would be the content and the reasons for issuing an administrative act. It would not suffice for hearing, if the person can only speculate on the content of the planned cumbersome administrative act. Upon violation of the right to be heard, a court may refuse to cancel an administrative act only if it is convinced that due hearing would not have resulted in a more favourable administrative act (i.e., if the right of discretion has narrowed to only one option). In this respect the burden of proof lies on the administrative authority.

In administrative matter no. 3-3-1-14-13, the Chamber explained that upon imposing a disciplinary penalty and choosing the penalty in each individual case, discretion shall be applied. Each offence must be treated as unique and it must be considered whether the penalty corresponds to the gravity of the offence, the circumstances of committing the offence, as well as the previous behaviour of the employee.

Building and planning

In case no. 3-3-1-46-13, the Chamber took the position that the construction project forming the basis of a building permit shall be prepared in such detail and with such coverage that it enables verifying correspondence of the building to the requirements set forth in law, incl. as regards safety and stability. A building permit for reconstruction of a building may not be issued if it would cause the danger of collapse in the building. If for some reason the work of a later stage of construction cannot be designed with sufficient detail before completion of earlier stages, it is not allowed to issue a blanket building permit for all stages of construction – in such case a building permit shall be issued via interim administrative acts by stages of completion of the building or it must be ensured with an additional requirement of a building permit that the supervisory authority shall check the essential parts of a project completed during construction before starting their implementation.

At the same time, the Chamber specified that the obligation of a local government authority to verify the conformity of a building and a construction project shall not depend on whether any person concerned objects to the construction. It must be presumed that the consent of a co-owner of a building to the construction has been granted, provided that the work shall not be started before a thorough analysis of the safety of the construction process.

In administrative matter no. 3-3-1-78-12, the Chamber recalled that when preparing a plan, it must be ensured that both public interests and the interests of the persons concerned are taken into account in a balanced way. Therefore, the previous buildings, limitations and problems should be taken into account. It would be correct to resolve in the course of planning the issue of access to a registered immovable, although within this procedure a final decision on the establishment of servitude of way cannot be made. A local government authority would consider the different interests of the participants in the planning procedure and evaluate whether the interest of one person in construction activities would outweigh the interest of another person in retaining the current situation.

EU law

In case no. 3-3-1-2-13, a ruling of a circuit court was contested in the Supreme Court, where the circuit court had suspended proceedings and applied for a preliminary ruling from the Court of Justice. The Chamber explained, relying, among else, on the case law of the Court of Justice, that upon application for a preliminary ruling, the proceedings must be suspended – a court has no right of discretion in this regard. National legislation may not prejudice the competence of the court applying for a preliminary ruling and a court of higher instance may not amend or cancel the applications for a preliminary ruling filed by a court of lower instance. It is not prohibited for a court of higher instance to pose additional questions in the appeal procedure of the same case if a court of lower instance has already applied for a preliminary ruling, and this is exactly what the Chamber did in this case, as it did not consider the questions asked by the circuit court to be sufficient.

Environment

In 2013, one of the most important decisions in the field of the environment was the decision in administrative matter no. 3-3-1-35-13, which entailed a dispute over an extraction permit. The Chamber found that an extraction permit can also be issued in a situation where the planning excludes extraction. In such a case, the planning must be amended before starting extraction. In order to alleviate any problems with legal clarity, an extraction permit should specify that there is a need for amending the planning.

In the same case, the Chamber specified that the environmental impact assessment (EIA) is not a separate procedure, but shall be carried out within the framework of the main procedure with the aim of collecting

information required for completing thereof. Thus, the deficiencies in the EIA may be brought to attention when disputing an administrative act independent of whether an appellant has participated in the EIA procedure or not. The Chamber also reiterated its previous statement that for the sake of proper decisions in issues with an environmental impact, the procedure itself is relevant and in most cases it would not be possible to decide convincingly that, in spite of the deficiencies in performing the acts of administrative procedure, an administrative act is essentially lawful. If the persons affected are not involved effectively enough in the proceedings or upon failure to follow the obligation of disclosure, as a rule, it cannot be precluded that in the event of due involvement of the public, the final result of the proceedings would have been different.

In addition, case no. 3-3-1-63-12 was related to the extraction of mineral resources, whereas the dispute concerned the fact that the Minister of the Environment refused to approve the application for the transfer of immovables in the usufruct of the appellant, as upon transfer the current situation shall not be retained with regard to the access to mineral resources. The Chamber agreed with the position of the Minister of the Environment. It would not be in conformity with the aim of subsection 62 (3) of the Earth's Crust Act if the Minister of the Environment were to grant a permit to acquire land in a situation where, in order to extract mineral resources, an agreement should be signed with the owner of the immovable, and where such an owner should be compensated for potential damage or the immovable should be transferred if no agreement is reached.

Tax law

Value added tax

In administrative matter no. 3-3-1-72-12, the Chamber noted that in the relationships of tax law, offices of the bodies of local government authorities have been attributed passive legal capacity similar to that of a legal person. Although such offices cannot perform mutual valid transactions in civil law, they can still transfer goods or provide services within the meaning of the Value Added Tax Act. If this occurs in the course of business, the mutual turnover of such offices shall be taxable with a Value Added Tax pursuant to general procedure.

According to the decision made in case no. 3-3-1-85-12, the sale of an immovable may be treated as the transfer of an undertaking if the nature of the economic activity of the undertaking permits and if the immovable has become an economic unit and is used for the purpose of earning revenue. A pool of assets not participating in economic activity, even if it constitutes the only asset of a company, cannot be treated as an undertaking. In administrative matter no. 3-3-1-25-13, the dispute also concerned the transfer of an undertaking. The Chamber found that the sale of property under the control of a bailiff shall not exclude the transfer of an undertaking.

Assessment of tax by estimation

In administrative matter no. 3-3-1-38-12, the Chamber explained that if a taxable person is holding the goods and the provision of services has been identified, but according to the tax authority the companies that actually received the goods or provided the services are not those indicated in the invoices, and the taxable person had to be aware thereof, the tax authority may have the obligation of assessment of tax by estimation. If the goods exist and it is unreasonable to presume that they have been received free of charge, it is important in order to establish the income tax liability to identify the actual amount of payment made for the goods. In case no. 3-3-1-54-13, the Chamber specified that the lack of information about the actual seller shall not exclude assessment of income tax by estimation. According to the judgment in administrative matter no. 3-3-1-15-13, taxation by estimation is also possible if the taxable person has no due original document or if such a document is not reliable.

In case no. 3-3-1-42-13, the Chamber recalled that it has previously considered it necessary to distinguish the acceptability of assessment of tax by estimation in the case of goods and services, whereas such a distinction is not always necessarily clear. The Chamber admitted that in the case of determining income tax for a service, it is as an exception also possible to apply estimation, if the fact of receiving the service or the person providing the service cannot be reliably identified. Estimation can be applied if it enables establishing the non-existence or reduction of the income tax liability.

In administrative matter no. 3-3-1-49-13, the Chamber explained that in general the whole payment must be deemed as funds drawn from business and shall be taxable in full, if a company has made a payment for a service allegedly used but the fact of receiving the service or the person providing the service cannot be reliably identified. Upon taxation by estimation, the taxable person shall fulfil the obligation of assisting, in the extent that it would be possible, to identify the materials and equipment used and determine their price.

Granting permit for enforcement action

After the judgment of the Supreme Court *en banc* in case no. 3-3-1-15-12, made at the end of 2012, numerous matters in granting permission for enforcement action had to be adjudicated in 2013 whose proceedings had been suspended in anticipation of the above judgment. In most of them, the judgment of the Supreme Court *en banc* was referred to. New opinions are related mainly to the seizure of the claim for a refund or prepayment account, and these addressed by this article in a separate section (see below).

In case no. 3-3-1-16-12, the Chamber replied to a statement, made by a party to the proceeding considering the unconsitutionality of subsection 136[1] (1) of the Taxation Act, that the absence of clear time limits would not render the provision disproportionate or unconstitutional. The relevant enforcement actions are with a temporary nature and the court may amend or cancel with its ruling the permission granted for a procedural action. In the event of unreasonably long-term application of measures, a person may rely on legal remedies (submission of claim for prohibition, identification of unlawfulness or damage).

Claim for refund

In administrative matters no. 3-3-1-4-13 and no. 3-3-1-8-13, upon which a number of subsequent judgments rely, the Chamber specified the essence of a claim for refund. A claim for refund is the right of a taxable person to the refund of an overpaid amount of tax. It should be distinguished from establishment and fulfilment of a claim for refund. Accepting a claim for refund is an action whereby the tax authority recognises the existence of the claim for refund and it shall terminate upon transfer of the overpaid amount to the prepayment account of the taxable person. For fulfilment of the claim for refund, the taxable person shall submit a relevant application to the tax authority, but the taxable person is entitled to leave the claim for refund for securing the timely payment of financial obligations which will arise in the future.

If refusal to satisfy the claim for refund cannot be substantiated within the term of fulfilment of the claim for refund, the claim shall be satisfied. This shall not exclude a more detailed verification further on and the final determination of the tax amount during the usual limitation period, but for the latter a separate procedure of verification of an individual case must be initiated. After expiry of the maximum time limit set forth for verification, the tax authority has no right to postpone the decision about fulfilment of the claim for refund till an indefinite time in the future, taking advantage of the possibility of seizing the prepayment account.

In administrative case no. 3-3-1-48-13, the Chamber specified that if a tax authority initiated with a single order the procedure for the identification of the claim for refund, as well as the procedure for the verification of calculation, declaration and payment of income tax and value added tax, the tax authority had to notify thereof the taxable person directly and unambiguously and to explain which procedure it needed information for.

