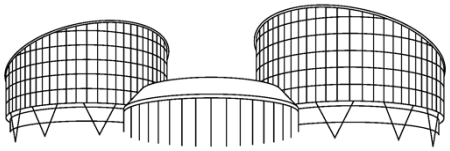

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SADOCHA v. UKRAINE

(Application no. 77508/11)

JUDGMENT
(*Merits*)

STRASBOURG

11 July 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sadocha v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Yonko Grozev,
Ganna Yudkivska,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 18 June 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 77508/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Vasil Sadocha ("the applicant"), on 6 December 2011.

2. The applicant was represented by Mr V. Kasko, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr I. Lishchyna.

3. The applicant complained that the confiscation of his lawfully acquired money had been an excessive and disproportionate measure and that he had not been duly summoned to court hearings in his case.

4. On 16 April 2018 notice of the above-mentioned complaints was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The Czech Government were invited to submit written comments, in accordance with Article 36 § 1 of the Convention, but declined to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and lives in Olomouc, the Czech Republic.

7. On 22 July 2011 the applicant travelled from Kyiv Zhuliany Airport to Poland. He went through the "green corridor" carrying 41,000 euros

(EUR) in cash in his hand luggage. At the security check, his hand luggage was X-rayed. According to the applicant, once the officer had asked him whether he was carrying any cash he had acknowledged that he had money in his luggage and showed it to the officer.

8. According to the customs offence report drafted by the State Customs Service on the spot, the applicant had breached customs control procedures in a simplified customs control area by carrying goods (cash) which had been subject to a mandatory declaration and had failed to make a written declaration in respect of the full amount of money he had been carrying on him. He was charged with breaches of Articles 339 and 340 of the Customs Code. The customs officer seized EUR 31,000 as the object of the offence, while allowing the applicant to keep the remaining EUR 10,000.

9. On 10 August 2011 a hearing was held in the Solomyanskiy District Court of Kyiv ("the District Court") in the presence of a prosecutor and the applicant's lawyer. During the hearing the applicant's lawyer admitted that the applicant had not declared the money to the customs authorities when leaving Ukraine, but submitted that he had not done so because he had not known what amount he had to declare and what amount could be carried on undeclared. The lawyer also informed the District Court that the applicant had obtained the money through a private loan in Kyiv and had been obliged to repay it within two months of borrowing it. He presented to the court a loan agreement between the applicant and K., a physical person residing in Ukraine, dated 22 July 2011. The agreement, which was a handwritten document, suggested that the applicant had borrowed EUR 31,000 from K., for a period of two months, and undertook to pay default interest in the event that he failed to repay the amount on time.

10. The District Court held on the same date that the customs report was sufficient evidence of the offences and issued a confiscation order for the sum of EUR 31,000. In so deciding it held as follows:

> "... the court considers the written evidence presented by the [applicant's] representative, namely the loan agreement and copies of the receipts for the amount of EUR 21,600, to be irrelevant because the origin of money has no impact whatsoever on the determination of the scope of the [applicant's] liability. ...
>
> Having examined the case file, the court considers the [applicant's] guilt is fully confirmed by the available materials, in particular by the customs offence report. ...
>
> When deciding on the punishment for breaches of the customs rules, the court has taken into account the nature of the offence and the way in which it was committed, and information on the character of the offender, and considers it appropriate to order confiscation of goods [from the applicant] as provided for by Article 340 of the Customs Code of Ukraine."

11. In his appeal, the applicant's lawyer complained that the first-instance court had imposed an unfair and disproportionate punishment on the applicant. He noted in particular that the court had failed to duly examine important factors which served as grounds for giving a less strict

punishment to the applicant, namely the lawful origin of the money, the lack of an intention to commit an offence, information about the character of the applicant and in particular the fact that he had never committed any administrative offences before, as well as his financial and family situation. Instead, the District Court had given the most severe punishment, having limited its reasoning to general phrases without providing any relevant details. The lawyer requested that the confiscation order be replaced by a fine.

