Criminal liability of veterinarians due to aiding and abetting animal cruelty, based on collaboration with animal transport to countries classified as high risk in terms of animal welfare, by granting a stamp of approval in accordance with Art. 14 (1) Regulation EC No. 1/2005 and issuing preliminary certificates in accordance with §§ 8, 12 Internal Market Epizootic Protection Ordinance

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This legal opinion has not been commissioned by persons involved in administrative or judicial procedures, their representatives, federations, an association or political parties, but is based exclusively upon the own initiative of the author and in his function as a lecturer in criminal law at a German university.

The author hopes that this opinion will stimulate debate in the academic community about the issues that are addressed.

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Legal opinion

I. Starting point and legal issue

- 1 The starting point for the following discussions is the question concerning criminal liability of veterinarians who provide a stamp of approval in accordance with [Council Regulation \(EC\) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations](#)¹ (hereinafter ATR), or issue preliminary certificates to confirm disease-free status in accordance with §§ 8, 12 Internal Market Epizootic Protection Ordinance or engage in other actions that facilitate or support transport of animals to countries whose legal systems do not provide adequate regulations to protect animals against pain and suffering when they are kept and slaughtered, or where the regulations for protection of animals are not observed in practice and actions are carried out during transport, holding at the location or slaughter in the third country that would constitute criminal acts of cruelty to animals under German law.
- 2 We are primarily dealing here with cases in which animals are transported across long distances to Turkey, the Middle East or to successor states of the Soviet Union (hereinafter referred to as countries with high risk in terms of animal welfare) and slaughtered under conditions that lead to severe and protracted or repeated pain and suffering and therefore do not comply with German and European animal protection rules. Criminal liability is also possible if the transport itself takes place under conditions that breach animal protection regulations such as heat, thirst, inadequate rest periods etc.
- 3 With regard to the facts that are relevant here, we refer in particular to the comments by *Maisack* and *Rabitsch*² as well as the resolution by the [European Parliament of 14.2.2019](#) and press reports³ about the conditions in the transport of livestock to particular high-risk countries.
- 4 The fact that the said actions in the slaughter or transport are to be regarded as animal cruelty as defined by § 17 No. 2b TierSchG (Animal Welfare Act) and also § 17 No. 2a TierSchG may be regarded here as beyond dispute.⁴
- 5 Moreover, the decisive factor in determining criminal liability is not whether the action is committed abroad, because a distinction is to be made here between the essential validity of German criminal law which is determined by the protected legal interest affected by the criminal act and the criminal law jurisdiction. In this case this means that it is essentially irrelevant where pain, suffering or injury is inflicted on an animal; the provisions of German criminal law apply. Whether they are applicable to the accomplice, i.e. whether a penalty can be imposed, is determined in accordance with §§ 3 et seq. StGB (Criminal Code) (for further details see margin note 12 et seq.).

II. Aiding and abetting

- 6 German public health officers could render a contribution that counts as aiding and abetting in this animal cruelty in the transport or slaughter abroad if they cooperate in the approval or handling or otherwise cooperate in carrying out transport to a country with high risk in terms of animal welfare.
 1. **Aiding and abetting by issuing a stamp of approval for transport to a high-risk country**
- 7 In this respect it must be noted that the granting of a stamp in the journey log for such a case of long-term transport to a third country ensuing in accordance with Art. 14 (1) ATR is an essential requirement in order to be able to carry out transport to a third country at all. This means that normally the granting of the stamp does not just objectively support the committing of animal

¹ [OJ. EU, 5.1.2005, L 3/1.](#)

² [Maisack/Rabitsch AtD \(German journal for official veterinary services\) 2018, 209, 210](#) et seq.

³ See only *Theile*, Jenseits der Schmerzgrenze, DIE ZEIT dated 28.2.2019, Politik p. 3.

⁴ See here also *Maisack/Rabitsch AtD (German journal for official veterinary services) 2018, 209, 211* et seq.

cruelty in the slaughter process in the third country – or all other types of animal cruelty during the transport – but is an indispensable *conditio sine qua non* for the committing of any other criminal act during the transport or the keeping of the animals at the destination.⁵

- 8 On account of this fundamental significance of the cooperative actions by the veterinarians involved with the transport, aiding and abetting of the acts committed abroad in the transport, keeping or slaughtering in accordance with [§ 17 No. 2 TierSchG \(Animal Welfare Act\)](#) is possible. [§ 27 StGB](#) regulates the issue of aiding and abetting in German criminal law. The regulation does not specify which actions could constitute aiding and abetting. It merely says:

"A person will be liable to punishment as an accomplice if he has intentionally assisted another person in his intentionally committed unlawful act."

- 9 There is agreement in this respect in case law and in the literature that in principle any action can constitute assisting insofar as it supports the commission of an intentional criminal act.⁶

*"Aiding and abetting is intentional assistance for an intentionally committed criminal act by another person (§ 27 (1) StGB). Assistance in this sense is constituted by any action that objectively supports the success of the act by the principal offender without having to be the actual cause of the success (established case law; cf. BGH (Supreme Court), judgment of 1.8.2000 – 5 StR 624/99, BGHSt (decisions by the Supreme Court in criminal matters) 46, 107, 109 with additional references). The assistance does not have to be rendered in order to carry out the act itself; support for a preparatory action is sufficient (BGH judgment of 8.3.2001 – BGH 1 StR 56/17, BGHR (supreme Court case law) StGB § 27 (1) Assistance 22 with further references)."*⁷

- 10 Therefore, it is not only the granting of the stamp required for the transport directly before the transport but also the granting of a health certificate in advance (the preliminary certificate), i.e. for transport within the Community for preparation of third country transport, that can be sufficient if in this way the transport is supported, or even made possible at all and if this subsequently leads to a case of animal cruelty in the third country or on the way to it. With regard to the question of aiding and abetting there is unanimous agreement that it is irrelevant whether the assistance for the criminal act is rendered directly before the offence is committed or a long time beforehand in the preparatory stage.⁸
- 11 What is, however, disputed is whether the assistance has to be causal for the way the crime is committed in order to constitute aiding and abetting.⁹ This question can be left unanswered because there is no doubt about criminal causality with regard to the necessity of the approval or the issue of a prior certificate in order to carry out transport. Even if the specific transport to a high risk country finally depends on subsequent approval in accordance with the [ATR](#) from another authority, that in no way changes the fact that the issue of the preliminary certificate in the specific individual case is *conditio sine qua non* for carrying out the specific transport to Algeria, Morocco or Uzbekistan. That is because without this certificate no transport is possible within the Community area that precedes the export to the country with a high risk in terms of animal welfare.

⁵ See also *Maisack/Rabitsch* AtD (German journal for official veterinary services) 2018, 209, 210 et seq.

⁶ Cf. *Heine/Weißer* in Schönke/Schröder, StGB (legal commentary on the German criminal code), 30th edition, 2019, § 27 margin note 1.

⁷ In place of many [BGH, judgment of 19.12.2017 – 1 StR 56/17](#), NStZ (legal journal) 2018, 328.

⁸ Cf. only [BGH, judgment of 19.12.2017 – 1 StR 56/17](#), NStZ (legal journal) 2018, 328, 329; also *Heine/Weißer* in Schönke/Schröder, StGB (legal commentary on the German criminal code) 30th edition 2019, § 27, margin note 1 with further references.

⁹ Cf. only the references to this dispute in *Fischer* StGB (legal commentary on the German criminal code), 66th edition 2019, § 27 margin note 14 et seq.

2. Criminal liability associated with participation within Germany in the act that takes place abroad

- 12 In terms of criminal law jurisdiction the fact that the criminal act has been committed abroad does not prevent criminal liability for aiding and abetting as long as the act of aiding and abetting is carried out in Germany. In this respect the regulation of [§ 9 \(2\) StGB](#) is applicable; it does not depend on whether the specific animal cruelty is punishable abroad.¹⁰

"§ 9 (2) ¹ The participation has taken place at the location where the action was committed and also at the location where the participant acted, or in the case of our mission should have acted, or where he intended the act to be committed. ² If the participant has, in this country, taken part in an action abroad, German law will apply to the participation even if the act does not constitute a criminal offence under the law that applies at the location of the crime."