In case no. 3-3-1-27-13, there arose a need for further specification of the concept of the claim for refund. The Chamber noted that the term "claim for refund" refers to the right to a claim against the tax authority, whereas it can also be used for designating an application of a taxable person claiming payment of the relevant amount to the prepayment account or fulfilment of an obligation corresponding to the claim. In addition, the term "set-off" can be used, which refers mainly to the way

of termination of an obligation that presumes the existence of two mutual claims. Sometimes, the same term is also used in tax law for designating an accounting operation on the prepayment account, while the entry made by such an operation may prove to be unfounded if the material assumptions of the set-off have not been fulfilled. If on the prepayment account an automatic entry about the set-off has been made, the tax authority may further on determine with a notice on assessment that the claim for refund was unfounded and a corrective entry must be made on the prepayment account. Acceptance of a claim for refund and set-off are not administrative acts, but rather accounting actions on the prepayment account; therefore, there is no need to cancel them with an administrative act. For the sake of legal clarity, a notice on assessment establishing that a claim for refund is unfounded should also refer to the absence of an assumption of set-off and to the conclusion that the payment liability has not expired as a result of the set-off.

Public procurements

In case no. 3-3-1-24-13, the Chamber specified that the qualifications of a tenderer must be also verified substantively. In addition to the explanations set forth in subsection 39 (4) of the Public Procurement Act, and any additional information for specifying some of the documents already submitted, the tenderer can also be requested to submit such documents and data which should have been presented with the tender already. A different interpretation of the requirements specified in a contract notice cannot be excluded and if the tenderers who have failed to submit similar documents or data are granted an identical opportunity, it would not violate the principles of equal treatment of tenderers or transparency. The obligation of disqualification of a tenderer in the case of even a minor mistake would be disproportionate. No substantive amendments may be made in the tenders submitted (except for specifying any data related to the tender or correction of obvious technical errors).

Structural aid

In administrative matter no. 3-3-1-77-12 on structural aid, the Chamber made a decision which has already been recurrently relied on in practice since. At first, the Chamber reiterated its position that in a directive of refusal to grant aid, the ARIB should indicate the score given to a person, the person's place in the ranking, as well as how many applications in the ranking were satisfied. The Chamber added that if different administrative authorities make the decision of approval of the ranking on the basis of scores and that of granting aid, the decision on approval of the ranking is not required to contain information about the place in the ranking. Taking into consideration the specific character of the procedure, the extensive room for manoeuvre left to the committee when giving scores and the resulting limitation of judicial verification are founded. An applicant has no subjective right to aid, and the full obligation of giving grounds would make the work of the committee unreasonably complicated. A court would be able to establish the unlawfulness of the scores given by a member of the committee only if the scores are in contradiction with the evaluation criteria and the facts of the case to such a serious extent that the contradiction is clear even without founding it.

Imprisonment

In administrative matter no. 3-3-1-79-12, the Chamber stated that the Imprisonment Act does not prohibit enforcement of a disciplinary penalty if the person punished is already in a punishment cell, and does not obligate a prison to observe that a prisoner is not committed, for various offences, to a punishment cell for more than 45 subsequent twenty-four hour periods – such a limitation concerns only a specific penalty. In general, enforcement of a disciplinary penalty can be postponed only if a probationary period has been applied to the person punished.

In administrative matter no. 3-3-1-19-13, the Chamber found that when deciding upon the application of means of restraint, the administrative authority must assess according to specific circumstances whether the person is likely to attempt escape, his or her previous behaviour and potential behaviour when escorted, a general danger to security with regard to the specific way of escorting, and the sufficiency of other measures for minimising danger. The use of hand-cuffs and leg-cuffs as means of restraint is founded in the event that with other measures (incl. participation of an escorting team and an armed unit and use of a special escorting bus) it is not possible to mitigate the danger to security to a sufficient extent.

Law on aliens

In case no. 3-3-1-62-12, the Chamber explained that if an application for asylum has been submitted during a stay in an expulsion centre or in the course of expulsion, the applicant shall stay in the expulsion centre up to the end of the asylum proceedings. If the application has been submitted earlier, the applicant is in general obliged to live in the reception centre. The expulsion proceedings may continue only if the application for asylum is refused. The Chamber also found that with regard to the minimum requirements of reception of asylum seekers, Estonian legislation is not in contradiction with the Directive 2003/9 based on the Convention relating to the Status of Refugees. The state has no obligation to ensure for asylum seekers material conditions of acceptance before submission of an application for asylum and no prohibition to recover the costs of an expulsion procedure held before submission of the application for asylum. It cannot be concluded from the legislation that the costs of staying in the expulsion centre can be claimed only if the person left Estonia or the expulsion was successful. The obligation of bearing the costs has not been related to the financial situation of the person either.

OVERVIEW OF THE CASE LAW OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT IN 2013

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In 2013, the Supreme Court adjudicated a number of matters of constitutional review related to procedural fundamental rights, in particular to the fundamental right of recourse to the courts ensured in the first sentence of subsection 15 (1) of the Constitution of the Republic of Estonia and infringements of the right of appeal ensured in subsection 24 (5) of the Constitution. In addition, the case on the restriction on the establishment of pharmacies received much attention from the public. In the case on extraction fees, the Chamber dealt more specifically than earlier with the principle of legitimate expectation, and there were some more cases of wider importance. In addition, a number of cases on state fees, as well as appeals about elections, were heard. In this year, a record number of cases was heard – the number of matters of constitutional review, combined with the cases forwarded by other chambers to the Supreme Court *en banc*, amounted to 66. This figure included 31 cases on state fees and 17 appeals about elections.

Cases related to having recourse to the courts and limitations on the right of appeal

According to the first sentence of subsection 15 (1) of the Constitution, everyone whose rights and freedoms have been violated has the right of recourse to the courts. According to subsection 24 (5) of the Constitution, in accordance with the procedure provided by law, everyone is entitled to appeal a judgment rendered in his or her case to a higher court.

In criminal matter no. 3-1-2-3-12, the Supreme Court *en banc* adjudicated a petition to review, handed over by the Criminal Chamber of the Supreme Court, which raised a question regarding the constitutionality of the absence of bases for review. The petition to review had been filed by a person who claimed to own a tank vehicle and a trailer which had been confiscated by the Harju County Court in a criminal case as assets of the accused. As the person was neither a party to the proceeding nor a participant in the proceedings in this criminal matter, he was not able to protect his right of ownership in the criminal proceedings, and allegedly he did not have other possibilities for protecting the fundamental right of ownership ensured by section 32 of the Constitution and for exercising the fundamental right ensured by subsection 15 (1) of the Constitution.

The Supreme Court *en banc* found that sections 366 and 367 of the Code of Criminal Procedure (CCP), which set forth the right and possibilities of submitting a petition for review, shall not provide a person with the possibility to submit to the Supreme Court a petition for review for protecting the right of ownership. At the same time, the Supreme Court *en banc* found that the absence of the bases for review does not violate the fundamental right of a person to have recourse to the courts for the reason that the court decision which was intended to be reviewed did not decide upon his or her subjective rights. The Supreme Court *en banc* evaluated the effect of confiscation and the legal meaning of the decision on confiscation and found that, according to section 85 of the Penal Code (PC), the decision of confiscation made by a court or an extra-judicial body shall apply only to the mutual relations of the state and the addressee of the confiscation decision. The ownership of the confiscated object or other confiscated right shall be transferred to the state only provided that the confiscated object belongs, at the time of making the confiscation decisions, to the person with regard to whom such a decision has been made. If the confiscated object actually belongs to a person who is not mentioned as the addressee of the confiscation decision, the rights of such persons shall remain valid in spite of confiscation. In order to reduce the risk of making a confiscation decision which has no legal consequences, the body conducting proceedings must involve in the criminal proceedings all persons known to it who could with considerable probability be the owners of the object confiscated. In such a case, the court judgment made in adjudicating the issue of confiscation and regarding the owner of the object confiscated shall be binding on all persons involved in the proceeding. This would mean, in particular, that a person involved in the proceeding, whose status of ownership has not been confirmed in the criminal proceedings, cannot rely in any other proceeding on the statement that the confiscated object belonged to that person during confiscation. The Supreme Court *en banc* refused to review the petition for review.

Administrative matter no. 3-3-1-82-12 concerned a case where the Tax and Customs Board (TCB) requested, from the administrative court, establishment of a notation concerning prohibition on an immovable in the joint ownership of spouses in order to secure the tax proceedings held against one of the spouses (M.R.). The Tallinn Circuit Court satisfied the application of the TCB. The other spouse (H.R.), who was not concerned by the tax proceedings, filed an appeal against the court ruling to the Supreme Court. Acceptance for proceeding of the appeal against the court ruling of H.R. was excluded by subsection 136[1] (4) of the Taxation Act (TA), which allows only a tax authority and a taxable person to lodge an appeal against a regulation to satisfy the request or refusal to satisfy the request of performance of an enforcement action. The Administrative Law Chamber of the Supreme Court had doubts about the constitutionality of this provision and the Chamber forwarded the administrative matter to the Supreme Court *en banc*. The Supreme Court *en banc* found that the prohibition on disposal of an immovable belonging to the joint property of spouses is also a serious violation of the fundamental right of ownership of the spouse who is not a taxable person, whereas such a spouse has no right to file an appeal against a court ruling. According to the Supreme Court *en banc*, subsection 136[1] (4) of the TA violates disproportionately the right of appeal ensured by subsection 24 (5) of the Constitution, as exclusion of the right of appeal was an unsuitable means for achieving the goal. The Supreme Court *en banc* finds that the situation where filing an appeal against a court ruling against permission granted by the court for the performance of actions set forth in subsection 130 (1) of the TA under subsection 136[1] (1) of the TA does not contribute to better collection of taxes or help to shorten the time of proceeding required for performing the enforcement action, as such an action can be performed independent of filing an appeal against a court ruling. The Supreme Court *en banc* declared subsection 136[1] (4) of the TA to

be unconstitutional and invalid, insofar as this provision did not allow a person, with regard to whose property the circuit court initially granted permission to perform an enforcement action, set forth in subsection 130 (2) of the TA under subsection 136[1] of the TA, to file an appeal against a court ruling to the Supreme Court.

