WORKSHOP

The workshop will address international standards and best European practices to strengthen defense and property rights and address misuse in criminal investigations: authorities and public officials who carry out criminal investigations and prosecution have wide powers to interfere with rights of private persons – both physical and legal. In a well-regulatedsystem, the use of such powers should be appropriately limited and subject to legal checks. However, in the majority of countries these powers are at least occasionally misused because of incompetence, negligence or malicious intent.

In Russia so-called “commissioned prosecutions” (zakaznye dela) are probably the most clear-cut examples of criminal legal abuse. The term has been used to refer both to criminal cases “commissioned” by third parties as a way of sabotaging business competitors and to criminal cases initiated by law enforcement for extortionate or other improper purposes. Extortionate prosecutions have expanded to target legitimate businesses, a feat accomplished by the creative use of legal loopholes and ambiguities to create a threat of criminal prosecution, which would not otherwise exist. In other instances, violations committed in the framework of legitimate criminal investigations may simply find their explanation in loopholes in the current legislation and judicial practice. They nevertheless create disproportionate interferences with the ability of a company to carry out its business activity or with its right to peaceful enjoyment of property.

 While bodies of preliminary investigation have wide powers to open a criminal investigation, gather evidence, exert pressure on the accused, accused individuals have more modest means to protect their rights, including the right to protection from unlawful prosecutions.

Common types of misuse include:

 Ungrounded or vaguely grounded initiation of criminal investigations (commissioned
criminal prosecutions,

 Initiation of criminal investigations in cases that in substance represent civil disputes,

 Ungrounded discretionary investigative actions (including raids, seizure of documents),
sometimes because the law sets vague criteria thereof or because officials are involved in corrupt conspiracies;

 Search and seizure, which either enable the unlawful seizure of confidential information or unnecessarily and disproportionately hamper operations of a legal entity,

 Arbitrary or disproportionate seizures with missing or vague grounds;

 Arbitrary and disproportionate extension of criminal investigations

 Excessive use of pre trial detention

Indeed the violation of defence and property rights in the context of criminal investigations do not only affect entrepreneurs, but almost any suspect and accused. The repercussions of these violations on the chances to a fair trial can be extremely negative, to the point of prejudicing any chance of a fair trial at all.

The author’s analysis integrates three major bodies of analysis. The first is a review of mandatory and recommendatory international standards. The second is analysis on problems and features of theegislative framework and practice in the Russian Federation. The third is a review of the experience of other member States of the Council of Europe and particular instances of the good practice.

The workshop discusses the existence of a plurality of mechanisms aimed at ensuring that the protection of defendants’ rights in the context of a criminal investigation is not undermined by excessive deference to prosecutorial discretion.

Criteria have been developed in order to assess whether there are sufficient grounds to open a criminal investigation against individuals (United Kingdom). Specialised judges have been charged with either the carrying out of the investigation (France) or with the supervision over the investigative stage to the extent that the investigation is regarded as a judicially supervised inquiry into an offence rather than the gathering of evidence to support the prosecution of the accused (Italy). Judges have been charged with the taking of certain evidence such as statements under oath or with the review of the evidence in order to decide whether there are sufficient grounds for an indictment (Italy). Depending on the gravity of the violation and on the impact that such violations may have on a defendant’s right to fair trial or on the administration of justice such remedies span from the introduction of a regime of nullities of investigative acts and decisions, to the inadmissibility of evidence, to the stay of proceedings by a court (France, the Netherlands, Belgium, United Kingdom). Stronger court supervision over the investigative stage is supplemented by the existence of a detailed regime of disciplinary, criminal and civil responsibility.

The workshop will further address specific reforms that have recently been introduced in several countries to improve human rights protection at the pre-trial stage following judgments of the European Court of Human Rights.