

**E. Provisional measures and injunctions under the implementing national legislation and court practice**

**I. Provisional measures under the national legislation in view of Article 9 of the Enforcement Directive**

**1. Application of provisional measures as procedural civil remedies**

**a) Objectives and nature**

Article 9 of the Enforcement Directive is generally aimed to harmonize provisional and precautionary measures that can be ordered by the courts during the civil proceedings before finally deciding on the merits of the case as well as before commencing civil proceedings. Such measures include: (1) interlocutory injunctions, also interlocutory injunctions to intermediaries, (2) orders regarding seizures or deliveries up of the allegedly infringing goods and (3) precautionary seizures of movable and immovable property, in case of commercial scale is established in the infringing activities<sup>715</sup>.

Article 9(1)(a) of the Directive explicitly refers to *interlocutory injunctions* by pointing out that they are to prevent imminent infringements, or to forbid the continuation of the alleged infringements, or to make such continuation subject to the lodging of guarantees which are intended to ensure compensation to right holder, whereas seizures of infringing goods are to prevent them from entering the market and seizures of movable and immovable property – from danger to recover the adjudicated damages. The requirements, which are applicable to measures for preserving evidence, are *mutatis mutandis* applicable to provisional measures<sup>716</sup>.

By examining the wording of the implementing provisions on provisional measures in Lithuanian legislation on IP rights<sup>717</sup>, it can be observed that they stipulate the measures which are (i) to ensure enforcement of final courts decisions, (ii) to prevent from imminent infringement, also (iii) to forbid a discontinuation of infringement. This, in turn, reflects the Lithuanian legal doctrine on provisional measures which also refers to them as measures to ensure enforcement of the final court decision, preventive measures and measures for preserving evidence:

“Where there are sufficient grounds to suspect that an infringement of protected rights in question has been committed, the court may, in accordance with the procedure laid down by the CCP, apply provisional measures necessary to prevent any imminent infringement, to forbid the continuation of the infringements and to enforce the final decision of the court.”<sup>718</sup>

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715 See examination of Art. 9 of the Directive in supra § 5A.II.2.c).

716 See examination of requirements for application of measures for preserving evidence in supra § 5D.I.3.b).

717 Art. 81(1) of the Copyright Law, Art. 41(3)(2) of the Patent Law, Art. 50(3)(2) of the Trade-mark Law, and Art. 47(3) (2) of the Design Law of Lithuania.

718 As described in *Commentary of Civil Code of Lithuania*, p. 333.

Thus, on the basis of the substantiated request by the interested party, the court can adopt an order: (1) to forbid persons to commit any imminent infringement of the protected rights, (2) to discontinue, on a provisional basis, any infringement of the protected rights, also 3) to forbid an intermediary to provide services to a third party who uses these services by infringing the protected rights. Moreover, Article 145 of the Lithuanian CCP stipulates an unlimited list of provisional measures which can be chosen by the interested party. They are mainly aimed to ensure enforcement of final court decisions which can be interpreted as narrowing the objectives of provisional measures in general<sup>719</sup>. For instance, a prohibition imposed on the defendant to enter to any agreements or take certain actions, which is established in the CCP, but aimed to ensure final court decisions, can be also seen as reasonable measure that can be imposed on a provisional basis during the civil proceedings and applied in IP infringement cases.

Similarly to measures for preserving evidence, national courts may also order the alleged infringers to lodge adequate security intended to ensure damage compensation to the person who requested injunction and (or), upon request of an interested person, order the competent authorities to communicate bank, financial or commercial documents, or provide appropriate access to the relevant information. Differently from the provision of Article 9(2) of the Enforcement Directive which is constructed on the British concept of so-called *Mareva injunction* or *freezing injunction*<sup>720</sup>, under the Lithuanian IP laws<sup>721</sup> it is not required to prove “commercial scale” (“commercial purposes”) in the activities of the opposing party in order to apply orders to communicate bank, financial or commercial documents, or provide appropriate access to the relevant information. In view of the aims of the Directive, such provision can be considered more favourable for right holders. It is, however, presumed that, while applying such provision, the principle of proportionality is to be duly observed by the national courts<sup>722</sup>.