In addition to the above, in the matters on constitutional review, the Supreme Court continued the practice of the Supreme Court *en banc* developed in 2012 (cases nos. 3-1-1-18-12 and 3-1-1-45-12), concerning the unconstitutionality of the limits on filing an appeal against a court ruling set forth in clause 385 (26) of the CCP. In criminal matter no. 3-1-1-5-13, the Supreme Court *en banc* declared clause 385 (26) of the CCP to be unconstitutional and invalid insofar as it did not allow filing an appeal with regard to a ruling made on the basis of section 428 (2) of the CCP by an executive judge, enforcing an imprisonment substituted by community service according to subsection 69 (6) of the PC. The Supreme Court *en banc* confirmed its earlier opinion that it constitutes a disproportionate infringement of the fundamental right of appeal ensured by subsection 24 (5) of the Constitution.

Restriction on establishment of pharmacies

The Chancellor of Justice initiated the constitutional review of the restriction on the establishment of pharmacies (case no. 3-4-1-2-13). The Medicinal Products Act set forth that an activity licence of a general pharmacy cannot be issued if, in a settlement classified as a city, there is already one pharmacy per less than 3,000 inhabitants and if in a rural area another pharmacy is closer than 1 km. The Chamber on Constitutional Review found that this case should be transferred to the Supreme Court *en banc.*

The Supreme Court *en banc* reviewed the correspondence of the restrictions on establishment with the freedom to conduct business arising from section 31 of the Constitution and analysed the freedom to conduct business more extensively than before. The Supreme Court *en banc* found that according to the freedom to conduct business, the state must ensure a legal environment for the functioning of the free market, in order to protect undertakings against any unlawful activity of other undertakings in obstructing competition or causing damage to business activities. Free competition, which forms part of the freedom to conduct business, shall protect both the undertakings' right to engage in entrepreneurial activity, as well as the consumer. Free competition assumes that competition ensures the best service or goods with the most favourable price. The freedom to conduct business protects the undertakings' possibility to operate under market conditions without any unjustified interference by the state. In addition, the state's right to interfere, incl. to limit competition, on the freedom to conduct business, is only permissible in the event that engaging in a certain type of business in market conditions alone would be impossible. The Supreme Court *en banc* found that a pharmacy service is not a service which can be provided only in the event that it is possible to offer such a service without competition or in low competition. Thus, the operators of pharmacies cannot request protection against competitors.

The aim of the restriction on establishment was to ensure the availability of pharmaceutical services and medicinal products in the whole country. The Supreme Court *en banc* found that the restrictions on establishment in their current form constitute a disproportionate limitation. The Supreme Court *en banc* found that the limitation on the establishment of pharmacies in cities may to a certain extent constrict the closing down of pharmacies in rural areas, but found that such a measure was not necessary. There are alternative measures less limiting of the freedom to conduct business which ensure the availability of pharmacy services in the whole country. For instance, an undertaking may be granted the right to operate a pharmacy or pharmacies in a favourable location only with the obligation to operate a pharmacy in a location with low demand. It would ensure better the existence of (additional) pharmacies in areas with low demand than ensured by restrictions on establishment. It would be possible to provide for support to pharmacies in areas with low demand payable in the event of operating a pharmacy in a favourable location.

The Supreme Court *en banc* found that declaring the restriction on the establishment of pharmacies to be invalid without providing for other measures does not exclude an increase in the rate of closing down of rural pharmacies, which could harm the availability of pharmacy services. Thus, the Supreme Court *en banc* postponed the entry into force of the decision by six months.

The right of a bailiff to impose a penalty payment in enforcement matters on the right to communicate with a child

Civil matter no. 3-2-1-4-13 concerned a situation where the procedure of communicating with a minor child had been defined with a court ruling and the father of the child (claimant in enforcement procedure) filed to the bailiff an application for enforcement in order to force the mother of the child (obligated person in enforcement procedure) to comply with the court ruling. The bailiff verified compliance with the court ruling and as the mother of the child did not appear at any of the meetings, the bailiff gave her a warning concerning the imposition of a penalty payment and finally imposed a penalty payment. The mother of the child contested both the warning concerning the imposition of a penalty payment, as well as the imposition of the penalty payment. The Harju County Court and the Tallinn Circuit Court refused to satisfy the appeals of the debtor and the debtor filed an appeal to the Supreme Court. The Civil Chamber forwarded the case to the Supreme Court *en banc*, specifying that a penalty payment in an enforcement procedure may be of penal and judicial nature, and therefore subsection 179 (2) of the Code of Civil Procedure (CCP), which delegates the right of imposition of a penalty payment to a bailiff, could be in contradiction with the Constitution.

The Supreme Court *en banc* found that subsection 179 (2) is not in contradiction with the Constitution. It stated that a penalty payment is not a penalty in a formal or material sense and the Constitution does not prohibit delegating the task of imposing a penalty payment to a person in private law (physical or legal person in private law). Formally, a penalty is a legal consequence which has been set forth in penal law as a penalty for committing an offence. According to valid legislation, a penalty payment applied by a bailiff is a coercive measure. Although in a material sense, i.e., with regard to the effect on the obligated person's fundamental right of ownership, a penalty payment is comparable to a fine imposed for a misdemeanour, materially it is still not a penalty, as the aim of a penalty payment is to motivate an obligated person to fulfil the obligation defined by a court decision. However, the aim of a penalty is a socio-ethical reproach for an act committed and stigmatisation of the offender.

According to the Supreme Court *en banc,* imposition of a penalty payment shall not constitute the administration of justice within the meaning of the Constitution and there is no obligation to delegate the right to impose a penalty payment to the competence of judicial power. In addition, the Supreme Court *en banc* treated as the administration of justice the tasks given to the courts with the Constitution and other legislation, in particular, adjudication of civil disputes, establishment of the guilt of persons who have committed a criminal offence or a misdemeanour and imposition of penalties to them, as well as verification of the lawfulness of the acts of public authorities. According to the Supreme Court *en banc,* when imposing a penalty payment within an enforcement procedure, a bailiff does not adjudicate a dispute between the parents of a child over the right to communicate with the child, as such a dispute is adjudicated in the interests of the child by the court hearing the civil matter.

In addition, it stated that when executing a court decision in the matters concerning the right to communicate with a child, there arises a contradiction between the interests and rights of the parents (the claimant and the obligated person), whereto the interests and rights of the child are added and do not always necessarily overlap with those of either of the parents. Imposition of a penalty payment within an enforcement procedure concerns directly the fundamental right of ownership of the obligated person (section 32 of the Constitution), but may also have an indirect impact on the fundamental right of family life (subsection 27 (1) of the Constitution).

Failure to comply with a court decision in matters on the right to communicate with a child and the absence or failure to apply coercive measures therefor may have a negative impact on the fundamental right of family life of the other parent who lives separately from the child (the claimant). Independent of the rights of the obligated person and the claimant, in matters on the right to communicate with a child, both the enforcement procedure itself as well as the imposition of a penalty payment will have an impact on the child's fundamental right to the inviolability of his or her family life.

The Supreme Court *en banc* underlined that according to section 14 of the Constitution, the protection of fundamental rights is the task of the state, whereas this obligation is binding also on a bailiff as a person in private law fulfilling public law functions. As part of public authority, a bailiff shall in his or her activity comply with the Constitution and other legislation. The Supreme Court *en banc* draw attention to the fact that the procedure of enforcement of a specific court decision governing communication between a parent and a child as a whole has not been regulated clearly enough in the Code of Enforcement Procedure, and therefore this regulation needs updates or amendments in order to ensure a clear procedure of enforcement of court decisions governing communication between a parent and a child and efficient and quick enforcement of such decisions.

Extraction fees with a specified term and legitimate expectations

In case no. 3-4-1-27-13, the Chancellor of Justice contested the increase in the rates of the fees for the special use of water and extraction fees (hereinafter: extraction fees) established by regulations of the Government of the Republic. The regulations adopted in 2009 set forth a table of rates by years until the end of 2015, providing for a gradual increase in the rates of the fees. Amendment regulations adopted in 2012 raised the rates of the fees as of April 2013 more than set forth before.

The Chamber reviewed the infringement of the right to conduct business in conjunction with the principle of legitimate expectations, finding that the establishment of a provision with a regulation shall not exclude the arising of a legitimate expectation. The rates of the fees are obligations and this means within the meaning of legitimate expectations that a person has a legitimate expectation that his or her obligations shall not be extended. From the point of view of the principle of legitimate expectations, it is important whether a person can rely on a regulation in a way that it would not be amended unfavourably for the person. The protection of legitimate expectations must ensure the undistorted exercising of the rights and freedoms (second sentence of section 11 of the Constitution). The rights and obligations can be exercised in full only if the person does not have to fear that the state imposes unforeseeable unfavourable consequences.

The Chamber found that the principle of legitimate expectations also extends to any regulations adopted and published without reservations, but not yet entered into force. This does not only constitute a limitation on state authority, but enables to bind oneself so that persons are given a promise and granted security with regard to the provisions entering into force in the future, and are thereby encouraged to make long-term plans in their activity, incl. investments.

The Chamber highlighted that in general it is prohibited to extend obligations via a legal act having a genuine retroactive effect, which means that no legal consequences can be imposed on acts performed in the past. Retroactive effect is not genuine if it concerns an activity which has already been started but not yet terminated by the time of adoption of the legal act, in particular, if it imposes proactive legal consequences to the activities started in the past. Proactive increase in the rates of extraction fees has a non-genuine retroactive effect, as it concerns the activities of undertakings planned and started earlier and investments already made. Non-genuine retroactive effect is allowed in the event that public interest in amendment of the regulation outweighs the legitimate expectations of persons. In order to amend provisions with a specified duration so that they become more unfavourable for a person, there must be more weighty goals than for amending the regulation without a specified term.

