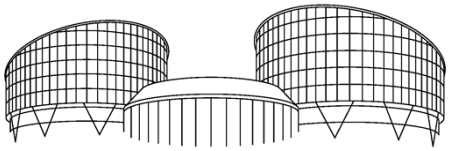

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KLAUS MÜLLER v. GERMANY

(Application no. 24173/18)

JUDGMENT

Art 8 • Respect for private life and correspondence • Administrative fine for lawyer's refusal to testify as witness in criminal proceedings in respect of information gained in course of professional activities • Relevant domestic law foreseeable in spite of divergent domestic case-law in other areas of territorial jurisdiction • Clients having waived confidentiality, meaning no right for the lawyer not to testify under domestic law, and no risk of committing an offence through disclosure • Sanction not excessive in light of interests at stake and sufficient safeguards in respect of duration of detention for non-payment • Relevant and sufficient reasons provided by domestic courts • Interference proportionate and necessary in a democratic society

STRASBOURG

19 November 2020

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 Klaus Müller v. Germany,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
Latif Hüseynov,
Lado Chanturia,
Anja Seibert-Fohr,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 24173/18) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Klaus Müller ("the applicant"), on 18 May 2018;

the decision to give notice of the application to the German Government ("the Government");

the parties' observations;

Having deliberated in private on 29 September 2020,

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

INTRODUCTION

1. The application concerns the compatibility with Article 8 of the Convention of an administrative fine imposed on the applicant, a lawyer. Relying on legal professional privilege, the applicant had refused to testify as a witness in criminal proceedings against the former managing directors of four companies to which he had provided legal advice prior to their insolvency. The applicant had been released from his duty of confidentiality only by the current managing director of these companies, but not by several of the former managing directors on trial.

THE FACTS

2. The applicant was born in 1967 and lives in Rhede. He is a practising lawyer and represents himself.

3. The Government were represented by one of their Agents, Mrs N. Wenzel, of the Federal Ministry of Justice and Consumer Protection.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. Between 1996 and 2014 the applicant's law firm was engaged to advise four companies: H. stock corporation and L., W. and G. limited liability companies, which all became insolvent in 2014. It was essentially the applicant who provided legal advice on different transactions to the companies.

6. In 2017 the Münster Regional Court opened criminal proceedings against the former managing directors of the companies, *inter alia,* for fraud. The managing directors were represented by different lawyers in these proceedings. The court summoned the applicant as a witness. He was to testify on specific sales transactions carried out by these companies. The court informed the applicant that the current managing director of the four companies, D., had issued a declaration releasing him from professional secrecy as a lawyer. The insolvency administrator had also agreed to the applicant testifying in court. Moreover, the former managing director of L. company had agreed to release the applicant from professional secrecy.

7. At the hearing before the Regional Court on 18 May 2017 the applicant, relying on Article 53 § 1 no. 3 of the Code of Criminal Procedure (see paragraph 26 below), refused to testify. He considered himself to be bound by professional secrecy. He argued that for him to be allowed to testify, it would be necessary for all the persons who had been managing directors at the time when he was the companies' lawyer, and who were now defendants in the present criminal proceedings, also to release him from professional secrecy.

8. The Regional Court informed the applicant that in its view, release from professional secrecy by the current managing director of the four companies was sufficient. As the applicant nevertheless refused to testify, the court, relying on Article 70 § 1 of the Code of Criminal Procedure (see paragraph 27 below), ordered the applicant to pay an administrative fine (*Ordnungsgeld*) of 150 euros (EUR), to be converted into one day's administrative detention (*Ordnungshaft*) per EUR 50 if payment of the fine could not be enforced.

9. On 17 August 2017 the Hamm Court of Appeal quashed the Regional Court's order. It agreed with the Regional Court that where a lawyer had only been mandated by a company, release from professional secrecy by the current managing director of the company was sufficient; additional release from professional secrecy by the former managing director(s) was not necessary. However, the Court of Appeal quashed the Regional Court's decision on a different ground. It considered that release from professional secrecy by the former managing director(s) was exceptionally required if a lawyer had been mandated both by the company and by its former managing director(s) in person and thus had a contractual relationship with both. However, the Regional Court had failed to establish in the present case

whether the applicant had been instructed, in addition, by the companies' former managing directors in person.