The legal nature of provisional measures, including interlocutory injunctions or, as they are formulated in the Lithuanian national doctrine and general case practice, “orders on discontinuation of illegal activities”, are based on the general legal doctrine of *actio negatoria* and should be distinguished from substantive preventive civil remedies in IP infringement cases such as permanent injunctions. The differentiation is due to distinct objectives of application of those civil remedies, their nature and application requirements (procedural or substantive), different standard for evi-

719 Such only aim, which actually reflects the formulation set out in the 1964 CCP of Lithuania, has been also criticised as narrowing the objectives of provisional measures, see *Mizaras*, Copyright Law (Vol. II), p. 416.

720 See *refs.* in supra § 5A.II.2.c).

721 See *refs.* to the implementing provisions on the provisional measures in Lithuania in supra Ft. 717 herein.

722 The extended scope of application of Art. 9(2) of the Directive is in compliance with Article 2 (1) of the Directive; see also in *Mizaras*, Copyright Law (Vol. II), p. 418.

dence that should be provided in order to apply them, also consequences of their application<sup>723</sup>.

Such differences have a practical relevance which can be illustrated with the example from the Lithuanian court practice on the issue. For instance, it cannot be agreed with the argumentation expressed by the Lithuanian Court of Appeal<sup>724</sup> that, in case requested provisional measures coincide with the claims by the plaintiff, such measures are to be considered as going beyond the scope of the request to apply provisional measures and they are to be examined as the part of that claim. The Court of Appeal confirmed the conclusion of the first instance court in the mentioned case that, although the dispute regarding subjective IP rights in question did not take place, by prohibiting the defendant to use infringing software in his activities, the goals of further substantive requests by the plaintiff, which actually covered the same requests, are achieved. Such case practice can be considered as faulty. It is also to be noted that requests for discontinuation of infringing activities are, as a rule, asked by the plaintiffs, IP right holders, while submitting civil claims to the courts.

The main characteristic of procedural provisional measures is preventive. Such characteristic can be also detected by analysing the provisions embodied in the Latvian and Estonian CCPs on provisional measures<sup>725</sup>. They are aimed to secure *status quo*, to ensure enforcement of the final court decision and to prevent from damage that can occur during the civil proceedings. Both provisional and permanent preventive civil remedies, however, do not compete and they are to be applied in a complex manner. Even more, once the final court decision on the merits of the case is rendered, provisional measures of procedural nature can be transformed to the substantive preventive civil measures which are aimed to, for instance, discontinue the infringing activities or prevent from them in the future.

## b) Requirements for application of interlocutory injunctions

In Lithuania the courts order application of provisional measures on the basis of a request by an interested party (a plaintiff). The court can order such measures on its

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723 The same legal doctrine is followed in the practice of other EU countries such as Germany or Switzerland, as referred in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 245-247, also *Mizaras*, Copyright Law (Vol. II), pp. 436. See also further discussion regarding requirements for interlocutory injunctions in *infra* § 5E.I.1.b).

724 Such argumentation has been provided in other, but IP infringements, civil cases, e.g., in Decision as of 8 November 2007, Lithuanian Court of Appeal, Civil Case No. 2-707/2007, "*Ashburn International*" vs. *AB "Lukoil Baltija"* et al.; also in similar case, Decision as of 26 January 2006, the Lithuanian Court of Appeal, Civil Case No. 2-49/2006, *AB "Krašto projektai"* vs. *UAB "Vilniaus kapitalinė statyba"* et al.

