Final Report on the Regional Meeting of the European Judicial Network (EJN) organised by the Austrian Contact Points in Vienna/Austria from September 24th to 26th, 2014
The Austrian Contact Points convened a Regional Meeting of the European Judicial Network (EJN) in Vienna from September 24th to 26th, 201$. The overall title of the meeting was "Seizure and Confiscation in transborder cases - the Role of the EJN".

After welcoming speeches by Johannes MARTETSCHLÄGER, Deputy Head of the Department of International Criminal Cooperation at the Federal Ministry of Justice and Coordinating Austrian Contact Point of the EJN and by Dr. Gerhard JAROSCH, President of the International Federation of Prosecutors, who all underlined the importance of personal contacts for the proper functioning of a good transborder cooperation in criminal matters two Austrian Prosecutors gave their presentations:

Stephan SCHMIDMAYR (Specialized Prosecution Service for Corruption and Serious Economic Crime) presented the Austrian legal framework for Confiscation and Forfeiture.

In his introduction he pointed out that especially serious organised crime can be best tackled by taking away the proceeds of crime. This idea guided the Austrian legislator when renewing the provisions for confiscation and forfeiture coming into force on January 1st, 2011. Despite of this new legal framework the instruments are still not as intensively used as they should be.

Confiscation under Austrian law is possible for

- instruments used in a criminal act (instrumenta sceleris)
- proceeds deriving from a criminal act (producta sceleris)

and means the transfer of property rights from the owner to the State by a judicial decision. To dangerous or forbidden goods the instrument of forfeiture applies. Confiscation has punitive character and has to be taken into account when measuring the concrete imposed penalty on a person. Confiscation is only possible if confiscated good or right belongs to the perpetrator at the moment of the decision of first degree. The rule of proportionality applies to the instrument of confiscation.
Forfeiture has no punitive character and applies to proceeds of an offence or equivalent to the full value of such proceeds but also to any economic advantage derived from the criminal offence (extended forfeiture). It can also be extended to the whole belongings of the perpetrator within the value of the proceeds of crime. Forfeiture can not take place if the proceeds are in the hands of a third party that has obtained it lawfully without knowing about the criminal origin or if the perpetrator has given full compensation with regard to claims based on civil law.

Procedural law:

Freezing ("Sicherstellung") can apply to evidence or to secure confiscation or forfeiture. Freezing for the compensation of victims can only take place with regard to the proceeds of crime themselves (and not to economic values replacing these proceeds). When preparing a MLA request for freezing or confiscation to Austria the object(s) to be frozen or confiscated must be clearly described including its/their link to the alleged crime.

Dr. Michael SCHIETZ introduced the participants to some questions in relation to cooperation in Criminal Matters in proceedings for property crime. When issuing an MLA request it is very important to focus on a clear description of the factual background of the proceedings. This information has to be dense enough to check the double criminality and the proportionality – for the latter the estimated damage has to be mentioned in the request.

From a formal point of view the Austrian Federal Law on Extradition and Mutual Legal Assistance requires either

- the order of a court of the requesting state

or

- if no court order needs to be issued according to the law of the requesting state a declaration of the requesting authority that the prerogatives for the requested measure are met according to the law of the requesting state.

When requesting bank account information from Austria it is necessary that the requests state

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the grounds to believe why an account in Austria exists;
the period of time when monitoring a bank account and its transactions (as to check the proportionality of the measure);
if a continuous monitoring is requested there must be grounds to believe for a continuous criminal activity.

When requesting a search of premises or objects the requests should contain
the exact address of the premise to be searched:
the nature of the presumptive evidence located at the place of search;
the probability of the presence of such evidence at the place of search;
the question of return of evidence if no longer needed in the requesting state.

It should be noted that the observation of a person does not require a Courts permission according to Austrian law.

When requesting confiscation according to the FD 2006/783/JHA of 6 October 2006 it is necessary to attach the decision to the certificate.