- 13 Consequently, the action carried out abroad as the substantive crime associated with aiding and abetting in this country is to be judged not under the foreign law but under German law. A correct understanding shows that taking a contrary view would also conflict with the principle of limited accessoriness that is geared only to the question of intentional and illegal action and not to whether German criminal law is applicable ([§§ 3 ff. StGB](#)).
- 14 Although the prevailing opinion accounts for criminal liability of the participation within this country in the offence committed abroad in a different way than the one presented here, it likewise leads to criminal liability as it identifies a breaching of the limited accessoriness in [§ 9 \(2\) P. 2 StGB](#).¹¹ Accordingly, the following is stated by Heintschel-Heinegg:

*"The principle is that participation taking place within this country depends on the substantive crime committed in this country or abroad (principle of accessoriness). Para. 2 S. 2 makes an exception here: In the case of participation within this country in a crime committed abroad that is not subject to prosecution in the foreign country, there is no requirement for an identical law at the place of crime as defined by § 7, and thus the issue of accessoriness of the participation is resolved (BGH NJW (legal journal) 1975, 1610 (1611); BGHSt 34, 101 (106))."*¹²

In the same way Hoyer¹³ states:

"If there is no intentional unlawful substantive crime under the foreign law although there would be under German criminal law, then it is to be assumed that there is an intentional unlawful substantive crime by the participant."

- 15 Something partially different can apply when normative elements of an offence need to be completed by using foreign law. Hoyer¹⁴ rightly states that the regulation of [§ 9 \(2\) S. 2 StGB](#) does not mean that the whole of foreign law would not apply:

"The question of whether the foreign substantive crime relates to a "foreign" matter may therefore (also with effect for and against the participant) be answered under foreign rules relating to acquisition of ownership. The same applies to other normative elements of an offence, for example for the question as to under which law compliance with the permitted risk is judged, whether there is a breach of hunting law or whether the required

¹⁰ See BGH judgment of 15.9.1953 – 5 StR 375/53, BGHSt (decisions by the Supreme Court in criminal matters) 4, 335; OLG (Higher Regional Court) Schleswig-Holstein, decision of 17.9.1997 – 3 Ws 284/97, wistra (legal journal) 1998, 30, 31; Eser/Weißer in Schönke/Schröder, StGB (legal commentary on the German criminal code) 30th edition 2019, § 9 margin note 14; Fischer StGB (legal commentary on the German criminal code), 66th edition 2019, § 9 margin note 10.

¹¹ Cf. only Ambos in MüKo-StGB (legal commentary on the German criminal code), volume 1, 3rd edition 2017, § 9 margin note 39.

¹² Heintschel-Heinegg in Beck-OK-StGB (legal commentary on the German criminal code), 41st ed. 1.2.2019, § 9 margin note 15.

¹³ Hoyer in SK-StGB (legal commentary on the German criminal code), 9th edition 2017, § 9 margin note 11.

¹⁴ Hoyer in SK-StGB legal commentary on the German criminal code), 9th edition 2017, § 9 margin note 12.

approval exists for environmental pollution. The **foreign law established in advance of the foreign criminal provision** remains decisive for the participant despite § 9 (2) sentence 2." (bold formatting in the original)

- 16 But this in no way affects the criminal liability entailed in aiding and abetting in this country that is to be assessed because the assessment of the fact of animal cruelty does not depend on the completion of elements of an offence by foreign law. The assessment of criminal liability due to participation in a property offence abroad based on the characteristic "*fremd*" [i.e. belonging to another] in §§ 242, 249, 303 StGB definitely depends on the foreign property ownership system.
- 17 Here, however, it is the elements of the offence *substantial pain or suffering due to brutality or substantially protracted or repeated pain and suffering* in § 17 No. 2 TierSchG that are to be looked at. Interpretation of German criminal law does not depend on the foreign law because the characteristics to be examined do not constitute elements of an offence *in terms of a legal norm*. A regulation in the foreign law that would permit an act that constitutes animal cruelty under the understanding in German law would be irrelevant for the issue of aiding and abetting within this country under German criminal law because it is not "preceding" in the above-mentioned sense.¹⁵
- 18 The administrative court in *Gießen*¹⁶ expressed concerns about criminal liability of veterinarians operating in Germany in its decision on 12.3.2019 in the case relating to interim relief because, it argued, the *Tierschutzgesetz* (Animal Welfare Act) applies only in the territory of the Federal Republic of Germany and not worldwide and this likewise applies to the purpose of animal protection of the TFEU. It said that against this background it could not understand how "a veterinarian employed by the state could be committing a criminal act of aiding and abetting in the case of slaughter that breaches animal protection outside the sphere of applicability of a legal standard when the veterinarian issues the requested preliminary certificate." An examination of § 9 (2) S. 2 StGB dispels these concerns very easily.

III. Restrictions with conduct typical in the profession

- 19 Considering the fact that veterinarians are acting in their professional capacity in their cooperation with animal transport, criminal liability for aiding and abetting could be restricted on the basis of the legal issue of neutral professional assistance that is discussed in jurisprudence and by scholars.¹⁷ In *Fischer*¹⁸ it says concerning this question of restricted criminal liability in the case of assistance in a neutral professional capacity:

"The handling of the matter of aiding and abetting by so-called "neutral actions", namely in the sphere of conduct typical in the profession is disputed [...]. The term "neutral action" does anticipate the evaluation of the problem and therefore has limited suitability for clarification: it is not about actions that are "neutral" in themselves. It is about the relationship between actions that do not outwardly appear to have a logical social connection with criminal acts and the criminal activities of third parties. Whether an action is "neutral" is not demonstrated by the fact that it is carried out in the course of a profession.

- 20 *Fischer* therefore rightly emphasises, whilst referring to BGH (Supreme Court)¹⁹ case law, that the question of criminal liability for aiding and abetting is about "defining the sphere of criminally culpable support for an action within the framework of outwardly socially acceptable conduct".²⁰

¹⁵ Cf. Considerations concerning restrictions in individual cases, *Böse* in NK-StGB (legal commentary on the German criminal code), volume 1, 5th edition 2017, § 9 margin note 22.

¹⁶ *Gießen* administrative court decision of 12.3.2019 – 4 L 1064/19.Gl, S. 6; cf. also *Kassel* administrative court decision of 22.3.2019 – 5 L 693/19.KS, S. 7.

¹⁷ Addressing in detail the issue of assistance in a neutral professional capacity in particular *Dannecker/Hagemeyer*, *Finanzstrafrecht* (fiscal offence law) 2008, S. 63 et seq. with further references; also *Tag JR* (legal journal) 1997, 49 et seq.; *Rabe von Kühnwein JZ* (legal journal) 2002, 1139 et seq.; *Rengier Strafrecht AT* (legal book on criminal law), 10th edition § 45 margin note 101 et seq. .

¹⁸ *Fischer StGB* (legal commentary on the German criminal code) 66th edition 2019, § 27 margin note 16 f.

¹⁹ *BGH judgment of 1.8.2000 – 5 StR 624/99*, BGHSt 46, 107 (113).

²⁰ *Fischer*, StGB (legal commentary on the German criminal code) 66th edition 2019, § 27 margin note 17.

1. Requirements for neutral professional action

- 21 Before we can deal with the disputed question about whether and, if applicable, under which conditions, so-called neutral professional actions will not entail criminal liability for aiding and abetting despite the objective fact of supporting the offence, it is necessary to ascertain in a concrete way whether the approval of an instance of animal transport or the issue of a preliminary certificate or similar item by an official veterinarian constitutes a "neutral action" at all. After all, in its established case law the *BGH* assumes that actions that are typical in a profession can involve criminal liability in terms of aiding and abetting. Neither the everyday nature of what is done nor actions that are customary in a profession are therefore neutral in every case because almost any action can be carried out in a criminal context.²¹
- 22 An examination of case law relating to neutral professional conduct shows that the cases adjudicated there are not comparable with the case of the official veterinarian who approves a case of animal transport despite concerns about the risks of animal cruelty during transport or at the intended destination. Case law has, amongst other things, dealt with works contractors and aiding and abetting with tax evasion,²² with lawyers and aiding and abetting fraud by their clients,²³ with bank employees and aiding and abetting in tax evasion by their customers²⁴ and with tax advisors and aiding and abetting by them for the purpose of tax evasion²⁵. All these instances have in common the fact that the professional carried out an action in the course of his work that essentially accorded with his job profile.²⁶ The lawyer gave legal advice and the bank employee effected transfers or opened accounts. Such actions were regarded as professional and neutral because they were an original part of the professional work of the relevant person and did not have a specific relationship with the wrongful nature of the act.²⁷
- 23 The reason why there are high thresholds for criminal liability for aiding and abetting in these cases and case law in particular requires a criminal relationship of the action to the offence or a specific knowledge element²⁸ was essentially that a lawyer, bank employee or notary is protected when carrying out his profession by his fundamental right to pursue a profession according to [Art. 12 GG \(German Basic Law\)](#).²⁹
- 24 A criminal liability that went so far that a bank employee who is aware that tax evasion is a serious possibility when making a foreign bank transfer and condoningly accepts it would be liable to prosecution for aiding and abetting tax evasion would make his professional activity that is protected by the fundamental rights largely impossible, especially if he were a very conscientious bank employee. And a lawyer who gives legal advice to his client even though he thinks it is very possible that the client will use this knowledge for criminal acts would be restricted in the exercise of his profession to an inordinate degree if he were not permitted to provide such legal

²¹ *BGH judgment of 1.8.2000 – 5 StR 624/99*, BGHSt 46, 107 (113); [decision of 21.12.2016 – 1 StR 112/16](#), NZWiSt (legal journal) 2017, 362 (365 et seq.); [judgment of 19.2.2017 – 1 StR 56/17](#), JR (legal journal) 2018, 293 et seq.