12. On 12 September 2011 the Kyiv Court of Appeal ("the Court of Appeal"), in the absence of the applicant but in the presence of his two lawyers, dismissed the appeal and upheld the judgment of the District Court. In doing so, it agreed with the District Court's conclusion that the origin of money was legally irrelevant to the question of the degree of the applicant's liability. It further noted that the applicant had been obliged to acquaint himself with the relevant custom rules before crossing the Ukrainian border and that he had not been prevented in any way from doing so. The Court of Appeal went on to note that the District Court's judgment suggested that it had examined and taken into account information about the character of the applicant. As regards the lawyer's arguments that the applicant had admitted to a negligent failure to declare the relevant amount of money, had never been held administratively liable and had a large family, these factors, according to the Court of Appeal, were not a *sine qua non* condition for quashing the District Court's judgment and changing the sanction imposed on the applicant. It noted that confiscation as a sanction was laid down in Articles 339 and 340 of the Customs Code and had been correctly imposed on the applicant with due regard being given to the nature of the offence, the way it had been committed and the available information on the character of the offender. Lastly, the Court of Appeal noted that the applicant had committed a gross violation of customs rules by failing to declare a substantial amount of money, which severely affected the external economic interests and security of Ukraine and encroached on the key elements of the customs regulations. It therefore ruled that there were no grounds to allow the appeal lodged by the applicant's lawyer.

13. The judgment of the Court of Appeal was final and not subject to appeal.

II. RELEVANT DOMESTIC LAW

14. The Customs Code (as worded at the material time) provided as follows:

Article 97. Limitations on the movement of certain goods across the customs border of Ukraine

"... The procedure on moving currency across the customs border of Ukraine is determined by the National Bank of Ukraine. ..."

Article 327. Ensuring the lawfulness of imposing sanctions on persons who breached customs rules

"Punishment for a violation of customs rules cannot be applied otherwise than on the basis of and in accordance with the procedure prescribed by this Code and other laws of Ukraine."

Article 377. Seizure of goods, vehicles and documents

"Goods which are the direct objects of violations of the customs rules ... are subject to seizure ..."

Article 339. Violations of the customs control procedure in simplified customs control areas (corridors)

"Violations of the customs control procedure in a simplified customs control area (corridor), as specified by this Code, that is when an individual who has chosen to go through such a corridor is carrying goods that are either forbidden from or restricted in respect of being carried across the customs border of Ukraine or in quantities exceeding the non-taxable norm set for such goods' movement across the customs border of Ukraine,

- shall be punishable by a fine of between fifty and one hundred times the minimum tax-free income of a citizen or confiscation of the goods."

Article 340. Non-declaration of goods or vehicles

"The non-declaration of goods and vehicles being carried across the customs border of Ukraine ... which are subject to mandatory declaration ...

- shall be punishable by a fine of between one hundred and one thousand times the minimum tax-free income of a citizen or confiscation of the goods or vehicle ..."

15. The Regulation on Transportation of Cash and Investment Metals across Ukraine's Customs Border (as worded at the material time), approved by the Decree of the National Bank of Ukraine of 27 May 2008, no. 148, provided as follows:

2. Bringing cash into and out of Ukraine

"1. Individuals may bring up to EUR 10,000 in cash (or the equivalent) into and out of Ukraine without declaring it in writing at the customs office.

2. Individuals may bring over EUR 10,000 in cash (or the equivalent) into and out of Ukraine subject to making a full declaration in writing at the customs office. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

16. The applicant complained that the decision of the domestic authorities in the administrative-offence proceedings to confiscate EUR 31,000 of his money for having failed to declare it at customs had been unlawful, excessive and disproportionate to the legitimate aim pursued. He relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

17. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

(a) The applicant

18. The applicant submitted at the outset that the confiscation of the money he had been carrying had not been lawful as the existing legislative framework within which the confiscation of money was ordered did not meet the Convention requirements of foreseeability and accessibility. In particular, under Article 337 of the Customs Code, any punishment for a breach of customs rules could not be applied otherwise than on the basis and in the manner established by the Customs Code and other laws (see paragraph 14 above). While the Customs Code provided for a fine or confiscation in case of the non-declaration of money which had been subjected to mandatory declaration, neither the Customs Code nor any other law contained a specific reference to the amount which was allowed to be carried undeclared across Ukraine's border. The Regulation referred to by

the Government (see paragraph 20 below) was not a "law" and had not been referred to by the domestic courts in their judgments as a part of the legal basis for the confiscation of the money from the applicant. It was also not clear whether the Regulation had been accessible to public at the time.

