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LGP RECHTSANWÄLTE / ATTORNEYS

RULE OF LAW IN CRISIS?

TURNING POINT
Sanctions and Limits to Fundamental Rights

LAW AND JUSTICE
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A booklet for the rule of law

We have decided to make the theme of this issue the "Rule of Law". The rule of law and human rights motivated me to become a lawyer over 50 years ago. Not as an entrepreneur, but as a human rights activist who wanted to make the world a better place. However, the path to a just world in which human rights are respected is thornier than expected. The rule of law is a key step on this path.

The realisation of the rule of law – whether in Austria, the EU, or globally – is a major undertaking. After all, it is not just about formal legal structures, but also about a society in which justice is strived for and realised. The rule of law means protection and fair solutions for all. Without human rights, there is no justice. Our law firm has had the privilege of working on numerous leading cases in European law for many years and, since 2014, in international sanctions law on a large scale. A dedicated sanctions law team was set up for this purpose in 2022. We select our clients carefully to ensure that our values are upheld. This issue takes you through some selected articles that are important to us, written by renowned guest authors and our partners, as well as members of our Senior Expert Counsel.

Maria Berger, former CJEU judge, sheds light on the various roles in the European constitutional state and the importance of "soft power". Constitutional expert Heinz Mayer emphasises the importance of administrative law and the training of judges in Austria, while Irmgard Griss, former President of the Supreme Court, stresses the importance of judicial independence, which can improve and develop through constructive criticism in a constitutional state. The contribution by the former Governor of the Austrian National Bank, Ewald Nowotny, outlines highly topical economic and socio-political issues in the context of the tension between the financial markets and the rule of law, not least with regard to issues of distributive justice and equal access to the judiciary and political decision-makers.

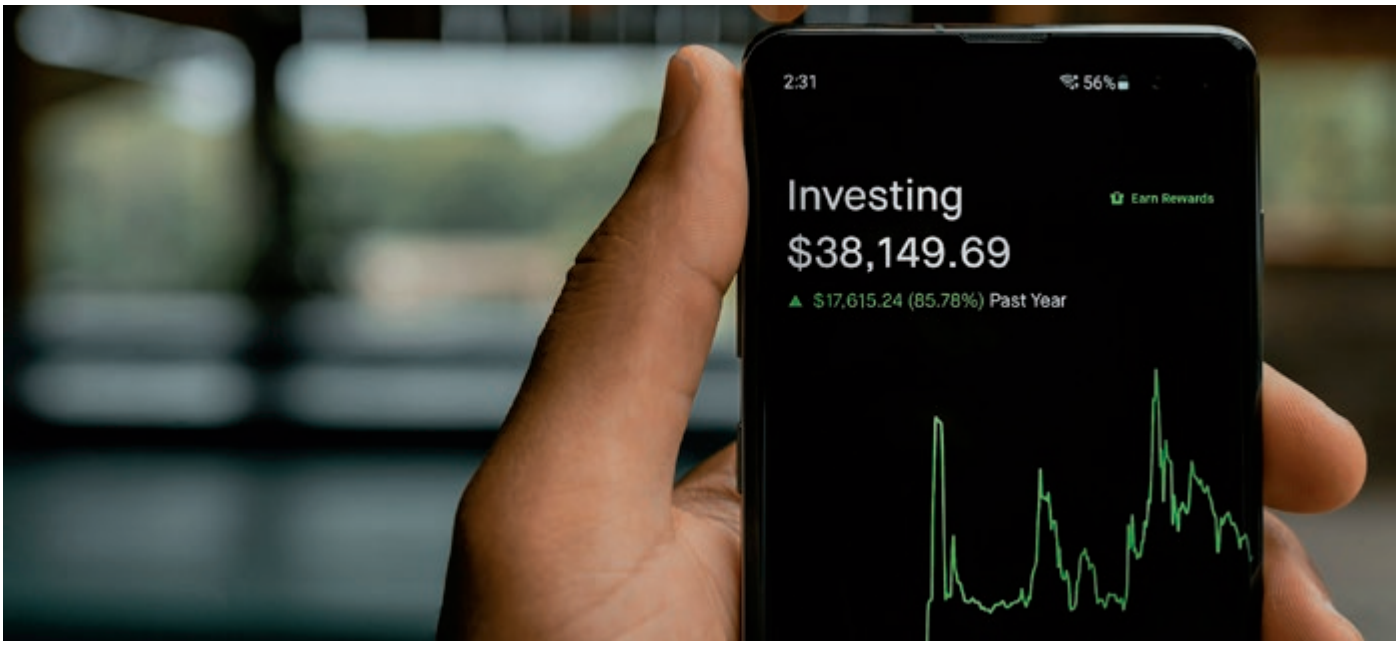
Georg Stawa, Judicial Attaché for South-East Europe at the Austrian Embassy in Belgrade, outlines the remarkable results of rule of law reforms in the Western Balkan states in the context of EU accession efforts. Klaus Steinmaurer, RTR Managing Director for the Telecommunications and Postal Services Division, explains the European and global perspective of regulatory policy, in particular the challenges in the area of tension between economic power and necessary regulation. Gerhard Jarosch, Head of our International Criminal Law Department, shares insight into the international cooperation of criminal defence lawyers in criminal investigations. Our colleagues from our law firm in North Macedonia explain the importance of the Constitutional Court in the growth of new democracies in South-East Europe, while our colleagues in Bratislava shed light on the opportunities and challenges of the rule of law in Slovakia and the importance of the Constitutional Court.

Finally, my law firm partner Philip Goeth, describes our experience in European and international sanctions law. We share a worrying analysis of the current legal system, but are endeavouring to strengthen the rule of law through small but significant steps. In my contribution, I discuss the ban on legal advice and representation in EU sanctions law as a particularly blatant infringement of fundamental European freedoms and human rights, which chambers and colleagues throughout Europe are rightly campaigning against.

Enjoy reading!

Gabriel Lansky

Financial markets and the rule of law



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Financial markets are of central importance for economic development – both at national and international level. There is, therefore, considerable national interest in ensuring the long-term stability of financial markets and the rule of law.

By Ewald NOWOTNY

Financial markets are among the most heavily regulated markets. This applies to the banking sector, where the main focus is on ensuring sufficient equity and liquidity, the stock exchange and securities supervision sector, and the payments sector, where security and efficiency are paramount. All of these regulations are based on legal foundations and must be categorised within a constitutional framework.

The first important aspect here is the rule of law as a location factor. Efficient economic activity generally requires stable and predictable framework conditions. Accordingly, security with regard to the "rule of law" is an important criterion for the admission of a country to the EU (although in some cases it has not proven easy to secure this in the long term). In the financial sector, in particular, the existence of efficient regulation and corresponding jurisdiction is an important criterion for the admission of a country to the European Economic and Monetary Union (Eurozone).

The intensity of regulation in the financial markets is, therefore, significantly higher than in most areas of the real economy. From an economic perspective, this is a problem of "asymmetric information". This is because it is impossible or very difficult for consumers of financial services

to determine the actual economic stability of the respective providers "from outside" and to recognise the corresponding risks. A centralised institution for information and monitoring is therefore required in order to establish the information equilibrium that is central to a functioning market economy.

In the banking and insurance sector, an intensive network of regulations was introduced in response to the devastating crises in the interwar period, starting with the "New Deal" in the USA and generally in Europe after 1945. Beginning with the neoliberal turn in the mid-1970s, a policy of "de-regulation" was implemented worldwide,, combined with the huge expansion of the financial industry. According to many economists, this development was a significant factor in the dramatic global financial crisis that began in 2008, where a new global economic crisis could only be prevented by the rapid and coordinated action of central banks. As a lesson from this financial crisis, there followed a worldwide phase of "re-regulation", particularly in the form of the internationally developed "Basel regulations". Indeed, banks today are significantly better equipped in terms of capital adequacy and liquidity than was the case in the past. This certainly cannot completely rule out problems, but as the dramatic case of Credit Suisse showed, such problems can be managed much more swiftly today.

Regulation ultimately always rests on legal foundations and must meet the requirements of the rule of law. The intensity of legal interventions is often a matter of controversy. Regulation is associated with costs for individual banks, and financial companies will often resist regulatory steps in accordance with individual benefit maximisation. Financial companies and their associations will, therefore, try to influence the legislative process accordingly. In the USA, for example, it has been shown that the financial sector is now at the top of all industries in terms of lobbying and campaign spending. From a macroeconomic perspective, however, it is crucial to note that banks and insurance companies are often "too big to fail" due to their close interconnection with the overall economy. This ultimately leads to a free state guarantee for "systemically important" institutions. On the other hand, there is also considerable macroeconomic interest in the banking industry's provision of adequate financing for private and state investments. Overall, it is a matter of very complex macroeconomic cost-benefit considerations, which in turn can lead to tensions with formal aspects of the rule of law.

MONEY AS A WEAPON

Particular challenges arise in the financial sector from the clash between the principles of the rule of law and areas of criminal and tax law. This applies, for example, to the increasing importance of the fight against money laundering as a central element of international crime. In the political sphere, the use of "money as a weapon" in the form of sanctions relating to payment transactions and other financial activities is growing. Targeting the financial sector in particular has often proven to be an efficient means of enforcing legitimate political objectives – but this can also lead to tensions in terms of the rule of law with regard to the protection of privacy, such as anonymity and data protection.

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A particular problem arises in the area of taxation. This concerns not only forms of illegal tax evasion, but also technically legal, mostly international "tax planning". An interesting example of the enormous importance of the legal infrastructure is the developments that have taken place in the financial sector since the end of the British Empire. Not least under the influence of international advisors, a large number of corresponding small states and territories have retained access to the English legal system while at the same time pursuing a policy of extremely low taxation of international activities. This applies, for example, to the "Crown Dependencies" such as Guernsey, British Overseas Territories including Cayman Islands or formally independent states such as the Bahamas. All of these states are used for tax-saving "wealth management", so that the relevant literature already refers to a "second empire of tax havens". According to studies, around half of the estimated USD 8.7 trillion held offshore in tax havens can be traced back to local authorities with links to the English legal system.

Other countries and regions are also pursuing a strategy of aggressive tax competition, whether within the EU, such as the Netherlands and Ireland, or in US states such as Delaware or Nevada. Combined with the largely implemented (and economically sensible) liberalisation of capital movements, this development leads to massive inequality of treatment between financially powerful companies and individuals who have access to relevant advice, and the majority of other taxpayers. Even where formal rule of law criteria are met, this means that central fundamental rights requirements for equal treatment are violated.

In this context, "rule of law" does not mean a comprehensive safeguarding of democratic structures and civil liberties, but only the largely unrestricted safeguarding of property rights. The massive restriction of the de facto-sovereignty of democratically elected decision-making bodies, where the judgement of financial markets determined by special interests is decisive rather than that of voters, also falls under this definition. This is welcomed by economic liberals as an effective antidote to "irresponsible voter majorities". However, it implies that for a wide range of economic and socio-political decisions, it is de facto not universal and equal suffrage that is central to fundamental rights, but a form of new "curia suffrage" in line with the very unequal distribution of economic power. This means that there is a risk that important public duties, such as in the education and social sectors, cannot be fulfilled or can only be fulfilled by increasing public debt. In economic policy practice, every government is advised – or even forced – to take the power of the financial markets into account, given these existing structures. It is in this sense that the controversial term of "market-conforming democracy," coined by former German Chancellor Angela Merkel, is probably best understood.

In long periods of peace and economic growth (especially for the "rich countries"), the importance and inequality of the distribution of financial assets at international and national level has increased massively. This is increasingly seen as a problem for the societal acceptance and the economic performance of the existing economic system. In line with the relevant international context, there are a number of initiatives to correct the international financial system. Within the OECD, rather tentative steps have been taken to introduce minimum tax standards regarding corporate rate. The results of these endeavours to date have not been very convincing. The dilemma, therefore, remains that a functioning rule of law is of central importance for the functioning of financial markets – but a rule of law shaped by special interests can lead to an erosion of fundamental democratic rights. ■

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is a retired university professor at the Vienna University of Economics and Business, where he headed the Institute for Financial and Monetary Policy. From 2008 to 2019, he was Governor of the Austrian National Bank (OeNB) and a member of the Governing Council of the ECB. Since 2019, he has served as President of the Austrian Society for European Policy (ÖGfE) and the Schumpeter Society Vienna.

Prohibition of counsel and representation in European sanctions law

Lawyers who have been trained in the firm belief that the right to qualified legal representation is one of the cornerstones of our constitutional order are suddenly faced with a new reality. This is because certain regulations in EU sanctions law significantly restrict legal counsel and, in some cases, even directly prohibit it.

By Gabriel LANSKY

As Olaf Scholz aptly put it, we are experiencing a turning point that requires a fundamental reorganisation of geopolitical and geo-economic conditions. In this context, Europe is trying to protect its interests and values with the help of comprehensive measures, although individual rights and freedoms are increasingly restricted. This new reality has made taking on mandates – whether for specific client groups, clients of Russian origin, or in relation to specialised products and services – a challenging obstacle course. At the end of the day, it is still about providing expert advice, but we are moving into a terrain where fundamental principles of the rule of law are being challenged. The EU's restrictive measures are based on decisions made under the Common Foreign and Security Policy (CFSP) and adopted

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by Council regulations that are directly applicable throughout the EU. These include Regulation (EU) No. 269/2014, which concerns individual sanctions, and Regulation (EU) No. 833/2014, which regulates sectoral sanctions. Both regulations contain provisions that significantly restrict and, in some cases, even directly prohibit the practice of the legal profession.

In particular, Regulation 833/2014 contains a direct ban on lawyers and legal professionals: the infamous Article 5n (2) prohibits the provision of legal services directly or indirectly to the Russian government and to legal persons, organisations, or entities established in Russia. This excludes representation in judicial, administrative, or arbitration proceedings and the recognition and enforcement of court decisions in EU member states. In addition, there are certain exceptions, for example for humanitarian purposes, activities to promote democracy in Russia, or to secure the EU's critical energy supply. However, these exceptions only cover a limited number of cases. In practice, this means that lawyers are not allowed to advise or represent Russian companies, even if they are not sanctioned, as long as it concerns, for example, a purchase transaction and not a court case. From 30 September 2024, this ban will also extend to Russian companies that are owned or controlled by Western companies. Austrian lawyers will then no longer be able to provide advice to a wholly-owned Russian subsidiary of an Austrian company when it comes to its business within the EU or worldwide.

The exact definition of what the Council understands by the "Government of Russia" is often vague. Lawyers must, therefore, make their own judgement as to the extent to which they are allowed to provide services for a German company that is indirectly part-owned by a Russian state-owned company. In order to protect themselves and avoid accusations of sanctions evasion, many lawyers fundamentally decline such cases. This means that the guarantee of legal advice in accordance with Article 47 of the EU Charter of Fundamental Rights (CFR) is no longer fully available. These ambiguities have also caused concern among notaries in Germany, who are increasingly refusing to provide notarial support for transactions for Russian, non-sanctioned companies. This is significantly exacerbating economic uncertainty in the European single market, without contributing to ending the ongoing war.

In addition, both regulations attack legal professional privilege: although the principle of lawyer-client confidentiality should be preserved under the CFR, all natural and legal persons are obliged to provide information to the competent authorities of the Member States where they reside or have their registered office in order to facilitate the implementation of the regulations. While Regulation 269/2014 at least gives examples of the type of information to be provided, such as data on frozen assets, Regulation 833/2014 remains unclear. In particular, it is questionable whether lawyers are obliged to report breaches of the regulations, which would constitute a de facto "whistleblowing obligation".

Another hurdle for lawyers is the processing of payment for their services. If a person is listed in Regulation 269/2014, their assets are frozen. However, lawyers' services are listed among the expenses for which the national competent authority can grant a release of assets. Lawyers must provide the competent national authority (in Austria, for example, the National Bank) with a detailed explanation of why, to what extent and for which services they charge which fees. Lawyers are, therefore, generally obliged to justify why clients are prepared to make the corresponding payments.

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Unfortunately, the restrictions on the legal profession introduced by the Council are only slowly being addressed at the European level. One example of this is a request for a preliminary ruling from a German court to the Court of Justice of the European Union (CJEU) concerning a complaint from German property buyers. A German notary had refused to participate in a property transaction with a Russian seller company. Advocate General Laila Medina stated in her opinion in this case (C-109/23) that the concept of legal advisory services is not sufficiently clearly defined in Regulation 833. In her opinion, the activities of a notary when notarising a property purchase contract do not have the necessary advisory element to fall under the prohibition. The prohibition of notarising such a contract of sale without a prohibition on legal persons established in Russia from owning, using, disposing of or bequeathing their lawfully acquired property would lead to an unlawful restriction of property rights under Article 17(1) CFR ('right to property') in conjunction with Article 52(1) CFR ('scope and interpretation of rights and principles').