²² *BGH judgment of 23.06.1992 – 5 StR 75/92*, NStZ (legal journal) 1992, 498.

²³ RG (Imperial Court) judgment of 17.11.1904 – 1178/04, RGSt (Imperial Criminal Court in criminal cases) 37, 321 (323).

²⁴ Cf. in particular *BGH judgment of 1.8.2000 – 5 StR 624/99*, BGHSt 46, 107 (112 et seq.).

²⁵ RG judgment of 26.11.1934 – 5 D 217/34, RGSt (Imperial Criminal Court in criminal cases) 68, 411.

²⁶ With further examples *Heine/Weißer* in Schönke/Schröder (legal commentary on the German criminal code), StGB 30th edition 2019, § 27 margin note 10.

²⁷ Cf. also *Rengier Strafrecht AT* (legal book on criminal law), 10th edition § 45 margin note 101 et seq. With further references.

²⁸ *BGH judgment of 1.8.2000 – 5 StR 624/99*, BGHSt 46, 107 (113 et seq.).

²⁹ Cf. *Dannecker/Hagemeyer* in Finanzstrafrecht 2008, S. 63, 69 et seq.; *Rengier Strafrecht AT* (legal book on criminal law), 10th edition 2018, § 45 margin note 104.

advice as part of his professional service. Therefore, the issue in the context of professional neutral actions is the protection of the fundamental rights of the professional.³⁰

2. No necessity of specific fundamental right protection ([Art. 12 GG](#)) with professional work of a veterinarian

- 25 If we now consider an official veterinarian who has to make sure in the course of official business with supervision of animal transport that the national and European regulations for protection of animals during transport are complied with, the decisive difference in relation to the above-mentioned cases becomes clear:
- 26 If the veterinarian cannot issue an approval for transport because he seriously considers the possibility that criminal actions may be committed during the transport or at the destination, this will not restrict him to any significant degree in his professional freedom guaranteed by [Art. 12 GG](#). He will not even be negatively impacted in terms of earnings. Such a threat of a penalty will have at most the effect of a negligible regulation relating to professional practice. The regulations concerning animal protection that he has to observe and implement in his work do not essentially restrict his professional freedom. Instead, they substantiate the definition of his professional duty to prevent danger.

3. No neutrality of wrongdoing for the actions of the guarantor

- 27 There is also another reason why there can be no question of a professionally neutral action when an official veterinarian issues an approval for transport where he recognises the possibility and seriously considers that criminal offences in accordance with [§ 17 TierSchG](#) may be committed during the transport or in the destination country:
- 28 The official veterinarian who is responsible for examining animal transport is, according to the prevailing and accurate opinion, legally required³¹ as defined by [§ 13 StGB](#) to make sure that no avoidable injury, suffering or pain is inflicted on the animals during transport. In the language used in criminal offences of omission he is a guarantor on the basis of his role as an official. He is "on watch"³² in order to prevent animal cruelty in connection with animal transport in the context of his responsibility.
- 29 He is essentially different in this regard from the bank employee who is not responsible for the state's revenue claim and the lawyer who has no guarantor's obligation for the assets of people who could possibly be harmed by his client. The neutrality of the professional action arises in these cases out of a differentiation of areas of responsibility that is determined by fundamental rights. The prevention of animal cruelty falls within the veterinarian's area of responsibility within the framework of his responsibility in terms of location and subject matter.
- 30 This means that the person who is appointed on the basis of his official role to protect a legal interest – in this case animal protection as a public constitutional matter in accordance with [Art. 20a GG](#) – is subject to the general rules concerning aiding and abetting.

4. No neutral action with the issue of certificates or approvals by the veterinarian

- 31 By way of summary we may say that the approval of animal transport to a country with high risk in terms of animal welfare is not neutral in terms of wrongdoing. Instead, it is a specific act of

³⁰ Concerning other approaches to justification, see *Tiedemann*, *Wirtschaftsstrafrecht* (legal book on criminal economic law), 5th edition 2017, margin note 362 et seq.

³¹ Cf. *Ehm/Robitsch* ZLR (legal journal) 2013, 730, 732 f.; *Iburg* NuR (legal journal) 2001, 77, 79; *Kemper* NuR (legal journal) 2007, 790 et seq.; *Hirt/Maisack/Moritz* TierSchG (legal commentary on the German animal welfare act), 3rd edition 2016, § 17 margin note 94; *Pfohl* in *MüKo-StGB* (legal commentary on the German criminal law), volume 6, 3rd edition 2017, § 17 margin note 64; different opinion. *VG (Administrative court) Gießen* decision of 12.3.2019 – 4 I 1064/19.GI, S. 5 et seq.

³² The wording of *Armin Kaufmann*, *Dogmatik der Unterlassungsdelikte* (legal book), 1959, p. 283; also *Rudolphi* in *FS Lackner* (commemorative publication for Karl Lackner), 1987, p. 863, 873.

wrongdoing. Not only does it facilitate animal cruelty abroad; it is in a close normative relationship with it as we are talking about the very person who makes a contribution to the committing of an offence although he is responsible within the framework of the state control for preventing all avoidable suffering, pain and injury to animals. Here, the guarantor is acting against the legal asset that is to be protected by him personally. This forms a "solidarity" with the perpetrator and his action. A comparison will clarify why there is no unpunishable neutral assistance in this case: The veterinarian who allows the offence to happen would be liable to prosecution as a guarantor on account of perpetration or aiding and abetting. To give this guarantor impunity, despite his active engagement, on the basis of neutrality of his action would simply be inconsistent and contradictory.

- 32 The principles of professional neutral action can therefore not be applied in this case because the activity of the official veterinarian in this context is not neutral in terms of wrongdoing; it is a specific act of wrongdoing. He can therefore not invoke the protection of [Art. 12 GG](#). It cannot amount to an unacceptable impairment of the right to exercise a profession if a professional is required to fulfil the responsibilities for which he is appointed in the context of his official work, i.e. the protection of animals against cruel transport or cruel slaughter. The veterinarian will not suffer any relevant disadvantages in his occupation due to fulfilment of the duty to refrain from approving transport or refraining from issuing the stamp of approval; therefore, the possibility of a violation of [Art. 12 GG](#) due to criminal liability in the case of breach of duty is excluded.
- 33 Thus, in the language of criminal case law then we could formulate position as follows: The guarantor who renders assistance for a violation of the legal interest that is to be protected by him is always operating in solidarity with the principal offender. This solidarity arises from the breach of his duty to prevent the harmful outcome which is threatening to happen as a result of the transport that he is supporting .

5. Professional neutral actions of other persons involved in transport

- 34 Nevertheless, the transporter may act with professional neutrality when he instigates transport as long as he acts in accordance with his duty, i.e. he does not presume with a high level of probability that animal cruelty will occur during the transport or in the slaughter. However, if he is aware of conditions or actions that constitute animal cruelty or if he considers them to be highly likely, he will be liable to prosecution in accordance with [§ 17 TierSchG](#) in conjunction with [§ 27 StGB](#).
- 35 The same applies to a lawyer who brings about such transport by judicial means. He will be acting with professional neutrality as long as he has no certain knowledge of impending animal cruelty in the transport and does not consider it to be highly probable on account of objective indications and as long as he does not breach any regulations of professional law.
- 36 If, however, he is aware that animal cruelty will take place during the transport itself or the time of slaughter or if he is aware that it is highly likely on the basis of experience, there is also a possibility that he may be liable to prosecution due to aiding and abetting animal cruelty abroad. Furthermore, criminal liability for aiding and abetting is conceivable if the lawyer does not have any certain knowledge about the matter but recognises the possibility of animal cruelty abroad, seriously considers it and condoningly accepts it, and also breaches rules of professional law when applying for a permit in court, for example by failing to comply with his duty to be truthful in proceedings in relation to the circumstances of the transport.
- 37 In this respect it does not depend on whether the court has required the authority to issue the preliminary certificate or a stamp of approval in accordance with [Art. 14 ATR](#) and this certificate or the transport is then generally legal. This is because actions by authorities do not justify animal cruelty abroad. However, we are dealing with offences that are aided by the court action by the lawyer.