725 Art. 250(10) of the Latvian CCP; Art. 378(2) of the Estonian CCP stipulates that in order to secure an action based on infringement of copyright or related rights, or industrial property rights, the court may, among other, seize the goods concerning alleged infringement of IP rights or impose an obligation to hand over such goods to prevent the putting on the market or distribution of such goods.

own motion only in cases of public interest<sup>726</sup>. Similarly to requests to apply measures for preserving evidence, the requesting party should provide evidence regarding its *locus standi*<sup>727</sup>, facts about the infringing activities or danger that such activities can occur, also *prima facie* evidence that the defendant allegedly committed or is committing such activities. These are the factors which are, as a rule, assessed by the Lithuanian courts while ordering preliminary injunctions.

By virtue of the legal doctrine of the Baltic countries, it is to be noted that, besides the mainly preventive nature of provisional measures and their procedural character, one of the most important differences lies on the fact that there is no requirement to prove fault in infringer's activities or inaction in order to impose an interlocutory injunction or other provisional measure (so-called "*objective infringement of rights*")<sup>728</sup>. The fact of illegal activities suffices in order to apply provisional measures, whereas general conditions for civil legal liability, including fault (intent or negligence), are required in order to ask for substantive preventive civil remedies in IP infringement cases.

It is required, though, to provide *reasonably available evidence* to convince the court that the right holder has a right to apply for such remedies, that the rights are being infringed or that the infringement is imminent. The requirement is set forth in the provisions on provisional measures in the national IP laws of Lithuania<sup>729</sup>. Notably, it is laid down that provisional measure can be applied by the court where there are *sufficient grounds to suspect* that an infringement of IP rights in question has been committed, whereas Article 9(3) of the Enforcement Directive uses another formulation. It is established in the Directive that the applicant is required to provide any reasonably available evidence in order to satisfy themselves *with a sufficient degree of certainty* that the applicant is the right holder (his *locus standi*) and that the applicant's right is being infringed, or that such infringement is imminent. Thus, it can be agreed with the arguments that the requirements on evidence standard for preliminary injunctions embodied in the Directive are higher than the one established in the national legislation<sup>730</sup>. On the other hand, such lowering of the standard can be interpreted as more favourable to right holders which can be considered as being in compliance with Article 2(1) and general aims of the Directive, as long as the principle of proportionality is observed.

Following such interpretation, the Lithuanian courts are not required to examine all circumstances of the case, especially considering the fact that provisional measures (injunctions) are to be applied promptly. Additionally, a reasonable sample of a substantial number of products shall be considered by the court to constitute reason-

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726 Art. 144(1), the Lithuanian CCP.

727 As referred in e.g., Lithuanian Court of Appeal, Civil Case No. 2-564/2007, *LATGA-A et al. vs. AB "Hesona" et al.*

728 It follows from the concept of *actio negatoria* which had been developed in Germany, Austria and Switzerland, as discussed in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 246-247.

729 See *refs.* to the implementing provisions on the provisional measures in Lithuania in *supra* Ft. 717 herein.

730 As also concluded in *Mizaras*, Copyright Law (Vol. II), pp. 437-438.

able evidence of an infringement of the rights to order interlocutory injunctions or apply other provisional measures. Moreover, provisional measures can be applied *inaudita altera parte*, in particular where any delay is likely to cause irreparable harm to the applicant. Identically to application for measures for preserving evidence, the same balancing schemes to ensure rights and interests of the opposing party are *mutatis mutandis* applicable under the national legislation<sup>731</sup>.

## 2. Permanent injunctions under the national legislation in view of Article 11 of the Directive

### a) Injunctions against the continuation of IP infringements

Injunctions, as a preventive or quasi-preventive civil remedy against infringements of IP rights, are known in the court practice of many EU member states and their legal doctrine<sup>732</sup>. Similarly, such substantive civil remedy, which is nowadays harmonized under Article 11 of the Enforcement Directive, is aimed at prohibiting the continuation of the infringement<sup>733</sup>. Injunctions can be imposed by rendering a court decision on the merits of the case, finding an infringement of IP right in question<sup>734</sup>.