In addition, several European bar associations and professional colleagues have brought actions for annulment against the Council before the General Court of the European Union.[1] They argue that the provisions of Article 5n violate legal professional privilege and the guarantee of legal advice and that the Council violated the obligation to state reasons and the principle of proportionality when adopting these measures. However, until these proceedings are finally decided and the regulations are either clarified or repealed, legal protection in the European arena remains inadequate.

Is it really necessary for European law to overstep such boundaries? On the contrary, it seems that a significant part of this development is due to populism, which has driven legislation without taking sufficient account of the fundamental principles of basic rights. We who apply European law must actively oppose such "taboo-breaking" and insist on the restoration of a rule of law based on European fundamental rights and freedoms. ■

Managing Partner
GABRIEL LANSKY
has worked as a lawyer for over three decades and advises numerous well-known clients from business and politics in Austrian and international matters. Gabriel Lansky has also made a name for himself outside Austria as a corporate lawyer, criminal defence lawyer and lobbyist. He is admitted to the bar in Vienna, Bratislava, and Budapest and represents the interests of his clients there. His clients include banks, energy and infrastructure providers, media companies, publishing houses and public institutions, as well as well-known private individuals and governments.

[1] Case T-797/22 and T-798/22

Are the Western Balkans moving towards the rule of law?

Will the "Western Balkan states" ever fulfil the requirements of a sound constitutional state? An unexpected look at Bosnian judges working from home, Albanian enthusiasm for reform, and prosecutorial simplicity between Podgorica and Ottakring.

A guest article by Georg STAWA,
Judicial Attaché for South-East Europe
at the Austrian Embassy in Belgrade.

Perhaps I should point out at the outset that I see myself as a representative of the principle of the rule of law given my role as a former judge and long tenure at the Ministry of Justice, including my international activities. As a matter of principle, the third branch of government attaches great importance to making an independent contribution to social harmony and legal certainty as the basis for a prosperous economy. But unfortunately there are not enough politicians with judicial backgrounds. The foreign policy context of "EU enlargement" will, therefore, be deliberately discussed from a judicial perspective in this article. My observations have both a judicial and political slant, especially where there is no other option.

The political tug-of-war between European rapprochement and nationalist-populist folklore, the clear European economic reality, the social entanglement of the Balkans with Ottakring and Düsseldorf, the promise of enlargement alongside critical political distance, common European foreign policy, and the echoes of the Yugoslav non-aligned tradition are not the subject of professional commentary here. They form the beacons of a technical process of EU rapprochement that is in constant motion behind the scenes.

But what criteria for this "EU rapprochement" actually need to be technically met? EU heads of state and government formulated three requirements for accession to the European Union in Copenhagen in 1993. The "Copenhagen criteria" include the **"political criterion"** (institutional stability, democracy, and the rule of law, respect for human rights, and respect for and protection of minorities), the **"economic criterion"** of a functioning market economy and competitiveness and the **"acquis criterion"**, i.e. the adoption of all Community law or the *"acquis communautaire"*.

What does this mean in practical terms in the area of rule of law? The establishment of Scandinavia's financially independent judicial council? The introduction of France's reformed criminal procedure? The adoption of Austria's highly efficient court automation? The establishment of the Netherland's citizen-friendly large courts? The Czech Republic's very short proceedings as a benchmark? The replication of Portugal's virtual courts? In the area of justice, "European, generally applicable standards" are largely lacking, because almost no competences have been transferred to the Community and its authorities – despite being constantly and misleadingly politically quoted.

In any case, the European Court of Auditors stated in its January 2022 special report "EU support for the rule of law in the Western Balkans: despite efforts, fundamental problems persist" that issues regarding EU external assistance projects continue. The findings were, incidentally, "somewhat mixed", but Austria's contributions were praised. The rule of law was defined and substantially explained by the report as follows:

The rule of law "as defined by the Council of Europe (!)"[1] is one of the common values of the EU Member States, enshrined in Article 2 of the Treaty on European Union. Although EU support for the rule of law in the Western Balkan states has led to reforms in technical and operational areas (e.g. improving the efficiency of the judiciary, developing relevant legislation), insufficient political will has meant that only limited progress has been made on fundamental rule of law reforms in the region: persistent problems exist, for example, in the independence of the judiciary or with regard to the concentration of power, political influence and corruption, which have not yet been resolved.[2]

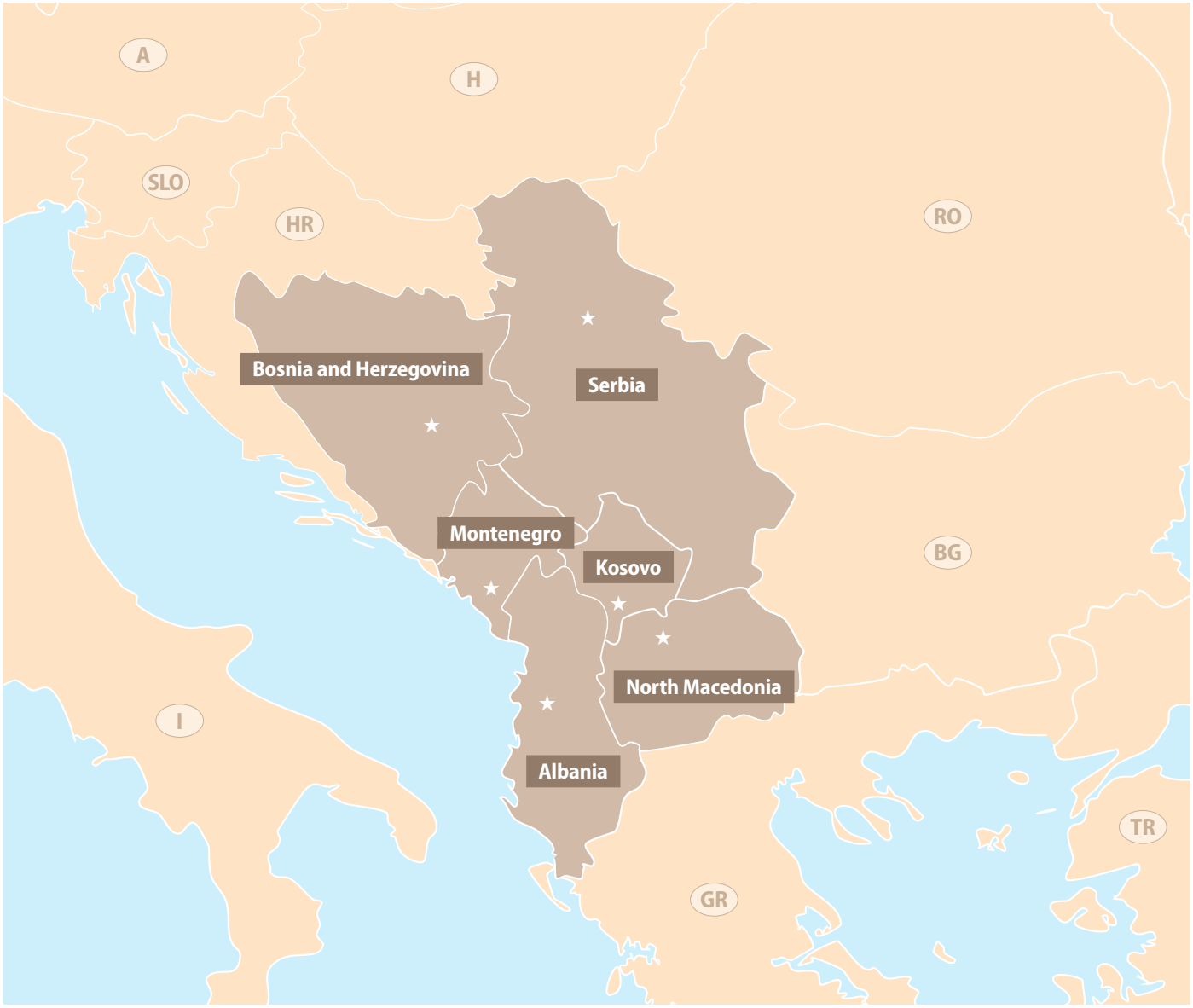
The EU Commission adds to this in the Montenegro country chapter of the 2024 Rule of Law Report:[3]

"The justice system of Montenegro is undergoing an intensive phase of reforms, involving the adoption and revision of a comprehensive package of laws, aimed at addressing systemic issues of independence, accountability and impartiality in the judiciary and the prosecution, and at further alignment with European and international standards. In May, Montenegro adopted a new judicial reform strategy 2024-2027." This is where the "European

[1] There is no official EU definition of the rule of law. According to the Council of Europe, it is "all public behaviour within the limits set by the law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial courts". The rule of law comprises six basic principles that have been recognised by the Court of Justice of the European Union and the European Court of Human Rights.

[2] With regard to the Western Balkan states in general, several studies have found that most governments in the region have become more authoritarian over the last ten years, despite having made formal progress towards EU membership (combining formal commitment to democracy and European integration with informal authoritarian practices). Corruption also remains a cause for concern in all countries in the region. Transparency International reports that the criminal justice system is often unable to effectively investigate, prosecute and punish high-level corruption cases. Governments in the region have enacted many laws that favour nepotism, including the awarding of privileged contracts, industrial monopolies and the employment of poorly qualified civil servants that enable corruption.

[3] "2024 Rule of Law Report" https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2024-rule-law-report_en



Rule of Law III – (EUROL III)" project, implemented by Austria in collaboration with Italy, comes into play: A total of 2.5 million euros in EU funds were invested in fighting corruption, improving access to justice, reorganising the judiciary, consolidating trust and, ultimately, democracy and the rule of law. In addition, the judicial map was streamlined according to objective indicators and modelled on successful reforms in Slovakia and Croatia. This, along with newfound dynamism, enabled Montenegro to successfully fulfil the interim benchmarks as part of the EU enlargement process. And, under new, calm management, the special public prosecutor's office (for combating corruption) has begun to "simply do its job", meaning one or two mayors and police commanders have already swapped their office for custody. And this has worked for more than ten years without directives needing to be issued by the Minister of Justice. However, it is also important not to undo previous progress in judicial reform: Montenegro was the first country in Central and South-Eastern Europe to appoint court presidents for a maximum of two five-year terms. Thus younger, hopefully more dynamic cohorts will reach the top office, while the passage of time guarantees "natural ventilation" of the system.

Serbia, in turn, has undergone significant reforms: over the past three years, the judicial constitution has been reformed as part of an exemplary inclusive process in collaboration with the Venice Commission. The reform removed the influence of politics from leading judicial bodies and was passed by referendum at the beginning of 2022. Serbia, therefore, currently has the most modern judicial constitution in Europe on paper, including an independent General Prosecutor's Office that has been in place for years. However, according to the Commission's assessment, political pressure on the judiciary needs to be reduced (doesn't this argument sound

familiar?), an electronic case management system needs to be implemented and high-level corruption must be combatted more effectively. The question arises as to what this means in concrete terms: Are a certain number of legally enforceable months of imprisonment to be imposed on ministers and state secretaries to fulfil this criterion, or do mayors also count? And why not focus on the mid-level corruption of hospital managers and land registry officials? The population would benefit much more from this than from a replaced minister. Brussels is sometimes unfathomable or at least deliberately (?) imprecise. After all, room must be left for future political negotiation.

Incidentally, civil proceedings will be streamlined first and then digitalised. Unfortunately, this is an almost unique event in Europe in terms of the priority order. Austria is actively involved in the reforms through working groups, it contributes Austrian references to lectures and workshops (expert witness law, the fight against domestic and sexual violence), sees itself as a reform communicator via the embassy in Belgrade and implements the victim protection association model as part of a European consortium (6.5 million EU funds, 0.5 million euros of which are ADA funds). The latter is also dedicated to efficiently preventing and combatting corruption.

Albania and North Macedonia want to finally start their accession negotiations – and work has already been successfully carried out behind the scenes. Austria is handling the Albanian vetting project IMO. The most important project in south-east Europe in terms of the rule of law checks the financial circumstances of judges and public prosecutors for plausibility and quickly delivers tangible results. So far, 62 per cent of the review dossiers have led to dismissals, resignations or mandate terminations. In addition, judges dismissed by the supervisory bodies are prosecuted by the special public prosecutor's office.

Amongst other things, a special court has confiscated the assets of a former attorney general, two former constitutional court judges and a former Supreme Court judge.

Bilateral contacts on judicial reform round off Austria's involvement. The Albanian corruption prosecutor's office SPAK is now being attacked equally by all political parties. There can be no better proof of successful and fearless action within the framework of the law. North Macedonia can at least boast a justice management system based on public and impact-orientated key performance indicators, which is rare progress in Europe.

Surprisingly, the EU's latest accession candidate, Bosnia-Herzegovina, is the country with the best judicial data: Just two weeks after the start of the Covid pandemic, judicial management knew that second-instance judges were working more productively from home than in court. Conclusions can be drawn from this for the future operation and organisation of the courts. Colleagues in Sarajevo also want to follow the US model and address the exciting question of whether artificial intelligence can be used to predict the outcome of civil proceedings. Austria is calling for significant reforms in the area of the rule of law, supporting young people and civil society and offering technical cooperation. One might still lament the unfortunate implementation of plea bargaining in the region. Or write about the sanctions regime, which is practical in terms of realpolitik, but seriously questionable in terms of the rule of law, and the associated reintroduction of the system of criminal justice. After all, what works in the US state of Wisconsin can be counterproductive in Bosnia-Herzegovina – I hope Ukraine is reading this.

CONCLUSION

There is still a long way to go, but the future of the Western Balkans lies in the European Union. However, the implementation of rule of law reforms as a prerequisite for long-term economic growth and stability in the region is essential. It is good to see that judicial reformers in the region continue to surprise us with "small but mighty" innovative approaches and ideas. Sometimes, these are new pan-European references, but they certainly create "regional rule of law standards" where there are none elsewhere. Austria is a very active and welcome European partner in this endeavour. Cooperation between the judicial authorities is already more "European" than one would expect. And what of the relatives in Ottakring? In future, they will hopefully be able to enforce legal claims in their old homeland quickly and without corruption, and reinvest the proceeds of proceedings locally in a legally secure manner. ■

BR OStA Mag. GEORG STAWA
was a judge, worked (as Head of Department and Secretary General) at the Federal Ministry of Justice for a substantial period of time and is now assigned to the FMEIA as "Judicial Attaché for South-East Europe" and seconded to the Austrian Embassy in Belgrade. He is a long-standing expert on judicial reform issues, lecturer and member of the Council of Europe's Commission for the Efficiency of Justice (CEPEJ), of which he was also President.

The rule of law – weaknesses and strengths

What needs to happen to ensure that the judiciary, as the most important pillar of the rule of law, remains trustworthy? It must see itself as a learning and self-reflective organisation and be prepared to accept criticism as an impetus for improvement.

By Irmgard GRISS

If someone in an authoritarian state is charged with corruption or espionage – two equally popular accusations against dissidents, rebels or other non-conformists – it often happens quickly and conviction is almost guaranteed. In a constitutional state, on the other hand, proceedings can take a long time to conclude. The outcome is open, and this applies to proceedings of all kinds, not just criminal. For example, the long duration of proceedings in immigration matters is considered to be particularly annoying. A repeated source of criticism is that criminals are able to enter the country without difficulty by allegedly seeking protected status, but it is only possible to remove them from the country – if at all – after a thorough examination of each individual case.

The duration and open outcome of proceedings are key differences between a constitutional state and a state that may also call itself constitutional, but does not include democratically created law in that definition. In the latter case, might is right, and that is the nature of the authoritarian regime. Of course, that makes many things easier. Because if one doesn't have to dwell on what really happened and whether civil liberties or other rights have been violated, then judgement is quickly passed. There are also no lengthy appeal proceedings to consider.

This leads to the legitimate question of whether the rule of law is up to the current challenges of our time. Challenges that are primarily characterised by the climate crisis, the migration crisis and the changed security situation. For example, complex authorisation procedures often have to be followed when wind turbines, power lines, pumped storage power plants or other facilities for the generation, transport and storage of alternative forms of energy are to be built. In addition to the large number of people seeking protection and migrants, the migration crisis is aggravated by the fact that attempts are being made to regulate the influx by means of asylum law. The right to asylum serves to protect the individual, and thus always requires a precise examination of the individual case. Security is not only

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threatened by war in our vicinity. Security and the subjective feeling of security have also deteriorated internally as a result of terrorist attacks and clashes between rival groups of different origins. Here too, the rule of law – or the perception of it – can stand in the way of effective protection.