Fritz ZEDER, Head of Unit of International Criminal Law at the Austrian Federal Ministry of Justice, gave an overview on the state of play of the discussions on the European Public Prosecutor (EPPO) at the level of the Council’s Working Group COPEN. He pointed out that there is still a lot of open questions both to the institutional part of the directive and to the procedural provisions.

The Austrian National Member to EUROJUST, Ingrid MASCHL-CLAUSEN and her deputy, Gabriele HORNBECK, reported a case where the new form of cooperation in a so-called EUROJUST Coordination Centre was successfully used. On September 1st, 2014 law enforcement authorities in Austria, Belgium, Cyprus, Hungary and the United Kingdom took part in simultaneous operations to stop the distribution of counterfeit, prescription-only medicines (mainly erectile dysfunction pills), the laundering of the related proceeds, and to address the impact of these counterfeit medicines on public health in the European Union.
To support the operations, the Spanish National Desk at Eurojust set up a coordination centre with the assistance of the National Desks of all countries involved, Eurojust’s Case Analysis Unit and Europol. The coordination centre facilitated the swift exchange of information, resolution of legal issues and the elaboration of a final overview of the results, tailor-made for the needs of the involved judicial authorities. At the same time, Europol provided valuable assistance by deploying a mobile office for real-time analysis and cross-checking. Simultaneously, experts and analysts from Europol assisted the police and provided forensic and analytical support during the action day.

Following intelligence gathered during an investigation carried out by the authorities in Spain that assisted further investigations in Austria, France and the UK and that also provided Europol with useful leads, several operational meetings were held to inform and exchange information with the concerned Member States and other involved countries. Eurojust organised a coordination meeting to discuss a common strategy among the authorities involved, including the establishment of a joint investigation team (JIT) among Spain, Austria, France and the UK and supported by the authorities in Cyprus, Hungary, and Slovakia, and common action days. Members of the JIT will now travel to other involved countries to facilitate the exchange of information.

Since the beginning of the investigation in September 2012, more than 300,000 pills with an estimated value of EUR 2 million have been seized in Austria alone. However, it is believed that this represents only one-fifth of the total transactions made by the OCG in Austria. In France, payments totalling EUR 9 million were identified as having been processed over three years. In Spain, counterfeit goods worth more than EUR 1.5 million have been seized and three people arrested. Over the last two years, the UK authorities have identified more than EUR 12 million in transactions involving counterfeit and unlicensed medicines. The Hungarian authorities were involved in a similar investigation last year.

This operation shows that a multi-agency approach and a swift exchange of information can lead to important operational successes.
On the second day of the meeting the participants made a visit to the neighbouring trans-border judicial authorities of Slovak Republic in Bratislava. The Slovak National Coordinating Contact Point of the EJN, Stanislava JURICEKOVA welcomed the participants and explained changes in the structure of the Network in her country. There are no judges appointed as Contact Points at the moment, the involvement of judges is not deemed to be necessary. An internal network is domestically set up with one Contact Point at each regional court/regional prosecution office. The international cooperation with the neighbouring countries is good, direct contacts are the rule.

Miroslav TISZA explained the structure of the Network at the prosecutorial level and informed about the Slovak legal provisions on forfeiture and confiscation.

I. EJN at SK Prosecution Service.

Structure
The Public Prosecution Service of the Slovak Republic has hierarchical structure. It is headed/governed by the General Prosecutor of the Slovak Republic. Within its structure, there is also the Office of Special Prosecution located in the city Pezinok. It is competent to deal with murder cases (premeditated murders), misuse of powers by public officials, corruption, public procurement fraud, acts affecting financial interests of the State, participation in a criminal organization, terrorism, serious economic or property crime.

Within the structure of the General Prosecutor’s Office there is also the International Department responsible for incoming and outgoing MLA requests. One prosecutor of the Department is the EJN Contact Point. Within the territory of the Slovak Republic there are eight Regional Prosecution Offices, each of them has its own MLA Department. Furthermore, there are 54 District Prosecution Offices, each one having one prosecutor specialised for MLA issues.