IV. Primacy of application and duty of approval

- 38 However, the requirements of Art. 14 (1) ATR could be problematic with regard to the issue of the stamp. According to this provision, the authority is required, at the place of departure, in the case of long journeys of particular animals (in particular cattle, pigs and sheep), to examine the authorisations and certificates of approval for the transport vehicles and the certificates of competence for the drivers (lit. a i)) as well as the organiser's journey log to ascertain whether the information is realistic and complies with the requirements of the regulation (a ii)). Insofar as the examination proceeds without problems, it will place a stamp in the journey log ([Art. 14 \(1\) c ATR](#)).
- 39 This fundamental duty to grant the stamp for the journey log could exclude criminal liability on the basis of aiding and abetting. This is because if there is a duty in EU law on the part of the authority or veterinarian to cooperate in this way, the primacy of application of EU law would inevitably lead to impunity. No-one can be accused of fulfilling duties under EU law and such fulfilment cannot, accordingly, be the starting point for criminal punishment.
- 40 However, impunity relating to aiding and abetting on the basis of the primacy of application of EU law would require a duty to arise from European law to always grant the stamp to a party who fulfils the formal requirements of [Art. 14 \(1\) a ATR](#). But that can only be assumed if interpretation of the regulation shows that the stamp must even be granted to a party who is aware, or who at least expects, that he will be exposing the transported animals to substantial and repeated suffering, injury and pain in the third country. The primacy of application of EU law would result in impunity under German law only if there were a duty to grant the stamp in this case of intentional cooperation in breaches of German and European animal protection law.

1. Art. 14 (1) a ATR as a "recommended regulation"

- 41 There could be doubt as to whether Art. 14 (1) c ATR is to be interpreted as a compulsory regulation. It is true that the German version of the regulation says that the authority „das Fahrtenbuch mit einem Stempel versieht“ [*issues a stamp in the journey log*]. That gives the impression that we are dealing here with an unavoidable legal consequence in the sense of a "mandatory regulation".
- 42 However, in EU law interpretation of such rules does not arise just by looking at one language version. Instead, other language versions are consulted in a case of doubt. Since the regulation in this case could also possibly be understood as a discretionary regulation in the German version that standardises a fundamental duty to issue the stamp, but which allows for exceptions, it is worth looking at the English wording. There it says *the competent authority shall stamp*". That could be interpreted as indicating that the regulation is to be understood as a discretionary regulation, i.e. that as a matter of principle the stamp is to be issued but that refusal is permissible in exceptional cases. This is not in conflict with the German wording because it does not expressly state that the stamp "must" be issued.
- 43 Insofar as it is supposed to be a discretionary regulation, it does not seem far-fetched to assume that the official veterinarian is neither required nor entitled to issue a stamp in cases in which the formal requirements exist for approving the transport although there are actual indications that criminal offences will be inflicted on the transported animals at the destination. In order to accept such actual indications, mere suspicions are not adequate; but if the official veterinarian has empirical data indicating that there will be a procedure in breach of animal welfare in the slaughter at the destination, i.e. it is a destination in a high-risk country, this can be sufficient to require the veterinarian not to issue the stamp insofar as no particular facts are known that cause the risk to appear to be low.

2. ECJ case law on abuse

- 44 But even if we assume that the above-mentioned regulation is fundamentally an unavoidable mandatory regulation, this does not inevitably imply a duty under EU law to issue the stamp in every instance of transport that looks right on paper. In this respect it must be remembered that when interpreting the law of the European Union the principle of prohibition of abuse of law must always be taken into account as has been developed and applied by the *European Court of Justice* in its established case law³³.

a) Bases of the prohibition of the use in ECJ case law

- 45 Accordingly, no-one can claim validity and application of European law if this meant that the application of the European legal regulation, the requirements of which are formally met, would conflict with the purpose of it. Invocation of EU law in such a way that the sense and purpose of the applied EU legal regulation would be thwarted, or in such a way that objectives pursued by the regulation would be negatively affected, is not permissible. Regulations and directives must not be interpreted in such a way, or legislation based on them applied in a way, that runs counter to the interests pursued by the respective regulations. This is a characteristic of the prohibition of contradictory conduct that is also generally recognised in EU law that is always to be observed when carrying out EU law, including application of national law by institutions of member states.³⁴
- 46 Application of this case law concerning abuse does not require any reference to specific legal regulations of substantive law or a connection to concrete elements of an offence in the law of a member state. It is instead the characteristic of a general legal principle in EU law that is to be read into national law when EU law³⁵ is implemented.³⁶ This is shown directly from the ECJ case law from *Cussens*³⁷ (paragraphs 31-33):

The principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax, thus displays the general, comprehensive character which is naturally inherent in general principles of EU law (see, by analogy, judgment of 15 October 2009, Audiolux and Others, C - 101/08, EU:C:2009:626, paragraph 50).

It should also be added that, according to the Court's case-law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis (see, to that effect, judgment of 14 December 2000, Emsland-Stärke, C - 110/99, EU:C:2000:695, paragraph 56; judgment in Halifax, paragraph 93; and judgment of 4 June 2009, Pometon, C - 158/08, EU:C:2009:349, paragraph 28).

Therefore, the principle that abusive practices are prohibited may be relied on against a taxable person to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgment of 18 December 2014, Schoenimport 'Italmoda' Mariano Previti and Others, C - 131/13, C - 163/13 and C - 164/13, EU:C:2014:2455, paragraph 62).

³³ To see the fundamental issue here, cf. ECJ [judgment of 21.2.2006 – C-255/02 – Halifax](#); cf. also instead of many, ECJ [judgment of 26.2.2019 – C-116/16 – Skatteministeriet](#), paragraphs 74 et seq. with further references.

³⁴ Cf. ECJ [judgment of 26.2.2019 – C-116/16 – Skatteministeriet](#), paragraphs 74 et seq. with further references.

³⁵ Concerning the implementation of EU law, ECJ [judgment of 26.2.2013 – C-617/10, Åkerberg Fransson](#), paragraphs 17 et seq.

³⁶ Cf. ECJ [judgment of 26.2.2019 – C-116/16 – Skatteministeriet](#), paragraphs 74 et seq.

³⁷ ECJ [judgment of 22.11.2017 – C- 251/16, paragraphs 31 et seq.](#)

- 47 The prohibition of abuse of the law is definitely not a specific feature of tax law despite its "origin" in VAT law, as is made clear by the decision of the *European Court of Justice* in the matter of *Kofoed*⁶⁸:

" Thus, Article 11(1)(a) of Directive 90/434 reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law."

b) Abuse by reference to the animal transport directive in order to carry out risky transport

- 48 If we look at the sense and purpose of the [ATR](#), it becomes clear that a transporter who undertakes animal transport to a third country although he is aware of a high probability that the regulations of the European Union for animal protection will not be complied with there in the slaughter cannot claim that the stamp and approval must be issued to him provided the formal requirements for the transport are complied with on paper. Such behaviour would amount to an unacceptable abuse of EU law and is therefore incompatible with a claim for the issue of a stamp in accordance with [Art. 14 ATR](#) because the approval of such transport would be contrary to the objectives of the [ATR](#) and [Art. 13 of the Treaty on the Functioning of the European Union \(TFEU\)](#).
- 49 Even the title of the Regulation (EC) No. 1/2005 "*on the protection of animals during transport and related operations*" shows that this is a set of regulations intended to protect animals during transport. It is stated expressly in [Art. 3 ATR](#):

"No person shall transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them."

- 50 The purpose of the Regulation, i.e. the protection of animals, is further confirmed by the recitals of the [ATR](#):

Recital 11: "*In order to ensure a consistent and effective application of this Regulation across the Community in the light of its basic principle according to which animals must not be transported in a way likely to cause injury or undue suffering to them, it is appropriate to set out detailed provisions addressing the specific needs arising in relation to the various types of transport.*"

Similar indications of the spirit and purpose of the regulation are found in recitals 15 and 18 [ATR](#).