This can diminish the value of the rule of law in the eyes of some. However, the fact that individual freedom only exists in a constitutional state is often overlooked. The rule of law was created to protect the rights of the individual against the state. But its significance goes far beyond this. In a constitutional state, the law of the jungle does not apply. Everyone is equal before the law, whether they own a lot or a little, no matter what position they hold. Doing justice to this is easier said than done. In a constitutional state, there must, therefore, be a constant process of self-reflection. This applies to courts and public prosecutors' offices, but it also applies to members of the legal profession. Is the task of protecting and upholding rights being fulfilled? Are equality before the law and the right to be heard more than just nice slogans?

Anyone who turns to a lawyer with a legal problem, for example, should be sure that the focus is on a good solution for them and not on a good financial result for the lawyer. In court, those seeking justice should be able to count on a fair process and a comprehensible decision and not have to fear that proceedings will be delayed due to a change of judge, organisational deficiencies or sheer avoidance of work. In many cases, proceedings could be handled more quickly. Delays are often due to a lack of resources. This applies in particular to investigations by the public prosecutor's office, which sometimes last for years. For the accused, excessively long proceedings are an unacceptable imposition. The fact that the long duration of proceedings can be grounds for mitigation is probably only a small consolation.

Digitalisation helps to simplify and speed up work. During my time at the Supreme Court, we started to deliver rulings electronically. Previously, rulings could sometimes be published in the legal information system before the parties had received it. This was because the file travelled via the court of second instance to the court of first instance and only the court of first instance delivered the ruling. However, easy access to digitised preliminary rulings and legal literature can also lead to rulings being overloaded with citations. This defeats an essential purpose of a ruling. Rulings should make people aware of injustice and they should shape behaviour in order to prevent future violations of the law. To do this, they must be comprehensible. This is only achieved if the key considerations are set out clearly and comprehensibly. Less is often more here.

CONCLUSION

The rule of law is too important for our life and freedom for its weaknesses to be accepted. After all, these could serve as a pretext for "reforms" that actually weaken it. So what needs to happen to ensure that the judiciary, as the most important pillar of the rule of law, is and remains trustworthy? In addition to self-reflection, the first prerequisite is the willingness not to reject criticism as a kind of "lèse majesté", but to take it seriously. The judiciary must see itself as a learning organisation. It must be prepared to take criticism as an impetus for improvement. And it must learn from mistakes and not ignore or try to conceal weaknesses out of a false sense of solidarity. Its self-image must be characterised not by complacency, but by the power of self-purification. ■

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EU sanctions against Russia in the light of the rule of law

Respect for the rule of law is of the utmost importance, even in times of conflict. Are the escalating EU sanctions in response to the Russian invasion of Ukraine degrading this key principle to a mere catchphrase?

By Philip GOETH

Just a few weeks after the attacks of 11 September 2001, the US Congress passed the USA/Patriot Act, an overhaul of the country's national security laws that was carried out without thorough preparation and which significantly expanded the powers of the US government to monitor its citizens while restricting control mechanisms such as judicial oversight, public accountability, and the ability to challenge official searches in court. These developments were heavily criticised in the media as well as by civil rights organisations,[1] and also by European governments, at least in the years just following 11 September.[2] It is by no means too far-fetched to compare the security significance for Europe of the Russian invasion of Ukraine on 24 February 2022 with that of 9/11 for the USA.

The EU has now imposed 14 sanctions packages against Russian natural and legal persons in response to the invasion. More than 1,800 individuals and 473 legal entities have been added to the EU sanctions list. At the time of writing, the consolidated regulation imposing sectoral sanctions comprises more than 300 pages and it can be assumed that further sanctions packages will be added. The Council of the Union had to significantly expand its powers to impose sanctions from February 2022 in order to create this flood of regulations in the first place. This has created an almost unlimited margin of discretion for the imposition of sanctions, thus materially lowering the bar for the Council's accountability.

These far-reaching powers of the Council raise various substantive issues relating to the rule of law, which are worrying for anyone who upholds the values and constitutional principles of the EU. These values should not fall victim to the motto "the end justifies the means" precisely because the fight with Russia is about protecting them.

PROBLEMS REGARDING THE PRINCIPLE OF SEPARATION OF POWERS

Firstly, EU sanctions law is created in a process that exists in strong tension with the principle of separation of powers, one of the cornerstones of the rule of law. In the case of EU foreign policy, including the imposition of sanctions, the Council creates the underlying legal norms (CFSP decisions, implementing regulations) independently and without the involvement of other institutions, in contrast to other legal acts of the Union (in particular regulations and directives in areas outside of foreign policy). Neither the Commission nor the EU Parliament are significantly involved in this standardisation process. This consequence of the Lisbon Treaty is problematic enough on its own; but the Council not only acts as a standard-setter in creating the "sanction criteria" according to which individuals and companies can be sanctioned, but it also subsequently applies its own rules by deciding specifically who should and should not be sanctioned. This is done through decisions and regulations that expand the sanctions lists attached to Regulation EU 269/2014 and the respective underlying CFSP decision.

But that's not all: if certain Council decisions to impose sanctions on individuals are successfully challenged in court, the Council can even go so far as to overrule the jurisdiction of the courts and "correct" the undesirable outcomes of court proceedings. It is, therefore, no exaggeration to say

[1] See, e.g., ACLU, Surveillance Under the USA/PATRIOT Act, https://www.aclu.org/documents/surveillance-under-usapatriot-act.

[2] See e.g. Thimm, From Exception to Normalcy, The United States and the War on Terrorism, https://www.swp-berlin.org/publications/products/research_papers/2018RP07_tmm.pdf, page 38.

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that in the case of sanctions law, the Council acts not only as legislator and executive, but even places itself above the authority of the Union courts. It is obvious that the excessively powerful position of a single institution is contrary to the principle of separation of powers and thus to the rule of law.

PROBLEMS WITH LEGAL CERTAINTY AND FORESEEABILITY OF ADMINISTRATIVE ACTION

Furthermore, there are material problems in connection with the principle of legal certainty and the predictability of administrative action. According to established case law, a rule that grants a state body discretion must ensure that "the scope and modalities of the exercise of such discretion are **sufficiently clearly defined** with regard to the legitimate aim in question in order to **provide the individual with adequate protection against arbitrariness**".[3] Otherwise, the respective authority would be in a position to make arbitrary decisions, which is contrary to the principle of the rule of law. The fact that various key provisions of EU sanctions law are not compatible with this fundamental principle becomes clear when one considers the sanctions criterion of Art. 3(1)(f) of Council Regulation (EU) 269/2014 (the "(f) criterion"). The wording of this criterion is extremely broad and covers any person who "materially or financially supports" the Russian Federation or who "benefits" from it. Taken literally, this criterion authorises the Council to sanction any person on earth who "benefits" from the use of Russian natural resources, as well as any person who "materially supports" Russia, for example, by voting for a political party that opposes support for Ukraine, and the like.

In the same unrestricted manner, the sanctions criterion of Art. 3(1)(g) of Regulation 269/2014 (the "(g) criterion") includes "leading businessmen operating in Russia ..., or businessmen … operating in economic sectors that are a significant source of revenue for the Government of the Russian Federation". This puts all ordinary "businessmen", insofar as they are active in economic sectors relevant to Russian state revenues, in the Council's crosshairs for potential sanctions. The text of the (g) criterion is the result of a revision of the sanctions

[3] Court of Justice of the European Union, T-138/07, Schindler, 13 July 2011, ECLI:EU:T:2011:362, paragraph 99.

criteria made by the Council in June 2023, which aims to further expand the Council's powers compared to the already almost unlimited discretion contained in the legal acts adopted in February 2022. The Council's new ability to sanction practically any business person operating in the Russian economy has massively undermined the principle of predictability further.

The uncertainties created by the (f) and (g) criteria are deepened by the combination with the term "associated" as contained in the last paragraph of Article 3(1) of Regulation (EU) No 269/2014 ("and natural or legal persons, entities or bodies associated with them"). This clause provides that any person who is "associated" with a person who, for example, "benefits" from Russia or who is a business person involved in the Russian economy can be added to the EU sanctions list by the Council. With this combination of sanctions criteria, almost anyone could be placed on the EU sanctions list, from the language teacher of a US Republican who opposes aid to Ukraine to the chambermaid of an employee of a Russian supermarket to the hairdresser of a Russia-friendly blogger in China. In conjunction with the already extremely broadly defined (f) and (g) criteria, the "affinity" criterion basically removes all limits that the Council has when imposing sanctions on any person.

This creates an extremely far-reaching power to make arbitrary decisions without any accountability. This is exactly what the Council is claiming: as has been shown in various court cases, the Council believes that it only needs to prove that the person in question falls under one of the extremely broad sanctions criteria (e.g. that the sanctioned person is "associated" with a business person operating in Russian economic sectors) for the sanctioning of the person in question to be lawful. And should the person concerned then question why he or she has been included in the list while hundreds of millions of others who would also fulfil these criteria have not been included, the Council merely declares that it is not obliged to sanction every person who falls under the sanctions criteria, nor is it obliged to provide a justification for its decisions that goes beyond the fact that the person in question fulfils the sanctions criteria. Regulations that enable such arbitrary decisions are as far removed from the principle of legal certainty as a legal norm can be.

HOSTAGE-TAKING OF FAMILY MEMBERS THROUGH CLAN LIABILITY

In an effort to be able to sanction every conceivable person at will, the Council has since gone so far as to establish the liability of family members under sanction law for the (alleged) offences of their close relatives, which can only be described as "clan liability". These particularly reprehensible provisions were also added to the (g) criterion by the Council in June 2023. Since then, the Council has been authorised to sanction "immediate family members" who benefit from a sanctioned person. This extension is a reaction of the Council to various judgements of the General Court (GC) in "related cases", which were lost by the Council, as the court judged a "relationship" based solely on a family relationship with a listed person to be inconsistent with the sanction criteria. In order to pre-empt this line of case law and neutralise the associated "delistings", a new sanction authorisation primarily tailored to family members was created, which has since been applied several times.

As mentioned, this legislation, which overrides the case law of the Union courts, is highly problematic. Even more problematic, however, are the effects of these amended provisions on family members, against whom the Council is now taking action on the basis of its extended powers. A textbook example is the case of Alexander Pumpyansky. Alexander, a Swiss citizen, and his father Dimitry Pumpyansky, a former Russian industrialist, were sanctioned at the beginning of March 2022. The sanctions against Alexander Pumpyansky were lifted by the GC in November 2023, as there was no "link" between father and son (beyond a family relationship). Despite this clear (and definitive) finding by the GC, the Council sanctioned Pumpyansky Junior again in March 2024 as a member of his father's family, without any evidence being presented that he benefited from his father's activities. Alexander Pumpyansky is thus de facto held communally liable because he is his father's son – a status that he cannot change.

This clan liability is reminiscent of the darkest times in history and is more in line with the legal culture of countries such as North Korea or the like than that of developed democracies. There is simply no valid argument that could justify the Council arbitrarily targeting individuals on the basis of a family relationship – especially when the courts have already ruled that there is no (other) connection between the two family members. The Council of the Union should not approve of such measures, let alone pursue them – they are diametrically opposed to the rule of law and come with considerable personal consequences for those affected. This finding is exacerbated by the fact that all these manoeuvres have little chance of influencing the Kremlin's decision-making regarding the war in Ukraine. In other words: we are degrading our legal culture without achieving any end benefit. It is highly questionable that such measures should characterise 21st-century Europe.

HOW ARE THE COURTS HOLDING UP?

Given the extremely broad definition of the sanctions criteria, one would think that the Union courts would not have much to scrutinise when restrictive measures are challenged. After all, it should not be too difficult for the Council to prove that someone is "a businessman active in Russian economic sectors" or similar. In

fact, however, successful challenges have been made in a number of cases, even in such prominent cases as Aven, Fridman, Pumpyansky, Rashevsky, and others. This is because the GC requires the Council to ensure that the grounds for inclusion on the sanctions list and the underlying evidence demonstrate the current activity of the person concerned and do not relate to circumstances dating back years before inclusion on the sanctions list.

As can be seen from the reasons given for the Council's respective court defeats, the Council has failed to fulfil even this bare minimum of accountability. The 'evidence' on which the Council's listing decisions are based often consists of outdated tabloid articles or anonymous blogs. As a result of such poor preparatory work, many sanction decisions contain gross misrepresentations, false factual claims and inconsistencies, and are not supported by evidence. To 'remedy' this obvious lack of substance, the Council has recently submitted arbitrary compilations on the Russian economy to the GC, including various extracts from books, journals, and publications by NGOs and public institutions. As a rule, this material has absolutely nothing to do with the position of the sanctioned person and only confirms the Council's arrogance in imposing sanctions and its disregard for the standards set by the courts.

"PERPETUUM MOBILE" OF UNLAWFUL SANCTIONS RENDERS EU COURT DECISIONS INEFFECTIVE

One would expect that the above-mentioned judicial successes of some prominent Russian businessmen should motivate the Council to change its course and correct its superficial approach to violating the fundamental rights of sanctioned persons. In fact, due to certain procedural circumstances, the Council can carry on as before with impunity – and does so unabashedly. The case of Dimitry Pumpyansky, who successfully challenged his sanctions of September 2022, March 2023, and September 2023 before the General Court, is characteristic of this. Although the General Court found that Dimitry Pumpyansky had been unlawfully listed for 18 months, the last sanction (from mid-March 2024) could not be included in the proceedings recently decided in Dimitry Pumpyansky's favour due to the procedural framework of the General Court. Although Dimitry Pumpyansky successfully brought an action for annulment in Luxembourg and on 26 June 2024 his sanctions were lifted until mid-March 2024, he nevertheless remains on the EU sanctions list based on the same criteria and evidence.

The EU's practice of re-imposing sanctions every six months, in conjunction with lengthy court proceedings, generally leads to the last sanctions imposed remaining in place despite a successful challenge. This creates a "perpetuum mobile of unlawful sanctions", a procedural "Frankenstein" that leads to the almost complete ineffectiveness of EU court decisions. The Council is well aware of this practice, which undermines legal protection in Europe and highlights a systemic weakness in the guarantee of fundamental rights in sanctions law, particularly with regard to Article 47 of the Charter of Fundamental Rights, which grants the right to an effective remedy.

CONCLUSION

In summary, the Council's sanctions practice relating to the Russian war in Ukraine is in strong tension with the principle of the separation of powers and legal certainty. In addition, there are significant problems relating to legal protection and fundamental rights, particularly in areas where the Council overrides the case law of the EU courts – whether by changing the applicable sanction criteria at will when cases are lost in order to override the standards defined by the courts or by simply re-imposing the same (unlawful) sanction according to the same criteria. In this case, all that remains for the individual seeking legal protection is to take legal action again and again, with the result that, despite successful annulment by the courts, they are never removed from the EU sanctions list.

After more than two years of intensive work in practically all key areas of sanctions law, there is no doubt in my mind that this practice has – regrettably – degraded the rule of law in the EU to a mere catchphrase. This is quite simply the antithesis of the rule of law – a situation in which arbitrary decisions are made on the basis of absolute and unrestricted discretion, legislation and executive power are united in one body, clan liability prevails, and the effectiveness of judicial protection is de facto eliminated.

Such developments are harmful to more than those directly affected by them. It is a creeping poison that has the potential to infiltrate the entire legal culture of the Union in the medium term – and which, unfortunately, we must assume will ultimately be felt by all European citizens. ■

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The rule of law as a European Union value

The rule of law cannot defend itself; it needs alue-conscious political institutions and a social environment to safeguard its ability to function. While on the European level, it is primarily Member States' excessive concepts of sovereignty that put the rule of law at risk, on the national level, it is increasingly jeopardised by populism and autocratic tendencies.

By Maria BERGER

Article 2 TEU states: *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States … ."* **Article 4(2) TEU**, on the other hand, deals with the relationship between Union law and the constitutional law of the Member States: *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government … ."*

1. LEGAL ASPECTS

These two central provisions of the Treaty on European Union illustrate very clearly which parameters must be taken into account in the legal interpretation and application of the principle of the rule of law. In the absence of a more precise definition at primary law level, the substance of the principle of the rule of law under EU law must be derived from the constitutions of the Member States through comparative law. This means that their lowest common denominator is the core of what is required under EU law. This core plays the role of minimum requirements or "red lines"[1] which the Member States may not fall short of or exceed.[2] The treaties do not confer the power to further homogenise the constitutional systems of the Member States under Union law.[3] Embedding the value of the rule of law within a series of other values also raises the question of the extent to which the rule of law can be relativised through reference to other values and the extent to which these other values reduce it to technical aspects. Can the abolition or paralysis of a constitutional court, which is the result of technically flawless parliamentary legislation or even a referendum, be justified by the value of democracy under EU law? Does the value of the rule of law also include respect for human rights or "only" the procedural and institutional aspects of legal protection and the separation of powers?

