

tion as such cannot be adjudicated in criminal cases on the basis of civil claims because it is not material damage in its strict sense<sup>924</sup>. The consultation by the Supreme Court partly reflected the ongoing discussion regarding compensation institute at that time<sup>925</sup>. It was furthermore the reason why IP right holders did not submit requests for adjudication of pecuniary damage in criminal cases, as the courts used to leave such requests untried by referring them to be heard under the rules of the CCP or reject them<sup>926</sup>.

## II. *Border measures under the EC Regulation 1383/2003*

### 1. General remarks

Following the recent reports regarding IP piracy in the Baltic countries<sup>927</sup>, the transhipment of infringing IP products, especially pirated optical media, also pirated CDs, DVDs, counterfeits with infringing trademarks, etc., have been reported as issues which are to be especially tackled with more effective application of border measures in the Baltic countries. The phenomenon of infringing IP products which are imported, exported or transported at the borders of or within the Baltic countries is mainly due to their geographical situation<sup>928</sup>. At the same time the significant increase of custom authorities' activities is observed. Such increase reflects the current tendency of a growing number of seizures of infringing IP products at the EU's external borders as well<sup>929</sup>.

Border measures were already applied before the adoption of the Enforcement Directive in the Baltic countries as well as the EC Regulation 1383/2003 coming into force in 2004<sup>930</sup>. Pursuing the standards set out in Articles 54 to 63 of the TRIPS Agreement, the national custom authorities acted on the basis of the national legisla-

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*Code. The judgement confirmed by Lithuanian Supreme Court, Decision of 8 October 2002, Criminal Case No. 2K-656/2002, G. Astrauskas under Article 142(1) of the Criminal Code.*

924 See *Lithuanian Supreme Court, Consultation No. B3-25 of 27 September 2001*.

925 See *refs.* to the discussion on the subject-matter in *supra* § 5F.I.1.c)(2).

926 Civil claims have been rejected, for instance, by the Judgement of 2 March 2004 of the Klaipėda District Court, Criminal Case No. 2A-78/2004, arguing that the civil claimants did not suffer damage, as the selling of the computer with illegal software installed had been stopped by the police, *i.e.* the infringing copies have not been circulated for which the profit would have been gained. Again, the court omitted the argument regarding installation (reproduction) of software for which commercial gain was not required.

927 Lithuania especially remains a key transhipment country for pirated materials from Russia and other source countries in the EU for further exportation to countries such as Estonia and Germany. Such issues as ineffective border measures in Lithuania, also lack of the regulation to stop the transhipment inside of the country, were indicated in *2008 Special 301 Report IIPA Special Mention: Lithuania*, p. 264.

928 See overview about geopolitical situation, also IP piracy in the Baltic countries in *supra* § 3A. and § 4A.II., respectively.

929 See EU Commission Press Release on “*Customs seizures of counterfeit goods at the EU's external border*” (May 2008).

930 See *refs.* in *supra* Ft. 163 herein.

tion at that time which was displaced by the Regulation 1383/2003<sup>931</sup>. A number of successful cases while applying the customs procedures have been reported since 2004<sup>932</sup>. Most of them related to transit shipment of counterfeit goods, which were intended to be distributed in the neighbouring countries, from China through Russia<sup>933</sup>. In 2006 the number of cases of application of border measures increased; moreover, the increasing number of requests of IP right holders to apply such measures regarding protected trademarks, patents or designs has been especially noted<sup>934</sup>. This can be partly explained by more active work and increasing competence of custom officers in the process of detecting pirated and counterfeited goods as well as timely response and assistance of IP right holders regarding their identification and further measures. The same tendencies have been recently reported in the EU as well<sup>935</sup>.

On the basis of the EC Regulation 1383/2003, also their national laws on customs and relevant secondary legislation on the subject matter, the custom authorities of the Baltic countries can decide regarding detention of goods allegedly infringing IP rights. Decisions can be based either on IP right holders' applications for action by the customs authorities or rendered *ex officio* by the customs authorities. Although the Enforcement Directive does not directly refer to any border measures which are to be taken in order to stop infringing goods being imported or exported from the corresponding jurisdictions, the closely connected application of such measures and civil remedies, as pursued by the Directive, are to be briefly discussed.

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931 The relevant national laws (also those valid prior to the EC Regulation 1383/2003) regarding application of border measures are listed in *Vrins, Schneider (ed.)*, Enforcement of intellectual property rights through border measures (2006), p. 684 (for Lithuania), p. 657 (for Latvia), pp. 367-368 (for Estonia).

932 In 2006 Lithuanian custom authorities detected 79 cases of importation of IP rights infringing goods (in 2005 there were 47 such cases). Most of them were related to counterfeit trademarks (ADIDAS, PUMA, NIKE, NOKIA, SIEMENS, BURBERRY, etc.). There were cases of potentially dangerous to consumers goods (e.g., toys) detected, as reported *Lithuanian Customs Department Information* (2006), p. 12.

933 See refs. to relevant cases in Estonia and Lithuania in *Vrins, Schneider (ed.)*, Enforcement of intellectual property rights through border measures (2006), pp. 368-369, 686.