EJN – period until July 2014 - past situation.

In the past period, the EJN network structure at the Slovak Public Prosecution Service consisted of two so-called “main contact points” i.e. one prosecutor of the International Department of the General Prosecutor’s Office dealing with the agenda of legal relations with foreign countries and one prosecutor of a Regional Prosecutor’s Office outside the capital city of the Slovak Republic who has been dealing with the agenda of legal relations with foreign countries. Furthermore, there has been EJN network consisting of so-called “sub-network” Contact Points i.e. which Heads of International Departments at all the Regional Prosecutors’ Offices of the Slovak Republic. List of main contact points has been made public in the EJN website.
EJN - Current situation.

The General Prosecutor’s Office of the Slovak Republic decided to increase the number of EJN Contact Points referring to the Report of the 6th Round of Eurojust and EJN Evaluations, stating inter alia that major part of contacts is carried out via SK Central Point at the General Prosecutor’s Office of the Slovak Republic pursuant to the Internal Instruction issued by the General Prosecutor’s Office with the purpose to improve efficiency and distribute administrative workload. It means that instead of two, there will be nine Contact Points. The aim is that each Regional Prosecution Office and each subordinate District Prosecution Office should be able to efficiently and directly fulfill tasks in the area of judicial cooperation in criminal matters.

Taking into account above described facts, the General Prosecutor of the Slovak Republic appointed new EJN Contact Points within the Public prosecution Service’s network.

Currently, each Regional Prosecution Office has its own EJN Contact Point. As mentioned before, within the entire Slovak Public Prosecution Service there is total number of 9 Contact Points; eight from among them are at eight Regional Prosecution Offices; one Contact Point is at the Central Authority i.e. the General Prosecutor’s Office of the Slovak Republic.

We need to inform you that recent changes i.e. increase of number of EJN Contact Points to operate on behalf of each Regional Prosecution Office has not been inserted in the EJN Site because of the short time period available for updating. Please be advised that updating will be carried out without any further delay.

II. Confiscation and Forfeiture.

With regard to limited time available, let me inform you briefly about some issues regarding confiscation and forfeiture of property according to the legal order of the Slovak Republic.

Legislative situation in Slovak Republic.

The Slovak legal order distinguishes forfeiture and confiscation. Forfeiture is a penalty and must always be based on a convicting judgment. Confiscation is protective measure. It can be imposed by a judgment or independently (without any criminal conviction).
The link to criminal proceedings is always required and any confiscation of the proceeds from crime is possible only within criminal proceedings. The Slovak Criminal Code provides for three types of confiscation:

1/ Confiscation of items/things (imposed on natural persons), Section 83 CC,
2/ Confiscation of money (imposed on legal persons/entities), Section 83 a, CC
3/ Confiscation of assets (imposed on legal persons), Section 83b CC.

In general, the confiscation applies to persons; nevertheless there are certain grounds for confiscation of items that do not require any link to specific person (Article 83 par. 1c, 1d and 1e, Criminal Code). While imposing confiscation measure, the Court must always deal with an owner (natural person) of items to be confiscated.

Confiscation of the proceeds from and instrumentalities for a crime always take place before a criminal Court.

In reference to confiscation, the Criminal code distinguishes natural and legal persons/entities.

1/ Natural persons:
Confiscation of the proceeds and instrumentalities of crime is possible, if:
- the person may not be prosecuted or convicted (the main grounds include: lapse of time, immunities, age restriction, death, ne bis in idem, insanity, non – consent of the victim in relation to specified offences),
- the items belong to an offender whose punishment the court waived or to an offender against whom criminal prosecution was terminated or to an offender against whom criminal prosecution was conditionally suspended or to an offender against whom criminal prosecution was terminated due to the approval of a settlement,
- it concerns goods without control stamps or without other technical control measures required by generally binding legal regulations for its identification for tax purposes (in rem),
- the circumstances of the case justify the assumption that the items could be a source of financing terrorism,
- the safety of persons or assets, or another similar public interest requires it.