[1] von Bogdandy, Tyrannei der Werte? Herausforderungen und Grundlagen einer europäischen Dogmatik systemischer Defizite in ZaöRV – Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 79 (2019), 503, 542.

[2] But even this restrictive view went too far for Poland and Hungary in the proceedings for annulment of Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the Union budget, see CJEU, judgement of 16 February 2022, ECLI:EU:C:2022:98

[3] Schroeder, The European Union and the Rule of Law – State of Affairs and Ways of Strengthening in Schroeder (ed.), Strengthening the Rule of Law in Europe (2016), 1, 11. Going somewhat further: Levits, Die Europäische Union als Wertegemeinschaft in Jaeger (ed.), Europa 4.0? Die EU im Angesicht politischer und technologischer Herausforderungen (2018) 239, 246f

A meeting of the Grand Chamber of the Court of Justice of the European Union | © Court of Justice of the European Union

2. POLITICAL APPROACH

The value of the rule of law is not just the subject of legal interpretation. Both the CJEU and the political bodies of the Union have to deal with the scope of this value in various contexts, be it in connection with enlargement (Art 49 TEU) or in the course of Article 7 procedures. Here, the authorised institutions, the Member States, or the Commission and Parliament, must justify why they see a "clear risk of a serious breach of the values referred to in Article 2". The Council must determine the existence of such a risk. In the case of Poland and Hungary, the Council prepared this so thoroughly and reluctantly that even after political change in Poland, proceedings against Hungary could not be finalised. As a result, the "window of opportunity" between the elimination of an impending Polish veto and the emergence of a possible Slovakian veto could not be utilised.

The other instruments of defence under EU law also depend on the commitment of the political institutions. Infringement proceedings against a Member State must be initiated by the Commission before the CJEU. The Commission has been very hesitant at times, particularly in the case of Poland, and had to be urged to proceed by Parliament, although the CJEU had already prepared the ground for systemic infringement proceedings with reference to Art. 2 and 19 para. 1 subpara. 2 TEU.[4]

Very often, the political institutions seek informal, non-binding forms to deal with emerging problems regarding the rule of law in Member States. One such attempt is the new **"EU Framework to strengthen the rule of law"** presented by the Commission in 2014.[5] The definition of the rule of

[4] CJEU, 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117.

[5] European Commission, 11 March 2014, COM (20149 final)

law contained therein, which was based on a summary of CJEU case law, went too far for the Council. This case law predominantly drew on issues from competition law and therefore related only to rule of law requirements for EU institutions and thus could not be transferred to the Member States.[6] These alone are responsible for organising the rule of law at national level. The Council then created a **rule of law dialogue** as a counterpart, which stipulated that a debate on individual topics relevant to the rule of law had to take place once a year in the General Affairs Council.[7] Both instruments coexisted more or less peacefully, but neither was very successful. Parliament then endeavoured to achieve a common approach by EU institutions and more effective mechanisms through the proposal for an **"EU mechanism on democracy, the rule of law and fundamental rights"**.[8]

2.1. RULE OF LAW REPORTS

After initially rejecting the Parliament's proposals, the Commission then took up at least some of the ideas and this led to the rule of law reports presented annually by the Commission since 2020. These reports contain chapters on all Member States, not just the "usual suspects". What is particularly exciting about these reports is that they not only shed light on the independence of the courts, their quality and efficiency, but also scrutinise the commitment to fighting corruption, the plurality of the media and other accompanying institutional factors. As a result, central **political obstacles** to a functioning rule of law are also coming to the attention of Europe for the first time. In the reports

Didier Reynders, Commissioner for Justice and the Rule of Law with Roberta Metsola, President of the European Parliament | © European Union

[6] Schroeder, The European Union and the Rule of Law – State of Affairs and Ways of Strengthening in Schroeder (ed.), Strengthening the Rule of Law in Europe (2016), 1, 20.

[7] Council of the European Union, 27.5.2014, Press Release (16936/14), 3362nd meeting of the General Affairs Council, 21 May 2014.

[8] European Parliament, Resolution (P8_TA(2016)0409) of 25 October 2016.

on Austria, obstacles of note were official secrecy, the lack of transparency and one-sidedness in the allocation of government advertisements, the inadequate protection of journalists against physical attacks and other threats – especially in the form of SLAPP suits – and the lack of commitment in the fight against corruption. These reports at least lead to political discussions in most Member States and therefore exert a certain amount of pressure on the respective governments, even if they are not legally binding.

2.2. VALUES VERSUS MONEY

Of course, these reports do not have any effect on those who stubbornly deny the rule of law. That is why the Commission decided to apply pressure to these states where it really hurts, namely finances. In addition to securing the infringement proceedings against Hungary and Poland with fines, it also submitted a draft Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the Union budget.[9] The draft was repeatedly on the brink of failure in the Council of Ministers and could only be saved by strictly limiting it to protecting the EU budget. It was first used against Hungary.

Whether this instrument will ultimately be successful will also depend on its consistent application by the Council and the Commission. The Commission's decision to disburse some of the funds withheld from Hungary does not indicate such consistent application. However, this regulation does have one merit: for the first time, it contains a legally binding definition of the rule of law, albeit only at a secondary legal level.

Art. 2 of this regulation reads as follows:

"The rule of law" *refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of the arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.* ■

The rule of law from the CJEU's perspective

The rule of law presupposes that all public authority is exercised within the law in accordance with the values of democracy and respect for fundamental rights, as laid down in the Charter of Fundamental Rights of the European Union ('the Charter') and in other applicable legal instruments, under the control of independent and impartial courts. It requires, in particular, that the principles of legality [(judgment of 29 April 2004, Commission v CAS Succhi di Frutta, C 496/99 P, EU:C:2004:236, para. 63)], which presuppose a transparent, accountable, democratic and pluralistic legislative process, legal certainty [(judgment of 12 November 1981, Meridionale Industria Salumi and Others, 212/80 to 217/80, EU:C:1981:270, para. 10)], the prohibition of the arbitrary exercise of sovereign power [(judgment of 21 September 1989, Hoechst v Commission, 46/87 and 227/88, EU:C:1989:337, para. 19)], effective judicial protection, including access to justice through independent and impartial courts [(judgments of 27 February 2018, Associação Sindical dos Juízes Portugueses, C 64/16, EU:C:2018:117, paras. 31, 40 and 41, and of 25 July 2018, Minister for Justice and Equality, EU:C:2018:117, paras. 31, 40 and 41)]. July 2018, Minister for Justice and Equality, C 216/18 PPU, EU:C:2018:586, paragraphs 63 to 67)] and the separation of powers [(judgments of 22 December 2010, DEB, C 279/09, EU:C:2010:811, paragraph 58, of 10 November 2016, Poltorak, C 452/16 PPU, EU:C:2016:858, paragraph 35, and of 10 November 2016, Poltorak, C 452/16 PPU, EU:C:2016:858, paragraph 35). 35, and of 10 November 2016, Kovalkovas, C 477/16 PPU, EU:C:2016:861, para. 36)] [(Communication from the Commission entitled 'A new EU framework to strengthen the rule of law', COM(2014) 158 final, Annex I)].

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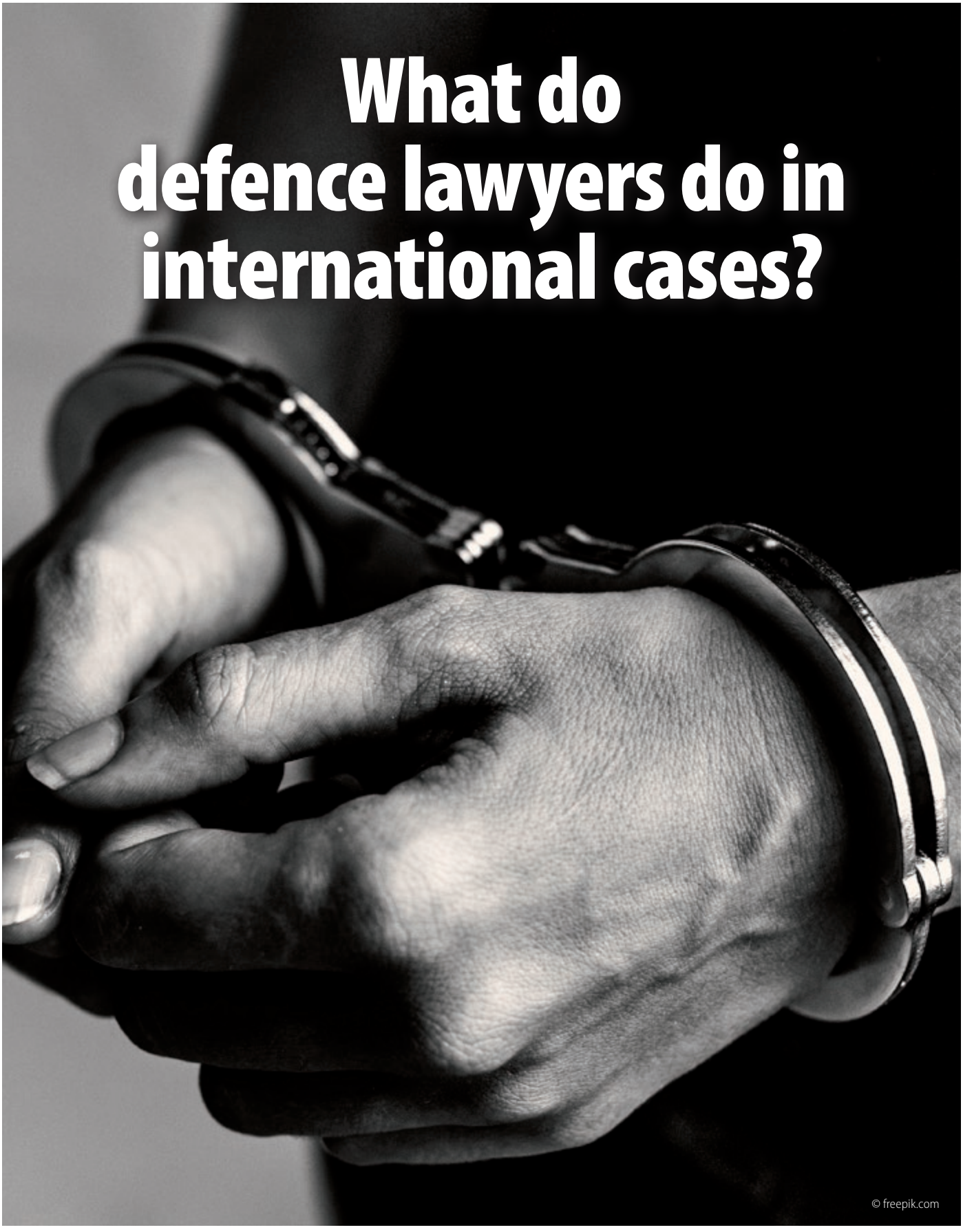
[9] OJ 2020, L 433 I, p. 1, corrected in OJ 2021, L 373, p. 94.

What do defence lawyers do in international cases?



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Not so long ago, any criminal investigation that crossed national borders was a nightmare for criminal investigators and public prosecutors.

By Gerhard JAROSCH

It took months, if not years, for law enforcement authorities to obtain information on foreign bank accounts. Even a request for legal assistance from another EU country was routed through diplomatic traffic according to long-established tradition. This not only made it almost impossible to conduct international white-collar criminal proceedings, it also meant that the sword of Damocles hung over companies – whether victim or accused – for a long time. But then politicians realised that national borders must be bridged in order to strengthen the work of criminal investigators without surrendering sovereignty.

In the EU alone, networks, legal institutions and legal tools have been created in just a few years that have catapulted law enforcement into the 21st century.

The most important of these measures are:

- The European Judicial Network (EJN), a non-bureaucratic network of prosecutors and judges in all regions of the EU and beyond, which enables a rapid flow of information in simpler cases.
- The EU legal assistance agency EUROJUST, which not only connects investigators in over 5 0 countries in more complex cases, but also enables centralised coordination of related national proceedings, especially in the most sensitive cases.
- The Joint Investigation Team (JIT), which can be deployed by EUROJUST to immediately use the results of an investigation in one country as admissible evidence in another.
- The European arrest warrant, which has shortened the previously lengthy extradition of prisoners awaiting trial to a few weeks, sometimes days.
- The European Investigation Order, which means that a court order for a house search, for example, can be executed in another country without any substantial examination of its content.

A complete list within the EU would be even longer, but there are also similar developments in other parts of the world, such as a network in South-East Asia (SEAJUST) based on the EU model and a dwindling distrust of other jurisdictions through the training of lawyers as a result of globalisation. Worldwide organisations such as the International Association of Prosecutors, the International Police Association and many specialised networks are resulting in increasingly effective cooperation between prosecutors.

And how should defence lawyers react to this? Regardless of whether they are representing a large corporation on international bribery charges or advising the victim of CEO fraud in several countries: simply knowing lawyers in all the jurisdictions involved is no longer enough. In addition to a thorough knowledge of the aforementioned cross-border legal institutions, a profound understanding of the differences in substantive law and procedural regulations in the countries involved is required. Just because you can translate "infidelity" into another language does not necessarily mean that you understand that the eponymous offence is punishable on the other side of the border. A basic understanding of the respective roles is needed: does the public prosecutor's office or the criminal investigation department lead the investigation? To what extent does the court intervene or is it limited to mere legal protection? Which national authorities play the most important role in cross-border co-operation? Who is the best point of contact with the authorities in all the countries involved?

In order to be able to act professionally and competently in modernised cross-border criminal prosecution, we at LGP have established the International Criminal Law Unit, experts with many years of EU-wide and global experience and a worldwide network of criminal lawyers and investigators who know what to do both in criminal defence and in the representation of victims in complex cases. ■

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Rule of law and regulation in the digital age

The economic power of non-governmental global tech giants and the rise of artificial intelligence pose a challenge to our democratic legal system. Can a coordinated, centralised European approach at both the legislative and regulatory level put a stop to these risks?

A guest article by Klaus M. STEINMAURER, Managing Director Telecommunications and Post at RTR*.

A by-product of the digital transformation of the last two decades has always been the vision of the "transparent citizen" and the threat of a surveillance state. The emergence of general purpose transformer models (GPTs) has led to these visions becoming ever more pronounced – to the point that technology can generally take control. But what do these dystopian images in our minds have to do with the rule of law and regulation? Why is it important to think about this? Why do we still have control over what our future looks like? And why can the state play an important role here so that this technological revolution works in our favour as citizens and as human beings? I would like to share a few thoughts with you in the following paragraphs.

First of all, we need to look at what the rule of law means in objective terms and how technology relates to it in general. We should then address the question of who should be authorised to legislate and on what basis. I would then like to round off the topic with the question of whether traditional legislative processes are still sufficient and why regulation is a necessary addition to create a legally secure environment for everyone, especially in our current technology-driven environment. After all, in order for us to realise ourselves as human beings and lead our lives the way we want to, technology should ideally serve and not, as is often feared, lead.

WHAT IS THE OBJECTIVE MEANING OF THE TERM "RULE OF LAW"?

The principle of the rule of law in the Austrian Federal Constitution stipulates that the federal government, the administration, and the courts may only act on the basis of laws and can only do what is laid down in the law.[1] In the Austrian Federal Constitution, this is explicitly regulated in Article 18. In order to ensure compliance with the law, the state is granted coercive powers, which it can enforce with the help of state bodies through special procedural rules. This is fundamentally a purely formal rule of law, which does not stipulate which national legal framework it is subject to or which concept of justice it follows, as justice is not a basic prerequisite. The legislative framework is essentially the constitution, which in turn is essentially subject to an abstract basic norm. Therefore, the rule of law basically does not declare whether a legal system is just or unjust, because this judgement is made exclusively from the subjective point of view of a specific norm of justice.[2] If this theoretical foundation is applied to the legal issues that arise today in connection with rapidly developing technical capabilities, many new problems

[1] https://www.parlament.gv.at/verstehen/politischessystem/bundesverfassung/parlament#:~:text=Das%20rechtsstaatliche%20Prinzip%20der%20Bundesverfassung,was%20in%20Gesetzen%20festgelegt%20ist.(07.06.2024)

[2] Cf Hans Kelsen, Reine Rechtslehre (1960), 201 "Therefore, any content can be law. There is no human behaviour which as such, by virtue of its content, would be excluded from being the content of a legal norm."

emerge. A central point here is above all the fact that technology is fundamentally universal and, in the absence of generally agreed objectivity, does not require any further justification as to whether it is just or unjust.

IS TECHNOLOGY LEGALLY NEUTRAL?