II. THE PROCEEDINGS AT ISSUE

A. The proceedings before the Münster Regional Court

10. At the hearing before the Münster Regional Court on 9 November 2017 the applicant, who had been summoned as a witness to testify on the legal advice he had given on a number of specified transactions to the four companies, again refused to testify as he considered himself bound by professional secrecy.

11. The Regional Court, referring to Article 70 § 1 of the Code of Criminal Procedure, having informed the applicant of its view regarding his duty to testify and having heard him, thereupon ordered the applicant to pay an administrative fine amounting to EUR 600, to be converted into one day's administrative detention per EUR 50 if payment of the fine could not be enforced. The applicant was further ordered to pay the costs incurred by his refusal to testify.

12. The Regional Court found that the applicant did not have a right to refuse to testify under Article 53 § 1 no. 3 of the Code of Criminal Procedure. It confirmed its view that release from professional secrecy by the current managing director of the four companies, that is, the director at the time when the release declaration was made, was sufficient. Moreover, the applicant had not substantiated that the legal consultancy contracts he had concluded with two of the former managing directors in person had covered subjects on which the court intended to question the applicant as a witness and that a right not to testify could have arisen from that contractual relationship.

B. The proceedings before the Hamm Court of Appeal

13. On 20 November 2017 the applicant lodged an appeal against the Regional Court's order. He argued that he had had the right under Article 53 § 1 no. 3 of the Code of Criminal Procedure not to testify in the proceedings.

14. The applicant argued that in order to be authorised to testify, he would have needed to be released from professional secrecy also by the managing directors of the companies at the time when the business transactions in respect of which he had been summoned to testify had taken place. Article 53 of the Code of Criminal Procedure protected relationships of trust, which a lawyer could only build up with individuals, not with a legal entity. A lawyer could only give comprehensive legal advice to a company if the managing director(s) acting for it provided him with a full

account of the relevant facts. In particular, if the managing director(s) did not also provide information potentially relevant in future criminal proceedings against them, a lawyer was unable to advise the company on risks that certain acts might make its representatives liable to criminal prosecution. It was therefore essential for the functioning of the lawyer-client relationship with a company that the managing director(s) kept the right to decide whether or not to release the lawyer with whom they had worked from professional secrecy.

15. Furthermore, courts of appeal in Germany took diverging views on the question of who had to release a lawyer from professional secrecy in circumstances such as those at issue in the present case. There was no decision of the last-instance Federal Court of Justice or the Federal Constitutional Court on the subject-matter. In these circumstances, lawyers were *de facto* forced to rely on professional secrecy in order not to run the risk of being found guilty of disclosure of private secrets under Article 203 § 1 of the Criminal Code (see paragraph 28 below).

16. On 27 February 2018 the Hamm Court of Appeal dismissed the applicant's appeal as ill-founded. It found that the requirements under Article 70 § 1 of the Code of Criminal Procedure for imposing on the applicant the administrative fine and the costs caused by his refusal to testify were met. The applicant could not rely on a right not to testify under Article 53 § 1 no. 3 of the Code of Criminal Procedure.

17. The Court of Appeal confirmed that it had been sufficient that the current managing director of the four companies had released the applicant from professional secrecy. It was not necessary for the former managing directors of these companies, in particular the defendants in the criminal proceedings at issue, also to release the applicant from professional secrecy.

18. The Court of Appeal stated that the right to release lawyers from their duty of confidentiality lay with the person to whose benefit that duty had been laid down in law. However, there was disagreement between the courts and among legal writers about who was entitled to release a lawyer from professional secrecy in the case of a change of managing director or where an insolvency administrator had been appointed.

19. A number of courts of appeal (including the Zweibrücken, Düsseldorf, Schleswig, Koblenz and Celle Courts of Appeal, see also paragraph 31 below) had decided that a company's lawyer could only be released from professional secrecy by both the current and the former managing directors. A relationship of trust protected by Article 53 of the Code of Criminal Procedure could only exist between individuals. Moreover, it usually could not be ruled out that in his lawyer-client exchanges, the lawyer had obtained knowledge of personal secrets of the former managing director acting for the company in addition to secrets of the company.