19. The confiscation measure was unfair and disproportionate to the legitimate aim pursued. It had not been illegal to bring foreign currency out of Ukraine. The money he had been carrying had been legally acquired and the applicant had freely shown it to the customs officers once he had been asked whether he had any cash. His failure to declare the money had not been intentional conduct and his actions had not caused any damage to the State. The confiscated amount was substantial for the applicant particularly as he had been required to repay it within two months and as he had three children. The domestic courts had disregarded all these factors and imposed the most severe punishment on him without demonstrating why a less severe measure, such as a fine, would have been an insufficient punishment in the circumstances of his case. According to the applicant, his situation was very similar to that of the applicant in the case of *Gyrlyan v. Russia* (no. 35943/15, 9 October 2018) in which the Court had found that the undeclared money had been confiscated from the applicant in breach of Article 1 of Protocol No. 1.

(b) The Government

20. The Government admitted that there had been an interference with the applicant's right of property when the domestic authorities had confiscated EUR 31,000 from him. However, the interference had been lawful and proportionate. In particular, confiscation, as a sanction for the administrative offences in question, had been provided for by Articles 339 and 340 of the Customs Code (see paragraph 14 above) and the relevant procedure for carrying the foreign currency through the Ukrainian border had been set out in the Regulation (see paragraph 15 above). The applicant should have been aware that the transfer of a considerable amount of cash across the border was subject to certain restrictions provided for by law. He could have reasonably been expected to make some enquiries into this matter before setting out on a journey. The facts presented in the domestic proceedings did not indicate that his alleged ignorance had been in any way justified.

21. As to proportionality, having examined the relevant factors, such as the number of the offences, their nature and the manner in which they had been committed as well as information about the applicant's character, the domestic court had opted for the most severe penalty given that the applicant had committed a gross violation of custom regulations which had severely affected the external economic interests of Ukraine. The applicant had been imposed only with confiscation as the sanction, an element which distinguished the present case from the case of *Gabrić v. Croatia*

(no. 9702/04, 5 February 2009) where the Court had condemned the fact that the applicant, in similar circumstances, had been subjected to both a confiscation order and a fine.

2. The Court's assessment

22. It is not in dispute between the parties that the decision to confiscate the amount of EUR 31,000 constituted an interference with the applicant's right to the peaceful enjoyment of his possessions. Having regard to its case-law on the matter (see, for example, *Ismayilov v. Russia*, no. 30352/03, § 29, 6 November 2008, and *Boljević v. Croatia*, no. 43492/11, § 37, 31 January 2017), the Court sees no reason to hold otherwise.

23. The Court reiterates its consistent approach that a confiscation measure, even though it involves a deprivation of possessions, falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which allows the Contracting States to control the use of property to secure the payment of penalties (see *Gabrić*, cited above, § 33, with further reference).

24. As to the lawfulness of the interference, the Court notes that the parties disagreed on the matter (see paragraphs 18 and 20 above).

25. The Court notes that the applicant was essentially found guilty of the failure to declare the amount of cash that he was carrying to the customs authorities. The sanctions for this offence, namely either a fine or a confiscation order, were set out in Article 340 of the Customs Code (see paragraph 14 above). The obligation to declare cash exceeding EUR 10,000 to customs was set out in the Regulation issued by the National Bank (see paragraph 15 above). Competence of the National Bank on the matter was referred to in Article 97 of the Customs Code. The Court considers that the rules in question were formulated with sufficient precision and thus met the qualitative requirement of foreseeability. It further notes, that, according to Ukrainian law data base available on the web-site of the Ukrainian parliament, the Regulation was published in the Official Gazette of Ukraine (*Офіційний вісник України*), no. 43 of 23 June 2008 and thus had been accessible to public. The fact that the National Bank's Decree which approved the Regulation was not a law in a formal sense does not alter the above assessment as the notion of a law under the Convention also has an autonomous meaning which can include subordinate legislation (see, for instance, *Bittó and Others v. Slovakia*, no. 30255/09, § 102, 28 January 2014). The Court is therefore satisfied that the interference with the applicant's property rights was based on law, as required by Article 1 of Protocol No. 1 to the Convention.

26. The Court next notes that States have a legitimate interest and also a duty, by virtue of various international treaties, to implement measures to detect and monitor the movement of cash across their borders, since large amounts of cash may be used for money laundering, drug trafficking, financing terrorism or organised crime, tax evasion or the commission of

other serious financial offences. The general declaration requirement applicable to any individual crossing the State border prevents cash from entering or leaving the country undetected and the confiscation measure in which the failure to declare cash to the customs authorities results is part of the general regulatory scheme designed to combat those offences. The Court therefore considers that the confiscation measure conformed to the general interest of the community (see *Gyrlyan*, cited above, § 23).