The Chamber highlighted that the principle of legitimate expectations is constrained by the principle of democracy. Political bodies that receive their mandate directly or indirectly from the people are, in principle, entitled to update their previous choices, unless it causes excessive harm to the persons who have relied on the regulation in force. Whereas a sufficient *vacation legis* shall not in itself exclude an infringement or violation of legitimate expectations.

The Chamber viewed environmental protection and earning of revenue by the state via environmental fees as the legitimate aim of the infringement. If an undertaking is allowed to use national resources in its business activity, it shall obtain a financial benefit on account of the national resources. According to sections 5 and 53 of the Constitution, the state is entitled and obliged to equalize such a benefit via imposing a fair fee payable to the state. The principle of legitimate expectations is an important component of the rule of law. Therefore, the aim related to environmental protection is in itself so considerable that it should always outweigh the principle of legitimate expectations. The Chamber stated that this field of activity is investment-intensive and the relevant regulation is with a specified term. The circumstances had not changed meanwhile. The Court found that the environmental and revenue-related aims did not outweigh the infringement of the undertakings' right to conduct business in conjunction with the principle of legitimate interests.

Parental benefit decreasing total income

Cases on parental benefit have been heard by the Supreme Court before. In case no. 3-4-1-7-13, the Supreme Court was posed the question of whether it is constitutional if, due to an additional income, the parental benefit is deducted to such an extent that the total income of the person becomes lower than it would have been without receiving the additional income.

The Chamber reviewed the infringement of the fundamental right of equality. The Parental Benefit Act provided for limits according to which a difference of some Estonian kroons or euros in additional income could cause a significant difference in the extent of reducing the parental benefit and thus in the whole income. Whereas the infringement was reviewed not only as regards the income of the specific appellant, but more widely. The reason for this was that one of the aims of distinguishing between concrete and abstract verification of a legal provision is to exclude popular appeals, and not to protect the constitutional rights of one person.

The Chamber considered saving of money as the legitimate aim of different treatment. Whereas it was specified that, in the case of parental benefit, it constitutes an issue of equal treatment in the field of social policy where the state has taken a duty, because payment of parental benefit is not a constitutional obligation of the state. Therefore, when considering this issue the political aims of the legislator should be taken into account. The political aim of the parental benefit established by the legislator is among other things an aim to support the achievement of a work and family life balance. The situation where a person's effort to balance work and family life results in a decrease in his or her total income is in contradiction with this aim.

The Chamber also discussed the impact of different treatment in a wider sense. If regulation ensures a person higher income in cases where he or she is not employed, compared with a situation where the person is employed, it favours non-employment of people. Favouring such a situation is not sustainable and that is also not the socio-political aim of the legislator. Favouring of commitment to raising a child is related to the aim set forth in the preamble of the Constitution regarding preservation of the people of Estonia. At the same time, it is possible to favour commitment to raising children only via taxpayers, i.e., employees. Achieving such an aim is obstructed by a situation where the total income of a person decreases in the case of working. The parental benefit is seen in particular to ensure a parent the possibility to be engaged in raising a child. The Chamber found that the Constitution does not request that the state pays an employed parent (income taxable with social tax is, as a rule, income earned from employment) parental benefit in the same size (benefit favouring commitment to a child) as to a parent who is not employed

and is presumably fully committed to raising a child. Consequently, the benefit can be reduced. The Constitution does not request that a person earning additional income and presumably being less committed to raising a child should all in all be ensured a higher income. With regard to the above, the Chamber found that it constitutes a violation of the principle of equal treatment to the extent that the parental benefit was reduced to such an extent that the total income of a parent decreased.

Case law on state fees

The Supreme Court continued the work started in 2009 of evaluating the constitutionality of state fees. In 2013, the Supreme Court dealt mostly with the rates of state fees valid from 1 January 2009 to 30 June 2013 and payable within civil procedure on a statement of claim or an appeal against a ruling, and less frequently with the rates of state fees payable within an administrative court procedure on matters of compensation of damage. In those cases, the Supreme Court found that the rate of state fees contested is not a proportionate measure to achieve the aims of procedural economy and participation in bearing the expenses of the administration of justice.

In addition to the invalid rates, the Supreme Court analysed in 2013 the constitutionality of valid state fees and, in case no. 3-4-1-20-13, declared subsections 57 (1) and (15) of the State Fees Act (SFA) (in the wording in force as of 1 July 2012) and Annex 1 thereto to be in conflict with the Constitution, as well as the part which prescribes, upon the filing of a petition in civil proceedings using other means, an obligation to pay a state fee in a larger amount than upon the electronic filing of a petition through the website www.e-toimik.ee. Thus, the Supreme Court declared – differently from the way of constitutional review of the previous invalid rates of fees and deserving attention with its choice from the point of view of constitutional review procedure – the whole principle of distinguishing between the "e-fees" and usual fees to be unconstitutional, without analysing the constitutionality of the specific rates of e-fees. In the wake of this decision, in 2014 the Supreme Court continued the constitutional review of the e-fees of acts of civil procedure set forth in subsections 57 (2–5) and (7–14) of the SFA.

The opinion of the Supreme Court about the possibility of the constitutional review of state fees paid in excess of the fees due, dependent on the stage of court proceedings, should also be highlighted. In case no. 3-4-1-13-12, the Supreme Court *en banc* found that if a person files, under clause 104 (5) (1) and the first and third sentence of subsection 104 (8) of the Code of Administrative Court Procedure, a claim to return the state fee paid in the amount paid in excess, the person who paid the state fee or the person on whose behalf the state fee was paid, can upon filing such a petition request, at least up to the entry into force of the court judgment, the constitutional review of the rate of the state fee applied under subsection 15 (1) of the Constitution. In case no. 3-2-1-140-12, the Supreme Court *en banc* specified that if a person requests, under clause 150 (1) of the CCP and the first sentence of subsection 12 (1) and clause 15 (1) (1) of the SFA, the refunding of the state fee paid in excess of the fee due, then clause 150 (1) (1) and subsection 150 (6) of the CCP should in conjunction be interpreted so that, when requesting the refunding of the state fee paid in excess, the person can rely on the unconstitutionality of the fee until the procedure is terminated with a decision that has entered into force, if a person had the possibility to file such a petition during the procedure. When adjudicating a petition filed later, the court would not be able to assess the unconstitutionality of the provisions forming the basis for payment of the fee. The Supreme Court *en banc* found that infringement of section 15, subsection 24 (5) and section 152 of the Constitution, arising from such an interpretation of clause 150 (1) (1) and subsection 150 (6) of the CCP, is allowed and such a regulation helps to avoid the proceeding of numerous petitions for the refund of state fees in courts, and thereby ensure the capability of the judicial system to offer persons efficient legal protection within a reasonable time.

The high number of state fee matters in 2013 arising from the topicality of the issue also resulted in situations where the Supreme Court received matters of constitutional review contesting the constitutionality of such a rate of fee which had already been subject to the constitutional review of the Supreme Court. In order to avoid such situations further on, a table on the statistics of state fees has been made publicly available on the website of the Supreme Court, and it is from time to time being updated and contains information about current state fee matters in proceeding.

With regard to the state fee matters heard in 2013, the prohibition arising from subsection 9 (1) of the Constitutional Review Court Procedure Act (CRCPA) on the courts of first and second instance to initiate a constitutional review procedure before making a final decision of a matter should also be highlighted: a court cannot issue a ruling only with regard to adjudicating an application for constitutional review. For that reason, in case no. 3-4-1-16-13 the Supreme Court returned, under subsection 11 (2) of the CRCPA, the application of the court without hearing it.

When imposing a state fee which is in conformity with the Constitution, the Supreme Court in 2013 continued to determine the rate of a state fee in conformity with the Constitution with the table of Annex 1 to the SFA valid until 31 December 2008 (case no. 3-2-1-27-13), as decided in 2011.

3.

YEARLY SUMMARIES

HIGHLIGHTS ABOF EVENTS IN JUDGES' SELF-GOVERNING BODIES IN 2013

Tanel Kask
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Kristel Siimula-Saar
Adviser to the Personnel Department of the Supreme Court

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Legal Adviser to the Chief Justice

Piret Raadom
Head of the Personnel Department of the Supreme Court

Work of the Council for Administration of Courts in 2013

For the Council for Administration of Courts,[1] the year 2013 was similar to previous ones. Four sessions were held during the year: in April, May, October and December. The agenda covered some more and some less traditional issues: the Council heard the reports of the chairmen of the courts of first and second instance regarding the due functioning of the administration of justice; discussed, on the initiative of the Minister of Justice, proposals for amendments of acts; monitored the development of the new information system of the courts; granted consent for the redistribution of the positions of judges between judicial institutions; and evaluated the principles of preparing the budget of the courts. Two decisions made during an ordinary work-year can be highlighted:

1. The Council supported an amendment to the Courts Act, according to which judicial registers are brought under a structural unit of one county court. The relevant draft act is already in the legislative proceeding of the Riigikogu as of March 2014.
2. The Council gave its consent to the proposal of the Minister of Justice to establish a procedure according to which the chairmen of the courts of first instance would monitor at least three times a year in greater detail the proceedings of the court cases heard by the court of first instance and find out the reasons for any delays in the proceedings.

[1] The justices being members of the Council were: Märt Rask (as of September, Priit Pikamäe), Meelis Eerik, Tiina Pappel, Andra Pärsimägi, Kaupo Paal and Henn Jõks, alternate members: Piia Jaaksoo, Virgo Saarmets and Lea Kivi. Members of the Council not being justices: Indrek Teder, Chancellor of Justice; Norman Aas, Prosecutor General; Sten Luiga, Chairman of Estonian Bar Association; Marko Pomerants and Deniss Boroditš, Members of the Riigikogu (alternate member: Rait Maruste).

Work of the Judge's Examination Committee in 2013

The workload of the Judge Examination Committee depends on the number of competitions for judges and

judicial candidates, as well as on the number of judicial candidates currently in office and the judges with less than three years of service.