20. In contrast, other courts of appeal (including the Cologne, Nuremberg and Oldenburg Courts of Appeal, see also paragraph 30 below) took the view that it was sufficient that the current managing director of a company or the insolvency administrator released a lawyer having worked for the company from professional secrecy. There was a lawyer-client relationship and a relationship of trust protected by Article 53 of the Code of Criminal Procedure only between the lawyer and the company as a legal entity. Therefore, the legal representative of the company at the moment of the statement releasing the lawyer from his duty of confidentiality alone was entitled to decide whether such a release from confidentiality was in the company's interest.

21. The Court of Appeal stated that it endorsed the latter view, which had been taken by a number of courts of appeal for a considerable time (see paragraph 30 below). Where the contractual lawyer-client relationship existed only between the company and the lawyer, the duty of confidentiality served the company's interests. It would often run counter to the company's interests if a former managing director could decide whether or not to release the company's lawyer from his duty of confidentiality. Furthermore, this would lead to undue restrictions on the investigation of the truth in criminal proceedings. A company's interest could be or become different from that of its managing director(s). The fact that a managing director might withhold information, in particular relating to his own potential criminal liability, from the company's lawyer as the latter was not under a duty of confidentiality towards the director was an acceptable consequence of the contractual relationship only between the company and the lawyer.

22. Furthermore, the applicant had not substantiated that he or his law firm had concluded legal consultancy contracts not only with the companies, but also with their former managing directors themselves concerning subject-matters on which he was to be questioned by the court.

C. The proceedings before the Federal Constitutional Court

23. On 15 March 2018 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that the decisions of the Münster Regional Court of 9 November 2017 and of the Hamm Court of Appeal of 27 February 2018, which had imposed a fine on him for failure to testify in criminal proceedings, had breached his constitutional right to exercise freely his profession. He stressed that the courts of appeal in Germany had taken diverging views on the question of who had to release a lawyer who had worked for a company from professional secrecy and that the Hamm Court of Appeal had endorsed the view taken by some of the courts of appeal which was less protective of the lawyer-client privilege. He submitted that the domestic courts' decisions had disproportionately

interfered with the secrecy of exchanges between lawyer and client, which covered both the company instructing a lawyer and persons acting on the company's behalf.

24. On 26 March 2018 the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 460/18).

D. Subsequent developments

25. On 15 May 2018 the applicant testified as a witness before the Münster Regional Court in the criminal proceedings against the former managing directors of the four companies on transactions covered by the legal consultancy contracts between his law firm and these companies. The court had announced that it would order the applicant's detention under Article 70 § 2 of the Code of Criminal Procedure (see paragraph 27 below) to enforce his duty to testify if necessary. The applicant further paid the fine of EUR 600 previously imposed on him by that court.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

26. Article 53 of the Code of Criminal Procedure lays down rules on the right to refuse to testify on professional grounds. The provision, in so far as relevant, provides:

> "(1) The following persons may ... refuse to testify:
>
> ...
>
> 3. lawyers ... concerning information which was entrusted to them or became known to them in this capacity;
>
> ...
>
> (2) The persons designated in paragraph (1), first sentence, numbers 2 to 3b, may not refuse to testify if they have been released from their duty of confidentiality. ..."

27. Article 70 of the Code of Criminal Procedure, on the consequences of an unjustified refusal to testify, in so far as relevant, provides:

> "(1) A witness who without having a legal ground therefor refuses to testify ... shall be charged with the costs caused by this refusal. At the same time an administrative fine shall be imposed on him and, if the fine cannot be collected, administrative detention shall be ordered.
>
> (2) Detention may also be ordered to force a witness to testify; such detention shall not, however, extend beyond the termination of the proceedings before the court in question, nor beyond a period of six months.
>
> ...

(4) Where these measures have been exhausted, they may not be repeated in the same proceedings or in other proceedings if the same offence is the subject of the proceedings."

II. RELEVANT PROVISIONS OF THE CRIMINAL CODE

28. Article 203 of the Criminal Code, which penalises the disclosure of private secrets, in so far as relevant, provides:

"(1) Whoever unlawfully discloses the secret of another, in particular a secret relating to personal privacy or a business or trade secret, which was revealed or otherwise made known to him in his capacity as a

...

(3) lawyer, ...

...

shall be liable to imprisonment for a term not exceeding one year or a fine.

..."