Injunctions, as the substantive civil enforcement measure, have been already constituted in the prior-to-implementation national legislation of the Baltic countries. In Lithuania they have been embodied in Article 1.138 of the Lithuanian Civil Code, also in the national IP legislation before the adoption of the Enforcement Directive<sup>735</sup>. In view of implementation of the Directive, the provisions did not require additional legislative improvements in Lithuania<sup>736</sup>. The national provisions on provisional measures, including injunctions, were established in the implementing pro-

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731 See *refs.* to legislative balancing schemes to ensure rights and interests of the opposing party in *supra* § 5D.I.3.e). Also, notably, *e.g.*, Art. 391 of the Estonian CCP does contain the obligation to compensate the damage caused to the other party by the securing of the action if, *inter alia*, court judgment for refusal to satisfy or hear the secured action enters into force, or the proceeding in the matter is terminated on any other grounds except approval of the compromise of parties.

732 *Injunctions* have been embodied in the copyright laws of Germany, Switzerland and Austria, as referred and examined in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 244-245.

733 See examination of Art. 11 of the Directive in *supra* § 5A.II.1.c).

734 There was no national case practice observed, which would illustrate cases when the IP infringement was found, however, the courts did not order a permanent injunction due to certain specific factors of the case (which could be considered as a similar outcome following the US Supreme Court Decision of 15 May 2006, *Ebay Inc. et al vs. Mercexchange LLC*); see also explanations in *Correa*, A Commentary on the TRIPS Agreement, pp. 423-424.

735 Art. 77(1)(2) of the Lithuanian Copyright Law, Art. 41(1) of the Lithuanian Patent Law, Art. 50(1) (2) of the Lithuanian Trademark Law, Art. 47(1) (2) of the Lithuanian Design Law and Art. 21(1) of the Lithuanian Semiconductors Law (before their implementing amendments in 2006).

736 As similarly argued in *Mizaras*, Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect, pp. 62-63.

visions set out in Latvian and Estonian CCPs<sup>737</sup>. The court practice to order permanent injunctions in IP infringement cases has been, however, modest in the Baltic jurisdictions<sup>738</sup>.

## b) Possibilities of preventive claims

Although they are not directly mentioned in Article 11 of the Enforcement Directive, but anticipated in view of its Article 9(1)(a), also Recital 24, as well as in view of Article 41 of the TRIPS Agreement<sup>739</sup>, injunctions to prevent from carrying out acts because of which the rights may be actually infringed or damage may be actually caused in the future can be ordered by the courts. A so-called *preventive claim* refers to infringing activities that, in case of a real threat, can occur in the future. Hence, it has to be distinguished from an injunction regarding discontinuation of infringing activities that actually occurred<sup>740</sup>.

Before the implementation of the Directive in Lithuania the national legislation on IP rights already established a right to ask the court to adopt a decision to prevent from carrying out acts because of which the rights may be actually infringed or damage may be actually caused<sup>741</sup>. Such substantive civil remedy was not specifically provided before the amendments to the Copyright Law in 2003, also in the laws on industrial property. Preventive claim could be, on the other hand, submitted on the basis of Articles 1.138 and 6.255 of the Civil Code. The same provisions of the Civil Code and the amended specific provisions in the national IP laws can be currently applied in case of submission of preventive claims to the courts<sup>742</sup>. According

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737 Art. 250(17) of the Latvian CCP covers permanent injunctions in IP cases.

738 E.g., there were 12 requests submitted to apply injunctions in IP cases (9 requests were met), whereas in 2005 there were 6 of such requests (5 were met), as reported by Vilnius District Court in *Questionnaire Regarding Implementation of the Enforcement Directive in Lithuania in 2005-2008. Answers by Lithuanian Supreme Court, the Court of Appeal and the Vilnius District Court (unofficial publication)*. Note: it is not indicated if the requests concerned preliminary or permanent injunctions.