In principle, technology is therefore neutral from a legal perspective. This means that technology per se can be neither just nor unjust. However, its use can be just or unjust depending on the legal system, whereby a distinction must be made here in terms of the positivist understanding of law depending on the underlying standard of justice, which does not, however, justify assessing whether the rule of law is fulfilled in one case and not in another. Consider, for example, the issue of social scoring and facial recognition in public spaces. While this is (still) not considered permissible in the EU under the AI Act and is not in line with European values, it is no longer a problem in the Chinese legal system. This same technology is considered permissible and used by one society and not by another. There can, therefore, be no universal principle of the rule of law; it is always determined by the respective legal system. The technology in question is therefore neutral and it is up to each society to decide how it wants to deal with it within its chosen legal system. However, insofar as I deal with open questions here, I will base my further considerations on a Western-style liberal understanding of the law.

WHY DO WE NEED TECHNOLOGY TO ENFORCE THE LAW TODAY?

The use of digital technologies is becoming increasingly important for law enforcement given the ongoing digitalisation of society. Such use, in turn, requires appropriate legal foundations, which may only be enacted in accordance with the constitutional framework underlying our legal system. The effective prosecution of many offences and the protection of our state are only possible with the appropriate technical tools. But if we want to open up their use to state bodies, this requires a strict balancing of the fundamental rights affected, such as freedom, privacy, data protection, freedom of opinion and the like. Finding the right balance here is an art that is not easy and the more that technical capabilites develop, the more difficult it becomes to draw a clear line without jeopardising our liberal state legal system and thus the rule of law as we know it.

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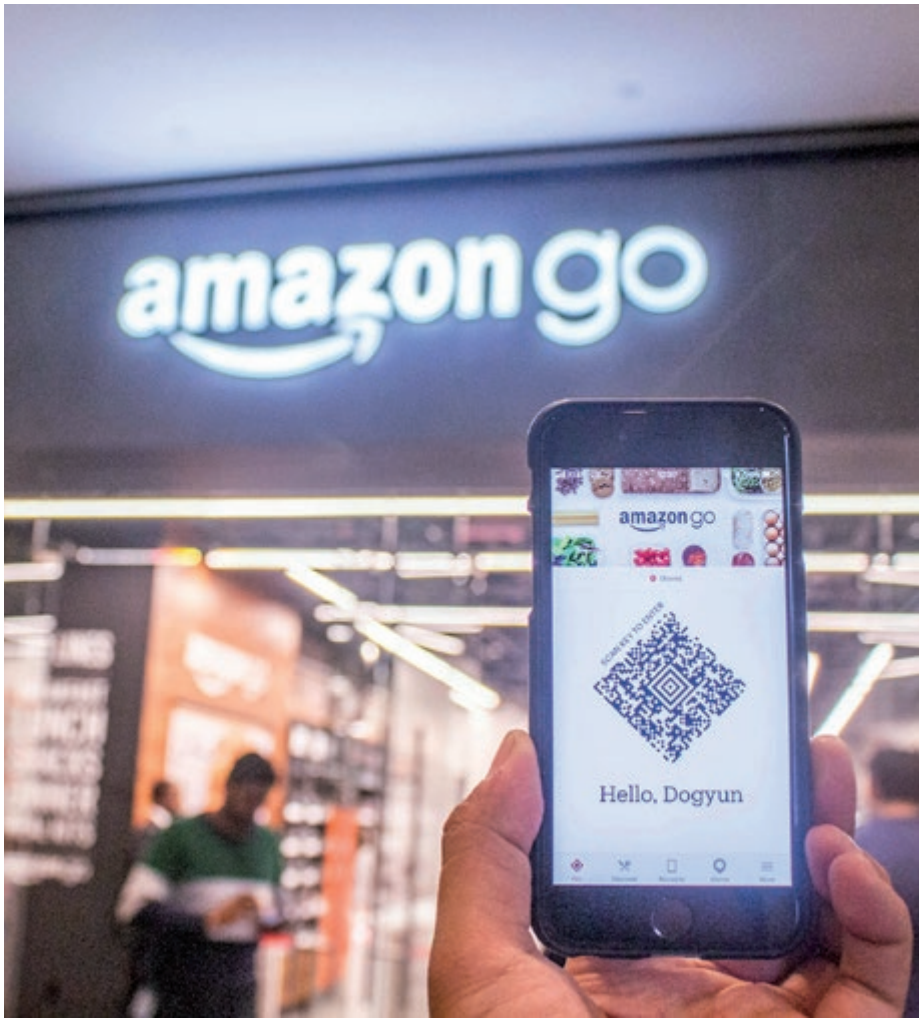
It is true that effective crime-fighting requires equally effective technical resources with which our police can legally work. But the danger of reaching the point where the liberal constitutional state could tip over into a police state is also increasing as a result of growing technological progress. Just consider the exemptions in the AI Act when it comes to the use of biometric recognition and the like. If the justification for the need to use technical aids is accompanied by the creeping dilution of the values laid down in the European treaties and thus also of our constitution, we should think about what the rule of law will look like in the future. Today more than ever, it is important to constantly and publicly remind ourselves about technological capability and to ask ourselves how much collective security individual freedom, which is very important to us all, can tolerate.

WHAT FRAMEWORK CONDITIONS ARE REQUIRED?

Digitalisation is not a national issue, it is global. As already mentioned, technol-

ogy can be used universally, regardless of the respective form of state or society. Therefore, when we talk about framework conditions, we must at least approach the issue from a European perspective in order to ensure effective compliance, and above all in order to be able to counter the ever-increasing power of global players. More on this in the following point. With its "Digital Decade Programme",[3] the EC has responded in a comprehensive manner to the challenges associated with digitalisation and has adopted a comprehensive regulatory package over the past five years – most recently the AI Act – with the aim of securing and improving legal certainty, competitiveness and innovative strength in Europe for all Europeans and the European economy. It is based on two fundamental principles: firstly, legal harmonisation through the increased adoption of regulations with direct effect in all Member States. Secondly, a comprehensive regulatory concept based on decentralised and centralised regulatory bodies, whereby it is clear that the formative future of regulation will most likely sit at the European level, and the execution at national level.

And that is the right thing to do, because only strong European regulatory jurisdiction will allow standards to be set for fair and socially balanced conditions in international competition and the rule of law to be upheld as a European principle. The task of the next European Commission will then be to consolidate this programme and, in particular, to ensure that the regulatory framework laid out by the Digital Markets Act, Digital Service Act, GDPR and Artificial Intelligence Act (AI Act) is harmonised where necessary and aligned at European and national level in the area of law enforcement. The current confusion of jurisdiction is still leading to legal uncertainty and has not yet been optimally implemented for competition. It is also important to ensure that not too many exceptions are made to originally agreed legal principles when applying new technologies in the public sector, resulting in a dilution of the underlying values, as explained above. With regard to the problem described below, the consideration of certain values at supranational and national level is of particular importance in order to be able to credibly and effectively prevent a situation in which globally active private companies, which already exceed the economic power of some G7 states today, are able to set the law to the greatest possible extent without state legitimisation.



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PLATFORMS AS STATES – IS THERE A RISK THAT THE STATE'S MONOPOLY ON THE USE OF FORCE MAY NO LONGER EXIST?

All theoretical treatises on the rule of law deal with the relationship between the state and its subjects. However, the economic power that exists today gives non-state, globally active companies greater influence over societies than states have ever had. This is a major problem and is fundamentally incompatible with the principle of the rule of law. Rather, it gives the impression that we are in danger of falling back into "digital" feudal rule. The behaviour of some of the key platform giants is a foreboding sign of things to come. It is not only the economic power of these companies that is problematic, but also a

[3] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en

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sometimes pronounced sense of mission, including a lack of reflection on the part of these new "feudal lords". Economic power bundled with a lack of democratic legitimisation and control can quickly become a dangerous mixture, which in the best-case scenario could result in something like the "enlightened absolutism" of Joseph II.[4] In this context, artificial intelligence in particular leads to an exponential increase in the dangers to the democratic legal system as we know it. Moritz Holzgraefe and Nils Ole Oermann address this topic in their current book "Digital Platforms as States" and analyse in detail the extent to which the individual pillars of the (democratic) rule of law are already being called into question today and where developments are heading.[5] From a European perspective, only a harmonised and coordinated centralised approach at all affected levels, both legislative and regulatory, can put a stop to the potential and actual risks arising from this.

FINAL THOUGHTS

The extent to which the EU regulations described above, which were issued as part of the Digital Decade Programme, and resulting regulation can effectively counteract undesirable developments (at least in our jurisdictions) will become apparent in the coming years and will also depend on general political developments. A credible concept of the rule of law in accordance with the agreed values must be represented internally in the EU and its Member States in order for it to be implemented consistently and effectively externally. Caution and attention, as well as consistent and, above all, credible action in connection with the use and assessment of new technologies at all political levels is the order of the day. All Member States are advised to actively support the EU here and to put their own interests to one side so that they are not ultimately replaced by digital platforms as the new states. Or as Google's Eric Schmid and Jared Cohen said back in 2013: "We are convinced that virtual states will emerge in the future that will shake up the virtual landscape of existing states."[6]

Digital technology does not pursue a specific political goal, but digital technology can be used to realise the political or economic interests of individuals or specific groups. For better or for worse. It is up to us to continue to protect the rule of law according to democratic, liberal principles in Europe. ■

* *Note: The statements and opinions expressed in this guest article are exclusively the personal thoughts of the author and do not represent the opinion of the authorities.*

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Photo: © APA / Martin Hörmandinger

[4] „Everything for the people, nothing by the people", Government Programme of Emperor Joseph II, https://www.habsburger.net/de/kapitel/der-nuetzliche-kaiser-joseph-ii (09.06.2024)

[5] Cf Holzgraefe/Oermann, Digitale Plattformen als Staaten, Herder 2023, 12

[6] Schmidt/Cohen, The New Digital Age, 150

From the European to the national rule of law: administrative law

The European Court of Human Rights in Strasbourg | © CherryX

Although the reform of administrative jurisdiction has reduced the workload of the Administrative Court, it has considerably reduced the legal protection of parties under administrative law, compounded by the lack of legally regulated basic training for administrative judges in accordance with European standards.

By Heinz MAYER

Such a dramatic outcry from a supreme court had never been seen before in the Second Republic. In its ruling of 14 October 1987,[1] the Constitutional Court of Austria accused the ECtHR of "open development of the law" through its case law, which, therefore, could not be followed by the Constitutional Court. The Constitutional Court also questioned whether the transfer of power required to develop the law into a convention body might constitute an overall amendment to the Federal Constitution. The case primarily concerned the interpretation of the terms "civil claims" and "criminal charges" in Article 6 of the European Convention on Human Rights. The result was that the ECtHR subsumed large parts of Austrian administrative law under these terms and demanded a court decision as a legal and factual authority in this matter. This obviously was met with considerable

[1] VfSlg 11500

The Court of Justice of the European Union in Luxembourg | © Court of Justice of the European Union

The Constitutional Court of the Republic of Austria in Vienna | © VfGH/Achim Bieniek

resistance, particularly in Austria, but also in Germany. The ECtHR based its legal opinion on the need for an autonomous interpretation of the European Convention on Human Rights, which could not be orientated towards a national legal system.[2] However, this judgement of the ECtHR was not entirely surprising: European legal literature has repeatedly pointed out that law shaped by interpretation is a long-established practice in the law of the European Communities. Both the CJEU and the ECtHR view their role as helping to ensure that the conventions remain living instruments.[3] It is indisputable that this practice of interpretation considerably impairs legal certainty.

The judgement in VfSlg 11500 was a wake-up call for Austrian politics. It was clearly impossible to continue living with such a divergence in the long term – above all because accession to the European Union was being considered at the time by large circles of political decision-makers. Independent administrative tribunals were therefore initially set up in the administrative proceedings, which correspond to tribunals as defined in Article 6 (1) of the European Convention on Human Rights. Although these were administrative authorities in the sense of Austrian constitutional law, they were also tribunals in the sense of European case law. However, the developments described above have made it clear that the European concept of the rule of law cannot be equated with the national concept of the rule of law. The European concept of the rule of law is considerably vaguer as it considers European courts as authorised to develop the law. Directly applicable European Union law, therefore, does not provide the same degree of legal certainty that national law must provide under Article 18 of the Federal Constitutional Act. Article 18 of the Act is only relevant if Austrian law-making bodies have to implement European law. In this case, the principle of double obligation applies. The transposition must comply with European Union law, but also have the certainty required by Article 18 of the Act.

It was clear from the outset that the independent administrative tribunals were only a temporary solution. After lengthy consultations, particularly between federal and state governments, a true administrative court of first instance was established in 2012. Experts unanimously welcomed this reform and saw it as a major step forward.[4] The considerations that ultimately led to the creation of these administrative courts were primarily characterised by a dispute between the federal government and the federal states, which wanted to have their own administrative jurisdiction alongside the federal government. This necessitated a division of responsibilities between the federal administrative courts and the provincial administrative courts, which is reflected in complicated regulations. However,

[2] see Grabenwarter/Pabel, Europäische Menschenrechtskonvention 7 [2021] 35ff; Muzak, Das österreichische Bundes-Verfassungsrecht[6] [2020] 897ff

[3] Mayer, ZfV 1988, 473 – here: 480f

[4] cf. e.g. Eberhard, Verwaltungsgerichtsbarkeit und Rechtsschutz JRP 2012 269; Bierlein, Gedanken zu den ersten fünf Jahren der Verwaltungsgerichtsbarkeit ÖJZ 2019, 448

one key aspect was overlooked in the reorganisation. Real progress in legal protection cannot be brought about by organisational changes alone, but instead requires the assurance that sufficiently qualified judges will exercise first-instance administrative jurisdiction.

This is, unfortunately, not guaranteed. Pursuant to Article 134 paragraph 3 of the Federal Constitutional Act, appointments require the completion of a law degree and more than five years of professional legal experience. For members of the Federal Fiscal Court, the completion of a relevant degree and five years of relevant professional experience are sufficient. No special judicial training is required. The constitutional legislator has made another regrettable mistake with the transitional provision of Article 151 paragraph 51 subparagraph 4.[5] For first-time appointments as an 'other member' of the administrative court, the aforementioned requirements for appointment are "deemed to have been met". This means that appointees might neither have a degree nor the relevant professional experience. Furthermore, the "judges" appointed in this way may be active for decades. The "judge" created by this regulation contradicts the constitutional concept of a judge in a key way: according to the prevailing view, "legal scholarship" is inherent to the concept of "judge" in the constitutional sense.[6] In addition, the initial appointment of the administrative judges of the federal states had to be made by the state governments and the judges of the federal administrative courts by the Federal President based on the proposal of the Federal Government. These bodies were not bound to consider proposals from existing judicial bodies. The appointments were made as is customary in Austria in such cases: depending on their strength, the political parties reserved the right to select candidates as they saw fit. Professional qualifications were not required to be a key consideration. Judges appointed in this manner can remain in office for decades.

I do not want to give the impression that the majority of judges are unqualified for office. Numerous decisions show that there are some excellent characters working in both the federal and provincial courts. However, there is also a considerable number of judges who clearly do not have these qualifications. Media coverage in connection with a new appointment to the Federal Administrative Court in 2023 demonstrated that highly unqualified people are in office. We have to live with this situation.

There is also a further issue. With the introduction of a "multi-level administrative jurisdiction", the constitutional legislator not only wanted to expand the legal protection system, but also to "relieve the Administrative Court".[7] To this end, the complaint by default in its previous form was abolished, which means that the complainant cannot obtain a decision from the Administrative Court, but merely a deadline. Practitioners say that this can lead to decisions being delayed for years at the Federal Fiscal Court. A further step towards relieving the Administrative Court was introduced with the so-called review model. This was essentially modelled on the design of the Supreme Court,[8] albeit with a formalistic hurdle. In an extraordinary appeal, the reasons for admissibility must be stated "separately".[9] This means that the appellant must not only assert the violation of his rights, but must also explain separately why the appeal is admissible. Many senates of the Administrative Court interpret the requirement of a "separate" statement extremely strictly, even to the point of victimisation. As a result, the admissibility of extraordinary appeals is rarely affirmed. It should come as no surprise that practitioners often have major problems with this absurd rule.

