with protection of IP rights and the "IP mentality" in the respective jurisdictions. It should be noted, however, that in practice the national courts are to apply those legislatively established civil enforcement means in proportionate, fair and reasonable manner, so that interests and rights of third parties are adequately considered in order to avoid any abuse of IP rights enforcement system.

C. General provisions of the Enforcement Directive in view of the implementing Baltic legislation and other Baltic national laws

I. Interpretation of the "subject-matter" under Article 1 of the Directive

By virtue of the final wording on the subject matter as set out in Article 1 of the Enforcement Directive, the term "*intellectual property rights*" also comprises industrial property rights[502]. However, a certain uncertainty or, at least, a possibility for a wide interpretation has been still left in view of the list of rights regarding which the harmonized enforcement measures and procedures are to be implemented.

Article 1, which is to be read together with Article 2(1) and Recital 13 of the Enforcement Directive, does not make any distinction in terms of any substantive intellectual property rights, be they national IP rights or IP rights deriving from the Community legislation, including also acts of unfair competition, parasitic copies or similar activities. The Commission's position is therefore further examined in order to assess the initial ideas regarding the scope of the subject-matter covered by the Directive. The subject-matter regulated under the implementing legislation and other national legal acts is subsequently discussed.

1. The Commission's position

In order to define the term "subject-matter", as set out in Article 1 of the Directive, a reference to the initial Commission's position is to be first made. In its Explanatory Memorandum[503], the Commission expressed the view that the Directive had to be focused to at least the rights such as copyright, related rights, *sui generis* rights and rights regarding topographies of semiconductor products, trademarks, designs, patents, utility models, rights regarding geographical indications, plant varieties, rights to other trade (commercial) indications, provided such rights are protected under the

502 Although it was suggested to exclude patents from the scope of the Directive, as referred in *Fourtou Report (2003)*, p. 6, the decision to comprise them under that scope has been finally taken.

503 See *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, pp. 4-5.

national laws. Such position was repeated in the Statement made by the Commission on the scope of Article 2 of the Enforcement Directive in 2005[504].

The final wording of the "subject-matter" was adopted without considering a proposal expressed in *Fourtou Report* regarding the elimination of patents from the scope of the Directive[505]. Another criticism referred to terms such as acts carried out on "*commercial scale*" which could be treated as being inherent for industrial property[506], but not for all IP rights, though. This implicated a broad final formulation regarding IP rights covered by the Directive and could be further considered as being far more reaching harmonization goal in comparison with the one initially pointed out in the Explanatory Memorandum by the Commission[507].

Furthermore, the broad "subject-matter" under the Directive left possibilities for *de facto* expansion of the harmonized regulation area into so-called "grey areas" such as personality rights, trade secrets[508], also firm names, provided they are protected under the national legislation. Assumingly, it also provides for an opportunity, or, one may say, an advantage, to the national legislators to have wider discretion rights to include enforcement measures and procedures applicable to "grey area" rights as well as moral rights in the implementing national laws[509], although it was not explicitly mentioned in the Directive.

2. The protected "subject-matter" under the Baltic national legislation

a) The definition of "IP rights" under the Baltic legislative acts

(1) IP right holders and their economic rights

By virtue of the implementing legislation in Lithuania, *i.e.* the Copyright Law, Patent Law, Trademark Law, Design Law and the Law on Legal Protection of Topographies of Semiconductor Products[510], enforcement measures, procedures and remedies are those applicable in case of infringement of the following rights which are listed in the respective implementing laws: copyright and related rights (rights of performers, producers of phonograms, broadcasting organisations and producers of

504 Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights. OJ L 94, 13.4.2005, p. 37.

505 See *Fourtou Report (2003)*, pp. 6, 25.

506 See *Cornish et al.*, Procedures and Remedies for Enforcing IPRs: The European Commission's Proposed Directive, p. 447.

507 As stated by the Commission in *Explanatory Memorandum of the Commission's Proposal for a Draft Enforcement Directive (2003)*, p. 5: "It is thus a logical extension that the Community should take an interest in the effective enforcement of the intellectual property rights which it has harmonized or created at Community level."

