

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.

Third, the Lithuanian practice on civil searches is limited to copyright infringement cases. It does not allow making the whole picture of the actual implementation of this institute, considering also other IP rights. The reasons for such practice can be found in the facts that only foreign companies, mainly software IP right holders, tried to request for civil searches considering that evidence in their rights infringement cases is a very delicate matter, *i.e.* it can be easily destroyed or hidden by the opposing party.

Fourth, it is also observed that the competence of court bailiffs, experts or specialists who are able to promptly evaluate evidence, to measure which evidence is to be taken as samples, etc. as well as the competence of attorneys who prepare necessary procedural documents to be submitted to the court for application of measures preserving evidence is essential for application of *civil (ex parte) searches*. The appropriate competence and knowledge in the field allows the listed persons to avoid inappropriate application of measures, as provided in Article 7(4) of the Enforcement Directive, and to achieve the aims of civil searches in general.

Fifth, an application of *civil (ex parte) searches* can have a deterrent effect. It can be anticipated that, by being aware of successful application of such searches which are held independently by IP right holders, companies will intend to assure that only legal IP products and (or) material are used in their businesses, by maintaining their IP assets, respectively. Companies, which use IP products in their commercial activities, are to take a due care and maintain all documents related to purchase and use of those IP products in their premises, by considering a possibility of surprise searches that can be performed by right holders on the basis of the court rulings. As a matter of fact, the opposing party is usually informed about the court ruling upon performance of a civil search and has a right to appeal it, in case its legal interests such as confidential information, etc. are infringed or unduly affected.

As far as the harmonizing provisions regarding the right of information are concerned, it should be mentioned that the implementing national legislation almost literally transposed the corresponding provisions on the content of requested information, also list of persons who can be requested to provide information. As the latter is concerned, it should be highlighted that the implementing national legislation provides for a possibility to request third parties to provide such information. The Lithuanian legislator even broadened the scope of the requested information under the Copyright Law, which is considered as more favourable solution for copyright and related right holders. Court practice on the issue is, however, modest which does not allow discussing actual implementation aspects on the subject-matter so far. On the other hand, considering the transposition of the provisions regarding provision of information by third parties, especially intermediaries, *i.e.*, the cases regarding IP infringements online and submission of the relevant information, can be expected in the near future.

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 activities⁷¹⁵.

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 measures⁷¹⁶.

By examining the wording of the implementing provisions on provisional measures in Lithuanian legislation on IP rights⁷¹⁷, 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.”⁷¹⁸

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 Trademark Law, and Art. 47(3) (2) of the Design Law of Lithuania.

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