In 2013, the Minister of Justice announced four competitions for nineteen positions of judges in total (four in the Tallinn Circuit Court, four in the Harju County Court, two in the Tartu County Court, seven in the Viru County Court, as well as one in the Tallinn Administrative Court and one in the Tartu Administrative Court). Thereof, the competitions for one position of a judge in the Tallinn Circuit Court, one in the Harju County Court and three in the Viru County Court were completed during the same year. In addition, the competitions announced in 2012 for the positions of three judges in the Harju County Court, two in the Tartu County Court, one in the Viru County Court and one in the Tallinn Administrative Court were completed.

In 2013, the President of the Republic appointed Orvi Tali to office as a judge of second instance (Tallinn Circuit Court, Criminal Chamber). The following persons were appointed to office as judges of first instance:

1. Andres Suik (Harju County Court)
2. Aivar Hint (Tartu County Court)
3. Deniss Minzatov (Viru County Court)
4. Marju Persidskaja (Tartu County Court)
5. Kristi Rickberg (Harju County Court)
6. Kadri Roos (Tallinn Administrative Court)
7. Tiia Bergson (Harju County Court)
8. Piret Raik (Viru County Court)
9. Tarmo Tina (Viru County Court)
10. Reena Nieländer (Harju County Court)
11. Andres Hallmägi (Viru County Court)

Competitions announced for the positions of two judges in the Viru County Court failed and ongoing competitions will be completed in 2014.

At the beginning of 2013, 13 judicial candidates were in the preparatory service for judges, and six of them assumed the office of judge. At the end of the year, seven judicial candidates continued in the preparatory service.

The Judge Examination Committee assesses the suitability for office of judges with less than three years of service; at the beginning of 2013, there were 21 such judges holding office. In 2013, four of these judges completed three years of service as a judge: Heiki Kolk, Judge in the Tartu County Court, Piret Mõistlik, Judge in the Harju County Court, Monika Laatsit, Judge in the Tallinn Administrative Court, and Innokenti Menšikov, Judge in the Viru County Court. At the end of 2013, there were 26 judges with under three years in service.

In 2013, the Judge Examination Committee decided to improve the system of supervision of judges with less than three years of service. In particular, upon completion of the first year of service as a judge, an opinion regarding his or her suitability for office is requested from the chairman of the court, the chairman of the circuit court, the Prosecutor's Office and the Bar Association. Upon completion of the second year, the chairman of the court shall give an opinion about the judge. Six months before the completion of the third year, an opinion is once again requested from all parties who gave their opinion after the first year, and in addition an opinion is requested from the Chancellor of Justice and the Minister of Justice. The aim of the amendment is to get timely and more thorough feedback about the judges, in order to identify any reasons for concern and to give guidance for resolving these issues.

Overview of the training of judges in 2013

In 2013, training materials entitled "Initiation of Constitutional Review in the Courts of First and Second Instance" was prepared and it has been made available to judges and court officials both as a document and as an e-training tool at the webpage for the training of judges.

In 2013, the current trend of using learner-focused (active learning) methods as widely as possible was continued. The training session for junior judges and judicial candidates on the management of the proceedings of a civil case can be regarded as particularly successful, having included group discussions as well as simulation exercises, which received very positive feedback from the participants. In addition, participants greatly appreciated the training session on organising a civil proceeding, where the lector was Villu Kõve, Justice of the Supreme Court, and which was prepared on the basis of files from actual court cases. For the second year, the training session on substantiating judgments was held, with all participants receiving individual feedback on their decisions.

External training has become a common form of individual development for judges and such training is no longer a privilege. In addition to different European training and field training opportunities (courts and training institutions for judges of the EU countries, EJTN, the Court of Justice of the European Union, the European Court of Human Rights, ERA, etc.), a training visit to the United States took place last year.

Among external training, a multi-day case study seminar held on 19–20 September 2013 by the Federal Court of Justice of Germany and the Criminal Chamber of the Supreme Court should be highlighted. With the help of the training materials, good-quality and in-depth study aids can be prepared for the future. The seminar's participants included the justices of the Supreme Court and the judges of the circuit courts, as well as prosecutors, including the Chief Public Prosecutor, and a representative of the Bar Association. Thus, this seminar was important for the Estonian legal system as a whole.

In agreement with the Ministry of Justice, the Training Committee decided to involve judicial clerks as a new target group in training. With regard to the fact that many judicial clerks have not previously worked in the judicial system, they might initially need a different type of training programme than that of the judges, in order for the professional level to be harmonised. In the long term, judicial training offered to them should not differ to a large extent from the training events offered to judges. In autumn 2013, two special training initiatives for judicial clerks were held.

In 2013, a training programme for judicial candidates and junior judges covering skills needed for managing civil proceedings was held for the first time. The training programme was prepared by judges Kai Härmand and Kersti Kerstna-Vaks. The aim of the training was to teach via seminar discussions and simulation exercises how to effectively manage the proceeding of a civil case, including how to chair a court session. In addition, the training dealt with the ethical problems faced by judges that may arise during court proceedings. There is a particularly clear need for simulation training in the management of court proceedings, considering the fact that current regulations do not allow a judicial candidate to practice chairing a session during the preparatory service before becoming a judge. The training organisers have proposed to establish an obligatory preparatory training programme for judicial candidates and junior judges. In 2014, an analogous methodology shall also be applied to prepare a course on the management of criminal proceedings.

In addition to the discussions on training activities, the Training Committee decided to amend the principles of preparing the judge examination programme. As the volume of the programme in its current form has exceeded reasonable limits and has become unwieldy, the programme should in the future contain a fewer number of topics, whereas references to Supreme Court judgments and legal literature shall be excluded altogether.

Cases resolved by the Disciplinary Chamber in 2013

In 2013, four disciplinary charges were filed against judges, with charges filed by the chairman of a county court in two cases, by the chairman of a circuit court in one case, and by the Chief Justice of the Supreme Court in one case. Three of the charges were filed for inappropriate performance of official duties, and one as regards inappropriate behaviour. The charges filed regarding inappropriate performance of official duties reproached the judges for failure to follow the principle of reasonable time; application of illegal judicial practice; and failure to prepare a complete judgment in a criminal case in over a year. The charge for inappropriate behaviour reproached a judge for driving a motor vehicle while intoxicated. In one disciplinary charge, a judge was acquitted, but in three cases judges were convicted of committing

a disciplinary offence, whereas in all those cases the punishment imposed was a reprimand.

In the first event, a judge was charged for not performing the first act of a civil case (an appeal against a court ruling regarding a payment order prepared in an expedited procedure) until after nine months of accepting the civil case for proceeding and the following act was not performed until after almost eleven months. The Disciplinary Chamber found that there is a requirement set forth in law that judges must organise their work so that they shall adjudicate court cases within a reasonable time. In the case in question, there was no debate over whether there was a failure to perform procedural acts within a reasonable time. The Chamber found that the judge did not arrange work as requested, leading to the occurrence of procedural delays.

In the second case, a judge was charged for several issues: the judge failed to order the accused to pay procedural expenses in full; approved an illegal agreement in a criminal case; and used "copy-paste" techniques in judgments. In this disciplinary case, the Chamber underlined that a judge can only be punished for a disciplinary offence with regard to concrete acts for which it is also possible to evaluate whether the act has expired. With regard to the use of "copy-paste", the Chamber found that the current Code of Criminal Procedure does not prohibit this; but at the same time the Chamber disapproved of repetitions in judgments and an excessively detailed presentation of witness testimonies and statements of parties in the proceedings, as it increases unnecessarily the volume of a judgment and complicates the reading and understanding of a judgment. In addition, the Chamber condemned the approval of an illegal agreement, but found that it would not be practical, reasonable or justified to treat this single mistake as a disciplinary offence. With regard to indemnifying procedural expenses, the Chamber stated that the legal act governing this issue is ambiguous, and it cannot therefore be proven that the judge's interpretation of the legal provisions on the indemnification of procedural expenses is clearly incorrect. The Chamber added that even if such an opinion were declared incorrect, in this situation it would not be fair to charge a judge with committing a disciplinary offence.

In the third case, a judge was charged with taking more than a year to compile a complete judgment in a criminal case. The Chamber explained that a judge shall perform his or her duties within a reasonable time, having regard to the terms for proceedings prescribed by law. The Chamber considered a delay exceeding one year to be unreasonably long.

In the fourth case, a judge was charged with committing an inappropriate act. Namely, the judge drove a motor vehicle when the judge's blood-alcohol level exceeded the established limit. The Chamber found that the judge committed a misdemeanour and failed to behave impeccably outside service and damaged with this act the reputation of the court within the meaning of section 70 (2) of the Courts Act.

The decisions of the Disciplinary Chamber are published on the webpage of the Supreme Court, taking into account the restrictions set forth in the Public Information Act. A disciplinary sanction shall expire if the judge does not commit a new disciplinary offence within one year after the entry into force of the decision of the Disciplinary Chamber (subsection 88 (6) of the Courts Act). Upon expiry of the punishment, the judgment shall be removed from the webpage of the Supreme Court.

CIVIL PROCEEDING STATISTICS OF THE COURTS OF 1st AND 2nd INSTANCE IN 2013

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General facts on proceeding statistics in 2013

In 2013, a total of 27,890 civil matters, 16,643 matters subject to criminal proceeding (incl. 8,418 criminal matters) and 8,790 misdemeanour matters were filed in county courts for hearing. Administrative courts received 2,957 appeals. With regard to appeal procedure and appeal against ruling procedure, 3,232 civil matters, 1,245 administrative matters, 2,284 criminal matters, and 194 misdemeanour matters were filed in circuit courts.

The following figures[1] reflect the trend of matters filed within the last 5 years in the courts of first instance (Figure 1) and second instance (Figure 2).

