that measures for preserving evidence are in compliance with the ECHR, provided that those measures are effectively used to prevent other persons from using evidence which is to be preserved under the court order[697].

The protection of confidential information can be accordingly secured by requiring an attending expert or specialist to sign an obligation regarding non-disclosure of confidential information which is detected during the performance of civil search and assured by the bailiff[698]. It should be however noted that, interpreting the implementing provisions in the national legislation, confidential information covers the attorney-client privilege as well[699].

II. Right of information under the national legislation in view of Article 8 of the Directive

1. Scope and content of requested information

Measures for preserving evidence serve to collect evidence which can support or deny existence of certain circumstances which are relevant to IP infringement cases in question. Right of information, as harmonized by Article 8(1) of the Enforcement Directive[700], similarly pertains to such aims. This harmonized legal institute was relatively new to many EU countries, including the Baltic countries, especially as far as information to be provided by third persons was concerned.

Differently from the industrial property laws which did not embody the provisions on right of information before the implementation of the Enforcement Directive, the Lithuanian 2003 Copyright Law already stipulated such provision[701]. The information, which could be requested from infringers at that time, covered the origin of infringing copies, especially the identity (names and surnames) and addresses of producers, suppliers (distributors), clients, channels of distribution of infringing copies of works, amount of produced, submitted, received or ordered infringing copies only. Similar information could be requested according to the prior-to-implementation provisions of the Latvian and Estonian CCPs. Generally, the prior-to-implementation national provisions on right of information obviously required

697 Such practice of proportionality between the interference of the applicant's right and other legitimate aims has been also established by, *e.g.*, ECtHR, *Chappel vs. United Kingdom*, 30 March 1989, Case No. 17/1987/140/194. ECtHR has interpreted that the term "*private home*", in view of Art. 8 of the ECHR, also covers business premises.

698 In the French practice the issue of confidentiality is solved by asking the bailiff to put confidential documents, etc. in the sealed envelope which can be further submitted to the court, as referred in *Véron*, "Saisie-Contrefaçon" an Overview: France, p. 138.

699 It can be also compared with the German practice on the issue, as referred in *Schuster*, The Patent Law Wilfulness Game and Damage Awards, pp. 129-130.

700 See examination of Art. 8 of the Enforcement Directive in supra § 5A.II.1.a).

701 The right of information, however, was not established in the Lithuanian 1999 Copyright Law. See also *refs*. to prior-to-implementation of the Directive national legislation in supra § 5B.I.1.a)(1).

more precise wording in view of the formulation of Article 8 of the Directive[702], *i.e.* the content and providers of such information were to be specifically defined.

By virtue of the implementing amendments in the special IP laws in Lithuania, also the CCPs in Latvia and Estonia, IP right holders can exercise their right of information by submitting a proportionate request to the court *during the proceedings* concerning the infringement, hence, the institute is not covered by pre-trial measures. Such request can be submitted with other requests, for instance, regarding application of provisional measures (injunctions), corrective measures or submission of financial or commercial documents which can contain case-relevant information. As far as the content of information is concerned, by implementing the Enforcement Directive in 2006 and amending the national IP laws in Lithuania, the *Seimas* went beyond the minimal set of the information that could be requested according to the Directive. Besides information which is listed in Article 8(2) of the Directive[703], Article 79 of the implementing Lithuanian Copyright Laws additionally provides for:

> "3) information on the exploited works and objects of related rights or *sui generis* rights, the scope and duration of their exploitation, income received by the users and other information necessary for calculation of remuneration."

The more extensive content of information that can be requested according to the Lithuanian IP laws can be considered as more favourable for right holders in view of Article 2(1) of the Directive, however, exercise of such right of information should fall under due scrutiny of particular circumstances of each case and of rights and interests of other persons in order there is no misuse of such right. An application of right of information serves as important procedural tool for IP right holders not only to receive information regarding alleged infringers of their rights, nature and location of the infringing activities, etc., but also to collect all relevant data and information, which are not in their possession, that can be helpful to assess damages, including profit gained by infringers. Notably, however, that the national laws on industrial property in Lithuania do not provide such additional clause which can be considered as legal inconsistency. Copyright, related rights and *sui generis* rights holders can be held in more favourable position in cases of calculation of remuneration.