- 51 The EU Council Slaughter Regulation ([EU] No. 1099/2009) also clearly shows the interest and objective of the European Union of including protection of animals in every sphere and at every stage of food production as a compulsory requirement. Art. 12 Commission Regulation (EC) No. 1009/2009 places animal protection on an equal footing alongside protection of health and makes it an inherent element of EU economic policy:

"The health certificate accompanying meat imported from third countries shall be supplemented by an attestation certifying that requirements at least equivalent to those laid down in Chapters II and III of this Regulation have been met."

Chapter II of Commission Regulation (EC) No. 1009/2009 includes in particular the rules for the most considerate possible slaughter. This ultimately demonstrates that it is not only products that are potentially harmful to health that must not be imported, but that there is also a

⁶⁸ ECJ judgment of 5.7.2007 – C-321/05, paragraph 38; cf. also ECJ judgment of 26.2.2019 – C-116/16 – [Skatteministeriet](#), paragraph 74 with examples from different areas of EU law.

prohibition on the import of products that have been produced under conditions that do not comply with those stated in Art. 4 et seq. Commission Regulation (EC) No. 1009/2009.

- 52 Animal protection is also established as an important EU objective in [Art. 13 TFEU](#):

"In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

- 53 In this way animal protection is to be taken into account in the interpretation of all regulations of primary and secondary EU legislation and it must be included as an aspect in all considerations concerning implementation of EU law by the member states (cf. below margin note 61 et seq.).

- 54 The specific meaning of animal protection in the interpretation of the [ATR](#) and general EU law is also emphasised by the ECJ in the decision on *Zuchttrieb-Export GmbH*:

*"It should be noted, as a preliminary point, that it follows, first of all, from recital 1 of Regulation No 1/2005 that that regulation is based on Protocol (No 33) on protection and welfare of animals, annexed to the EC Treaty, under which the Community and the Member States, in formulating and implementing the Community's policies on inter alia agriculture and transport, are to pay full regard to the welfare requirements of animals. According to the case-law, the protection of animal welfare is a legitimate objective in the public interest, the importance of which was reflected, in particular, in the adoption by the Member States of that protocol (see, to that effect, *Viamex Agrar Handel and ZVK*, C-37/06 and C-58/06, EU:C:2008:18, paragraph 22, and *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353, paragraph 27). The substance of Protocol No 33 is henceforth to be found in Article 13 TFEU, which is a provision of general application of the FEU Treaty, contained in Part One thereof, setting out the 'Principles'.*

It further follows from recitals 5 and 11 in the preamble to that regulation that the legislature intended to lay down detailed provisions based on the principle that animals must not be transported in a way likely to cause injury or undue suffering to them, considering that, for reasons of animal welfare, the transport of animals over long journeys should be limited as far as possible.³⁹

- 55 For this reason it is not possible to permit an entrepreneur who intends to carry out transport to rely on the formal requirements of the transport documents in order to then undertake transport that is likely to lead to many actions of animal cruelty and is thus diametrically opposed to the sense and purpose of the regulation that he is relying on. Concerning this matter the ECJ states the following in the judgment on the *Skatteministeriet* case:

"It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally."⁴⁰

- 56 This means: The interpretation of [Art. 14 \(1\) ATR](#) shows that in the case of a carrier who intends to transport animals to a destination where a slaughter under conditions that breach the conditions of EU law as defined by [Art. 3 \(1\) ATR](#) and [Art. 13 TFEU](#) it is not only that no approval *has to be* granted but that no approval *can be* granted.

This interpretation is also confirmed by recital 22 of the [ATR](#) where it says:

³⁹ ECJ judgment of 23.4.2015 – C-424/13, paragraphs 35 et seq.

⁴⁰ ECJ judgment of 26.2.2019 – C-116/16 – *Skatteministeriet*, paragraph 72.

"Inadequate follow-up of infringements of legislation on animal welfare encourages non-compliance with such legislation and leads to distortion of competition. Therefore, uniform procedures should be established throughout the Community to increase checks and the imposition of penalties for infringements of animal welfare legislation. The Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation and ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive."

- 57 Art. 25 [ATR](#) determines that the Member States are to lay down and impose penalties that are effective, proportionate and dissuasive. In this way European law requires the Member States to actually prohibit and impose serious penalties for breaches of the rules of animal protection during transport. Cooperation by a publicly employed veterinarian in transport to a country with high risk in terms of animal welfare would be in fundamental contradiction to this interest of the European Union.

c) Requirements for abusive action

- 58 The *European Court of Justice* also demands no definite certainty that the action regarded as abusive actually is or actually will be carried out with motives or aims that are improper or that are incompatible with the purpose of EU law. Instead, the structural abuse can be identified on the basis of indications:

"Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent".⁴¹

(1) Breaches of animal protection rules during transport

- 59 If an entrepreneur undertakes transport to a country with high risk in terms of animal welfare in the knowledge of a high degree of probability that the requirements for which there is an assurance on paper concerning transport (route description, drinking places, rest periods) will not be complied with, these requirements for abuse are fulfilled. In this case the transporter artificially creates the conditions for granting the stamp in accordance with [Art. 14 \(1\) ATR](#) by submitting a journey log containing realistic information giving the impression that the transport complies with the terms of this Regulation ([Art. 14 \(1\) a ii\) ATR](#)).
- 60 If the information in the journey log does not correspond to the facts, this is an artificial arrangement that serves the sole purpose of fulfilling the formal requirements. In this respect the transporter is acting in a way that constitutes abuse because his action is geared solely to gaining the advantage under EU law – a stamp in the journey log – without having any real intention of complying with these terms. This is prohibited conduct that constitutes abuse as defined by the case law of the *European Court of Justice*.
- 61 In terms of evidence, the existence of such abuse in accordance with the above-mentioned case law can also be deduced from indications. Accordingly, it is sufficient if the transport to a country with high risk in terms of animal welfare is to be undertaken and it is to be expected on the basis of experience that the route for the journey including breaks will not be complied with exactly or that there will be other breaches of animal protection law during the journey (transport with excessive heat etc).

(2) Breaches of animal protection law in the slaughter in a third country

- 62 From these conditions laid down by the ECJ concerning abuse by artificial arrangement it cannot be concluded that there is no abuse of the law in a case in which the transport is carried out properly

⁴¹ ECJ [judgment of 26.2.2019 – C-116/16 – Skatteministeriet](#), paragraph 124.

and it is only at the destination that there is a high degree of probability of slaughter in a manner constituting animal cruelty. The fact that this is not the case is definitely shown from the approach in EU law that says that no-one may rely on EU law to be able to carry out actions that contradict or impair the objectives and purposes of EU law. This does not require any arrangement constituting abuse in the narrower sense; instead, the concept of abuse refers to all actions that serve to breach EU law with the appearance of legality and legal conformity.

- 63 This is shown clearly by ECJ case law relating to VAT law. Accordingly, an entrepreneur is denied the option to claim tax benefits, even if his turnover is totally legitimate, if by his conduct he has contributed in a comfortable manner to VAT fraud by others. An artificial arrangement in the sense of a constructed fictitious transactions or similar is not required for this form of abuse. The ECJ says here in effect that properly conducted business that conceals the illegal objective of another party is equivalent to an improper arrangement.⁴² This does not depend on intentional concealment – de facto cooperation in the abuse of the law by another party is sufficient.
- 64 This is precisely what would happen in a case where the transporter asserts claims for the issue of stamp or other actions of approval in order to carry out transport where there is objectively a high degree of probability of slaughter constituting animal cruelty in a country with high risk in terms of animal welfare. There is no requirement here for intentional action on the part of the carrier; it is sufficient according to ECJ case law in another context⁴³ if the transporter has not recognised the danger for the legally protected interest but should have known about this risk.

3. Claim for issue of a stamp as an abuse of EU law

- 65 The question of the primacy of application of EU law in relation to German criminal law is not ultimately the issue because EU law does not establish any duty to issue a stamp in accordance with Art. 14 (1) ATR in the case of abuse of the law if it is obvious that it will lead to breaches of European or national animal protection law.

V. Case law of the administrative courts concerning the issue of prior certificates

- 66 The administrative courts in *Schleswig*,⁴⁴ *Gießen*,⁴⁵ *Neustadt a.d. Weinstraße*,⁴⁶ *Koblenz*,⁴⁷ *Darmstadt*⁴⁸ and *Kassel*⁴⁹ have required the veterinary authorities in their current case law and with essentially the same reasons adopted from the administrative court in *Schleswig*, to issue preliminary certificates in accordance with §§ 8, 12 of the Internal Market Epizootic Protection Ordinance that are required in order to transport animals within the Community. This is a health certificate that merely permits transport in the territory of the Community but not to a third country. However – as far as we can see – in each of these cases subsequent transport to a country with high risk in terms of animal welfare was planned. For this purpose the animals were first to be transported within Germany in order to then apply for a permit for transport to the third country in a federal German state where a denial of the transport permit was not expected or where such denial was less likely.