739 See also interpretation of the content of Art. 41 of TRIPS in *Correa*, A Commentary on the TRIPS Agreement, p. 411.

740 In Estonia, for instance, the Supreme Court in its Decision No. 3-2-1-167-04 concluded that it was not possible to claim to stop abstract copyright infringement in the future, the claim to stop future actions had to be concrete, as pursued by the Law of Obligations Act, Art. 1055. However, the lower instance courts used to argue that a preventive injunction could derive from the content of the claim, considering that the plaintiff sought for a continuous protection of his registered rights, as follows from Tartu Circuit Court, Civil Case No. 2-2-188/2003, Decision of 10 December 2003, *AS Flora Liit vs. AS Flora*. In Latvia, following the formulation of Art. 250(17) of the CCP (on permanent injunctions), a preventive claim can be submitted.

741 Art. 77(1)(3), the 2003 Lithuanian Copyright Law.

742 Notably, the statute of limitations is not applicable while submitting a preventive claim because they are based on still continuing activities. The general 3-years statute of limitations is applicable to claims regarding damage incurred due to infringements of IP rights, except claims regarding infringements of personal non-pecuniary rights, as follows from Arts. 1.125(8), 1.134(1) of the Lithuanian Civil Code.

to the general formulation embodied in Article 6.255 of the Lithuanian Civil Code, the aim of a preventive claim is to prevent from any potential damages that may occur in the future. Considering such aim, preventive claims are based on the following conditions.

*First*, there should be a real threat of infringing activities. Importantly, a threat of possible infringing activities cannot be presumed and should be substantially proved by the plaintiff. The national legislation does not provide any guidance what a real threat specifically means and what evidentiary means can be provided to prove it. Thus, it is left for the court's discretion to decide. The references can be made, though, to the court practice of other countries. In Germany a threat which is a basis to submit a preventive claim can be proved by referring to the infringement which has been already committed by the same defendant, also to the nature of activities of the defendant, *e.g.* publishing activities by using software, pharmaceutical-related activities using patented products. In Austria, for instance, the defendant's involvement in other infringing activities, which can be related to IP infringements counts as well, *e.g.* the defendant is involved in illegal distribution of certain movies, thus there is a threat that such activities can cover distribution of other copyrightable material as well<sup>743</sup>, etc.

*Second*, similarly to application of measures for preserving evidence and procedural provisional measures the fact of infringing activities matters. The obligation to prove a defendant's fault is not required by the applicable laws<sup>744</sup>. However, as argued<sup>745</sup>, the defendant's rights, also public order are to be carefully considered by applying a principle of proportionality, *i.e.* by considering the nature of defendant's activities and other circumstances of the case.

### 3. Injunctions against intermediaries

Articles 9(1)(a) and 11 of the Enforcement Directive contain one more very important provision. Both embody a possibility for the national courts to order interlocutory injunctions as well as permanent injunctions against intermediaries<sup>746</sup>. Importantly, permanent injunctions against intermediaries are to be applied without prejudice to Article 8(3) of the Copyright Directive<sup>747</sup>. In view of widespread use of internet services, the growth of IT services and, at the same time, the increasing number of IP rights infringing content on the Internet, which is not an exception for the Baltic countries as well<sup>748</sup>, the implementation of the provision on injunctions against in-

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743 As provided in *Mizaras*, Civil Remedies for Infringement of Copyright, pp. 254-256.

744 See *Commentary of Civil Code of Lithuania*, pp. 355-356.

745 See *Mizaras*, Civil Remedies for Infringement of Copyright, p. 256.

746 The term “intermediaries” can be described as operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services (ISPs), etc., as follows from *ECJ*, Decision as of 29 January 2008, Case No C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España S.A.U.* (2008), para 34.

747 See also *refs.* in *supra* § 5C.II.1.a).

748 See overview on IP piracy level and forms in the Baltic countries in *supra* § 4A.II.

intermediaries is important. Considering a preventive role of injunctions, intermediaries, be they local or foreign companies, are to be aware of such regulation and to take all precautionary measures to control, to the most possible extent and technical and (or) administrative possibilities, the content of services which are being provided by them and used by third parties.