Considering complexity of calculation of remuneration of damages in IP infringement cases in general, the provision on third party information can be effective for IP litigation practice, especially in cases of information that can be requested from intermediaries who provide services or access to telecommunication networks to other persons who can be infringing IP rights (for instance, ftp-related services, P2P services, etc.). Moreover, provision of information is also relevant in terms of

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702 Such suggestion was expressed in *Mizaras*, Study on the Implementation of the Enforcement Directive into the Lithuanian Copyright Law, p. 52.

703 Art. 8(2) of the Directive lists: *(i)* the names and addresses of the manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers; *(ii)* the quantities of manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question. Such list of requested information is reflected in Art. 250(16) of the Latvian CCP. Art. 280 of the Estonian CCP stipulates the obligation to provide information in action related to intellectual property.

discontinuing infringing activities, preventing from infringements in the future and application of corrective measures[704].

2. Providers of requested information

The implementing amendments introduced one of the most important changes in terms of the institute of right of information in the national legislation of the Baltic countries, *i.e.* that information can be requested not only from direct infringers, but also from third persons who are not infringers[705]: *(i)* persons who possess for commercial purposes the goods and copies of works, other objects of the protected rights, which infringe the protected rights, *(ii)* who were found to be using on a commercial scale the services infringing the protected rights or *(iii)* who were found to be providing on a commercial scale services used by third persons in activities infringing the protected rights, as well as *(iv)* those indicated by the above mentioned persons as being involved in the manufacture or distribution of the goods or copies of works, other objects of the protected rights, which infringe the protected rights, or the provision of the services, infringing the rights defined under the IP laws[706].

Similarly, in Latvia the information can be requested from a third party, which is in possession of counterfeit goods on commercial scale, or which has on commercial scale provided or used services in connection with the illegal use of IP object, or which has been indicated by the person noted in the above two examples to be involved in the manufacturing, distribution or supply of the counterfeit goods (or provision of services in connection with the illegal use of IP objects)[707].

The important aspect is that, the same as formulated in Article 8(1) of the Directive, direct infringers are to provide information irrespective whether an infringement is committed for commercial purposes or not, whereas third persons are required to provide information only in case of commercial purposes involved in their activities[708].

Noticeably, provision of such information should be performed by observing *proportionality* requirement, *i.e.* by observing if such measure reflects nature of the infringement in question, if it does not affect infringer's rights in unjustified manner, etc. Other legal limitations such as provisions which afford an opportunity for refusing to provide information which would force the person to admit to his own participation or that of his close relatives in an infringement of the protected rights and govern the protection of confidentiality of information sources or the processing of

704 See *Mizaras*, Copyright Law (Vol. II), pp. 397. Also further examination of the implementing legislation on corrective measures in infra § 5F.III.1.

705 This is an important novelty which has been introduced by the Directive by taking the examples of practice of other countries; see more in *Knaak*, Die EG-Richtlinie zur Durchsetzung der Rechte des geistigen Eigentums und ihr Umsetzungsbedarf im deutschen Recht, p. 749.

706 Art. 79(2) of the Copyright Law, also Art. 41(1)(2) of the Patent Law, Art. 50(1)(2) of the Trademark Law, Art. 47(1)(2) of the Design Law of Lithuania.

707 Art. 250(16), the Latvian CCP.

708 On the term "*commercial purposes*" ("*commercial scale*") see discussion in supra § 5C.II.2.

personal data are to be considered. The observation of requirements regarding confidential information as well as provision of personal data is especially due in cases when the requested information is possessed by the intermediaries, *i.e.* operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services (ISPs), etc. Considering the growth of internet piracy which is a common phenomenon not only in the whole world, but also in the Baltic countries[709], provision of the requested information can be also seen in view of legal liability of internet service providers which is embodied in the national IP laws, *i.e.* ordering an injunction against the intermediary with the aim of prohibiting him from rendering services in a network to third parties who make use of these services infringing a copyright, related right or *sui generis* right, also patent, trademark or design rights[710].