[1] Figure 1 shows: civil matters[1] – excl. supervision proceedings, matters of payment order in expedited procedure, and matters on petition adjudicated by assistant judges; matters of payment order[2] – all matters of e-payment orders in expedited procedure, filed with the Haapsalu courthouse of the Pärnu County Court; matters subject to criminal proceeding[3] – aggregate number of criminal matters filed in this type of procedure in county courts, preliminary investigation matters and matters with judges in charge of execution of court judgments, etc. Figure 2 shows: aggregate number of appeals submitted to circuit courts in all types of procedure[4], i.e., both appeal procedures and appeal against ruling procedures and proceedings initiated in a circuit court.

FIGURE 1

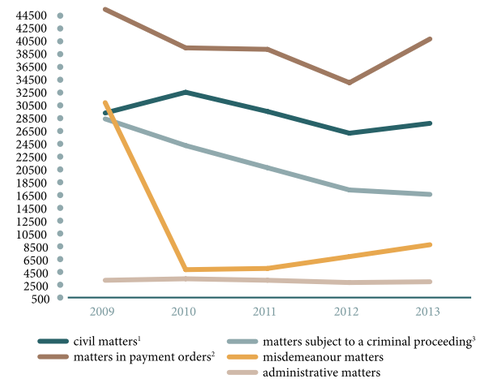
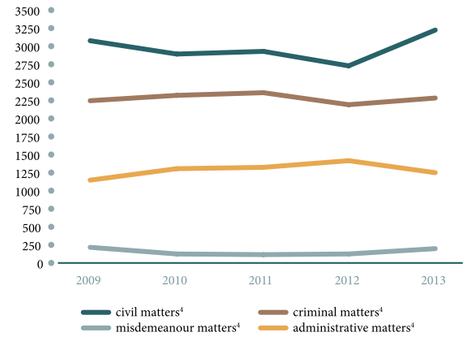


FIGURE 2



In 2013, a total of 29,301 civil matters, 16,678 matters subject to criminal proceeding (incl. 8,429 criminal matters) and 7,507 misdemeanour matters were adjudicated in county courts. Administrative courts adjudicated a total of 2,687 administrative matters.

Circuit courts adjudicated in civil proceedings a total of 3,006 matters, incl. 1,276 civil matters; in criminal proceedings a total of 2,279 matters, incl. 708 criminal matters in appeal procedure, and in misdemeanour proceedings 195 matters, incl. 97 misdemeanour matters. In total, 1,326 administrative matters were adjudicated in circuit courts, incl. 604 matters in appeal procedure.

Aggregate data on the proceeding statistics in 2013 of all courts of the first and second instance by type of proceeding, as well as a more detailed analysis, are available at the courts' webpage: http://www.kohus.ee/et/eesti-kohtud/kohtute-statistika.

More detailed overview of civil proceedings

Continuing the policy started last year, this year (13 February 2014) all judges received an individual overview of the matters adjudicated in 2013, the average estimated time of proceedings, and the share of old matters in proceedings.

The following overview of the results of adjudicating civil matters in county and circuit courts is somewhat more detailed, but the limits on the volume of this article would not allow a more accurate statistical analysis of civil proceedings. The aim of the following is, in particular, to enable each judge to compare his or her work with that of others, and to provide information important for the judicial system.

In addition, by the time of publication of the courts' yearbook this year, the Council for Administration of Courts will have held its May session, where the proceeding statistics of 2013 will be analysed and a discussion will be held about the due functioning of the administration of justice on the basis of reports from the chairmen of the courts.

Adjudication of civil matters in circuit courts

The number of civil matters adjudicated in circuit courts amounted to 2,989 (2,210 in the Tallinn Circuit Court and 779 in the Tartu Circuit Court), whereof 1,276 civil matters were heard in appeal procedure (915 in the Tallinn Circuit Court and 361 in the Tartu Circuit Court) and 1,713 in appeal against ruling procedure (1,295 in the Tallinn Circuit Court and 418 in the Tartu Circuit Court), incl. 951 appeals filed against a final decision of a county court (730 in the Tallinn Circuit Court and 221 in the Tartu Circuit Court).

The following table indicates that in 2013 the average duration of an appeal procedure was 152 days and the average duration of an appeal against ruling procedure (without differentiating the types of ruling) was 36 days.

1,376 decisions of county courts remained unamended in circuit courts, incl. 954 final decisions of county courts. 112 civil matters were referred to county courts for a new hearing, whereas in 366 civil matters the judge of a circuit court made a new decision.

By the end of 2013, the total number of civil matters which remained unadjudicated in circuit courts amounted to 867, i.e., 35% more than the number of matters in proceeding at the beginning of 2013.

Court	Average time of proceeding of matters adjudicated in appeal procedure in 2013 (days)	Average time of proceeding of matters adjudicated in appeal against ruling procedure in 2013 (days)
Tallinn Circuit Court	142	35
Tartu Circuit Court	175	37
Average of the courts	152	36

The number of matters that remained in proceeding was higher in the Tallinn Circuit Court, where the workload increased significantly in 2013. Therefore, the Civil Chamber has not been able to hear all matters received, and the number of matters that remained in proceeding increased. This figure has not yet become excessive, but should this trend continue (where the capacity is lower than the increase in workload), it will also start to affect the county courts of the region. In the Tallinn Circuit Court, 662 civil matters remained unadjudicated at the end of 2013 (56.1% more than at the beginning of 2013). In the Tartu Circuit Court, 205 civil matters remained in proceeding, which is comparable to the number of matters in proceeding at the beginning of the year (218 civil matters at the beginning of 2013).

In circuit courts, the matters are considered "old", if an appeal procedure, a proceeding has lasted more than 365 days, and an appeal against ruling procedure, more than 180 days. By the end of the year, the number of such appeal procedures that continued was 14 in the Tallinn Circuit Court and 4 in the Tartu Circuit Court, whereas in the Tallinn Circuit Court an additional 8 procedures of appeal against ruling remained in proceeding.

Adjudication of civil matters in county courts

In 2013, the number of civil matters adjudicated in county courts amounted to 29,301, whereof 19,096 were heard in an action and 10,205 in a proceeding on petition. 15,629 civil matters, i.e., about half (53.3%) of all civil matters, were heard in the Harju County Court (10,160 in an action and 5,469 in a proceeding on petition); 5,982 or one-fifth (20.4%) of the civil matters were heard in the Tartu County Court (3,699 in an action and 2,283 in a proceeding on petition); 4,358 civil matters or 14.9% in the Viru County Court (3,009 in an action and 1,349 in a proceeding on petition); and 3,332 or 11.4% in the Pärnu County Court (2,228 in an action and 1,104 in a proceeding on petition).

In 2013, 11,132 civil matters were adjudicated by county courts on the merits of the matter, whereof 59.1% or 6,576 civil matters were adjudicated by making a default judgment. In the Harju County Court, a judgment on the merits of the matter was made in 6,052 civil matters, incl. 3,418 default judgments (56.5% of the judgments); in the Pärnu County Court, a judgment on the merits of the matter was made in 1,203 civil matters, incl. 665 default judgments (55.3%); in the Tartu County Court, a judgment on the merits of the matter was made in 2,099 civil matters, incl. 1,338 default judgments (63.7%); and in the Viru County Court, 1,778 judgments were made, incl. 1,155 default judgments (65.0%). When compared, for instance, with the data of 2010, the share of default judgments has decreased a little (7.3%) in all county courts. In 2010, the average share of default judgments in civil matters heard on the merits of the matter was 66.4%.

89% of the civil matters adjudicated on the merits of the matter were either partially or totally satisfied in county courts, incl. 89.1% in the Harju County Court, 83.0% in the Pärnu County Court, 91.7% in the Tartu County Court, and 93.6% in the Viru County Court.

In county courts, approval of a compromise was achieved in 2,682 civil matters, i.e., 9.2% of the total number of matters adjudicated, incl. 1,384 in the Harju County Court (8.9% of the total number of matters adjudicated), 342 in the Pärnu County Court (10.3%), 532 in the Tartu County Court (8.9%), and 424 in the Viru County Court (9.7%). A comparison of the share of compromises with the figures of 2010 reveals that it has remained on the same level; i.e., in the year of comparison a compromise was approved in the case of 9.1% of the total number of civil matters adjudicated. The share of approval of compromises by different courts is the same.

In sessions, a total of 7,973 civil matters were adjudicated, whereas, in order to hear these matters, 13,684 preliminary hearings and court sessions were determined (incl. postponed and cancelled sessions). In most cases, the issues are solved in one (61.7%) or 2–3 sessions (30.6%); i.e., 92.3% of the matters heard in a session were adjudicated in up to 3 sessions. At the same time, there were 16 civil matters which required 10–17 sessions for hearing.

At the end of 2013, the total number of civil matters which remained unadjudicated in county courts amounted to 8,467, i.e., 17.6% less than at the beginning

of 2013. In the Harju County Court, 3,743 civil matters remained in proceeding (27.6% less than at the beginning of 2013); in the Pärnu County Court 1,148 civil matters (22.5% less); in the Tartu County Court the figure was down by 4.5%; and only in the Viru County Court was there more (4.5%) than in the beginning of 2013, i.e., 1,569 unadjudicated civil matters.

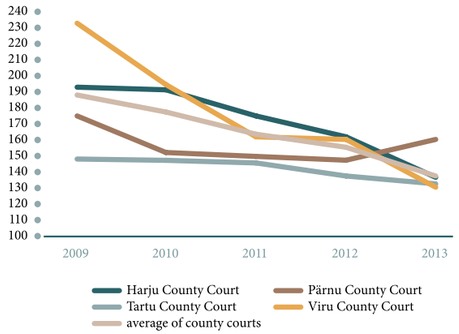
Average time of proceedings

When calculating the average time of proceedings, the time spent from the date of arrival of a civil matter to the date of the final decision shall be taken into account, excluding any periods where the proceeding is either suspended, waiting for serving of procedural documents, or waiting for adjudication of an appeal against ruling in a circuit court; in addition, in the case of civil matters which are referred back for hearing by the courts of higher instance, the previous time of proceeding in a county court shall not be taken into account. In consideration of the above, in 2013 the average time of proceeding of a civil matter was 138 days – in the Harju County Court 137 days, in the Pärnu County Court 161 days, in the Tartu County Court 133 days and in the Viru County Court 131 days. Figure 3 indicates the trend of the average time of proceeding of civil matters heard in county courts. It shows that the proceedings have clearly, to a greater or lesser extent, become quicker in most of the county courts. Unfortunately, the Pärnu County Court is an exception, with the average time of proceeding again following an upward trend in 2013.