1. Decision of the administrative court, Schleswig-Holstein, decision of 27.2.2019 – 1 B 16/19

- 67 The administrative court in *Schleswig-Holstein* argued against the assumption of criminal aiding and abetting by the granting of a preliminary certificate as defined by §§ 8, 12 of the Internal Market Epizootic Protection Ordinance in the case relating to interim relief in the decision of 27.2.2019; it said there was no possibility of such criminal liability because the case concerned the issue of a

⁴² Cf. only [ECJ judgment of 18.12.2014 – C-131/13 – Italmoda](#), paragraphs 40 et seq. with further references.

⁴³ [ECJ judgment of 18.12.2014 – C-131/13 – Italmoda](#), paragraphs 50 et seq. with further references.

⁴⁴ VG *Schleswig-Holstein* decision of 27.2.2019 – 1 B 16/19.

⁴⁵ Administrative court, *Gießen* decision of 12.3.2019 – 4 L 1064/19.GI.

⁴⁶ Administrative court, *Neustadt a. d. Weinstraße*, decision of 19.3.2019 – 5 L 294/19.NW.

⁴⁷ Administrative court, *Koblenz* decision of 19.3.2019 – 1 L 2841/19.KO.

⁴⁸ Administrative court, *Darmstadt*, decision of 11.3.2019 – 4 L 4461/19.DA.

⁴⁹ Administrative court, *Kassel*, decision of 22.3.2019 – 5 L 693/19.KS.

certificate to which the transporter had a right if the requirements for the certificate, the healthy status of the animals, were fulfilled.

a) Administrative court, Schleswig-Holstein: No criminal liability due to a right to approval

68 The administrative court stated the following in this regard:

"According to § 12 (3) of the Internal Market Epizootic Protection Ordinance cloven-hoofed animals and equines may only be brought to an assembly centre if they are accompanied by a certificate in accordance with § 8 (1) (exemption from approval for movement). According to § 8 (1) of the Internal Market Epizootic Protection Ordinance intra-Community movement of cattle amongst other things requires a certificate in accordance with Column 2 of Annex 3 of the Ordinance. Accordingly, there is a requirement for an animal health certificate issued by an official veterinarian in accordance with model 1 of Annex F of Directive 64/432/EEC (on animal health problems affecting intra-Community trade in bovine animals and swine).

If these requirements relating to cattle disease exist for intra-Community movements of cattle, there is a legal entitlement (on the part of the trader/owner) to the issue of this certificate by the relevant official veterinarians. Otherwise, it would be their responsibility to hinder/prevent intra-community trade on the basis of aspects that are alien to the Internal Market Epizootic Protection Ordinance.

In this case we are talking exclusively about this preliminary certificate for the transport of 21 purebred breeding animals to Aurich (Lower Saxony) to a (permitted) assembly centre there.

In this case there is no dispute as to whether the intended transport of the 21 cattle from there to Morocco in accordance with Art. 14 (1) c of Council Regulation (EC) No. 1/2005 22 December 2004 on the protection of animals during transport and related operations (ATR) by the veterinarians responsible at the location of the assembly centre is eligible for approval. It is only there that the animal protection aspects of transport in accordance with the ATR and – not yet legally clarified in this respect – possibly also circumstances in the third country concerning animal protection law after the end of the transport, in particular the disputed slaughter conditions, can be considered. This is the responsibility of the official veterinarian responsible for the assembly centre when issuing the cross-border transport certificate.

However, in this case there are no indications that the 21 cattle are animals intended for slaughter. It is true that the defendant, but not the court, is bound by the order issued by the MELUND (ministry) dated 25.02.2019 with an instruction to refuse transport permits and preliminary certificates in their administrative functions. However, the order issued by Schleswig-Holstein exceeded its authority for the federal state with the prohibition on the issue of preliminary certificates, because the order intervenes on a binding basis in the power of the relevant authorities of another federal state, in this case Lower Saxony, when it prohibits transport to the assembly centre there even though it is only the authorities there who have to check the requirements for transport to third countries.

No indications that animal health requirements of Regulation 64/432/EEC conflict with fulfilment of the preliminary certificates have been claimed, nor are they identifiable.

Furthermore, a requirement on the part of official veterinarians to issue the requested preliminary certificates is not opposed by possible criminal liability based on participation in an offence in accordance with § 17 No. 2 b of the Tierschutzgesetz (Animal Welfare Act). This is because even if we were to accept – and the court does not judge this to be evident but does not pass further judgment about it here – the existence of causal aiding and abetting, this action would at least be justified. Based on the above-mentioned reasons, there is a duty under public law regulations on the part of official veterinarians to issue the preliminary certificates. If a particular procedure is prohibited by public-law regulations, the principle of consistency of the legal order means that this procedure cannot at the same time entail criminal liability. This is an unwritten justification (cf. Sternberg-Lieben, in: Schönke, commentary StGB, 30th edition 2019, preliminary remarks concerning §§ 32 et seq. margin note 27 et seq.)."

b) Criticism of the decision by the administrative Court in *Schleswig-Holstein*

69 These considerations are subject to radical objections relating to method, criminal law, EU law and constitutional law.

(1) Existence of effective aiding and abetting

70 First, we must remark that the reasoning for what has been said in passing, i.e. that the issue of the certificate does not entail any causal aiding and abetting, is not plausible.

71 Apart from the fact that the Supreme Court does not require causality with aiding and abetting but only a support for the criminal act *at any time*, even if it is in the preparatory stage long before the actual offence,⁵⁰ the concept of causality in criminal law must be interpreted broadly. Consequently, it is not evident how the court's doubts arise, that the issue of the preliminary certificate is *conditio sine qua non* for the transport of the animals to the assembly centre and from there to the transport already determined – in this case to Morocco – if a slaughterer constituting animal cruelty can be expected with a high degree of probability at the destination.

72 Furthermore, in the specific case in question the likelihood of handling during transport involving cruelty to animals is obvious. Insofar as criminal actions take place during transport or at the destination, they are causally facilitated by the preliminary certificate. The fact that the transport could also have been facilitated in a different way or that other authorities could or even should have prevented the transport is of no relevance to the assessment from the point of view of criminal law of an action as assistance as defined by § 27 StGB (Criminal Code).⁵¹

73 The fact that the issue of a preliminary certificate that abets animal cruelty is not an action that is neutral in terms of wrongdoing but that it is expressly an action of wrongdoing by a guarantor of protection has already been demonstrated (margin note [19 et seq.](#)).

(2) Consistency of the legal order and justifying effect of the approval

74 There are also serious concerns that oppose the argument that "consistency of the legal order" requires the certificate to be issued. Apart from the fact that the literature about constitutional law has for a long time presented a convincing argument that a "principle of consistency of the legal order" is not generally recognised but that it is only a *postulate*,⁵² the arguments by the administrative court concerning this aspect are not convincing because they are based on a circular argument:

75 The court accepts that the approval must not be refused on the grounds that the issuing of the preliminary certificates entails criminal liability because criminal liability is excluded due to the right to approval. In this way impunity for the action is established by the duty to issue the approval for which it is, however, a compulsory requirement that the action of the applicant is not criminal. This argument leads to an infinite regress, and it is therefore logically inconsistent.

76 Furthermore, the administrative court's reasoning contains an error of method: The court examined the eligibility of the transport for approval but did not present the possible wrongful consequences of an approval. The court separated the evaluation in terms of health law from the valuation in terms of criminal law. Consequently, the obligation for approval is affirmed even

⁵⁰ Supreme Court [judgment of 19.12.2017 – 1 StR 56/17](#), NStZ (legal journal) 2018, 328.

⁵¹ Concerning the essential irrelevance of reasons for reservations and hypothetical causal processes, see *Eisele* in Schönke/Schröder, StGB (legal commentary on the German criminal law), 30th edition 2019, before §§ 13 margin note 80.

⁵² Concerning this matter, see *Felix Einheit der Rechtsordnung* (legal book), 1998, p. 399 et seq.; and also *Engisch Die Einheit der Rechtsordnung* (legal book), 1953, p. 69; it is ultimately about the "consistency of the legal order", according to *Sternberg-Lieben* in Schönke/Schröder, StGB (legal commentary on the German criminal law) 30th edition 2019, preliminary remarks concerning §§ 32 et seq. margin note 27.

though the action for which the approval is requested will lead to a criminal action with a high degree of probability.