27. The remaining question for the Court to determine is whether the interference struck the requisite fair balance between the protection of the right of property and the requirements of the general interest, taking into account the margin of appreciation left to the respondent State in that area. The requisite balance will not be achieved if the property owner concerned has had to bear "an individual and excessive burden". Moreover, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity to put his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake (see *Boljević*, cited above, § 41; *Denisova and Moiseyeva v. Russia*, no. 16903/03, §§ 58-59, 1 April 2010; and *Rummi v. Estonia*, no. 63362/09, § 104, 15 January 2015).

28. The administrative offence of which the applicant was found guilty consisted of his failure to declare the amount of cash that he was carrying across the customs border. It is to be noted in this respect that indeed, as stated by the applicant, the act of taking foreign currency out of Ukraine was not illegal under Ukrainian law. Not only was it permissible to export foreign currency, but the sum which could be legally transferred or, as in the present case, physically carried across the customs border, was not, in principle, restricted at the time of the events, if declared (see paragraph 15 above). Those elements distinguish this case from certain others, in which the confiscation measure applied either to goods whose import was prohibited or to vehicles used for transporting prohibited substances or trafficking human beings (for examples of such cases, see *Ismayilov*, cited above, § 35).

29. Furthermore, in the proceedings before the District Court the applicant explained that he had obtained the money through a private loan and submitted documentary evidence in support of those factual allegations (see paragraph 9 above). The domestic authorities did not address that issue in particular, as they apparently considered it irrelevant, at least for the imposition of the confiscation measure. The Court observes that there is no evidence before it to suggest that the applicant produced the loan agreement, which is a handwritten document, signed between the applicant and a physical person on the date of his departure from Ukraine, to the customs authorities. As it follows from the available documents, the first reference to the agreement was made at the court proceedings. However, given that no

assessment of the lawfulness of the origin of the money was made by the domestic court and given the fact that in their observations before this Court, the Government have not raised any doubts as regards the validity of the loan agreement, the Court is not in a position to call into question the lawful origin of the confiscated cash. On that ground it distinguishes the present case from cases in which the confiscation measure covered assets which were the proceeds of a criminal offence, were deemed to have been unlawfully acquired or were intended for use in illegal activities (for examples of such cases, see *Ismayilov*, cited above, § 36, and *Grifhorst v. France*, no. 28336/02, § 99, 26 February 2009).

30. Turning next to the applicant's conduct, the Court notes that there is no indication that he was deliberately seeking to circumvent the customs regulations. It has not been disputed by the Government that the applicant did not deny at the security check that he was carrying cash (see paragraph 19 above and compare with *Moon v. France*, no. 39973/03, § 8, 9 July 2009, and *Grifhorst*, cited above, § 8, in which the applicants denied that they had any money on them). The fact that the Ukrainian authorities did not institute criminal proceedings against the applicant also evidences that they conceded a lack of intent to deceive them on the part of the applicant and that by imposing the confiscation measure on him the authorities were not seeking to prevent any other illegal activities, such as money laundering, drug trafficking, financing terrorism or tax evasion. The money the applicant was carrying had been lawfully obtained and he was allowed to take it out of Ukraine so long as he declared it to the customs authorities. It follows that the only illegal (but not criminal) conduct which could be attributed to him was his failure to make a written declaration to the customs authorities to the effect that he was carrying such cash across the border.

31. The Court reiterates that in order to be proportionate, the interference should correspond to the severity of the infringement, and the sanction to the gravity of the offence it is designed to punish – in the instant case, failure to comply with the declaration requirement (see *Gyrlyan*, § 28, and *Gabrić*, § 29, both cited above).

32. It is true that the amount confiscated was substantial for the applicant. However, there is no evidence that the applicant might have caused any serious damage to the State: he had not avoided customs duties or any other levies or caused any other pecuniary damage to the State. The statement contained in the decision of the Court of Appeal that the applicant's actions had caused "severe damage to the external economic interests and security of Ukraine" is too vague and general and not supported by any details as to what exactly constituted that damage. Thus, the Court finds that the confiscation measure was not intended as pecuniary compensation for damage – as the State had not suffered any loss as a result

of the applicant's failure to declare the money – but was deterrent and punitive in its purpose (see *Gyrlyan*, cited above, § 29).

