

and/or specialists' opinions, etc.⁴⁵⁰) incurred by the successful party which, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.

Although the harmonizing provision in the Directive on the legal costs is laconic and comprises broad terms such as "reasonable and proportionate legal costs" without explaining how it should be estimated⁴⁵¹, it has an extreme practical importance in IP litigation process, especially in the jurisdictions where litigation is generally expensive⁴⁵².

III. Concluding remarks

Despite the initial positive legal and anti-piracy policy intentions for which the Enforcement Directive was welcomed, the legal context and the final wording of it left many doubts in terms of its actual harmonizing effect in different jurisdictions, including the Baltic countries. Such conclusion follows from the following observations.

First, the Directive, which goal was mainly to fight against piracy and counterfeiting by harmonizing the enforcement rules within the EU, did not indeed accumulate all methods and forms of IP enforcement, be they civil, administrative and criminal. The focus on civil enforcement alone was logically based on impossibility to cover all IP enforcement means, especially combining civil and criminal measures. It was due to the different legal nature and characteristics of civil and criminal measures. Moreover, harmonization of criminal measures on that stage would have been a quite demanding and legally doubtful exercise due to the fact that criminal law and criminal procedural law exceptionally falls under the scope of the national regulation of the Member States.

Second, a legal uncertainty remains due to the scope of the Enforcement Directive. The Directive is applicable to *all* IP rights, including industrial property rights, by not addressing essence and nature of the latter rights due to their specific subject-matter. The same applies to the specificity of the systems of Community rights to which the Directive does not give any special attention and also other rights which are not IP rights from their essence (so-called "grey area" rights), however, which can indirectly fall under the scope of the Directive.

Third, although the best legal practices in some countries regarding the application of some enforcement institutes had been duly considered, the Enforcement Directive has been drafted without actual assessment of certain characteristics of legal traditions of the EU Member States. The consideration of the accession fact of new

450 The list of sample expenses has been initially provided by the Commission, as referred in *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 22.

451 The same can be said about the provision on legal costs, embodied in Article 45(2) of TRIPS, which, interestingly, covers appropriate attorney's fees as an optional part of the expenses; see also Correa, A Commentary on the TRIPS Agreement, p. 427.

452 On the legal costs in the Baltic legislation and IP litigation practice see further discussion in infra § 5F.II.

Member States and their relatively young IP traditions and a legal heritage from the Soviet legal tradition was not taken into account.

Last, but not least, the obligations of the Member States to enforce the TRIPS standards regarding enforcement of IP rights prior to the Enforcement Directive have been not addressed as well. As rightly argued, instead of the possible revision on how the EU Member States implemented the TRIPS standards, the Enforcement Directive has been adopted by demonstrating the low-level *acquis* which can actually reduce its harmonizing effect. Such effect can be also reduced by leaving discretion for the national legislators to determine a scope of application of some provisions of the Directive on the basis of the applicable law. On the other hand, the national legislators of the Member States – also the national legislators of the Baltic countries – were obliged to adopt new enforcement provisions related to collection of evidence, damages, the right of information, etc., in view of the aims pursued by the Enforcement Directive. It deemed to be positive improvement in terms of comprehensive IP rights enforcement scheme in the Baltic region.

B. Implementing legislation of the Baltic countries

I. Legislative (formal) implementation

1. Prior-to-implementation provisions on IP enforcement, duration of the implementation and the implementing provisions

Already before the adoption of the Enforcement Directive on 29 April 2004, the Baltic IP legislation contained a number of provisions regarding enforcement of IP rights. The provisions were mainly embodied in the national special laws on IP rights as well as in the Civil Codes⁴⁵³ and Codes of Civil Procedure. The key provisions on civil enforcement remedies in both copyright and related rights as well as industrial property legislation, which were constituted before the adoption of the implementing amendments, are further examined.

a) Prior-to-implementation national IP enforcement provisions: key aspects

(1) Copyright legislation

The extensive list of provisions on enforcement measures and remedies regarding infringements of copyright, related and *sui generis* rights could be found in the Lithuanian Copyright Law. Importantly, since its initial adoption in 1999 and its later amendments in 2003⁴⁵⁴, Chapter VI of the mentioned law embodied the provisions

⁴⁵³ See also *refs.* regarding the national Civil Codes in *supra* § 3B.III.1.

⁴⁵⁴ The amendments to the Lithuanian Copyright Law in 2003 mainly covered the implementation of the provisions set out in the Copyright Directive. See also further *refs.* to the legislative acts in this section.