2/ Legal persons/entities:
Confiscation of money (monetary sum) and confiscation of assets are the only two sanctions applicable to legal persons under Slovak law. These measures may be imposed under conditions set out in Article 83a and 83b, Criminal Code (see below). Legal persons may not be considered perpetrators of crime and thus may not be convicted of a criminal offence.
As regards seizure/freezing of a property, the Slovak legal order applies two approaches:
1) Seizure/restraint/freezing of property based on a request for legal assistance; procedure is followed pursuant to respective provisions of the Slovak Code of Criminal Procedure (Section 447, par. a) transposing international agreements which is the Slovak Republic bound by; and

As regards seizure of property on the basis of a request for legal assistance we need to emphasize that anticipated forfeiture of property is the objective of seizure of property for the purposes of criminal proceedings abroad, not the claim of an injured party. It is necessary to draw your attention on the fact that a foreign authority often has requested for seizure of a property in order to enable satisfaction of injured person's claim for compensation.

Under Slovak Code of Criminal Procedure, seizure is cancelled if it was requested by foreign country in order to satisfy injured person's claim for compensation but not in order to enable confiscation, and if the thing concerned is not a movable property being evidence in criminal proceedings at the same time. If a thing is considered evidence, it is necessary to inform requesting country thereof (hanging over of the evidence shall be suggested).

With regard taken to time limit, it is impossible to further discuss here the Act No. 650/2005 Coll. on Seizure of Property or Evidence, transposing the Council Framework Decision 2003/577/JHA.

If someone would be interested in knowing the wording of respective legal provisions and definitions – that would be hardly possible for me to read here – please note that there is the detailed information on the Council of Europe webpage provided by the Slovak Republic that has been submitted to the Committee of Experts on the Evaluation of Anti Money Laundering Measures and the Financing of Terrorism (MONEYVAL) within (4th round) assessment visit in Slovakia. It includes further thorough full legal definition, also highly detailed recommendations on the ways to improve the effectiveness of Slovakian regimes and legislation, information about the current situation and statistics data. It can be found through the following link:


On the third day of the meeting, Sonja HERBST, Prosecutor at the Prosecution Service in Vienna, and Markus ANGERER, Federal Office of Investigation, gave a presentation on the criminal phenomenon of money-counterfeiting: AT is a
usual transit country where counterfeited money is either transported or distributed. The production of the falsified money takes place in other countries. In one case, however, the production unit was placed and found in Austria. The presentation summarized the investigation against a group of foreign suspects acting in Austria. The investigation started when the banks realized a significant increase of falsified Euro-banknotes in Austria at the end of 2012. Especially when paying for i-phones or other electonical equipment bought through Internet-platforms falsified 50 and 100€ banknotes were used. Covert investigations allowed to identify more perpetrators and with the help of EUROPOL falsified money could be bought for analytical purposes. In May 2014 the group of perpetrators could be set in custody in a coordinated police action involving the prosecutor and 230 police officers. 10000 pieces of forged 100€, 1000 pieces of forged 50€ and 1000 pieces of forged 10€ were found together with the production instruments. The investigation has been concluded and an indictment has already been lodged. The case showed the importance of close cooperation between the prosecutor and the police in a small team and problems in cooperation with third countries on the police level.

As the last presentation of the meeting, Judith HESTER, Legal Advisor in the Federal Ministry of Justice, spoke about the European Investigation Order which will mark a significant change of habits and step forward in the field of Mutual Legal Assistance.

At the end of the meeting the participants summarized its usefulness for a deeper knowledge of the judicial systems of the countries involved and for the fostering of a proper cooperation within the EJN.

September 26th. 2014
Johannes Martetschläger