33. The Court is not convinced by the Government's argument that an assessment of proportionality was incorporated in the domestic decisions. It does not appear that the above considerations relating to the lawful origin of the money, the unintentional nature of the applicant's conduct or the absence of other customs offences records, despite being expressly raised by the applicant's lawyer, played any role in the courts' decision-making. The domestic courts merely referred in a general manner, without providing details, to the "nature of the offence and the way in which it had been committed" and "information on the [applicant's] character" and did not examine the question of whether or not the requisite balance was maintained between the public interest and the applicant's right to the peaceful enjoyment of his possessions. Accordingly, the Court finds that the scope of the review carried out by the domestic courts was too narrow to satisfy the requirement of seeking a "fair balance" inherent in the second paragraph of Article 1 of Protocol No. 1 (ibid., § 30).

34. In the same way, it has not been convincingly shown by the Government before this Court that a less severe sanction, such as a fine, was not sufficient to achieve the desired deterrent and punitive effect and to prevent future breaches of the declaration requirement.

35. The Court observes in this respect that, unlike in the *Gyrlyan* case referred to – in which the Russian courts appeared not to have been left any discretion on the matter as, by virtue of the law, the entire undeclared amount was to be forfeited to the State in any event, either as a fine or under a confiscation order – in the applicant's case the Ukrainian courts did have a choice as regards the amount of the fine to be ordered as a sanction (see paragraph 14 above).

36. In these circumstances, the confiscation of the entire undeclared amount of the money, in the Court's view, imposed an individual and excessive burden on the applicant and was disproportionate to the offence committed (see *Gabrić*, § 39, and *Ismayilov*, § 38, both cited above; and *Tanasov v. Romania* [Committee], no. 65910/09, § 28, 31 October 2017).

37. There has therefore been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. On the basis of the same facts the applicant further complained, under Article 6 § 1 of the Convention, that the above-mentioned administrative offences proceedings were unfair as the court hearings were held in his absence.

39. Having regard to its findings under Article 1 of Protocol No. 1 (see paragraph 37 above), the Court considers that the main issue at the heart of the applicant's complaint, specifically the lawfulness of the confiscation of

EUR 31,000 following the above-mentioned administrative proceedings, has been addressed by the Court and that it is not necessary to give a separate ruling on the admissibility and merits of the allegation of a breach of Article 6 of the Convention mentioned in the paragraph above (see, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references, and *Mocanu and Others v. the Republic of Moldova*, no. 8141/07, § 37, 26 June 2018).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Damage

41. The applicant claimed EUR 31,000 in respect of pecuniary damage, representing the confiscated amount, and EUR 3,100 representing the penalty that he must pay for his failure to fulfil the terms of the loan agreement with K. He explained that the amount of the penalty to be paid was set out in an amended loan agreement which he had concluded with K. on 6 February 2014. The penalty replaced the amount of statutory default interest the applicant had been required to pay under the original loan contract of 2011. He also claimed EUR 2,000 in respect of non-pecuniary damage.

42. The Government contested these claims.

43. The Court observes that the ground for finding a violation of Article 1 of Protocol No. 1 in the present case was the disproportionate nature of the sanction imposed on the applicant, which does not imply that the applicant did not have to bear any responsibility for the breach of the domestic law he had committed. However, it is not the Court's task to speculate on the amount of the fine which would have been imposed on the applicant in lieu of the confiscation of the entire undeclared sum of money which has been found to be in breach of the Convention and to substitute itself for the national authorities on this matter. In these circumstances, the Court considers that the question of pecuniary damage is not yet ready for decision. It should therefore be reserved to enable the parties to provide their written observations on this question and inform the Court of any agreement reached between them in this respect (Rule 75 §§ 1 and 4 of the Rules of Court).

44. As regards non-pecuniary damage, the Court considers that in the circumstances of the present case the finding of a violation of Article 1 of Protocol No. 1 to the Convention constitutes in itself sufficient just satisfaction (see, for instance, *Gabrić*, § 49; *Boljević,* § 54; all cited above).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 1 of Protocol No. 1 to the Convention admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine the admissibility and merits of the applicant's complaint under Article 6 of the Convention;

4. *Holds* that, as regards pecuniary damage resulting from the violation found, the question of just satisfaction is not ready for decision and accordingly:
   (a) reserves the said question;
   (b) invites the Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on this question and, in particular, to notify the Court of any agreement that they may reach;
   (c) reserves the further procedure and delegates to the President of the Chamber the power to fix it if need be;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President