508 See *Kur*, Enforcement Directive – Rough Start, Happy Landing? P. 824.

509 See *Massa, Strowel*, The Scope of the Proposed IP Enforcement Directive, p. 248.

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

the first fixation of an audiovisual work (film)), also *sui generis* rights to databases; industrial property rights such as patents, trademarks, designs, also rights related to topographies of semiconductor products. Rights to the listed objects comprise an exclusive right of the owners to manufacture, use, import, export, offer for sale, etc. (as far as industrial property rights are concerned); also reproduce, publish, distribute, adapt, broadcast, make available to the public, etc. (as far as copyright and related rights are concerned).

Moreover, according to Article 56(3) of the implementing Lithuanian Trademark Law, the remedies which are provided in this law are *mutatis mutandis* applicable to rights related to geographical indications[511]. The amended Law on the Protection of Plant Varieties[512] also provides the Directive-based enforcement means which can be applicable in case of infringement of rights on plant varieties.

A similar list of IP rights can be made while examining the subject-matter defined in both Latvian and Estonian IP legislation on copyright and neighbouring rights, which also cover the rights of database makers (*sui generis* rights), as well as legislation on patent, trademark and industrial design rights, also rights related to topographies of semiconductor products, geographical indications and plant varieties[513]. It can be additionally noted that, differently from Lithuania and Latvia, utility models are protected in Estonia[514].

(2) Moral rights

As far as copyright and neighbouring rights are concerned, besides the listed economic rights, the copyright laws of the Baltic countries embody moral rights of authors and performers[515]. The provisions regarding the redress of damage for infringement of moral rights of authors and performers are listed in the sections on enforcement of rights embodied in the national copyright laws[516]. The latter laws generally provide for a possibility to claim moral damage which is assessed by the

511 The registration and protection of geographical indications is regulated under the EU Council Regulation 1791/2006/EC, OJ 2006 L 363, 20.11.2006, p. 1; also under the Order of the Minister of Agriculture of the Republic of Lithuania No. 499 as of 26 February 2007. Neither the Regulation nor the Order establishes specific enforcement remedies, measures or procedures.

512 Chapter X, the Lithuanian Law on Plant Varieties, see also *ref.* to the legislative act in supra § 5B.I.1.

513 See *refs*. to the legislative acts in supra § 5B.I.

514 Utility Models Act, passed on 16 March 1994 (entered into force 23 May 1994), last amended 10 March 2004 (entered into force on 1 May 2004) (hereinafter – the "*Estonian Law on Utility Models*").

515 Art. 14(1) of the Lithuanian Copyright Law embodies non-transferable moral rights of authors: *(i)* the right of authorship, *(ii)* the right to the author's name, *(iii)* the right to the inviolability of a work. Performers also enjoy their moral rights in their direct (live) performance or the fixation of his performance, as set out in Art. 52 of the Law. In Latvia moral rights of authors are protected under Sec. 14 of the Copyright Law, and in Estonia under Art. 12 of the Copyright Law.

516 Art. 84 of the Lithuanian Copyright Law, Art. 81(2)(1)(1) of the Estonian Copyright Law, and Sec. 69 of the Latvian Copyright Law

courts while applying other civil enforcement remedies, including an economic damage[517]. Although the Enforcement Directive does not regulate civil enforcement measures, procedures and remedies related to infringements of moral rights, the Baltic national legislation contains such provisions which are to be considered being more favourable for right holders pursuant to Article 2(1) of the Directive.

b) "Grey areas" under the national legislation

(1) Non-property rights, firm names, commercial (industrial) secrets

By virtue of Recital 13 of the Enforcement Directive, the list of IP rights which are protected under the national IP legislation and to which the harmonized enforcement measures are to be applied directly, can be also complemented with other rights that are protected under the Lithuanian Civil Code, Estonian Law of Obligations Act[518] and Latvian national legislation[519]. Although those rights are not, as a rule, considered IP rights as such, they either embody moral non-property related interests and values or they can be treated as results of certain intellectual activity or an identification of commercial (trade) activities which is similar to the notion of trademarks such as firm names[520].

