

“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.

*cient degree of certainty*, as set out in Article 9 of the Directive. Moreover, more favourable solutions are provided by the Lithuanian legislator in terms of assurance of compliance with permanent injunctions, *i.e.* such assurance also covers also other forms, except of penalty payment.

Such implementing solutions can be considered as more favourable for IP right holders in view of Article 2(1) and aims and objectives of the Enforcement Directive, as long as the principle of proportionality is observed. Notably, the national courts are to carefully examine individual circumstances of each case, *i.e.* the nature of an infringement, its character, which can also mean examining if commercial purposes were involved in the infringing activities. It is very important to stress that by imposing injunctions, also ordering other procedural provisional measures, the courts are able to distinguish between infringements committed on commercial scale and other infringements, as application of injunctions can have a serious effect on, for instance, business of the alleged infringer, etc. It is especially relevant while talking about injunctions against intermediaries which can be anticipated in the upcoming judicial practice in the Baltic countries.

## **F. Damages, legal costs and other enforcement measures**

### **I. Adjudication of damages in IP rights infringement cases in view of Article 13 of the Directive**

#### **1. Actual damages and alternative methods to calculate damages: dilemma in the national IP infringement cases**

Before starting to examine the current implementing provisions on reimbursement of actual damages as well as alternative methods to calculate them and national court practice, especially focusing on the Lithuanian practice on the issue, it can be generally mentioned that in the Soviet legal doctrine the general rule regarding reimbursement of damages existed: damages were to be reimbursed either by paying in kind or by recovering losses in full<sup>758</sup>. No alternative methods to compute damages, which would be specific to copyright or industrial property rights cases, were established.

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758 Such principle has been established in Art. 496 (as amended in 1994) of the Soviet Civil Code of 7 July 1964 (valid until 1 January 2001 in Lithuania). The same was applicable to Latvia and Estonia; see also *Dietz et al.*, *Urheberrecht in Mittel- und Osteuropa*. Teil II, pp. 18, 76, see also *refs.* to the legislative acts applicable to IPRs during the Soviet Union in *supra* § 3B.II.1.