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COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE DISCUSSION ON PRIVATE REMEDIES: PASSING ON DEFENSE; INDIRECT  
PURCHASER STANDING; DEFINITION OF DAMAGES**

**-- The Competition Council of the Republic of Lithuania --**

*The attached document is submitted by the delegation of the Republic of Lithuania to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 7 February 2006.*

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## **I. Passing-on defence/indirect purchaser standing**

### ***1. Concerning the passing-on defence***

1. In Lithuania, in litigation for the purpose of claiming damages incurred through the anticompetitive actions plaintiff is obliged to prove the illegitimate conduct of the defendant, damages incurred by the plaintiff, their scope, and the existence of causal link between the illegal actions of the defendant and the damages incurred. The fault, contrary to other conditions for civil liability, is presumed therefore the plaintiff is under no obligation to prove it<sup>1</sup>. The allocation of the burden of proof is an important factor in relation to the application of the over-charges passing-on defence principle. First, the plaintiff himself must prove the amount of the loss incurred by the plaintiff. Where the amount of the loss is proven on the basis of the damages suffered by the plaintiff, the plaintiff should include into the claim only the immediately incurred damages that were not passed to anybody. In the case the plaintiff fails to do that and the amount of the loss is established on the basis of the benefit derived by the defendant, the defendant may object the calculation of the loss as presented by the plaintiff (direct purchaser), by arguing that the plaintiff has passed all or part of the loss to its purchasers (i.e., has not incurred the loss immediately by himself).

2. The Civil Code of the Republic of Lithuania stipulates that in cases where one and the same action has created both damages and benefit for the aggrieved person, the benefit may be included into damages to be indemnified. In such cases damages are indemnified only to the extent not covered by the benefit derived. However, the Court has discretion to decide concerning the application of the principle, therefore the Court, having considered all the specific circumstances of the case, may award all damages regardless of the gain of the aggrieved person where the consideration of the gain would be contrary to the principles of reasonableness, good faith and justice. Therefore the Court retains the right to decide, on a case-by-case basis, to apply or to refuse to apply the passing-on defence.

### ***2. Concerning the standing of indirect purchasers***

3. Indirect purchasers are entitled to the same right to bring suit for damages and are subject to the same procedures as direct purchasers. In Lithuania the indirect purchasers are not entitled to any privileges in respect of litigation, or initiation of proceedings or the proving of the validity of the claims. The possibilities of the indirect purchasers to bring actions concerning the indemnification of claims is facilitated by the doctrine of flexible causal link provided for by the Civil Code which enables the Court in each specific case to duly consider the legitimate interests of the plaintiff and the defendant and numerous other important circumstances, such as the behaviour of the aggrieved person, the relative wealth of the parties, the degree of fault of the defendant and others. The behaviour of the defendant does not need to be the only reason for the occurrence of damages, therefore to establish the causal link it suffice to prove that the conduct of the person at fault is a sufficient reason for the occurrence of damages although being not a sole one. The enforcement of such principles enables the indirect purchaser to appeal to court and claim damage from the person accused of a competition law violation.

4. The Competition Council of the Republic of Lithuania is not aware of a single case concerning damages resulting from the anti-competitive conduct with an indirect purchaser acting as a plaintiff. The judicial experience in this field is rather scarce due to a very small number of private litigations concerning the losses incurred through an anticompetitive behaviour. In addition there are objective reasons preventing the occurrence of such claims. For instance, the final consumer finds it difficult to present to the court the evidence substantiating damages incurred, and in view of very small damages incurred to each individual

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<sup>1</sup> 6.248 (1) of the Civil Code of the Republic of Lithuania.

consumer the initiation of the process seems very unappealing due to the significant related time and financial costs.

### **3. *Concerning the allocation of damages between the direct and indirect purchasers***

5. Up till now there is no established practice in Lithuania concerning part of damages incurred through anticompetitive actions to be attributed to the direct and the indirect purchasers. Due to the applicable doctrine of the full compensation of losses whereby the civil liability performs the compensatory rather than punishing function, the assignment of the share of damages incurred by direct and indirect consumers shall be based on the specific amount of the damage suffered by the specific undertaking. In such cases the establishment of the amount of the damage on the basis of the gain derived by the persons infringing the competition rules would be difficult.