Amongst the list of the subject-matter regulated under the Lithuanian Civil Code[521], special personal non-property rights and values, also rights to a business name of a legal person[522] and to a commercial (industrial) and professional secret can be also analysed in the perspective of enforcement means as set out in the Direc-

517 Notably, Art. 68 of the Lithuanian Copyright Law as of 1999 provided for moral damage not less than 5,000 and not more than 25,000 Litas (ca not less than 1,449 Euro, not more than 7,246 Euro). In assessing the amount of moral damage, the court should take into account the degree of the culpability of the infringer, his (her) financial position, the consequences of moral damage, as well as other circumstances that were significant to the case, which the courts actually considered. *E.g.*, Decision of 19 February 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-273/2003, *J. Jakštas et al. and LATGA-A vs. UAB "Mūsų gairės"*. See also further discussion in infra § 5F.I.1.d).

518 Law of Obligations Act, as of 26 September 2001 (entered into force on 1 July 2002), last amended as from 1 May 2004.

519 In Latvia the provisions on moral non-property related interests and values or on identification of commercial (trade) activities, which are not IP rights, for instance, trade secrets can be found in the national Civil Code, the Labour law, the Criminal law, the Law on Competition, the Civil law, the Freedom of Information law, the Commercial law, etc.

520 Notably, Lithuanian Supreme Court also heard the dispute regarding the firm name infringing the well-known trademark which was followed by the landmark decision on the issue, *i.e.* Decision of 27 March 2006, Lithuanian Supreme Court, *Danish Company "Kirkli A/S" ("Lego Juris A/S") vs. UAB "Legosta"*.

521 The list of civil subject-matter regulated by the Lithuanian Civil Code, which, *inter alia*, covers intellectual property, personal non-property rights, commercial (industrial) secret, is embodied in I Book, III Part, V Chapter of the mentioned Civil Code.

522 Business (firm) names of legal persons are not specifically regulated in Latvia and Estonia. The protection of such names can be asserted by application of the national trademark legislation of the corresponding countries.

tive. The protection of personality rights, including a disclosure of incorrect information, as established in the Estonian Law of Obligations Acts[523] can be similarly examined.

By further focusing on the listed rights in the mentioned jurisdictions, the question can be raised if the harmonized remedies, also procedures embodied in the Directive can be in any way applicable to cases of infringements of the mentioned rights on the national level. This is especially due considering novelties of civil enforcement such as the right of information, also *civil (ex parte) searches* as pre-trial measures.

(2) Civil enforcement remedies in cases of infringements of "grey area" rights

In Lithuania in case of infringement of special personal non-property rights and values such as a right to a name, right to an image, privacy and secrecy as well as a personal honour and dignity right, also a right to the inviolability and integrity of the person[524], besides an order to discontinue the infringing activities (injunction), non-pecuniary and pecuniary damage can be ordered. Damage is accordingly assessed under the norms of the Lithuanian Civil Code and other national laws, *e.g.* the law on provision of information to the public as far as right to an image and its commercial exploitation is concerned[525].

Regarding personal honour and dignity, a person has a right to demand refutation in judicial proceedings of the publicised data, which abase his honour and dignity and which are erroneous as well as redress of the property and non-pecuniary damage incurred by the public announcement of the said data. Where erroneous data were publicised by a mass medium (press, television, radio etc.), the person about whom the data was publicised has a right to file a refutation and demand the given mass medium to publish the said refutation free of charge or make it public in some other way. Such publication of information is similar to publication measures embodied in Article 15 of the Directive and in the implementing national legislation[526].

In Estonia, if personality rights are violated by defamation of a person, *inter alia*, by passing undue judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right, a person can ask the court to adjudicate damages. The obligated person should compensate the aggrieved person for the expenses caused to the person and for damage arising from a decrease in income or deterioration of the future economic potential

523 Arts. 131, 134(2), 1045(1)(4), 1046, 1047 of the Estonian Law of Obligations Act.

524 Art. 1.114, the Lithuanian Civil Code (I Book, III Part, V Chapter), also Arts. 2.20-2.25, the Lithuanian Civil Code (II Book, II Part).