In order to get a more thorough overview of the length of civil matters, it is also necessary to measure the average time of proceeding of matters which remained unadjudicated in county courts at the end of the year. At the end of 2013, the average time of proceeding of such unadjudicated civil matters was 200 days – the average "age" of unadjudicated matters in the Harju County Court is 187 days, in the Pärnu County Court 230 days, in the Tartu County Court 217 days, and in the Viru County Court 191 days.

In courts which have set goals for improved efficiency in the administration of justice, one of the objectives agreed upon is that in general the proceeding of a civil matter in a county court shall not exceed 365 days. At the end of 2013, the total share of such civil matters in county courts amounted to 15.3% – in the Harju County Court 14.3%[2], in the Pärnu County Court 18%, in the Tartu County Court 17.5%, and in the Viru County Court 13.4%. These results indicate that the proceeding of civil matters in county courts must become about 10% shorter in the coming years.

FIGURE 3



Old unadjudicated matters

At the end of 2013, 180 civil matters whose proceedings had lasted over 3 years remained in proceeding in county courts. Surely, judges and the officials of their proceeding groups are aware that this year a directive of the Minister of Justice took effect whose aim is for the chairman and judge conducting proceedings to find ways for adjudicating these as quickly as possible. More detailed information about reporting is available in the newsletter of the courts of first and second instance published in February this year[3] or from a given court's analyst, and for that reason this article does not go into further detail about the organisation of reporting, but provides an overview of the types of such matters and their distribution between courts.

The average age of old unadjudicated matters was 4.5 years, but 7 matters have been in proceeding at a county court for at least 10 years; i.e., during all this time, the proceeding of those matters has not advanced further from the county court. Across all county courts, 57 judges had old unadjudicated civil matters in proceedings. In 2013, 99 county court judges heard civil matters to a greater or lesser extent, and every other judge had civil matters whose reasonable time of proceeding was over. The list of old matters is diverse with regard to their type, divided into 30 different statistical types. Most of the old unadjudicated matters (108 matters or 60%) comprise matters in an action with differing levels of difficulty. The following table indicates classifications of matters where the number of unadjudicated matters is highest, also noting the level of difficulty according to the workload methodology.

Old unadjudicated civil matters as of 31.12.2013					
Year	Harju County Court	Pärnu County Court	Tartu County Court	Viru County Court	Total
1998	1				1
2001	1				1
2002				1	1
2003	2				2
2004	2				2
2005	1	2	1	1	5
2006	1	5	3	2	11
2007	9	1	2	2	14
2008	5	6	5	4	20
2009	19	5	9	8	41
2010	27	20	26	9	82
Total	68	39	46	27	180
Number of judges who have old unadjudicated matters in their proceedings	28	8	12	9	57
Total number of judges hearing civil matters in a court	43	16	23	17	99

[2] In the Harju County Court, where the proceeding statistics are evaluated monthly in 2014, by the end of March (at the time of writing this article), 11.6% of the civil matters had been in proceeding by judges for more than 365 days, whereas the aim is to keep the share of such matters under 5% at the end of this year (except under special circumstances).

[3] The newsletter is available on the webpage http://joom.ag/liGX.

Statistical category of civil matter	No. of unadjudicated matters as of 31.12.2013	Level of difficulty according to workload methodology (points)
Action – matters in the law of obligations – other contracts for the provision of services	26	*4.6*
Action – law of property	21	*11.5*
Action – non-contractual obligations	15	*11.5*
Action – matters in the law of obligations – transfer deeds	14	*4.6*
Action – matters in the law of obligations – loan and credit agreements	11	*2.3*
Action – bankruptcy matters	11	*10.35*
Action – matters in the law of obligations – other contracts for use	10	*5.75*

According to the workload methodology, civil matters are divided according to difficulty on a scale of 1.15–11.5. As can be seen from the table above, it cannot be claimed that the proceedings are obstructed only in the most difficult and time-consuming civil matters, as 61 matters indicated here have been rated as civil matters with either an average or less-than-average workload.

On a court-by-court overview of old unadjudicated civil matters, we can see that in the Harju County Court 68 such civil matters were in the proceedings of 28 judges. None of the judges can be singled out with regard to a higher number of old matters; 20 judges had 1-2 old matters in proceedings. The highest numbers of old matters in proceedings was five (one judge) and four (five judges). The three categories with the highest number of matters were property law (7 matters), other contracts for the provision of services (18 matters) and disputes in bankruptcy proceedings (7 matters).

In the Pärnu County Court, the number of old unadjudicated civil matters was 39 (8 judges). There were three judges who are hearing 27 matters in total (11, 10 and 6 old unadjudicated matters, respectively), and three judges had 1-2 matters in proceedings. In the Pärnu County Court, most of the matters concerned were transfer deeds (7), matters in property law (6) and matters of non-contractual obligations (5).

In the Tartu County Court, 12 judges had 46 old matters in proceedings. There are two judges who account for more than half of the old matters of that court, i.e., 18 and 12 old unadjudicated matters, respectively. Eight judges had 1–2 old matters in proceedings. Basically, no specific categories can be highlighted, although 5 negative instances of unadjudicated matters in labour law can be pointed out, having already been in proceeding by the two judges mentioned above for 5–6 years.

In the Viru County Court, 9 judges had 27 unadjudicated matters in proceedings. There are two judges who account for more than half of the old matters (8 and 6 matters, respectively). Seven judges had 1–2 old unadjudicated matters in proceedings. By type, only property law can be highlighted in this court, where 5 actions were unadjudicated.

By the end of March, the number of old civil matters described above had decreased by about 27%.

The above short overview of old unadjudicated matters and the justifications given by the courts indicate that in some cases the delays in proceedings are inevitable. They are related either to the proceeding of some other court matter or waiting for a decision of a court of higher instance, whereas the difficulty of a civil matter does not necessarily determine which proceedings are older than 3 years. In addition, about 80% of the judges hearing civil matters have only two or less than two stalled proceedings.

Adjudication of matters of payment order in expedited procedure

Last year, 40,967 petitions were filed at the payment order centre in Haapsalu, which means that the downward trend of recent years has been reversed (the increase continues this year, as in the first three months almost 11,000 matters were filed with the payment order centre).

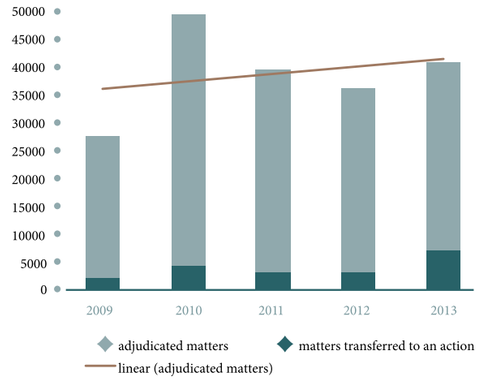
In 2013, 40,741 expedited procedures in matters of payment order were adjudicated, whereof 30,050 were satisfied either in full or in part, and 227 procedures were refused. In 2013, more than 6,890 debt claims or claims for support were filed in actions, constituting 16.8% of the expedited procedures in matters of payment order heard. When compared with the previous years, the increase is almost 10%. Such a surge is caused by the amendment to the Code of Civil Procedure which entered into force in 2013 and sets forth that hearing in actions will also be continued in the case of claims where the service of the proposal for payment on the debtor has failed and the petitioner has not explicitly asked for termination of the proceedings[4]. Despite the fact that as a result around 4,000 more civil matters were filed in county courts (each judge hearing civil matters had to adjudicate on average 7–8 civil matters more per year), the current proceeding is more efficient for all participants. This amendment contributes to procedural economy; i.e., petitioners are no longer themselves obliged to initiate several proceedings. In addition, a court is able to obtain from a previous proceeding the information required for completing the proceeding and making a judgment.

Although, in 2013, a record number of matters was transferred from expedited procedure in matters of payment order to an action, it can be claimed that this procedure has become more efficient, in particular due to the service of procedural documents. But when comparing the proceedings transferred to an action in 2013 with similar data from the previous years (completions + transferrals to an action), the number of matters transferred to an action as indicated in Figure 4 refers to a downward trend of about 8–9%.

In 2013, the average time of proceeding of matters in payment order adjudicated was 87 days, incl. 81 days in the case of proceedings satisfied in full or in part. In fact, the longest proceedings (112 days) were those which were finally transferred to an action. At the same time it should be noted that the payment order department has reached its capacity and 41,000 matters is the upper limit for the given speed of proceeding.

At the end of 2013, 9,724 expedited procedures in matters of payment order remained unadjudicated, whereof 9,596 concerned debt claims and 128 claims for support.

FIGURE 4



[4] RT I, 29.06.2012, 3 – entry into force on 01.01.2013.

REVIEW OF COURT CASES IN THE SUPREME COURT IN 2013 - OVERVIEW OF PROCEEDING STATISTICS

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The Supreme Court collects statistical data characterising the work of the court with regard to the petitions filed with the Supreme Court and the matters which have received leave to appeal or been reviewed, in all four types of procedure: civil, administrative and offence procedures and constitutional review proceedings. Data regarding the petitions is recorded about appeals and petitions filed (e.g. appeals in cassation, appeals against a court ruling and petitions for review). In the case of court matters reviewed, the data are presented by the number of court cases, although in one court case many appeals or petitions may come under review.[1]

Review of petitions in chambers of the Supreme Court

The statistics of petitions continues to indicate an increase in the number of petitions, which means that in the last three years (2011-2013) the number of petitions filed with the Supreme Court showed stable growth. The Supreme Court is able to cope with a higher workload, as the number of petitions reviewed is growing at the same rate (see Figure 1). The increase in the workload of the Supreme Court is clearly connected to an increase in the capacity of the courts of first and second instance, as in the last three years the average time of proceedings in courts of first instance shortened for all types of procedure. If the capacity of the courts of first instance increases and court cases are adjudicated more quickly, the workload of the courts of next instances will inevitably grow.