6. Although there is no institution of class actions in Lithuania, the Code of Civil Procedure of the Republic of Lithuania provides for a possibility to bring a joint action against the defendant in a single claim. Also a situation is possible where the direct and indirect purchasers file multiple claims for the indemnification of damages. However, in such cases the court may decide to consolidate the related suits into one single case where such consolidation may ensure a speedy and fair resolution of the dispute. Since in accordance with the provisions of the Code on Civil Proceedings the claims must be filed to the court of residence of the defendant (registration venue), such situation prevents the occurrence of multiple claims of direct and indirect purchasers in different courts.

## **II. Definition of damages**

### **1. *Concerning the definition of damages***

7. Art. 46(1) of the Law on Competition of the Republic of Lithuania provides that the undertakings that violate this Law must compensate for damages caused to other undertakings or natural and legal persons according to the procedure established by the laws of the Republic of Lithuania. However, the Law does not provide for any specific criteria underlying the assessment of damages resulting from the anticompetitive actions. Therefore damages incurred through unfair competition shall be assessed and proved on the basis of the general damages indemnification principles established in the Civil Code. Damages are not presumed therefore the aggrieved person must prove damages themselves and amount of them. In cases where the exact amount of damages is difficult to establish and the plaintiff requires the gain acquired by the defendant be recognised as damages suffered by the plaintiff, the latter shall have to prove the scope of the gain derived by the defendant through the illegal actions.

8. In the Lithuanian judicial practice the private suits for damages incurred due to anti-competitive actions are extremely rare. We are aware of only two cases whereunder the plaintiff applied to the court requesting the reparation of damages suffered by him due to actions of the undertaking recognised by the Competition Council as having abused the dominant position. One of the cases is still pending examination in the first instance court and in the second case (UAB *Siauliu tara* v. AB *Stumbras*) the main issue was the assessment of the amount of damages inflicted. Both parties of the proceedings submitted the findings and conclusions on the amount of damages incurred by the plaintiff drawn up by well-known international audit companies. However, the assessment of damages commissioned by the plaintiff the amounts mentioned reached several million litas (about 800,000 euros), while the conclusions presented by defendant stated that the actions of the defendant did not inflict any damages to the plaintiff whatsoever. In this situation the court commissioned the special State expertise institution (the Lithuanian Court expertise centre) to perform the assessment of damages. Despite the fact that the experts of the centre performed two expert examinations (primary and the repeated), the first instance court chose to disregard the presented conclusions, as, in the opinion of the court, the experts mistakenly interpreted the Resolution of the

Competition Council. In this particular case the court chose to be guided by the damage assessment presented by the plaintiff which at the same time took into consideration the slowdown of the growth in the plaintiff's trade volumes.

9. It should be noted that the above case is still pending the final ruling in the Appeal court. In general, however, the course of the examination of this particular case demonstrates the difficulties encountered in Lithuania while assessing the amount of damages. To a large extent such difficulties are caused by an extremely scarce experience in the litigation of the type.

10. In our opinion the difficulties related to the establishment of the occurrence of damages and their amount is one of the vital factors determining a very small number of the private suits for damages incurred due to anticompetitive actions. Guidelines of some general nature concerning the determination of the amount of damages in such cases could facilitate the growth of the number of cases of the kind and the formation of more just and uniform practice in this area. A facilitating factor to the benefit of the plaintiffs and the courts could be a more specific assessment of damages to the relevant market established in the resolutions of the Competition Council establishing the violations of the competition rules and the imposition of sanctions to the violators (given that for the purpose of imposing sanctions for the anticompetitive actions the competition authorities take into account the effect of the actions of the violator to the relevant market and the overall damages incurred to the market concerned).

## **2. *Concerning the application of multipliers for the assessment of damages to be indemnified***

11. The legal acts of the Republic of Lithuania do not authorise courts to apply at their own discretion the multipliers in the cases concerning the compensation of losses. One of the fundamental principles concerning the indemnification of damages is the full compensation of damages. The principle means that the plaintiff is under obligation to prove the fact of the damage and the amount of the damage, and the defendant may be obligated to indemnify the damage only to the extent of the damage actually incurred by the plaintiff. The principle of the total indemnification of the damage also implies and ensures that, on the one hand, the violator is prevented from gaining benefit through its illegal actions, and, on the other hand, the civil liability performs the compensatory, not the punishment function. In practice such approach prevents the application of multipliers in the damage indemnification cases.

12. In 2001, the new Civil Code of the Republic of Lithuania came into force, and in 2003 – the new Code of Civil Procedure was made operational which, however, did not introduce any major changes in the rules concerning the passing-on defence, determination of the status of indirect purchasers or the establishment of the amount of damages.