

§ 6 Conclusions and observations

A. *Implementation of the Enforcement Directive in the Baltic countries: outcomes*

After examining how the EU Enforcement Directive has been implemented in the Baltic countries – Lithuania, Latvia and Estonia – it can be observed that the current civil IP rights enforcement scheme generally reflects the required level of measures, procedures and remedies which were promulgated by the Directive. This is especially true of the current legislation in place. In many cases, though, a number of substantive and procedural aspects of enforcement, which were intended to be harmonized within the EU and which were also new to some other European countries (such as pre-trial measures to preserve evidence, the right of information concerning third parties, damages, also so-called “license analogy” for the reimbursement of damages, alternative measures), represented novel challenges to the legislative and court practice of the Baltic countries.

Notably, many of the provisions of IP legal enforcement such as provisional measures, interlocutory or permanent injunctions, corrective measures, adjudication of actual damages (losses), legal costs and publication of judicial decisions had been already embodied and applied in the Baltic practice before the adoption of the Enforcement Directive. Furthermore, some provisions and concepts which were very rare in European IP litigation practice, for instance, compensation instead of damages which was frequently criticised as importing the doctrine of punitive damages from the Anglo-Saxon legal environment (namely, the US), had been established in IP legal doctrine and court practice in Lithuania since 1994. Additional changes to the law were mainly due to the accession by the Baltic states into the EU process, starting in 1998, which, *inter alia*, required embracing general revision and improvements in national legislation.

Certain questions remained, however, such as whether substantive and procedural measures and remedies were applied in practice effectively before the implementation of the Directive, what pertinent tendencies could be discerned from the then court practice (which, admittedly, was modest, especially concerning patent and design rights), and what improvements in this legal field were necessary. Despite IP civil enforcement measures and remedies, as well as the enforcement infrastructure and its players (*i.e.*, special IP police divisions, prosecutors working on IP cases, experts, specialists specializing in IP matters, the courts competent to hear IP cases, etc.) having been put in place, actual IP enforcement practice remained quite patchy. Such an outcome was mainly due to heritage of the Soviet legal doctrine which was for some time still reflected in the national codes of civil procedure, and also to some human factors such as frequent reluctance of national judges to enforce the law in matters related to IP because of the specificity of the issues raised. The diver-

gent case practise was also influenced by legislative discrepancies in the national IP laws before the implementation of the Directive in the Baltic legislation.

This can be illustrated by the Lithuanian Supreme Court practise in situations where important legal matters regarding IP enforcement had to be tackled, and where issues such as authorship presumption, calculation of compensation instead of damages, moral damages, and also the Directive-relevant term “*commercial purposes*,” have been salient. Such disputed aspects, which were customary in other European countries, were unorthodox and problematic in the context of nascent IP enforcement practice in the Baltic countries in general. Some of the highlighted problems that arose in the early stages of the Baltic IP enforcement practice have already been solved. This has been partly achieved by following the definitions, aims and objectives of the Directive, however, the implementation of which can further lead to heterogeneous outcomes in Baltic IP litigation practise.

By analysing those (mostly legislative at the moment) outcomes, uncertainty regarding the provisions set out in the Enforcement Directive can be observed. The obscurity of some formulations embodied in the Enforcement Directive (which, noticeably, was drafted incredibly quickly) remains as one of the main issues associated with its implementation. The examination of the implementation of the Directive in the Baltic countries serves as an example of difficulties that can, in fact, arise after transposing harmonized provisions of EU law into the national legislation, especially when it comes to practical application.

Additionally, as mentioned above, legal practice in the Baltic jurisdictions still indirectly expresses specific aspects of the Soviet legal doctrine, together with features of a developing legal tradition, while at the same time striving to adopt enforcement novelties such as *civil (ex parte) searches* or the *licence analogy* as alternative methods of computing damages. Such tension is frequently observed in the decisions of the local courts, where high so-called “western” IP protection standards meet local “IP mentality and thinking”. Such factors play a substantial role and should be further considered in discussions of other proposed EU instruments in the field of IP enforcement, namely, the Draft Criminal Enforcement Directive.

Although it has been criticised on some legal fronts—such as, *inter alia*, the lack of legal precision regarding its scope and subject-matter, the lack of legal justification for its very existence (due to the TRIPS Agreement already being in place), or possibly ineffective harmonization in some cases – it should be admitted that the implementation of the Enforcement Directive in the Baltic countries has prompted certain processes in the field of protection of IP rights in general that would not otherwise have come about. *First*, it led to comprehensive revision and improvements in IP legislation on a full-scale, *i.e.* before the Directive enforcement provisions in national IP laws differed (which in many cases led to flaky or flawed lawmaking outcomes). *Second*, it fostered amendments to a few substantive provisions in the national IP laws, such as those related to *locus standi* or presumption of related rights (right of performers) in civil proceedings. *Third*, the implementation of the Directive has frequently led to strengthened protection of IP rights, thereby playing

a significant role in the prevention against IP counterfeiting and piracy, and in raising awareness about IP in general.

It is noticeable, on the other hand, that some aspects of IP enforcement nowadays deserve more attention. The newly implemented enforcement provisions, which also provide for more favourable treatment of IP right holders instruments in view of the Directive, may make valuable contributions towards solving currently unsolved problems. *First*, they may help address internet piracy – a phenomenon which is present not only in the Baltic states, but worldwide, and which calls for effectively applied means of enforcement, especially provisional measures, injunctions, and corrective measures. *Further*, more complex application of civil enforcement means in administrative and criminal procedure should be embraced, especially where adjudication of damages is concerned. The same applies to customs and civil enforcement measures. The strict separation of civil, administrative and criminal procedures is considered to be a relic of the Soviet era that needs to be set aside. Combining administrative measures, criminal measures and civil remedies (especially when it concerns collection and presentation of evidence, as well as adjudication of damages) may allow IP right holders to enjoy their rights in more effective manner – particularly when specificity of evidence, substantiation in IP infringement cases and also the principle of economy in procedures, is taken into account.

Moreover, the current civil IP enforcement scheme stemming from the Directive, embodied in the implementation of national legislation, can prompt IP right holders to be more active in initiating, for example, *civil (ex parte) searches*, by not being dependant on police or prosecution offices; and it may also prompt them to consider pursuing enforcement measures and remedies in more complex manner. This study on the implementation of the Enforcement Directive in the Baltic countries, in view of their development of a system for the protection of IP rights, is intended to highlight the main trends of IP litigation in the respective jurisdictions and to help local and foreign IP right holders to anticipate likely outcomes in cases of IP litigation.

B. Further strengthening IP rights enforcement: incentives to innovate and create in the Baltics?

The IP enforcement landscape has certainly changed in the Baltic countries during the last decades and, admittedly, it has not been due only to the harmonization of the laws associated with European-wide legislation, including the Enforcement Directive, but also to other social and economic processes which have been closely intertwined. Additionally, many incentives have been implemented in order to foster local innovations, R&D activities in both public and private companies, and also in educational institutions, through various projects in the Baltic countries.

These factors, together with the fact that, by operating innovation-related projects and businesses in the Baltics, companies, especially foreign ones, took account of the necessity of strengthening the enforcement of IP rights, should be acknowledged as having facilitated positive improvement in the IP regime of the Baltics. It was