Injunctions against intermediaries have been already embodied in the prior-to-implementation Lithuanian Copyright Law by transposing the provisions set out in the Copyright Directive in 2003. The national provisions on injunctions were, however, omitted in Lithuanian laws on industrial property which were respectively amended in 2006<sup>749</sup>. Article 78(1) of the current Lithuanian Copyright Law sets out that owners of copyright, related rights and *sui generis* rights shall have the right to apply for an injunction against an intermediary, with the aim of prohibiting him from rendering services in a network to third parties who make use of these services infringing their rights. The same provisions are embodied in Lithuanian industrial property laws<sup>750</sup>. The implementing Latvian and Estonian legislation also constitutes a right to request an injunction against intermediaries<sup>751</sup>.

In Lithuania the courts can order three types of injunctions against intermediaries which provide services to third parties who infringe IP rights: (1) suspension of a transmission of information related to the infringement of the rights, (2) elimination of such information, if an intermediary has technical means to carry this out, or (3) removal of the access to information infringing the rights, as provided in the national IP laws.

Injunctions can be ordered on the basis of a request of an interested party which, by applying to the court, is required to provide any information that an intermediary's networks, websites, servers contains infringing content. By analysing the national legislation on injunctions against intermediaries, it can be observed that practical application of such injunctions can be complicated for a couple of reasons, though. *First*, difficulties to collect *reasonably available evidence* about the alleged infringing content online can be anticipated. As the information in intermediaries' networks, websites or servers can be very temporary, the right holders are to maintain certain system to regularly control it and collect evidence which for many right holders can be time-consuming exercise that is not directly related to their primary activities. It is presumed that applications to order injunctions to intermediaries can mainly follow the fact when IP right holders detect a substantial amount of evidence about infringing content online, collect (actually, print in hard copies) evidence re-

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749 See *refs.* to the implementing legislative acts in *supra* § 5B.I.1.c).

750 Art. 41(4) of the Patent Law, Art. 50(4) of the Trademark Law, and Art. 47(4) of the Design Law of Lithuania.

751 Art. 250(10)(3)(3) of the Latvian CCP (provisional injunction) and Art. 250(17)(3)(3) of the CCP (permanent injunction); also Art. 69(1)(7) of the Latvian Copyright Law provides for the right to request intermediaries to cease providing services to third parties who infringe the relevant IP rights. If such request is not complied with, the claimant may bring an action against the intermediary. In Estonia, however, the law does not *expressis verbis* contain such provision, but the court may take any measure considered necessary by the court to secure an action, as provided in the Estonian CCP.

garding such content and promptly submit a request for an injunction, be it interlocutory or permanent. *Second*, as the national court practice on the issue is more than modest, it is difficult to anticipate how the local courts would examine the information about the alleged infringements which is provided in a form of, for instance, printed emails or lists regarding P2P files, or any other infringing content downloaded on ftp servers. The issue regarding solidity of such evidence can be yet raised by the courts.

Last but not least, injunctions are to be generally seen in the concept of liability of intermediaries in cases of infringing content online downloaded by third parties. By virtue of the Directive on E-Commerce<sup>752</sup>, intermediaries are not generally liable for IP infringements online, except the cases when they: (a) initiate the transmission; (b) select the receiver of the transmission; (c) select or modify the information contained in the transmission; or (d) they are aware about the infringing content on their websites, networks or servers, including infringing copies or references. Thus, intermediaries' liability is based on their fault (intent or gross negligence) which is required to be proved in order that damages can be awarded. On the other hand, although the general obligation to monitor the content online is not established<sup>753</sup>, intermediaries can be requested to control the content by the interested parties (IP right holders) and inform them accordingly<sup>754</sup>. Although there are no specific provisions which establish such duty in the national legislation as well, the requests from IP right holders may be considered while assessing the evidence regarding IP rights infringements and ordering injunctions against intermediaries by the courts in view of requirements to observe personal data protection and confidentiality of information<sup>755</sup>.