- 77 In this respect it is irrelevant whether the veterinarian renders himself liable to prosecution but there is no doubt that the transporter is objectively providing assistance for the offence in accordance with § 17 No. 2 TierSchG (Animal Welfare Act) abroad as defined by § 27 StGB if he applies for an administrative action that is intended to facilitate transport to the location of animal cruelty. Insofar as he considers these consequences of the transport to be very probable and goes along with this, he acts in solidarity with the perpetrator abroad; his action – which was essentially neutral in terms of wrongdoing – becomes criminal aiding and abetting (cf. here [margin note 31 et seq.](#)). This objective illegality, and in the specific case even criminality, of the action must not be overlooked in the decision about the administrative action.
- 78 Insofar as the administrative court says, with regard to assessment in terms of criminal law, that a permit must be granted because it relates only to the situation concerning health law, it masks the illegal, in this specific case even criminal, objective of the action. The court thereby violates the very postulate of consistency of the legal order that it endeavours to uphold: The veterinarian is forced to commit an action which would make him – first of all in the non-technical sense – an accomplice in an illegal act. Therefore, the criminal liability entailed in the subsequent transport and the co-operation of the veterinarian in a substantial breach of law must be taken into account already in the decision in terms of administrative law.
- 79 The administrative court avoids this by an artificial fragmentation of the actual life situation – a view that is alien to criminal law and EU law – and the narrowing of attention to the animal health issues, excluding the concerns of animal welfare and animal protection during transport to a country with high risk in terms of animal welfare. In this way the administrative court distorts the perspectives of the assessment in terms of administrative law and pursues a method which is implausible for teleological reasons and with regard to the nature of animal protection law as a law averting danger, and which is questionable in terms of EU law as well as constitutional law (see [margin note 92 et seq.](#)).

(3) Prohibition of issuing the preliminary certificate by EU law

- 80 Therefore, the administrative court should have engaged with the question as to whether a preliminary certificate has to be issued even though the issue of this certificates amounts to a step along the way to transport to a third country that will lead with a high degree of probability to an action abroad that is prohibited under EU law and German criminal law.
- 81 The overall view required by EU law was not, however, pursued by the court because it limited itself expressly to the animal health view. This isolated animal health view that obscured the animal protection aspects is in conflict with [Art. 13 TFEU](#), amongst other things, which establishes the horizontal clause of animal protection in primary law of the European Union (cf. [margin note 52 et seq.](#)).
- 82 According to this provision the legislature, judiciary and executive must fully take into account the requirements of animal protection in the application of every legal regulation that is regarded as an implementation of EU law in the said areas – in this case transport, internal market and agriculture. In this context *Callies*⁵³ points out the following:

"However, along with these minor additions, we must emphasise the systematic position that animal protection acquires with incorporation into the series of "consolidated" horizontal clauses. An increase in political importance is communicated here which is rightly expressed. [...]"

⁵³ *Callies* in *Callies/Ruffert*, TFEU (legal commentary), 5th edition 2016, Art 13 margin note 1 et seq.

The concept of the requirements for the well-being of the animals as sentient beings is associated with a guarantee of a condition appropriate to the species. In contrast to protection of the species, it is not maintenance of a population as a whole but the physical and mental state of the individual animal that is emphasised and to which an intrinsic value is attributed. Is not only animals living in the wild but also pets and livestock that are included. The question of the requirements to guarantee the well-being of the animals is to be determined depending on the type of animal and the regulatory context."

- 83 Even if the requirement of [Art. 13 TFEU](#) is understood primarily as a political requirement and therefore only needs to have a direct effect in the guiding principles of EU policy and not for each specific individual action of the EU institutions and the Member States, the *"implementation of EU policy"* in the said areas must be understood as an administrative implementation of EU law.⁵⁴ Here, the Member States are always directly required, in every application of national law that serves to implement EU law in the area of transport, agriculture and the internal market, to observe the animal protection function of EU law and to interpret national legal regulations in a manner that accords with EU law and which is thus effective in terms of animal protection.⁵⁵ This fundamental importance of animal protection for the interpretation of the entire EU law in the areas of law mentioned in [Art. 13 TFEU](#) is also highlighted by the case law of the ECJ presented here (margin note 54).⁵⁶

- 84 [Art. 13 TFEU](#) is therefore, on account of its wording and its position, to be understood as a legal imperative in the sense of a binding requirement for action for the Union and the Member States.⁵⁷

"In parallel with other horizontal clauses, animal protection issues do not actually acquire an absolute precedence in this way but they must be brought into balance with conflicting interests by means of practical concordance. The ECJ has a judicial control in this respect.

"Alongside its significance as a legal imperative, Art. 13 TFEU also serves – like other horizontal clauses – as an aid for interpretation in connection with other norms of EU law, in particular in the interpretation of indeterminate legal notions and in the context of discretionary decisions".⁵⁸

- 85 Therefore, it is a breach of EU law if a court in a member state, in the interpretation of a regulation the application of which constitutes implementation of EU law does not take adequate account of [Art. 13 TFEU](#). This is, beyond doubt, true for the regulations of the [Internal Market Epizootic Protection Ordinance](#) since that Ordinance serves to implement 32 directives of the European Communities or the European Union. The isolated interpretation of the German animal protection law by the administrative court in *Schleswig-Holstein* without consideration of the national and European animal protection law and the requirement of [Art. 13 TFEU](#) is therefore not permissible in EU law.

- 86 This requirement for assessing animal health measures under the aspect of animal protection law is highlighted expressly by recital 7 of Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law')⁵⁹.

"This Regulation does not contain provisions which regulate animal welfare. However, animal health and welfare are linked: better animal health promotes better animal welfare, and vice versa. When disease prevention and control measures are carried out in accordance with this Regulation, their effect on animal welfare, understood in the light of Article 13 of the Treaty on the Functioning of the European Union (TFEU), should be considered in order to spare the animals concerned any avoidable pain, distress or

⁵⁴ Callies in Callies/Ruffert, TFEU (legal commentary), 5th edition 2016, Art. 13 margin note 5; cf. also Streinz in Streinz, EUV/AEUV (legal commentary), 3rd edition 2018, Art. 13 TFEU margin note 8.

⁵⁵ Callies in Callies/Ruffert, TFEU, 5th edition 2016, Art. 13 margin note 6.

⁵⁶ ECJ judgment of 23.4.2015 – C-424/13, paragraphs 35 et seq.

⁵⁷ Callies in Callies/Ruffert, TFEU (legal commentary), 5th edition 2016, Art. 13 margin note 7.

⁵⁸ Callies in Callies/Ruffert, TFEU (legal commentary) 5th edition 2016, Art. 13 margin note 10.

⁵⁹ [OJ. EU of 31.3.2016, L 84/1.](#)

suffering. Animal welfare legislation, such as Council Regulations (EC) No 1/2005 and (EC) No 1099/2009, should necessarily continue to apply and should be properly implemented. [...]"

- 87 Even if this regulation will only develop its full effect by 21.4.2021, the recital makes explicit and clear the requirement for an overall view of animal health law taking particular account of all regulations for animal protection.
- 88 The starting point for the decision by the administrative court in *Schleswig-Holstein* that the matter relevant in this case is exclusively the assessment from the point of view of animal health law with transport inside Germany is incorrect because it does not take into account the fact that the specific planned transport could not only amount to an action that is not permissible under German and European law in theory, but that the concrete danger of an action that is illegal and even criminal by European and national criteria is recognisably high based on experience with transport and slaughter at the specific destination in a country with high risk in terms of animal welfare.
- 89 In the cases that are of relevance here, the instances of transport within the Federal Republic of Germany specifically serve to facilitate transports which the authorities in the federal state of departure had already recognised as being illegal, by abusing the legal opinion of the authorities of another federal state which, as shown above, is incorrect.
- 90 Thus the regulations of the [Internal Market Epizootic Protection Ordinance](#) must be interpreted in the light of Directive 64/432/EEC, which in turn must be interpreted on the basis of [Art. 13 TFEU](#), the [ATR](#) and [Regulation \(EU\) No. 2016/429](#) to the effect that a preliminary certificate not only does not have to be issued but that it actually *must not be issued* if there is a significant degree of probability that this will, on account of the planned transport route, cause or promote the danger that actions will be committed abroad that are illegal according to EU law. Therefore, from the point of view of EU law, not only is there no right to the issue of a preliminary certificate for transport that is assessed as risky transport under criminal law, but it is imperative that the issue be refused for reasons of EU law because the application constitutes abuse of the law.
- 91 Accordingly, the preliminary certificate must also not be issued for reasons of criminal law because the veterinarian who issues it may be liable to prosecution for aiding and abetting animal cruelty if the authority responsible for approving transport to the country with high risk in terms of animal welfare grants this approval. This is because this approval has no justifying effect for committing animal cruelty abroad. The effect of the approval in terms of administrative law is at most the authorisation of the transport as such, and not the way in which the animals are treated.