III. RELEVANT PRACTICE

29. The courts of appeal in Germany have adopted different stances on the question of who had to release from professional secrecy a lawyer who had given legal advice to a company in the case of a change in the company's management.

30. One group of courts of appeal takes the view that release from professional secrecy by the representative of a company at the time of the declaration of release, that is, the current managing director (or the insolvency administrator) was sufficient; additional release by former managing directors was not necessary. These courts argue, in essence, that there was a contractual relationship only between the lawyer and the company, which alone was protected by the lawyer's duty of confidentiality and could decide alone whether or not it was in its interest to release the lawyer from that duty (see, in particular, Cologne Court of Appeal, file nos. III-2 Ws 544/15 and 2 Ws 544/15, order of 1 September 2015; Nuremberg Court of Appeal, file no. 1 Ws 289/09, order of 18 June 2009; and Oldenburg Court of Appeal, file no. 1 Ws 242/04, order of 28 May 2004).

31. Another group of courts of appeal, in contrast, considers that both the current representatives of a company and the former representatives had to release the company's lawyer from his duty of professional secrecy. These courts generally stress that a relationship of trust protected by the duty of confidentiality could only exist between individual persons, not with a company as a legal entity. Moreover, in his exchanges with company representatives, a lawyer usually obtained knowledge also of the

representatives' personal secrets (see, in particular, Zweibrücken Court of Appeal, file no. 1 Ws 334/16, order of 8 December 2016; Düsseldorf Court of Appeal, file no. 1 Ws 1155/92, order of 14 December 1992; Celle Court of Appeal, file no. 1 Ws 194/85, order of 2 August 1985; Koblenz Court of Appeal, file no. 2 VAs 21/84, order of 22 February 1985; and Schleswig Court of Appeal, file nos. 1 Ws 160/80 and 1 Ws 161/80, order of 27 May 1980).

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

32. The applicant complained that compelling him to testify as a witness in criminal proceeding by means of an order imposing on him an administrative fine had breached legal professional privilege protected by Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

33. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Whether there had been an interference

(a) The parties' submissions

(i) The applicant

34. In the applicant's submission, the order to pay an administrative fine, which could be followed by detention, for having refused to testify had interfered with his right to respect for his private life and his correspondence under Article 8 of the Convention. More particularly, the order had interfered with legal professional privilege, which was protected by Article 8, and under which he had the right and the duty not to disclose secrets of which he had obtained knowledge as a lawyer in his relationship with the person seeking advice.

35. The applicant argued that legal professional privilege had been interfered with even if he (or his law firm) had concluded a contractual relationship only with the companies, legal entities, as a relationship of trust could only exist between natural persons. As legal entities could only act via natural persons, the latter, that is the managing directors of the four companies, had to be directly included in the relationship of trust protected by legal professional privilege, without it being necessary that the managing directors had an additional contractual relationship with the lawyer. If the managing directors ran the risk that, after a change in the companies' management, their communication with the companies' lawyer was no longer confidential, they would be unable to communicate all relevant information, including information potentially relevant under criminal law for the managing directors, to the lawyer and thus to obtain comprehensive legal advice for their companies.

(ii) The Government

36. The Government argued that the order to pay the administrative fine, which served to enforce the applicant's duty to testify as a witness, had not interfered with the applicant's right to respect for his private life and his correspondence under Article 8 of the Convention. That provision, in principle, protected the secrecy of exchanges between lawyers and clients. However, the order had not affected that secrecy in the present case. Only the four companies, that is, separate legal entities, had been the applicant's clients, while there had not been a legal consultancy contract between the applicant and the four former managing directors of these companies. Therefore, the applicant could not rely on legal professional privilege in respect of these former managing directors and defendants in the criminal proceedings at issue.