#### 4. Assurance of compliance with permanent injunctions

Another aspect which is to be mentioned in view of the implementation of Article 11 of the Enforcement Directive is imposition of penalty payments for non-compliance with an injunction ordered by the court. Considered as an effective security mean, such requirement can, but must not be embodied in the national legislation. By virtue of Article 77(2) of the Lithuanian Copyright Law:

752 Namely, Articles 12-15 of the E-Commerce Directive.

753 See *ECJ*, Decision as of 29 January 2008, Case No C-275/06, *Productores de Música de España (Promusicae) vs. Telefónica de España S.A.U.* (2008), paras 50-71; also previous discussion regarding provision of information by the intermediaries in supra § 5D.II.2.

754 Such mutual cooperation, for instance, was established in the Memorandum of Understanding signed by the IT companies and IP right holder associations in Lithuania in 2003, see also corresponding *refs.* in supra § 4A.II. It can be also agreed with the opinion that notice and take-down procedures should be taken as a ground to release host providers from liability, except cases of intent or gross negligence, as expressed in *Osthaus*, *Fighting Piracy and Counterfeiting in the Light of European Principles of eCommerce*, pp. 646-647.

755 See also observations regarding consideration of personal data protection and protection of confidential information in supra § 5D.II.1.

“Seeking to ensure the enforcement of an injunction to continue the unlawful acts, as well as an injunction to prevent any acts because of which the rights may be actually infringed or damage may be actually caused <...>, the court may, at the request of the persons who are entitled to make such demands, obligate an infringer to lodge adequate assurance intended to ensure compensation for any possible damage.”<sup>756</sup>

Thus, instead of requirement to pay penalty in case of non-compliance with the court’s injunction, as formulated in Article 11 of the Enforcement Directive, the lodging of assurance for damage compensation to right holders is provided in the Lithuanian laws. It can be agreed with the opinion<sup>757</sup> that such assurance for compensation is more effective in view of the aims of the Directive for the following reasons. *First*, it allows having more forms of the adequate assurance to compensate possible damages (e.g., it can be mortgage, real estate bonds, bank deposit instead of lump-sum payment). *Second*, it provides for more security for right holders and it is more preventive because infringers’ economic interests can be more tightened by such requirement than by a just lump-sum payment. It should be also noted that practically payment of penalty is not eliminated. As follows from Article 771(5) of the Lithuanian CCP, which establishes general liability rules for debtors for their non-compliant activities or inaction, it is likewise possible to impose penalty. It means, in turn, that by ordering injunctions the courts can alternatively choose which form of assurance to request in order the interests of right holders are secured in the case at hand.

## II. Concluding remarks

The implementing national legislation of the Baltic countries demonstrates a full scale legislative implementation regarding provisional and precautionary measures in view of Article 9 of the Directive and injunctions in view of Article 11 of the Directive, especially, concerning injunction against intermediaries. Although the case practice on application of the listed measures in IP infringement cases is still under development, some important aspects for the upcoming practice are to be mentioned.

It can be observed, *first*, that the national legislators, namely, the Lithuanian legislator went beyond the minimal standard which is established in the Enforcement Directive in some cases. This namely refers to: (i) non-requirement to establish “commercial scale” in allegedly infringing activities in order to apply orders (as far as provisional measures are concerned) to communicate bank, financial or commercial documents, or provide appropriate access to the relevant information from alleged infringers, also (ii) lower standard for evidence to be provided to the court while asking to order an interlocutory injunction, i.e. *sufficient grounds to suspect* that an infringement of IP rights in question has been committed, instead of *suffi-*

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<sup>756</sup> The identical provisions are embodied in the Lithuanian industrial property laws.

<sup>757</sup> As explained in *Mizaras*, Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect, p. 64.