525 Law on Provision of Information to the Public, revised version as from 11 July 2006. The remedies for infringements of, for instance, a right to an image and commercial exploitation thereof, are assessed on the basis of the Lithuanian Civil Code as the mentioned law, as observed in the landmark Decision of 15 March 2004, Lithuanian Supreme Court, Civil Case No. 3K-3-197/2004, *Linas Karalius vs. UAB "Ieva"*.

526 See more discussion on judicial practice regarding publication of the decisions in IP infringement cases in infra § 5F.IV.

of the aggrieved person, but only if this is justified by the gravity of the violation, in particular by physical or emotional distress. The law also provides a civil liability for a disclosure of incorrect information (publication measures). In that case, similarly to the Lithuanian practice, the person who disclosed such information should refute the information or publish a correction at the person's expense regardless of whether the disclosure of the information was illegal or not[527].

The provision regarding a right to commercial (industrial) and professional secret[528] directly refers that, in case of an infringement of this right, remedies, including also adjudication of actual damage, which are listed in the Lithuanian Civil Code are applicable. The rules regulating rights to business names of legal persons (firm names)[529] contain an explicit reference to remedies which are embodied in the articles on business names. The remedies, which are similar to the ones constituted in the national IP laws, contain a right of a legal person to request the court to oblige another legal person to discontinue unlawful acts (injunctions) or alter the business name and to redress the property and non-pecuniary damage incurred by the infringing acts. In case another legal person gained rights and assumed obligations by using other legal person's business name as a cover or used it without the latter's consent, remedies likewise would comprise a right of the legal person to request another legal person (infringer) to return everything he has acquired by using other person's name as a cover or using the said name without the latter's consent.

Additionally to those civil remedies which are directly embodied in the provisions on protection of special personal non-property rights and values, rights to a business name of a legal person and to a commercial (industrial) and professional secret, the plaintiff can also ask the court for other civil remedies constituted in the Lithuanian Civil Code[530]. The list of these other civil remedies comprises:

(1) an acknowledgement of rights;
(2) a restoration of the situation that existed before the right was violated;
(3) a prevention of unlawful actions or prohibition to perform actions that pose reasonable threat of the occurrence of damage (preventive action)[531];

527 Arts. 131, 134(2), 1045(1)(4), 1046, 1047 of the Estonian Law of Obligations Act.

528 Art. 1.116, Lithuanian Civil Code (I Book, III Part, V Chapter). Commercial (industrial) and professional secret is defined as information having a real or potential commercial value, not known to third persons and not freely accessible because of the reasonable efforts of the owner of such information, or of any other person entrusted with that information by the owner, to preserve its confidentiality (Art. 1.116(1), Lithuanian Civil Code).

529 Arts. 2.39-2.42 Lithuanian Civil Code (II Book, II Part, IV Chapter). A business name of a legal person is understood as a composition of words or word-combinations used in their figurative or direct meaning, following the legal requirements for making such composition, which enables to distinguish that legal person from other legal persons. Until 1 January 2004, the business names of legal persons were regulated under the Law on Firm Names as of 1 July 1999 in Lithuania.

530 Art. 1.138, Lithuanian Civil Code (I Book, V Part, VIII Chapter).

531 *E.g.*, in case of violation of a right to a firm name, the right holder can ask the court for an injunction to discontinue an infringement on the basis of Art. 1.138 of the Lithuanian Civil

(4) an ad judgement to perform an obligation in kind;
(5) an interruption or modification of a legal relationship;
(6) a recovery of pecuniary or non-pecuniary damage from the person who infringes the law and, in cases established by the law or contract, a recovery of a penalty (fine, interest);
(7) a declaration as voidable of unlawful acts of the state or those of the institutions of local governments or the officials thereof in the cases established in the Civil Code;
(8) other ways provided by laws.