(b) The Court's assessment

37. In establishing the right of everyone to respect for his "correspondence", Article 8 of the Convention protects the confidentiality of private communications (see *Frérot v. France*, no. 70204/01, § 53, 12 June 2007), whatever the content of the correspondence concerned (*ibid.*, § 54), and whatever form it may take. This means that what Article 8 protects is the confidentiality of all the exchanges in which individuals may engage for the purposes of communication (see *Michaud v. France*, no. 12323/11, § 90, ECHR 2012; *Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, § 77, 3 September 2015, and *Laurent v. France*, no. 28798/13, § 35, 24 May 2018). This may cover exchanges by, *inter alia*, letters (see, for instance, *Schönenberger and Durmaz v. Switzerland*, 20 June 1988, §§ 23-24, Series A no. 137, and *Campbell v. the United Kingdom*, 25 March 1992, § 33, Series A no. 233),

telephone (see *Kopp v. Switzerland*, 25 March 1998, § 50, *Reports of Judgments and Decisions* 1998-II), oral communication (see *Altay v. Turkey (no. 2)*, no. 11236/09, § 51, 9 April 2019) or electronic data (see *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, § 45, ECHR 2007-IV, and *Sérvulo & Associados - Sociedade de Advogados, RL and Others*, cited above, § 76).

38. Requiring lawyers to report to the authorities information concerning another person which came into their possession through exchanges with that person was considered to constitute an interference with the lawyers' right to respect for their correspondence (see *Michaud*, cited above, § 91).

39. Such a duty also constitutes an interference with their right to respect for their "private life", a notion which does not exclude activities of a professional or business nature (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B; *Michaud*, cited above, § 91, and *Denisov v. Ukraine* [GC], no. 76639/11, § 100, 25 September 2018).

40. The Court considers that Article 8 protects the right to establish and develop relationships with other human beings and the outside world (*Denisov*, cited above, §§ 95-96, 100). These considerations must apply where a lawyer is obliged to testify as a witness and provide information in criminal proceedings on exchanges he had with others in the course of his professional activities.

41. The Court notes that in the present case, the applicant complained of having been compelled, by means of an administrative fine, to make statements in criminal proceedings about information he had come to know as a lawyer through exchanges (oral, in writing or electronically) with four companies which, at the relevant time, had been represented by the managing directors who were now on trial. Having regard to the above principles, such business exchanges with the representatives of his law firm's clients are covered both by the notions of "correspondence" and "private life". The Court would note in that context that the fact that the applicant had been a member of a law firm which had concluded the consultancy contract with the four companies did not dispense him from his rights and duties as a lawyer, in particular the duty of professional secrecy (compare also *Sérvulo & Associados - Sociedade de Advogados, RL and Others*, cited above, § 79). Obliging the applicant to disclose the information in question thus constituted an interference with the rights to respect for his "correspondence" and "private life".

2. Whether the interference had been justified

(a) Whether the interference was in accordance with the law

(i) The parties' submissions

42. In the applicant's view, the interference with his right to professional secrecy was not justified under Article 8 § 2 of the Convention. It had not

been in accordance with the law. The legal provisions on which the order to pay the fine had been based, Articles 70 and 53 § 2 of the Code of Criminal Procedure (see paragraphs 27 and 26 above), were not sufficiently precise and foreseeable.

43. The applicant's submissions state that different courts of appeal in Germany have taken diverging decisions for decades on whether, in the case of a change in company management, release from confidentiality obligations in accordance with Article 53 § 2 of the Code of Criminal Procedure necessitated only a waiver by the current representatives of the company or whether, in addition, a waiver by the former representatives was required. It appeared arbitrary that the scope of professional secrecy was thus dependent on the residence of a lawyer in the area of jurisdiction of one court of appeal or another. The lawyer would further run the risk of punishment under Article 203 of the Criminal Code (see paragraph 28 above) if he breached professional secrecy.

44. The Government argued that, even assuming that there had been an interference with the applicant's rights under Article 8 of the Convention, that interference had been justified under paragraph 2 of that provision. In particular, Articles 53 and 70 of the Code of Criminal Procedure, on which the order against the applicant to pay an administrative fine had been based, were sufficiently precise and foreseeable in their application.

45. In the Government's view, the diverging case-law of the courts of appeal on the scope of legal professional privilege in the case of a change of managing director did not affect the foreseeability of the said provisions. The view taken by the domestic courts in the present case that release from professional duty by the current managing directors of the companies was sufficient in order for the applicant to be no longer bound by an obligation of professional secrecy and to be obliged to testify was compatible with the wording and the aim of the provisions and defendable – just as was the opposite view. The courts had given comprehensive reasons why they had endorsed this approach previously taken by a number of other courts of appeal and legal writers. They had argued, in particular, that only the person or entity for whose benefit a duty of professional secrecy had been set up had the right to release a lawyer from that duty, that is, in the present case, only the companies who had a contractual relationship with the applicant and not their managing directors.