In absence of national court practise on the application of the right of information in IP infringement cases so far[711], it is difficult to assess how the national courts are to practically solve the issues regarding requests by right holders to apply such measure in view of legal protection of other rights and interests protected by the national laws. It is assumed, however, that the courts are to follow other national provisions on definition of family or close relative relations in order to define certain limitation for application of right of information[712], also on protection of confidential information and processing of personal data[713].

As far as the balance between the protection and enforcement of IP rights and other fundamental rights and interests is concerned, the courts of the Baltic countries should likewise take into consideration the court practice on application of the right of information of other countries, also interpretations and conclusions made by the ECJ on the issue. For instance, as far as requirement for the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings is concerned, the ECJ concluded[714] that by transposing the provisions embodied in the E-Commerce Directive, the Copyright Directive, the Directive on Privacy and E-Communications, also the Enforcement Directive, namely its Article 8(1), a fair balance should be found be-

709 See also overview on IP piracy in the Baltic countries in supra § 4A.II.

710 See further discussion regarding injunctions against intermediaries in infra § 5E.I.3.

711 Only a few cases in which such request was submitted by the plaintiffs have been reported 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*); and no cases reported in *Latvian Ministry of Justice Information (2008) (unofficial information)*.

712 The corresponding national provisions can be found in the Constitution of the Republic of Lithuania (Art. 31), also the Civil Code and CCP.

713 Law Amending the Lithuanian Law on Legal Protection of Personal Data of 11 June 1996 No. I-1374 (new version of 1 February 2008, No. X-1444, to be entered into force since 1 January 2009); Estonian Personal Data Protection Act of 1 October 2003, amended 14 April 2004 (entered into force from 1 May 2004); Latvian Personal Data Protection Law of 23 March 2000, last on 19 December 2006.

714 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.

tween the various fundamental rights protected by the Community legal order, the principle of proportionality and protection of IP rights. Neither Article 8 and Article 9 of the Enforcement Directive nor Article 8 of the Copyright Directive provide an obligation for ISPs to report to IP right holders about the infringements of their rights. On the other hand, following the argumentation by the ECJ, it is not prohibited to embody such obligation in the national laws by virtue of protection of other rights, interests and freedoms of other persons.

III. Concluding remarks

Measures for preserving evidence in the form of so-called *civil (ex parte) searches* can be considered as essential tools for the relatively young and still forming practice regarding enforcement of IP rights in the Baltic countries, based on the implementing provisions in the special IP laws (Lithuania) and the CCPs (Latvia and Estonia) nowadays. The national court practice on preservation of evidence was quite modest before the implementation of the Directive in 2006 and it still is. More defined court practice on *civil (ex parte) searches* can be observed in the past years in Lithuania only. The examined Lithuanian court practice on the basis of the recent court rulings on this subject-matter and their enforcement can allow depicting features of actual implementation of this very important legislative novelty in the field of civil IP enforcement. Thus, the following observations can be made.

First, application of *civil (ex parte) searches* assures rapid and independent from police officers or prosecutors actions taken by IP right holders against activities which allegedly infringe their IP rights. By virtue of the examined wording of the Lithuanian implementing legislation on the subject-matter, it can be presupposed that IP right holders should be careful, though, to substantiate their requests, provide reasonably available evidence which will be further assessed by the courts. As the national practice on copyright infringement cases shows, the courts still face certain issues which mostly concern the definition of "*reasonably available evidence*" in those cases. It should be stressed that the implementing provisions embody low threshold of *prima facie* evidence while requesting a civil search, which should be followed by the national courts.

Second, the courts are also reluctant to apply "samples" provision in cases where there are many infringing items involved. It can be advocated that more frequent application of "samples" provision can contribute to effective preservation of evidence in the mentioned cases and foster speedier and less costly litigation scheme by also preventing against illegal use of protected IP subject-matter. The practice, which confirms the application of civil searches on *inaudita altera parte* basis, seems to turn to the direction where it is required from requesting parties to present at least sorted *prima facie* evidence to the court. In turn, IP right holders are required to substantiate their claims better, in order to assure more efficient and speedier civil proceedings in the court as well as to avoid any unsubstantiated or roughly substantiated claims.