The situation is exacerbated by the fact that many administrative judges are highly inclined to rule out the admissibility of an ordinary appeal and force the complainant into making an extraordinary appeal. As a result, if you have the misfortune of being confronted with an administrative judge who is legally less qualified and inclined to rule out the admissibility of ordinary appeals, the chance of obtaining justice at the Administrative Court is minimal. Although these regulations may ease the burden on the Administrative Court, they considerably reduce the legal protection of the parties. Anyone who challenges a decision by an administrative authority because they consider it to be unlawful and comes before an administrative judge who – for whatever reason – rules out an ordinary appeal, has very little chance of obtaining justice at the Administrative Court. ■

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[5] Federal Law Gazette I 2013/114

[6] see Walter, Verfassung und Gerichtsbarkeit (1960) 53; Piska Rz 8 on Article 86 B-VG in Korinek/Holoubek [eds] Österreichisches Bundesverfassungsrecht

[7] cf. 1618 BlgNR 24. GP 1

[8] § 502 ZPO

[9] § 28 para 3 VwGG

Recognition and enforcement of court judgements in the UAE

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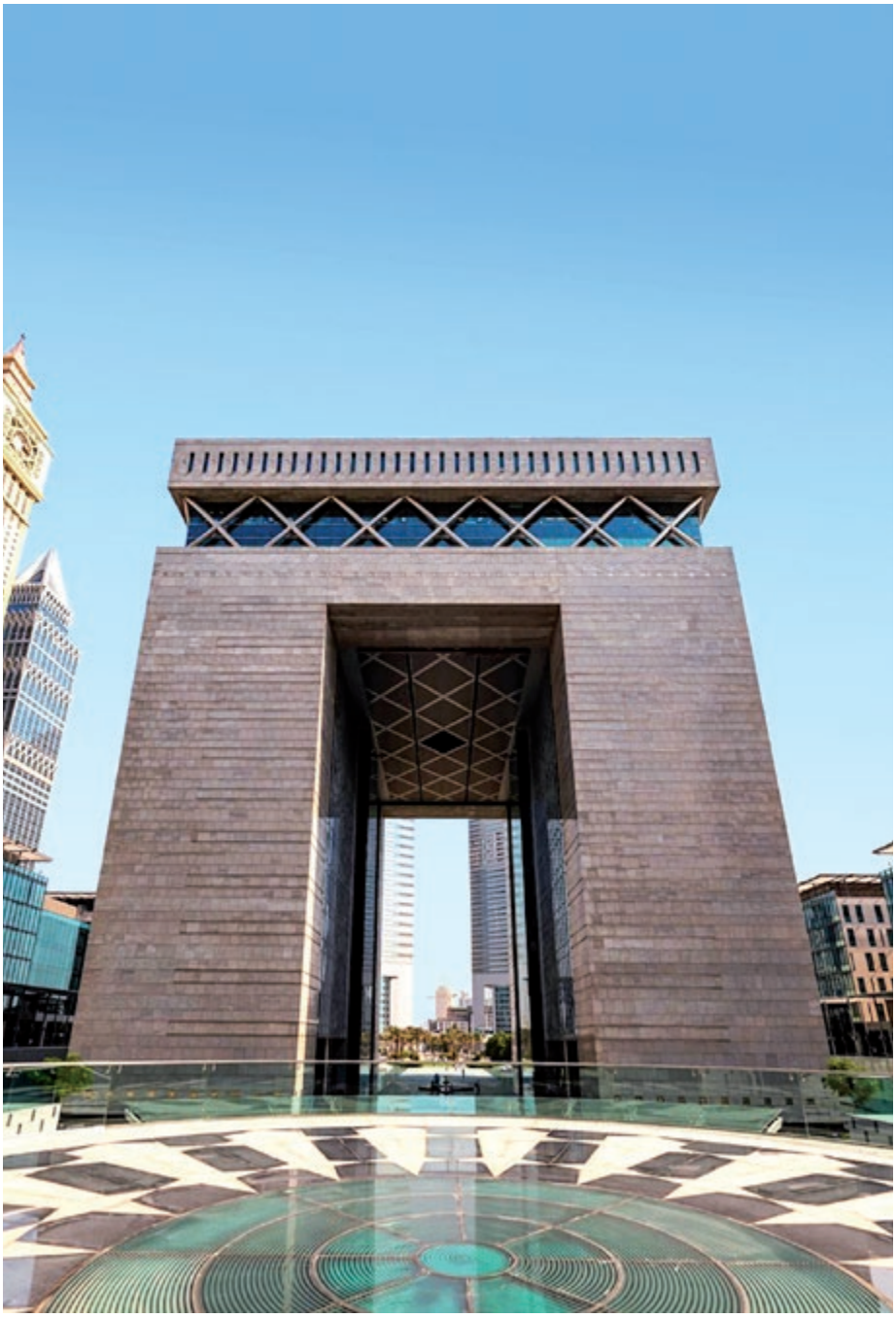
Access to justice, as an integral part of the rule of law, has been under scrutiny worldwide, with the Middle East in the spotlight as a focal point for dispute resolution. Improving access to justice means not only being able to obtain a judgment, but more importantly, being able to enforce it in a timely and cost-effective manner. Can the UAE, as an emerging hub, provide this?

By Anna ZEITLINGER and Elena BUROVA

The UAE is a unique jurisdiction in terms of the dualism of the judicial system: There are two separate court systems within one country: (i) the courts of the UAE, "mainland" or "onshore", and (ii) the courts of free economic zones (courts of Dubai International Financial Centre (DIFC Courts), courts of Abu Dhabi Global Market (ADGM Courts).

FOREIGN JUDGMENTS IN THE UAE MAINLAND

In 2023, the UAE government modernised the procedure for enforcing foreign court judgments with the enactment of the Federal Civil Procedure Law.



The DIFC-Courts in Dubai

Creditors of foreign judgments will no longer have to initiate proceedings at the court of first instance – instead, they will now be able to apply directly to the judge in charge of enforcement.

The enforcement judge issues an enforcement order in summary proceedings within five working days, after checking that certain criteria have been met. The grounds for refusal are the traditional ones, such as: lack of jurisdiction of the foreign court that issued the judgment subject to enforcement, exclusive jurisdiction of the UAE courts over the matters underlying the judgment, improper service of process, lack of res judicata, contradiction of the morals and public order of the UAE.

The UAE's mainland courts may enforce foreign judgments "under the same conditions as are provided by the law of that country for the enforcement of Emirati judgments" (Art. 222(1) FCPL), which is analogous to the principle of reciprocity. It is, therefore, essential for a foreign creditor to prove that a UAE judgment would receive similar treatment in the foreign court. In recent years, onshore courts have taken a relatively friendly approach to enforcing foreign judgments from a number of countries in the absence of a treaty. The English judgments stand out in this respect, as it has been difficult to establish reciprocity between two countries in the absence of the necessary treaty.

In 2022, the UAE Ministry of Justice issued a letter advising the UAE courts that the reciprocity requirement was met, following the precedent set in Lenkor Energy Trading DMCC v Puri (2020) EWHC 75 (QB), where the UK High Court ordered enforcement of a judgment of the Dubai courts. Despite the non-binding nature of the letter, it was an encouraging step forward and the Dubai courts are currently following the Ministry's recommendation and continuing to enforce English judgments (e.g. Case No. 592 of 2023, Decision of the Dubai Court of Cassation of 25 January 2024).

CHALLENGES STILL REMAIN

However, in the absence of a treaty, not all foreign court judgments may receive similar treatment in the onshore courts of the UAE.

Although the UAE is a party to several important regional conventions (Riyadh Arab Convention for Judicial Cooperation, GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications), there is a gap in the international treaty framework with respect to EU jurisdictions and many BRICS jurisdictions, including Russia.

The UAE has not acceded to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (effective from 1 September 2023), while it is in force for EU Member States, and Russia has signed

the Hague Convention. In practice, this means that there are likely to be difficulties in demonstrating reciprocity for the enforcement of Russian judgments in the Emirates, and likewise for the enforcement of Emirati judgments in Russia.

FOREIGN JUDGMENTS IN THE DIFC COURTS

The DIFC courts have broad jurisdiction in civil and commercial matters. By default, the DIFC Courts have jurisdiction in cases involving any institution operating in the DIFC. The jurisdiction of the DIFC Courts also operates on an 'opt-in' basis: parties, regardless of their connection to the DIFC, may choose to submit their claims to the DIFC Courts by way of a prorogation agreement, either before or after the dispute arises.

The DIFC Courts Law (Section 24) empowers the Court of First Instance to ratify any judgment of a foreign court. No reciprocity or treaty is required for the enforcement of foreign judgments, making the DIFC Courts a more liberal forum compared to the mainland.

HOW CAN A FOREIGN JUDGMENT BE ENFORCED THROUGH THE DIFC COURTS?

In practice, the liberal approach of the DIFC Courts to foreign judgments has led to a 2-stage mechanism of "conduit jurisdiction":

Step 1: resort to the DIFC Courts to "ratify" a foreign judgment and obtain a local DIFC Court order.

Step 2: Apply to the mainland UAE court for enforcement of the local DIFC court order if the subject matter of the enforcement (e.g. the debtor's assets) is located outside the DIFC.

The use of the conduit jurisdiction of the DIFC Courts has been questioned as an abusive practice aimed at circumventing the stricter enforcement procedures of the mainland UAE Courts in the absence of a real connection with the DIFC. However, the DIFC Court of Appeal put an end to these debates in its precedent DNB Bank ASA v (1) Gulf Eyadah (2) Gulf Navigation, rejecting the argument that the use of the DIFC Courts as a conduit jurisdiction amounted to an abuse of process.

Another issue with the conduit jurisdiction of the DIFC Courts is the potential conflict of jurisdiction between the DIFC and mainland courts, as both onshore and offshore courts may have jurisdiction to enforce foreign judgments. A special body, the Judicial Authority for Resolving Jurisdictional Conflicts between DIFC Courts and Emirate of Dubai Judicial Bodies, resolves jurisdictional conflicts in Dubai from April 2024. The conflict is to be resolved in favour of the court to which the creditor of a foreign judgment has first applied.

CONCLUDING REMARKS

While European and Russian companies have become increasingly active in the Emirates in recent years, there remain certain gaps in the regulatory framework which need to be addressed. One of these gaps is the lack of a multilateral agreement that would bind the UAE on the one hand and the countries of the European Union or BRICS on the other.

Against the background of the recent accession of the UAE to the BRICS, such a multilateral solution can potentially be developed within the BRICS legal space. As the recent BRICS Chief Justices Forum in June 2024 confirmed, there is great potential for judicial exchanges among the BRICS countries and a broad consensus to promote judicial and legislative cooperation among the participating countries.

In general, the UAE federal government is open to signing and ratifying both bilateral and multilateral treaties providing for mutual enforcement. At present, practitioners should carefully consider whether there is an applicable treaty between the sending and receiving jurisdictions that covers foreign enforcement (as opposed to general mutual assistance). ■

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North Macedonia: Submitting initiatives to the Constitutional Court

Submitting an initiative to the Constitutional Court in North Macedonia is a regulated legal mechanism for upholding the principle of the rule of law. The Constitutional Court's role is to ensure a hierarchy of legal norms and to safeguard rights and freedoms. Our office in Skopje assists clients in challenging laws, statutes, and regulations that do not comply with the Constitution. Read on for more about the challenges that are faced in practice on the path to achieving justice.

By Angela ANGJELOVSKA and Marko GUCHESKI

THE CONSTITUTIONAL COURT: A CONTROL MECHANISM IN THE LEGAL SYSTEM OR THE LEAST DANGEROUS LINK?

It is not uncommon for the enjoyment of constitutional rights by natural and legal persons in North Macedonia to be hindered by legislative or legislative amendment processes. This is because the constant development of the law sometimes creates unpredictable situations that make it impossible to foresee the impact of newly proposed laws. For this reason, natural and legal persons are often confronted with contradictory implications for their fundamental rights and obligations. Although imposed by law, these situations can be countered through various legal remedies and mechanisms. One such mechanism is the procedure for submitting an initiative to the Constitutional Court. After all, every citizen in a democratic society should have permanent access to justice, open to all via the courts as the legitimate guardians of the legal system. The Constitution of the Republic of North Macedonia enshrines the fundamental rights as well as the economic, social, and cultural rights of natural and legal persons. Accordingly, the state's power is divided into legislative, executive, and judicial branches.

COMPOSITION OF THE CONSTITUTIONAL COURT AND SELECTION OF JUDGES

Cases are heard by a total of nine judges, who reach their decisions by majority vote. The President of the Constitutional Court is elected by these judges for a three-year term with no possibility of re-election. The other judges are appointed by the Assembly of the Republic of North Macedonia from a pool of distinguished jurists for a nine-year term with no possibility of re-election.

THE CONSTITUTIONAL COURT IN NORTH MACEDONIA

Over the years, the Constitutional Court has repeatedly declared itself incompetent when deciding upon numerous submitted initiatives for challenging laws that are non-compliant with the Constitution. This has created the public perception that it is the least dangerous link in the chain of the judicial system, perceived as being halfway between a political body and a judicial entity. As a developing country and EU candidate member, North Macedonia faces significant challenges in ensuring its government bodies respect and implement the judgments of its lower courts. Consequently, the importance of the Constitutional Court as a control mechanism is crucial in upholding the rule of law effectively.

JURISDICTION OF THE CONSTITUTIONAL COURT

Pursuant to Article 110, the Constitutional Court of the Republic of North

Macedonia is competent to rule on the following matters: the compliance of laws with the Constitution; the compliance of collective agreements and other regulations with the Constitution and the law; the protection of the freedoms and rights of the individual and the citizen with regard to freedom of belief, conscience, thought and public expression of opinion, political association and activity, as well as the prohibition of discrimination among citizens on the basis of sex, race, religion or national, social, or political affiliation; conflicts of jurisdiction between holders of legislative, executive and judicial functions; conflicts of jurisdiction between national bodies and units of local self-government; the remit of the President of the Republic; the constitutionality of the programmes and statutes of political parties and civic associations; and other issues stipulated in the Constitution.

A PARALLEL UNIVERSE IN THE JUDICIAL SYSTEM: THE RELATIONSHIP BETWEEN THE CONSTITUTIONAL COURT AND LOWER JUDICIAL COURTS

Conventional wisdom states that constitutional courts sit outside of the regular judiciary system and are not connected with the lower courts. As a result, a certain duality and parallelism was assumed between constitutional courts, which have exclusive jurisdiction to guarantee constitutionality, and regular courts – which are tasked with protecting legality and individual rights. This vision is quite different from modern European trends in constitutional legislation. The legal framework does, however, defer both procedures to the Constitutional Court, enabling it to oversee and influence the functioning of lower courts in safeguarding constitutionality and protecting constitutional rights and freedoms. In practice, however, the mechanisms for constitutional review and appeals have proven to be entirely ineffective. Since the independence, there is no record of an initiative involving a preliminary question on the constitutionality of a legal act being submitted by a lower court to the Constitutional Court during ongoing proceedings

The lack of interaction between the Constitutional Court and lower courts has led to a minimal application of constitutional provisions, resulting in inadequate judicial protection of rights and freedoms. Furthermore, the courts operate without external oversight from the Constitutional Court, due to a rigid dual structure that contravenes modern legal trends, leaving the Constitutional Court isolated from the regular judiciary.

THE ROLE OF NORTH MACEDONIA'S CONSTITUTION IN THE PROTECTION OF RIGHTS AND FREEDOMS

The fundamental values of the constitutional order in North Macedonia are established in Article 8, where the freedoms and rights of the individuals and the rule of law are recognised. Article 50 of the document also stipulates that every citizen may claim the protection of the freedoms and rights laid down in the Constitution before the courts and the Constitutional Court of the Republic of North Macedonia in proceedings based on the principles of priority and urgency. In practice, the effectiveness of this is far from desirable. The primary cause is the overly strict and narrow definition of the rights and freedoms eligible for protection by the Constitutional Court, which lacks any rational basis and explanation. Additionally, the Court's inexcusable inadmissible self-restraint, often rooted in rigid textualism, further limits its scope, reinforcing the impression that the Court is uninterested in its role as a protector of constitutional rights and freedoms.

This narrow definition and limitation of specific constitutional appeals effectively undermine the possibility of enforcing constitutional compliance, thereby weakening respect for the rule of law, a cornerstone of the constitutional order. This is of greatest harm to the citizens, who are deprived of the opportunity to protect their rights and freedoms before domestic institutions, as was originally envisioned by the authors of the Constitution. Therefore, an expansion in remit of the constitutional appeal should not be viewed solely through the lens of its effectiveness in the context of the ECHR and ECtHR, but primarily as being in the best interest of North Macedonia's citizens. It is also a necessary step toward constitutional compliance in the legal system, particularly in the practice of lower courts.

THE PROCEDURE FOR SUBMITTING AN INITIATIVE TO THE CONSTITUTIONAL COURT

The initiation of proceedings to review the constitutionality of a law, the legality of a regulation, or another general legal act may be challenged by a ruling of the Constitutional Court on the basis of an initiative (Article 11 of the Rules of Procedure of the Constitutional Court of RSM). Article 12 of the Rules of Procedure of the Constitutional Court stipulates that anyone may submit an initiative to initiate proceedings to review the constitutionality of a law, the constitutionality and legality of a regulation, or another general legal act. The Rules of Procedure of the Constitutional Court provide for the adoption of a decision in cases of the initiation of provisions, regulations and other general legal acts.