(4) Examination in terms of constitutional law

- 92 In parallel with animal protection under EU law from [Art. 13 TFEU](#), it is essential in the interpretation of §§ 8, 12 Internal Market Epizootic Protection Ordinance to take into account the state objective of Art. 20a GG (Basic Law). Art. 20a GG contains directly applicable binding constitutional law in this respect.⁶⁰ The obligation of the state objective applies objectively so that although the individual citizen cannot derive any rights from it⁶¹ the state objective nevertheless has a binding effect on all state authority in such a way that ongoing maintenance of animal protection is compulsory by law and the fundamental importance for the state and society is emphasised.⁶² Through art. 20a GG, the constitution itself requires the legislator to pass suitable

⁶⁰ Cf. also [BT-Drs.\(Bundestag document\) 14/8860, p. 3; 14/9090, p. 2.](#)

⁶¹ Cf. *Faber* UPR (legal journal) 2002, 378.

⁶² *Schulze-Fielitz* in Dreier, Grundgesetz (Constitutional Law), volume 1, 3rd edition 2018, Art. 20a GG margin note 24.

regulations for animal protection⁶³ and to observe this constitutional value as an immensely important community value⁶⁴ in all aspects of its actions.⁶⁵

"The principle formulates a legally binding directive for the entire role of the state, including the interpretation of laws and other legal regulations.⁶⁶ The state objective formulates an optimisation requirement: The protection of animals must be realised as far as possible, both legally and in practice, without rendering the realisation of opposing principles impossible. This implies that the principle of animal protection does not take precedence over all other principles but that it ranks equal to them. It is not that the industrial society should be eliminated by Art. 20a GG but that animal protection should be developed in this society.⁶⁷ Animal protection activities are subject to the constitutional order. That definitely does not mean that animal protection is subject to a general legal reservation; instead, it must be seen in the overall context of the legal order, it must be integrated into it and brought into balance with other interests."⁶⁸ ⁶⁹

- 93 This means that [Art. 20a GG](#) must always be taken into account in the interpretation of national animal health law and put into effect as far as possible in terms of the requirement for optimisation. The administrative courts have, as far as we can see, ignored this constitutional aspect by interpreting animal health law without reference to animal protection law.

2. Decision of the administrative court, *Neustadt a. d. Weinstraße*, 19.3.2019 – 5 L 294/19.NW.

- 94 The administrative court in *Neustadt a. d. Weinstraße*⁷⁰ based a duty to issue a preliminary certificate in the case of healthy animals on the fact that the issue of an approval relating exclusively to animal health law does not depend on the legal aspects of animal protection. The court justified this saying that the preliminary certificate does not include a statement as to whether the subsequent transport may be undertaken. It stated that the transport may only take place after arrival at the assembly centre and after expiry of the quarantine period. Finally, it argued, the local veterinary authorities – in this case in Lower Saxony – must decide whether transport to Algeria is permissible.
- 95 This argument might have been correct if the destination of the transport had not yet been established in the specific case. However, in cases where the transporter has already determined that he will carry out the transport to a destination that entails high risk in terms of animal welfare, an official cannot be compelled to cooperate in the preparation for an action that contravenes the law on animal cruelty by granting a certificate "knowingly" just because the planned action is to take place in the future and there is an uncertain possibility that the authority of another federal state will prohibit the unacceptable transport. This applies especially when the authority that is to issue the preliminary certificate must expect that the authority responsible for final approval of the transport will approve it illegally.
- 96 The approach taken by the administrative court at *Neustadt a. d. Weinstraße* results in fragmentation of the coherent circumstances of life and in concealment of relevant aspects of the abusive conduct

⁶³ BVerfG (Federal Constitutional Court) decision of 3.7.2007 – 1 BvR 2186/06, BVerfGE (Federal Constitutional Court decisions) 119, 52, 83.

⁶⁴ Cf. OVG (Higher Administrative Court) *Magdeburg* decision of 27.10.2017 – 3 M 240/17, LKV 2018, 80 (85); [VG Gelsenkirchen judgment of 1.7.2015 – 7 K 5257/13](#), margin note 28; [VG Cologne decision of 28.8.2018 – 21 L 1543/18](#), juris margin note 51.

⁶⁵ Jarass in Jarass/Pieroth, Grundgesetz (legal commentary on the German constitutional law), 14th edition 2016, Art 20a GG margin note 18.

⁶⁶ Schulze-Fielitz in Dreier, Grundgesetz (legal commentary on the German constitutional law), volume 1, 3rd edition 2018, Art. 20a GG margin note 25.

⁶⁷ Schulze-Fielitz in Dreier, Grundgesetz (legal commentary on the German constitutional law), volume 1, 3rd edition 2018, Art. 20a GG margin note 26.

⁶⁸ Cf. also BT-Drs. (Bundestag document) 14/8860, p. 3.

⁶⁹ Cf. [Comments by the individual expert, Prof. Dr. Jens Bülte for the 15th meeting of the Committee for Agriculture and Food, public consultation on 26.11.2019, draft bill of the CDU/CSU factions and the SPD, draft of a fourth law to amend the Animal Welfare Act, BT-printed matter 19/5522, P. 14, margin note 51 et seq.](#)

⁷⁰ Administrative court, *Neustadt a. d. Weinstraße*, decision of 19.3.2019 – 5 L 294/19.NW.

of the transporter and thus leads to a contradiction within the legal order: The veterinary authorities would have to cooperate with a case of transport that amounts to illegal and even criminal actions.

VI. Summary

- 97 Therefore, we may say in conclusion that the criminal liability of an official veterinarian who issues a certificate despite recognising the possibility that if transport takes place animals will suffer actions that fall under the conditions set out by § 17 No. 2a or No. 2b of the Animal Welfare Act, is not prevented by the principles of neutral aid or by the primacy of application of EU law (margin note [6-18](#))
- 98 The principles of neutral aid are not applicable to the official veterinarian who is on watch for the protection of transported animals because approval of transport associated with wrongdoing is not a neutral action but eo ipso an action that is dangerous to the legal interest. Furthermore, his action is not subject to the protection of occupational freedom defined by the Basic Law in such a way that a restriction of criminal liability for aiding and abetting would be necessary or make sense. In fact, it would be contrary to the spirit and purpose of state control in terms of animal protection as a constitutional value (margin note [19-37](#)).
- 99 The primacy of application of European law does not limit criminal liability because even the interpretation of the regulations of the animal transport ordinance means that in a case where animal cruelty at the destination is suspected it is not only that no approval has to be granted but that *no approval may be granted*. EU law provides an unambiguous prohibition of any cooperation on the part of veterinary authorities in such transport (margin note [38-66](#)).
- 100 The arguments stated so far by the administrative courts supporting a duty to issue a preliminary certificate do not have sufficient validity, and they lead to a contradiction between criminal law and administrative law due to an artificially isolated view of the coherent life situation. There is, on the basis of EU law and constitutional law, no right to the issue of a preliminary certificate to carry out transport within the country for the purpose of circumventing regulatory safeguards against transport to countries that have a high risk in terms of animal welfare and which would therefore give rise to a concrete danger of animal cruelty in the country of destination or during transport (margin note [67-98](#)).
- 101 A veterinarian who issues such a preliminary certificate is liable to prosecution due to aiding and abetting animal cruelty abroad if actions are committed during transport to a country with high risk in terms of animal welfare or at the time of slaughter that are punishable under German law. This applies even if he is acting under the impression of current case law of the administrative courts because although in these decisions the question of criminal liability for cooperation in Germany for animal cruelty abroad is called into doubt (without valid reason), it is not denied. It is true that the veterinarian has impunity if he issues a preliminary certificate on the basis of a court order because he will then be acting on the basis of a court order that justifies his action. However, the possible criminal liability of a transporter due to aiding and abetting animal cruelty abroad and also of his legal adviser in the individual case who obtains the permits in court required for the transport remains unaffected by this.

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