According to law, the Supreme Court may decide whether it accepts a petition (appeal in cassation) filed with the aim of ensuring the legitimacy of the court judgments of a court of lower instance, harmonising case law and developing procedural law.

In 2013, 20% (478 out of 2361) of the petitions reviewed were accepted, whereas in 2012 this figure was 22% (464 out of 2151). A year earlier the same figure was higher by one percentage point, i.e. 23% (443 out of 1932). Thus, the number of petitions accepted is also gradually increasing, but as the rate of acceptance is not growing as rapidly as the number of petitions, the percentage of acceptance has still decreased somewhat. The intensity of the review of petitions is also indicated by the fact that petitions have not started to accumulate. By the end of the year, constantly around 500 petitions remain unreviewed. By the end of 2011, the balance was 485 petitions; at the end of 2012 and 2013 this figure was 514 and 499, respectively.

[1] More detailed data regarding the reviewing of petitions and court cases in the Supreme Court since 1993 is available on the website of the Supreme Court: http://www.riigikohus.ee/?id=79.

In 2013, the workload of the Civil, Administrative and Criminal Chambers of the Supreme Court was clearly higher than previously. In all three chambers the number of petitions has increased (see Figure 2). The Civil Chamber accounts for the highest number of petitions accepted.

In civil matters, the Supreme Court heard 1301 petitions, of which 1070 were reviewed. In the case of 898 petitions a decision to accept was made, of which 204 or 23% were accepted.

The Administrative Chamber had 770 petitions, of which 665 were reviewed. In the case of 573 petitions a decision to accept was made, of which 118 or 21% were accepted.

In the Criminal Chamber, the number of petitions totalled 1279, of which 1116 were reviewed. In the case of 890 petitions a decision to accept was made, of which 155 or 18% were accepted.

In criminal matters, 1126 petitions were heard, of which 982 were reviewed. In the case of 777 petitions a decision to accept was made, of which 128 or 16% were accepted. In misdemeanour matters, 140 petitions were heard, of which 134 were reviewed. In the case of 113 petitions a decision to accept was considered, of which 28 or 25% were accepted.

Thus, the bulk of the decisions of circuit courts concerned civil matters. The highest proportion of petitions reviewed was in the Criminal Chamber, although in 2013 the number of petitions regarding offences was lower than in civil matters. The workload of the Administrative Chamber was almost half that of other chambers, but here it must be taken into account that the number of petitions filed with administrative courts is also many times smaller.

FIGURE 1. Review of petitions in the Supreme Court, 2011-2013

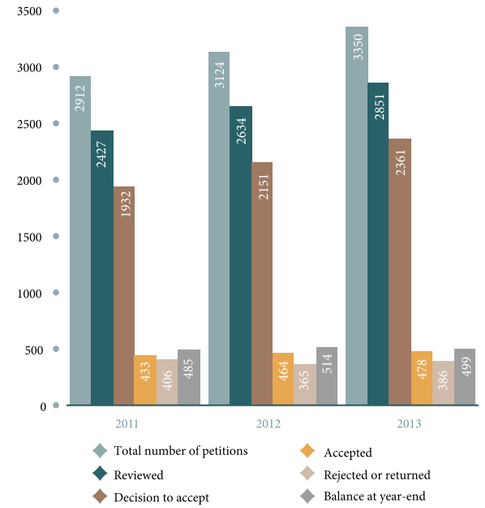
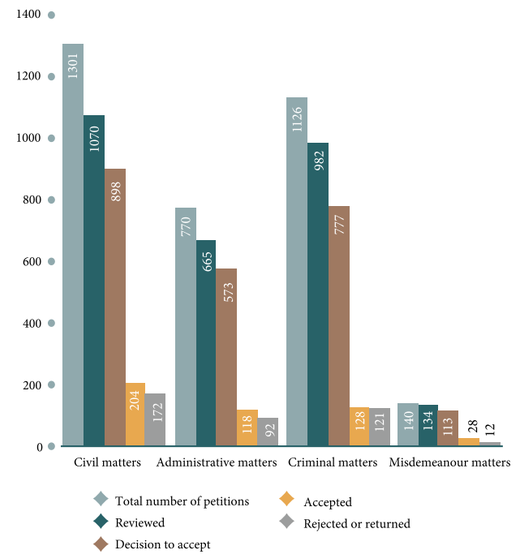


FIGURE 2. Review of petitions by type of procedure in 2013



Results of review of court cases in chambers of the Supreme Court

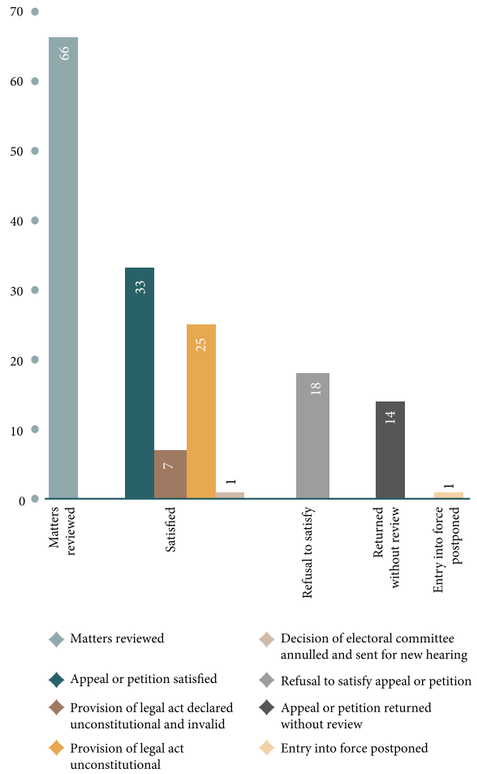
Constitutional review

In 2013, a record 66 court cases were subject to constitutional review in the Supreme Court. Such a high number of matters arises from the fact that half of those reviewed dealt with the constitutionality of excessively high state fees.

Of the matters reviewed, 59 concerned court cases filed with the Constitutional Review Chamber, to which seven matters forwarded by other chambers to the Supreme Court *en banc* for constitutional review were added. The Supreme Court *en banc* received for constitutional review four matters from the Civil Chamber, one from the Administrative Chamber and two from the Criminal Chamber.

In the matters heard by the Constitutional Review Chamber and the Supreme Court *en banc*, 33 petitions or appeals were satisfied. A provision of a contested legal act was declared unconstitutional and invalid in seven cases, whereas in 25 cases it was admitted that the provision contradicted an earlier wording of the Constitution, and in one case a decision of the electoral committee was annulled and sent to the committee for review. 18 appeals or petitions were left unsatisfied; 14 were returned without review. In one case it was decided that the entry into force of the decision of the Supreme Court should be postponed for six months in order to give the legislator time to regulate the legal situation.

FIGURE 3. Results of review of court cases subject to constitutional review



Criminal Chamber

The Criminal Chamber adjudicated 152 matters of offence, including 123 criminal matters and 29 misdemeanour matters.

In criminal matters, 17 court decisions contested were left unchanged. In most of the matters (86 cases), the decision of a lower court was annulled. The Supreme Court amended the statement of reasons for a contested court decision in nine cases. In misdemeanour matters, the Supreme Court left the decision of a county court unamended in only two cases; in the remaining 25 cases, the decision of the county court was annulled (see Figure 4).

FIGURE 4. Results of review of matters of offence in the Criminal Chamber

Civil Chamber

In 2013, the Civil Chamber adjudicated a total number of 181 court cases (incl. one court case by the special panel of the Civil and Administrative Chambers to determine a competent court). Similarly to the Criminal Chamber, three-quarters (138) of the court decisions contested and accepted were annulled, whereas 21 decisions were left unamended, and the statement of reasons for the judgment were amended in 17 cases.

FIGURE 5. Results of review of civil matters in the Civil Chamber

Administrative Chamber

The Administrative Chamber reviewed 93 administrative matters in cassation proceedings or review procedures (incl. one court case in the special panel of the Civil and Administrative Chambers to determine a competent court). Likewise, in administrative matters, the Supreme Court decided to annul almost 70% (62) of the judgments of courts of lower instance contested and accepted, whereas 16 judgments were left unamended and the statement of reasons was amended in 15 cases.

Comparison of the burden of review of matters by the Civil, Administrative and Criminal Chambers in 2013 is provided in Figure 7.

In summary, it can be said on the basis of the data of proceedings of 2013 of the Supreme Court that the number of petitions is constantly increasing. Intensive work is done in reviewing petitions, as in spite of the increase in the number of petitions the number of petitions left unreviewed by the end of the year had not increased, but in fact decreased somewhat. The steady growth in the number of petitions will raise thoughts about whether in the future the possibilities set forth in the codes of procedure for contesting a court judgment in a court of higher instance should be revised.

Figure 6. Results of review of administrative matters in the Administrative Chamber

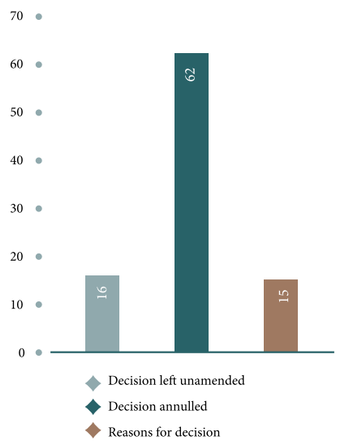


Figure 7. Number of court matters reviewed and matters left unadjudicated by chambers