Decisions by the Constitutional Court may be annulled or cancelled in accordance with Article 112 of the Consti-

tution. The decisions of the Constitutional Court are final and enforceable and the implementation of these decisions is mandatory and binding. According to the 2023 Report on the Work of the Constitutional Court of the Republic of North Macedonia from 1 January 2023 to 31 December 2023, the court dealt with a total of 359 cases. Of these, 210 cases broke down into the following categories: 101 cases (48.1%) concerned the review of the compatibility of laws with the Constitution, 100 cases (47.62%) related to the review of the constitutionality and legality of other regulations and acts, 2 cases (0.95%) dealt with the resolution of conflicts of jurisdiction and 7 inquiries (3.33%) concerned the protection of freedoms and rights.

LGP SKOPJE'S EXPERTISE IN PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

LGP Skopje has registered a growing number of requests for initiatives and challenges of laws and general acts before the Constitutional Court by natural and legal persons. Since these rights are guaranteed to natural and legal persons, the procedures are clear and open for the parties concerned to challenge certain legal instruments. By launching an initiative on constitutional and legal grounds, the appellant aims to challenge the operation of legislation that contradicts the object and purpose of the constitutional provisions and prevents the exercise of rights. To this end, a precise interpretation of the prescribed provisions, their subject matter and their purpose is required. The initial analysis focuses primarily on the constitutional provisions that protect citizens and only then on the conflict with regulations and lower legal and general acts.

In any case, commentary on these contradictions aims to expose the existence of a legal vacuum and to propose that the court initiate further proceedings to review the constitutionality or legality of the articles specifically disputed in the initiative, as well as to initiate a proposal to decide on the repeal of certain articles of positive legislation or a motion to stop the implementation of certain laws and/or decrees.

As LGP Skopje, we are proud of our expertise and commitment to upholding constitutional principles through proactive legal action. Over the years, we have successfully filed initiatives before the Constitutional Court on behalf of our clients to challenge laws, bylaws, and regulations that do not comply with the Constitution. Our extensive experience in navigating the complexities of constitutional law allows us to provide our clients with effective representation and strategic advice. In utilising our comprehensive understanding of legal practice and case law, as well as in-depth analysis of constitutional provisions, we strive to provide our clients with the best possible advice while also actively contributing to the legal system.

CONCLUSION

The current mechanism for protecting the rights of private entities before the Constitutional Court of the Republic of North Macedonia requires further development and enhancement to effectively uphold the rule of law and maintain the overall legal order. The relations and the control mechanism between the Constitutional Court and the lower courts need to be strengthened and further developed. This control mechanism will enable effective cooperation with and oversight of the regular judiciary, focused on ensuring consistent adherence to the rule of law and the robust protection of constitutionality, rights, and freedoms. The protection of constitutional rights is crucial in upholding the rule of law, ensuring justice and preserving the fundamental freedoms and equality that form the foundation of a democratic society. This protects citizens from abuses of power and ensures that their rights and freedoms are upheld and respected. ■

MARKO GUCHESKI, LL.M
is a legal associate at Lansky, Ganzger, Zeqiri + Partner in Skopje. He has extensive professional experience in the private sector as a human resources manager and legal advisor and has also worked at the Ministry of Foreign Affairs and the Parliament of North Macedonia. He holds an LLM degree in Environmental Law (QMUL) and International Law (UKIM).

ANGELA ANGJELOVSKA, LL.M
is a lawyer at Lansky, Ganzger, Zeqiri + Partner in Skopje and specialises in energy, corporate law and human rights. She graduated from the Faculty of Law "Iustinianus Primus" in Skopje and passed the bar exam in December 2021. She specialises in providing comprehensive legal advice in corporate and commercial law.

Constitutional Court protects Slovakian rule of law

This article discusses two important decisions by the Slovakian Constitutional Court that illustrate the practical application of the rule of law. The Court's aim was to protect the constitutional right to privacy and the right to a fair trial from the whims of the state and potential abuses of power.

By Angela ANGJELOVSKA and Marko GUCHESKI

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The rule of law is a fundamental cornerstone of democratic society. It ensures that everyone, from senior government officials to ordinary citizens, is subject to the same laws. This principle is the central foundation of justice and equality and protects our most important rights and freedoms.

Slovakia is aware of the necessary struggle for the rule of law and recognises its importance in maintaining a just and equal society. One of the most important tasks of the rule of law is to protect the rights of the individual, such as the right to privacy and the right to a fair trial. These two fundamental rights are enshrined in our constitution and are crucial for safeguarding personal freedom.

In the Slovak Republic, the Constitutional Court plays an important role in interpreting and upholding these constitutional protections – ensuring that all actions, whether taken by the government or by individuals, comply with constitutional principles.

As lawyers, we see it as our duty to contribute to the rule of law in Slovakia. For instance, the amendment to the Act on the Reorganisation of the National Institute of Values and Technology in the Slovak Healthcare System contains inconsistencies. Therefore, we are supporting members of the Slovak Parliament in drafting their proposals to the Constitutional Court.

Two recent judgements by the Constitutional Court illustrate not only how the rule of law protects our rights, but also underline the great importance of a solid constitutional framework as the basis for a fair and just society.

EMERGENCY REGULATION WITH ELECTRONIC MONITORING OF CITIZENS

The National Council of the Slovak Republic passed a new law in response to the COVID-19 pandemic which allows the national health authority access to confidential telecommunications data from mobile phone operators in the event of an emergency. However, these highly sensitive data, which include user locations, may only be made accessible to the health authority on the basis of a justified written request during an emergency or state of emergency, while the collection and storage of these data may continue only until the end of the calendar year. On 7 April 2020, a group of MPs submitted a request to the Constitutional Court to review the compatibility of this regulation and other legal provisions with the Constitution of the Slovak Republic.

The wording of the contested provision is as follows: "Data subject to telecommunications secrecy may be made available to the health authority in times of emergency or health emergency for the purpose of collection, processing and storage insofar as this is necessary to identify natural persons in the interest of protecting life and health, including in the causal connection with the occurrence of a pandemic or the spread of a dangerous contagious human disease. The data referred to in sentence 1 may be collected, processed and stored by the health authority for the duration of the state of emergency or emergency situation, but no longer than 31 December 2020."

On 13 May 2020, the Constitutional Court of the Slovak Republic issued a landmark decision in which it suspended the effectiveness of the above-mentioned provision and accepted the case for further processing. In its justification for the suspension, the Constitutional Court stated: "It was found that part of the suspended legislation was not sufficiently determined, as it allowed state authorities to process personal data without clearly defining the purpose of such processing and the methods of processing personal data. In another part of the suspended legislation, although the purpose was clear, the necessary safeguards against possible misuse of the processed personal data were lacking."

The Constitutional Court of the Slovak Republic also found that the legislation did not take into account the possibility of obtaining the necessary data from less sensitive sources or of achieving its purpose via other, less restrictive means. In addition, the legislation did not provide for independent quality control and an extremely high level of protection and security in the processing of personal data by the authority, nor did it provide for a clear time limit for

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the destruction of personal data once the purpose of the processing has been achieved and, finally, there were no provisions for informing the persons whose personal data might be processed.

Subsequently, the legislator amended the regulation to include safeguards governing the access of the health authority to confidential telecommunication data which ensure the protection of the fundamental rights and freedoms of data subjects (such as the condition that the provision of information is subject to the consent of the data subject and the obligation to destroy the information in question after the purpose for which it was obtained has expired). Consequently, the Constitutional Court of the Slovak Republic closed the proceedings on the constitutional compatibility of the contested regulation.

REVIEW OF PLEA-BARGAINING

Shortly after taking office, the current government of the Slovak Republic began work on an amendment to the penal code which was followed very closely by the media and the opposition. The new amendment's adoption was accompanied by a variety of controversial opinions and heated public debate involving all parties. The amendment included the dissolution of the Special Prosecutor's Office for Serious Crimes and the transfer of its powers directly to the General Prosecutor's Office and other law enforcement agencies. It was also proposed that certain penalties for property, economic, and other criminal offences be reduced and that the statute of limitations for criminal offences be shortened.

One of the revised laws allowed the Minister of Justice to appeal against agreements made with cooperating defendants up to three years after their conclusion – i.e. retroactively back to 2021. The legal instruments relating to the cooperating defendant were frequently used during the tenure of previous governments from 2020 to 2023 in the prosecution of civil servants and members of law enforcement agencies in connection with suspected criminal activities. In particular, the process was heavily criticised for placing the co-defendant in a conflict of interest, as they receive benefits such as a reduced or conditional prison sentence if they testify against other people. After a lengthy legislative process in the National Council of the Slovak Republic, which was accompanied by vociferous protests from the opposition, the amendment to criminal law was finally passed on 8 February 2024. The President in office at the time and selected members of the National Council immediately challenged the adopted amendment before the Constitutional Court of the Slovak Republic.

In their constitutional complaint regarding the review of plea agreements with cooperating defendants, the members of the National Council stated: "The contested law constitutes a serious interference with the legal certainty and protection of the legitimate expectations of the defendants with whom agreements were made, as well as an interference with the principle of separation of powers, as a representative of the executive branch was given the power to judge the appropriateness and fairness of agreements, which is the exclusive prerogative of the judiciary." On 3 July 2024, the Constitutional Court of the Slovak Republic ruled that the transitional provision allowing the Minister of Justice to appeal against the accused retroactively for up to three years in the case of guilty plea bargains approved before 15 March 2024 is incompatible with the rule of law.

The court based its decision, among other things, on a legal opinion on the constitutional interpretation of the contested law. According to this, the provisions on the extension of the appeal period against the accused to three years and the extension of the Minister of Justice's power of appeal against court judgments with plea bargains can only be applied to decisions finalised from 15 March 2024 on (i.e. from when the criminal law amendment entered into force), as they would otherwise violate the prohibition of negative retroactivity. The Constitutional Court of the Slovak Republic ruled that the other points of the constitutional complaint stand up to constitutional scrutiny – including the dissolution of the elite unit of the public prosecutor's office, the reduction of penalties for property and economic offences and the shortening of the statute of limitations for criminal offences. ■

Mgr. ĽUBOMÍR CHRIPKO, LL.M.
is a senior lawyer at LGP Bratislava and provides legal services primarily in banking and finance law, civil law, commercial law, corporate law, labour law, administrative law, and insolvency law. He specialises in the preparation of lawsuits and other court applications, legal analyses, drafting contracts, and representing clients in court proceedings.

JUDr. MARTIN JACKO
is a lawyer and managing partner at LGP Bratislava and LGP Prague. He advises his clients primarily in the areas of compliance, strategic advice, crisis management, insolvency and restructuring law, mergers and acquisitions, and construction law (including FIDIC)

Two years of LGP Middle East – an overview

In April 2022, LGP moved to the UAE and registered its offices in Ras Al Khaima and subsequently in Dubai. For more than two years, LGP Middle East Legal Consultants has been successfully building bridges between the West, the East and the Middle East and unlocking the potential of the MENA region.

Elizaveta Dubrovskaya, Pavel Astakhov, Gabriel Lansky, Maxim Gubarev, Izzat Dajani, Anna Zeitlinger, Eryk Pausch, Philip Goeth, Elena Burova

The UAE has become an extremely important international political and economic centre in recent years. One of the key factors in the success of the UAE, one of the fastest growing and most diverse countries in the world, are the seven emirates, each with its own distinct history and united since independence. At LGP Middle East, we are working hard to tap into this huge potential. After successfully operating in two leading emirates over the past two years, we are now also active in Abu Dhabi with a focus on dispute resolution and are exploring the potential of UAE's largest neighbours, Qatar, Kuwait, and Oman for industrial and construction projects.

Our team consists of international lawyers with a wide range of professional experience in various countries and industries. We specialise in European and international law, international trade,

LGP Middle East lawyers admitted to practice before the DIFC courts

Gabriel Lansky
Managing partner

Philip Goeth
Managing partner

Anna Zeitlinger
Managing partner

Elena Burova
Senior Associate

\+ LGP MIDDLE EAST

Gabriel Lansky
Philip Goeth
Anna Zeitlinger
Gerald Ganzger

cross-border investments, and dispute resolution. LGP ME also advises companies and individuals from East and West primarily in the areas of sanctions and trade restrictions, compliance and regulation, sanctions-related litigation (including before the courts of the European Union), cross-border disputes, and international arbitration.

In the local market, our team, alongside our local partners, focuses on advising clients expanding in the region, particularly in the areas of regulation and corporate governance, market entry, investment structuring and investment protection.

Our sector expertise includes energy, banking, finance, healthcare, and education.

EXPANSION IN THE ARABIAN GULF REGION

In June 2024, Gabriel Lansky, Managing Partner of LGP Middle East, visited Kuwait, Qatar, and Saudi Arabia – accompanied by Levent Kılınç from the Turkish partner law firm Kılınç Law & Consulting and Arlind Zeqiri, Managing Partner and Business Development Director LGP Group – to explore new partnerships with leading law firms from the region.

Thanks to our wonderful hosts, Al Sulaiti Law Firm (Doha) and Al-Yaqout & Al-Fouzan Legal Group (Kuwait City), we are confident that we will soon be able to expand our international capabilities and offer even more high-level legal expertise to our clients in the Arab Gulf States. ■

Al Sulaiti Law Firm and LGP

Al-Yaqout & Al-Fouzan Legal Group and LGP

MEET LGP MIDDLE EAST

Elizaveta Dubrovskaya LL.M.

Leiterin des Büros in Dubai

Elizaveta Dubrovskaya joined LGP in 2011 and holds a Russian law degree (cum laude) and a Master's degree in European Business Law (Leiden University). Her expertise is based on extensive practical experience in European law and is also underpinned by her experience in sanctions litigation since 2014. Elizaveta also handles complex international business and investment projects and advises clients on international litigation. As a native Russian speaker who is fluent in English, German, French, and Italian, she is used to building bridges between different legal systems and cultures. As head of LGP's Dubai office, she supports LGP's business development and acts as its main point of contact.

Izzat Dajani

Partner in Charge

is the former Managing Director of the Investment & Development Office, the investment department of the Government of Ras Al Khaimah (RAK) in the United Arab Emirates. He was also the Head of Key Accounts at Goldman Sachs-Investment Management in Dubai and Chairman and CEO of Citibank Qatar. Izzat holds a Master in Public Administration (MPA) from the Harvard Kennedy School, Harvard University. He also holds a Bachelor of Science from the Liverpool School of Pharmacy in the UK. An experienced investment banker with in-depth knowledge of UAE structures, fluent in Arabic and English, Izzat is a strategic government and business advisor with more than 25 years of experience in the GCC and MENA region as well as Turkey and the Balkans.

Maxim Gubarev, LL.M.

Senior Associate

advises clients on trade law and international sanctions, including individual sanctions and sectoral trade restrictions. His expertise includes industrial projects and regulatory aspects, including in the MENA region. He gained his experience at the leading international law firm in regulatory and foreign trade law, at UNCTAD in Geneva with a focus on international non-tariff measures, at the Secretariat of the WTO Appellate Body in Geneva and at the WTO Expert Centre in Moscow. He held a senior positon in an international contracts division of one of the largest energy companies and has experience in the automotive, tobacco, consumer goods, agriculture and energy sectors. Maxim holds an LL.M. from the US University of Arkansas School of Law and a Master's degree in International Law and Economics from the University of Bern, Switzerland.

Elena Burova, LL.M., MCIArb

Senior Associate

specialises in complex cross-border disputes, international arbitration and sanctions. Her profile includes investment and commercial arbitration, cross-border litigation, inter-state proceedings and public international law matters. She has represented clients in various industries, including oil and gas, mining, banking, construction and maritime. She has experience in institutional and ad hoc arbitrations under the UNCITRAL, ICSID, SCC, LCIA, ICC, RAC and RIMA rules. Elena also acts as an arbitrator and is listed in the Next Generation of Russian Arbitrators Guide. She has been included in Best Lawyers (International Arbitration, Arbitration & Mediation). Elena holds an LL.M. in Investment Treaty Arbitration (Uppsala University) and graduated from MGIMO University with a Bachelor's and a Master's degree (cum laude). She is licensed to practice law in Moscow and before the DIFC courts and is a member of the Chartered Institute of Arbitrators. She is fluent in Russian, English, and French.

Pavel Astakhov, LL.M.

Senior Associate

Pavel Astakhov specialises in cross-border disputes, including in connection with sanctions. He has been involved in international arbitration and litigation and has advised clients on complex multi-jurisdictional disputes, asset searches, provisional measures, enforcements, cross-border insolvencies and distressed assets. Pavel has extensive knowledge of public international law and EU law as well as UK, US, and German private law from a comparative perspective. He has worked in leading international and regional law firms and as a senior in-house counsel. His industry expertise includes construction, real estate, banking and finance, energy and automotive. Pavel graduated from MGIMO University with a Bachelor's and a Master's degree (cum laude) and is currently in the process of qualifying as a solicitor in England and Wales. He is fluent in Russian, English, and German and has working knowledge of French, Spanish, and Polish.