Thus, the general civil remedies under the Lithuanian Civil Code, as listed above, which are applicable in cases of infringements of special personal non-property rights and values, rights to a business name of a legal person and to a commercial (industrial) and professional secrets, are similar to the remedies which are set out in the national IP laws for infringements of IP rights. Other enforcement remedies such as a right of information (Article 8 of the Directive), corrective measures (Article 10 of the Directive), alternative measures (Article 12 of the Directive), and alternative adjudication of compensation instead of actual damages (as constituted in the implementing Lithuanian Copyright Law only[532]) or pre-established damages (Article 13(2) of the Directive) which are embodied in the Directive and the national implementing legislation are not constituted in the Lithuanian Civil Code.

This allows observing that, according to the national legislation, the civil enforcement remedies, as harmonized by the Directive, are still specific for IP rights and they are not additionally applicable in case of infringements of personality rights, also rights to a name of a legal person or to a trade (commercial) and professional secret in Lithuania. Notably, civil enforcement procedures such as *civil (ex parte) searches*, provisional measures (on pre-trial stage, for instance) regarding "grey area" rights can be ordered under the general rules of the national CCPs. The same approach can be observed while examining Estonian and Latvian provisions on personal non-property rights and values. In comparison, in Germany, for instance, the personality rights are similarly protected under the German Civil Code which provisions specifically embody the liability for infringements of those rights as well as civil remedies[533].

Code which reflects the provision on injunctions harmonized by Art. 11 of the Enforcement Directive on permanent injunctions.

532 See further discussion on compensation instead of damages as alternative computation of damages in the Lithuanian Copyright Law in infra § 5F.I.1.c).

533 Art. 12, Bürgerliches Gesetzbuch (BGB); also Arts. 22, 23, Kunsturheberrechstgesetz (KUG).

II. The scope of the application of the Enforcement Directive

1. Covered and excluded legal areas under Article 2 of the Directive

a) Areas to which the Directive has no prejudice

Following the examined provisions on the subject-matter of the Enforcement Directive under its Article 1 and the Baltic legislation on the issue, while observing civil remedies in "grey area" rights, the references to the legal fields and regulations, which are not covered or in any other way concerned by the Enforcement Directive, are further discussed. Article 2 on the scope of the Directive, in particular its Paragraphs 1 and 2, begins with the list of the legal areas to which the Directive has no prejudice.

First, the Directive is not applicable to any enforcement means which exist in the Community or national legislation, in so far as those means may be more favourable for right holders (for instance, compensation instead of damages, known in the Lithuanian copyright doctrine, can be considered as more favourable to right holders).

Second, by virtue of Recital 16 of the Directive, the specific provisions on the enforcement of rights and exceptions contained in the Community legislation on copyright and related rights, namely, the rights in relation to the legal protection of computer programs[534], *i.e.* the special measures of protection of them embodied in Article 7 of the Computer Programs Directive, or the rights as they are harmonized in the Copyright Directive, *i.e.* Articles 2 to 6 and Article 8 thereof, are not covered by the Directive as well. This is due to the fact that the mentioned directives already concretized some specific enforcement remedies. The enforcement-related provisions embodied in the Computer Programs Directive and the Copyright Directive were actually the most extensive ones in comparison with other EU-wide legal instruments prior to the adoption of the Enforcement Directive[535].

Third, according to its Article 2(3)(a), the Enforcement Directive has no effect on the Community provisions regarding the substantive law on intellectual property, namely, the rights on processing of personal data and free movement of such data[536], on electronic signatures[537], and on e-commerce, by particularly referring to the lia-

534 Council Directive 91/250/EEC on the legal protection of computer programs. OJ L 122, 17.5.1991, p. 42 (hereinafter – the "*Computer Programs Directive*").

535 The list of other directives in trademark, patent, designs, etc. fields, which were adopted before the adoption of the Enforcement Directive, and their brief content in view of the Enforcement Directive is comprehensively examined in *Amschewitz*, Die Durchsetzungsrichtlinie und ihre Umsetzung im deutschen Recht, pp. 31-73.

536 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. OJ L 281, 23.11.95, p. 31.

537 Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures was published in the Official Journal of the European Communities. OJ L 13, 19.01.2000, p. 12.