934 The number of requests from the right holders increased (165 requests in 2006), as reported *Lithuanian Customs Department Information* (2006), p. 12. Such numbers can be also compared with overall statistics on border measures in EU as well as in other jurisdictions which represent higher number of cases, see more at *Vrins, Schneider (ed.)*, Enforcement of intellectual property rights through border measures (2006), pp. 76, 77. More than 10,000 application from the industry were reported in 2006 in EU Commission Press Release on "Customs seizures of counterfeit goods at the EU's external border" (May 2008).

935 Custom seizures at the external EU borders increased 17 % in 2006, as reported in EU Commission Press Release on "Customs seizures of counterfeit goods at the EU's external border" (May 2008).

## 2. Border measures and civil remedies as implemented under the Enforcement Directive

Differently from civil measures and remedies set out in the Enforcement Directive, it should be noted that the EC Regulation 1383/2003 establishes administrative customs measures which application is not related to civil litigation regarding protection of the infringed IP rights. However, validity of customs measures, which are applied regarding goods infringing IP rights, depends on the fact if a right holder requests the court to apply those civil measures and remedies regarding to the same infringement<sup>936</sup>.

By virtue of Article 13 of the EC Regulation 1383/2003, if within 10 working days of receipt of the notification of suspension of release or of detention, the customs office is not notified that proceedings have been initiated to determine whether IP right has been infringed or certain provisional measures have been applied, release of the goods should be granted or their detention should be ended, as appropriate, subject to completion of all customs formalities. This does not apply in case of administrative or criminal liability. Hence, in order to ensure the validity of customs measures for longer period, civil, administrative or criminal proceedings are to be initiated by the right holders. In case such proceedings have been already initiated, the relevant documents such as a copy of the court decision, etc. are to be submitted to the customs authorities. In case a civil claim on the subject matter in question is rejected, customs measures are to be revoked as well.

The national customs authorities are to destroy goods which are found to infringe IP rights (which can be done by the court only) or dispose them outside commercial channels in such a way as to preclude damage to the right holder, without compensation of any sort and at no cost to the right holders. Other measures can be taken in order to deprive other persons from gaining economic profit from the transaction, *e.g.* removing labelling with protected trademarks from the counterfeit goods. Notably, subject to certain conditions which include the agreement of the right holder, Article 11 of the Regulation also allows the Member States applying a simplified procedure, *i.e.* when the goods infringing IP rights can be destroyed without a court decision on the subject-matter. Lithuania has chosen such possibility<sup>937</sup>.

The goods can be also transferred to the right holders or to persons indicated by them. Such possibility is also established in the Lithuanian Copyright Law. The court applies further civil remedies concerning the deterred goods infringing IP

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936 Notably, in one of the cases Lithuanian Supreme Court argued that the courts should be more active and prompt IP right holders to choose not only destruction of illegal infringing IP items, but also other measures (transfer of items to the right holder, for instance), according to the circumstances of the case, see Decision 24 November 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-1069/2003, *Italian Company "Diesel S.p.A." vs. UAB "Mita", Klaipėda Territorial Customs as a third party*.

937 The simplified procedure of destroying goods which infringe IP rights is also regulated under the *Order by the Chief Director of the Customs Department of the Republic of Lithuania No. 1B-288*.

rights, *i.e.* corrective measures<sup>938</sup>, or in case of administrative or criminal liability appropriate sanctions<sup>939</sup>.

### *III. Concluding remarks*

By reviewing the national legislation and practice regarding administrative and criminal liability and sanctions for infringements of IP rights, the following aspects should be mentioned.

*First*, criminal liability for certain infringements of IP rights is established in all Baltic countries. Lithuanian and Latvian legislation also constitutes administrative liability for such infringements by establishing certain legal standards which allow to distinguish crimes and administrative offences. In the course of application of the provisions in the national Criminal Codes, also Codes of Administrative Violations, certain legislative discrepancies are however observed. This especially concerns Lithuania where the national provisions seem to be chaotic due to inconsistency and different interpretation of “*commercial scale*”, *i.e.* the clear line between administrative and criminal liability for copyright and neighbouring rights infringements is missing, which, in turn, necessitates tentative legislative improvements to be adopted<sup>940</sup>.

*Second*, application by both civil remedies, which are embodied in the implementing national legislation due to the Enforcement Directive, as well as the border measures as set out in the EC Regulation 1383/2003, can help the right holders to protect their rights more effectively. This is especially true if an IP right holder is active and involved into the custom procedures by providing the application to the custom authorities. The practical concerns, however, mainly refer to the competence of the customs authorities which are to detect goods infringing IP rights. The help from the right holders, *i.e.* timely applications to apply customs measures, which are submitted along with samples and description of legal and, if possible, illegal IP goods, or timely reaction in case such measure is applied *ex officio* by the customs authorities play a substantially important role in IP enforcement practice.

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938 See examination of the provisions regarding application of corrective measures in *supra* § 5F.III.1.

939 See *reft.* to the national legislation on administrative or criminal liability for infringements of IP rights in *supra* § 5G.I.1.

940 As referred, the draft amendments regarding the Lithuanian Code of Administrative Offences on the issue are pending.