Kılınç Law & Consulting partners with LGP

LGP officially established a partnership with the Turkish law firm Kılınç Law & Consulting in May 2024, marking a significant milestone in the expansion of its global network.

Managing Partner Arlind Zeqiri, Dr. Philip Goeth, Anna Zeitlinger, Levent Lezgin (Kilinc), Dr. Gabriel Lansky, Dr. Gerald Ganzger

The partnership with Kılınç Law marks the beginning of an exciting new chapter for both firms. It is a strategic move and a shared vision to ensure our growth and success in the rapidly evolving legal landscape. In an increasingly complex world, the collaboration with Kılınç Law helps us to enhance and develop our roles in a complementary manner. Our broad range of legal services and extensive experience in corporate law and M&A, dispute resolution, EU law, foreign direct investment, insolvency & restructuring, public law, real estate law, sanctions law & trade restrictions, tax law, TMT, IP & related fields, transformative technologies, and other specialisations correlate perfectly with the professionalism of our new partner Kılınç Law & Consulting. The Turkey-based law firm offers both domestic and international legal services with a special focus on energy and commercial law, competition law, mergers and acquisitions, project financing, and foreign direct investment advisory services, alongside other areas.

BETTER MANAGEMENT OF COMPLEX LEGAL CHALLENGES

The partnership between the two renowned law firms from Turkey and Austria represents a strategic alliance that aims to revolutionise modern legal services. These mainly relate to the digital transformation of our society, the need for smooth cross-border transactions, and the ever-changing regulatory framework, such as ESG regulations. LGP and Kılınç Law have the relevant resources and a long history of successful client representation – as experienced experts in legal matters, but also as reliable partners who invest in the relationship with their clients. In addition, Kılınç Law's international presence, with offices in Turkey, Qatar, Kuwait, Saudi Arabia, and other locations in the Gulf region, enables both firms to operate in various jurisdictions around the world.

PARTNERSHIP AS A GLOBAL LEGAL SYNERGY

We always help our clients to obtain the best possible legal advice on questions relating to legal issues and regulatory challenges. This requires local expertise, a mix of international and domestic experience, a proactive approach and high service levels, followed by constant updates, which remain core principles to improve efficiency. With the new partnership between Kılınç Law and LGP, we are now even better equipped to meet future challenges, provide innovative legal solutions and make a positive impact on our clients and the legal industry. ■

Distinguished new additions to the LGP team

LGP News presents several well-known names from the worlds of business and law, whose expertise enriches LGP's growing pool of experts in a competent and solution-orientated manner – an asset that is particularly valuable in international projects.

They advise, generate ideas, actively support new processes and projects and leverage their professional experience, valuable contacts, and global networks. LGP partners and lawyers have experienced many challenging situations over the course of their long careers and have successfully solved complex problems thanks to their diverse competencies and practical skills. What they have in common is that each individual is highly qualified in their respective specialisms, has worked in companies of very different sizes and structures, and has an excellent international network.

SENIOR EXPERT COUNSEL / PARTNER IN CHARGE

Dr Stephan KLINGER has more than 15 years experience in the banking and finance sector. He was head of the legal department and the national authority for the enforcement of EU financial sanctions in his last position at the Austrian National Bank. Prior to that, he centralised legal and compliance tasks as Head of Group Compliance at the Austrian Association of Volksbanks, worked as Head of Group Legal at the Vienna Insurance Group and, as Head of Legal & Compliance, restructured the ÖVAG banking group by spinning off a company in liquidation. As Head of the "Legal Treasury, Capital Markets and Asset Management" department at Österreichische Volksbanken, he was responsible for all relevant legal services in the areas of treasury and trading, including legal disputes.

Stephan M. Klinger has received several awards (e.g. Best Scientific Paper Award)

MMMag. Dr. Stephan KLINGER

Izzat DAJANI

and scholarships (e.g. European Forum Alpbach) and has been listed in renowned legal rankings (Legal 500). He has a solid academic background in economics, law, anthropology, and philosophy and has been teaching at the renowned WU Vienna and other universities for over 25 years, where he lectures in the fields of management, law, data philosophy, negotiation management, leadership ethics, and intercultural management. His extensive experience in the financial sector, combined with his expertise in compliance, regulation and strategic management, is invaluable to our clients.

Izzat DAJANI is no stranger to LGP. In his capacity as LGP Senior Expert Counsel, Dajani has shared his many years of experience in investment, corporate banking, and advising companies and governments for some time – and now also supports our Middle East endeavours in his new role as Managing Partner at LGP Project Solutions Middle East, based in Dubai.

Dajani's impressive career began at Harvard. He is now Managing Director of IM-Capital Partners and a board member of numerous organisations, former Managing Director of Citibank Qatar and the investment department of the government of Ras Al Khaimah in the United Arab Emirates. He was also former Head of Key Clients at Goldman Sachs Investment Management in Dubai. Izzat Dajani is a thought leader and strategist with over 30 years experience. In addition to his Masters in Public Administration (Harvard), he also holds a Bachelor of Science from the Liverpool School of Pharmacy in the UK and is a founding member of the Royal Pharmaceutical Society of Great Britain.

PARTNERS

Dr Helena MARKO, LL.M. is specialiced in national and international litigation, national and international arbitration, labour law and general civil law. She has been supporting well-known national and international clients from many different industries for many years. Before she founded her own law firm in Vienna and Lower Austria, Helena Marko was a partner and head of the labor law and dispute resolution (procedural law, litigation/arbitration) departments at LGP. She has returned to LGP as a partner since March 2023 and has since then successfully led various mandates in the areas of dispute resolution, labor law and criminal law.

After studying law at the University of Vienna, Helena Marko also completed a doctorate with a dissertation on international tax law, as well as a university course in information and media law.

Helena Marko advises her clients and works in German, English and Greek.

Ivo STITIC, MBA specialises in the areas of corporate law/M&A, private equity, start-ups & venture building, real estate, foreign direct investments, insolvency & restructuring as well as technology & digitalisation. Before joining LGP, the Croatian-born lawyer ran his own boutique commercial law firm and co-founded a technology company. Prior to that, he gained over 10 years of practical experience at renowned major Viennese law firms in Austria and the CEE/SEE region. Stitic has excellent expertise in private equity transactions in various industries, including healthcare and healthcare technology, e-commerce, smart

Dr. Helena MARKO, LL.M.

Mag. iur. Ivo STITIC, MBA

logistics, AI technology, property development and prop-tech, sustainable transport, and renewable energy. He primarily advises multinational companies, private equity firms, and strategic investors using a multidisciplinary and international approach.

Ivo Stitic studied law at the University of Vienna and completed further academic programmes at Wake Forest University, Law School (North Carolina), Penn State University, and Dickinson School of Law (Pennsylvania). He obtained further academic qualifications at Columbia University in New York City (MBA) and at the London Business School (MBA).

SENIOR LEGAL EXPERT / ATTORNEYS AT LAW

Gerhard JAROSCH has been a Senior Legal Expert at LANSKY, GANZGER, GOETH + partner (LGP) since January 2024. He specialises in Austrian and international criminal law as well as litigation and crisis PR. He previously held top positions in the Austrian judiciary for more than 25 years, most recently as First Public Prosecutor at the Vienna Public Prosecutor's Office and as National Member for Austria in the EU Legal Aid Agency Eurojust in The Hague.

The latter is a coordination centre for the judicial authorities and public prosecutors from 27 EU countries and consists of high-ranking public prosecutors and judges from these countries.

With decades of experience in Austrian, European, and global criminal justice, internal and external communication, and legal crisis management as well as extensive knowledge of the Austrian legal system and the national media landscape, the Linz-born lawyer supports and represents companies and individuals in domestic criminal proceedings. Thanks to his worldwide network and his intimate knowledge of various judicial systems on all continents, he is also able to provide extremely sound advice on investigations and criminal proceedings with an international angle.

Dr Konstantin OPPOLZER has joined LGP's Vienna office as a new lawyer (Switzerland). He specialises in complex and cross-border proceedings, arbitration, white collar and sanctions cases, as well as internal and external investigations. Oppolzer's dispute resolution practice focuses on banking and financial services, mining, retail, technology, media and communications. Prior to joining LGP, Konstantin worked as a lawyer at Quinn Emanuel Urquhart & Sullivan in Zurich (2019 – 2023) and in the Governmental Affairs team at UBS in Zurich (2017). He holds a doctorate from the University of St.Gallen (2019) and a master's degree from the University of Vienna (2015). Konstantin is an EIZ Visiting Research Fellow at Georgetown University.

Tomislav MAROS has also joined LANSKY, GANZGER, GOETH + partner (LGP) in Vienna as a lawyer. He specialises in dispute resolution and focuses on commercial litigation and complex cross-border disputes. He also represents national and international clients in various areas of public law. Before joining LGP, Tomislav Maros worked for a Viennese law firm, where his wide range of activities developed his rounded expertise. Tomislav Maros graduated from the Karl-Franzens University of Graz with a degree in law and subsequently completed his legal clerkship in the district of the Higher Regional Court of Graz. ■

Mag. Gerhard JAROSCH

Dr. Konstantin OPPOLZER

Mag. Tomislav MAROS

Book launch in Belgrade

LGP hosted a book launch by Senior Expert Counsel Wolfgang Petritsch at the premises of the Serbian business club "Privrednik" on 29 February 2024. The high-ranking panel had a passionate discussion about the future world order.

The cornerstones of our current paradigm have begun to totter: we are experiencing phenomena such as post-democracy, the resurgence of authoritarian forces, and the weakening of liberalism as the guiding principle of the Western world. In his book "Smena Epoha" (Epoch Change, newly translated into Serbian), former Austrian ambassador to Belgrade Wolfgang Petritsch provides expert insight into global political scenarios and outlines the contours of our future world order.

Wolfgang Petritsch presented his latest book "Smena Epoha" in Belgrade.

Guests were welcomed at the book launch by Zoran Drakulić, President of the Serbian business club "Privrednik", Gabriel Lansky, Managing Partner at LGP, and Christian Ebner, Austrian Ambassador to Serbia. The keynote, delivered by the United States Ambassador to Serbia, Christopher R. Hill, touched upon the defining geopolitical and economic developments of our times, topics taken up again in the subsequent a panel discussion between Amb. Petritsch and Amb. Hill, and moderated by Zoran Stanojević, News Editor at RTS. The evening ended with a small reception, where the guests took the opportunity to further discuss the event's most significant topics in the intimate surroundings of "Privrednik". LGP has been active in the Western Balkans region since its foundation and has had a presence in Skopje (North Macedonia) since 2018. ■

BRICS+ New Economy Legal Forum


LGP lawyer Elena Burova and LGP Middle East partner Anna Zeitlinger

LGP Managing Partners Gabriel Lansky and Anna Zeitlinger and LGP lawyers Pavel Astakhov and Elena Burova took part in the "BRICS+ New Economy Legal Forum" in Dubai on 6 and 7 March 2024.

The aim of this high-calibre international forum was to discuss current legal and economic issues and to create a legal infrastructure for international trade and investment with a focus on the UAE and the MENA region.

More than 200 delegates, including top executives and heads of legal departments of international companies as well as partners from leading law firms from BRICS+ and GCC member states attended the forum. Elena Burova, Senior Associate at LGP, spoke at the round table on the current challenges of the new arbitration centre Arbitrate AD, which recently opened in Abu Dhabi. ■

Austrian Brand Equity Study 2024

The European Brand Institute (EBI) has conducted its Austrian Brand Value Study and identified the most valuable brands for the 21st time. The results were presented to media representatives and brand managers on 26 June 2024.

According to Gerhard Hrebicek, author of the study and President of the European Brand Institute, this year's growth in brand value among the top 10 brands is primarily driven by an increasing awareness of sustainability. According to the study, ESG reporting has not only become a legal obligation in 2024, but also a strategic opportunity for all brand companies: "Our studies show a strong correlation between a company's sustainability practices and its brand value as well as its general financial performance." Brands must, therefore, be professionally managed, emphasised LGP Managing Partner Gerald Ganzger in his keynote speech "Sustainability pays off!". Young companies, in particular, would do well to create a brand quickly and register it straight away. This would allow them to enjoy an unlimited term of protection and increase the economic value of the company at the same time.

Herbert Kovar, Managing Partner Deloitte Austria; Monika Racek, CEO Admiral; Gerhard Hrebicek, President European Brand Institute and Gerald Ganzger, Managing Partner LGP (from left to right) | © Martin Lusser

In summary: Salzburg-based energy drink manufacturer Red Bull remains by far the most valuable brand in Austria. It is followed by the gaming group Novomatic and the retail company Spar. According to the latest brand value study by the European Brand Institute, the ten most valuable brands increased their value by 2.7 per cent to a total of 38 billion euros. ■

LGP event at the Austria-Serbia match

The friendly football match between Austria and Serbia on 4 June 2024 provided a valuable opportunity for an exclusive event hosted by LGP in collaboration with the Southeast Europe Business Development Network (SEEBDN).

Numerous prominent guests accepted the invitation to strengthen Austrian-Serbian business relations and open dialogue for future cooperation at LGP's roof terrace. The acting Secretary General of the Serbian Ministry of Foreign Affairs, Dušan Kozarev, the Serbian Ambassador to Vienna, H.E. Marko Blagojević, and LGP Managing Partner Gabriel Lansky emphasised the importance of Austrian-Serbian relations in their speeches, particularly in the areas of business and investment. Against the backdrop of global trends towards relocating production processes to a proximate country (nearshoring) and the decomplexification of supply chains, Serbia is uniquely positioned to become a central location for European investment flows in industry, manufacturing, technology, and energy. Political stability and mutual respect remain the most important components for successful cooperation. ■

Aleksandar Gros, SEEBDN; Daniel Gros, Grimex Consult; H.E. Žarko Obradović, Permanent Representative of the Republic of Serbia to the OSCE; H.E. Marko Blagojević, Ambassador of the Republic of Serbia in Vienna; Dušan Kozarev, Acting Secretary General of the Serbian Ministry of Foreign Affairs; Gabriel Lansky, Managing Partner LGP and Nebojša Radojičić, Minister Counsellor at the Embassy of the Republic of Serbia in Washington, D.C. (from left to right) | © Prokofief Photo

Alumni meeting of the College d'Europe

On 1 July 2024, the annual summer meeting of the College d'Europe took place on the roof terrace of the LGP headquarters in Vienna. Alexander Egger again welcomed many prominent guests from near and far.

Alexander Egger, Head of EU, Regulatory, PP & State Aid at LGP and alumnus of the renowned postgraduate programme, was delighted with the large number of high-calibre guests who had accepted his summer invitation.

The guests included keynote speaker and former Luxembourg court judge Josef Azizi, the Director General of the Austrian Federal Competition Authority Natalie Harsdorf-Borsch, the Executive Director of E-Control Wolfgang Urbantschitsch, the Austrian diplomat and former Permanent Representative of Austria to the EU Gregor Woschnagg, the Austrian diplomat and OSCE Special Representative Thomas Mayr-Harting, and numerous other EU representatives. In the presence of LGP founding partner Gabriel Lansky and Gerald Ganzger, alumni spent a balmy summer evening on the beautiful roof terrace in excellent surroundings. ■

Keynote-speaker Josef Azizi (l.) and Alexander Egger

Celebrity visit to Vienna

LGP invited representatives from politics, business and the media to an exclusive reception on 17 July 2024: US Congressman Eric Swalwell shared insights into current US politics ahead of the upcoming elections in November against the backdrop of recent events

Gabriel Lansky and Eric Swalwell | © LGP/Rudolph

The upcoming presidential elections in November this year are of immense importance for both the USA and Europe. No wonder that many guests responded to this international commercial law firm's call to exchange views with Californian Congressman Eric Swalwell in person. LGP Managing Partner Gabriel Lansky welcomed illustrious guests such as former Chancellor Christian Kern, WKÖ Vice President Wolfgang Hesoun, Ambassador Gerhard Sailler, Deputy Political Director at the BMEIA, bank manager Erich Hampel, and other well-known names from politics, business, and the media to his Vienna headquarters early on Wednesday evening. Lansky praised the democrat Swalwell for his diplomatic commitment and described him as an "unshakeable advocate of international stability and peace". The evening was opened by Christoph Matznetter, Chairman of the Foreign Affairs Committee of the Austrian National Council, and moderated by LGP Senior Expert Counsel Wolfgang Petritsch, President of the Austrian Institute for International Politics and the Austrian Marshall Plan Foundation. ■


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