46. It was true that, in the present case, the applicant could not have obtained a decision of the Federal Court of Justice determining, for the lower courts, the interpretation to be adopted of the provisions of the Code of Criminal Procedure in question, as no appeal lay to that court against the Court of Appeal's decision regarding the administrative fine. However, the legal question could be settled by the Federal Court of Justice in a different context, notably in the course of the criminal proceedings at issue. If the former managing directors were convicted following the applicant's

testimony, without having released him from professional secrecy, they could raise this issue in an appeal on points of law to the Federal Court of Justice, which would then have to decide whether this amounted to an error of law.

47. Moreover, not least owing to the domestic courts' previous decisions and advice given to the applicant prior to issuing the impugned order imposing the fine, it had been foreseeable for the applicant, a lawyer, that the courts would interpret the scope of his right not to testify as they did. It had finally been ruled out, in these circumstances, that the applicant could have been prosecuted for a breach of professional secrecy under Article 203 of the Criminal Code as a result of his testimony following a potential change in the case-law on the scope of the duty of professional secrecy as, following the domestic courts' advice in the proceedings at issue, he would have acted without guilt.

(ii) The Court's assessment

(1) Relevant principles

48. As to whether the measure was "in accordance with the law", the Court's case-law has established that a measure must first have some basis in domestic law. In a sphere covered by statutory law, the "law" is the enactment in force as the competent courts have interpreted it (see *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III, and *Robathin v. Austria*, no. 30457/06, § 40, 3 July 2012 with further references).

49. The expression "in accordance with the law" further refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned who must, moreover, be able to foresee its consequences for him (see, *inter alia*, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008, and *Iordachi and Others v. Moldova*, no. 25198/02, § 37, 10 February 2009).

50. In order to be foreseeable, the law must be formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II; *Rotaru*, cited above, § 55, and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008). However, the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity. Many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Michaud*, cited above, § 96).

51. As regards conflicting decisions of domestic courts, the Court has repeatedly had to deal with questions of divergent case-law in the context of Article 6. It stated, in that context, that the principle of legal certainty was implicit in all the Articles of the Convention and constituted one of the basic elements of the rule of law (see *Beian v. Romania (no. 1)*, no. 30658/05, § 39, ECHR 2007-V (extracts), and *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, § 47, 2 July 2009). The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, § 33, 27 January 2009, and *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 56, 1 December 2009). However, the requirement of legal certainty does not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008, and *Borg v. Malta*, no. 37537/13, § 107, 12 January 2016).

52. The Court further recalls that it has established the principle, which is, moreover, generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients. It has stressed in that context that the law must indicate with sufficient clarity which matters connected with a lawyer's work are covered by the lawyer-client relationship and are thus protected by legal professional privilege (compare *Kopp*, cited above, §§ 73 and 75).

(2) Application of these principles to the present case

53. The Court observes at the outset that the imposition of an administrative fine on the applicant in order to compel him to testify as a witness in criminal proceedings had a basis in domestic law, namely Article 70 § 1 of the Code of Criminal Procedure, read in conjunction with Article 53 § 1 no. 3 and § 2 of the Code of Criminal Procedure (see paragraphs 26-27 above). It further observes that the Hamm Court of Appeal, which was the court of last instance within the area of jurisdiction in question, had interpreted these provisions to the effect that the applicant did not have a right to refuse to testify in the circumstances of the case. This interpretation was in line with the interpretation adopted by a number of further courts of appeal in such cases. In contrast, other courts of appeal in different areas of jurisdiction had taken the opposite view in comparable circumstances.

54. The Court notes that this divergence of interpretation notably of Article 53 of the Criminal Code, which is phrased in broad terms, led to long-standing differences of approach in the case-law of the courts of appeal. It further observes that, in principle, a mechanism to overcome that divergence exists in that the Federal Court of Justice may address it in the context of an appeal on points of law in criminal proceedings, where a

former representative of a legal entity has been convicted following a witness statement of a lawyer whom he had not released from professional secrecy (compare paragraph 46 above). That court, in line with the role of supreme courts to resolve case-law conflicts (see *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 9 others, § 59, ECHR 1999-VII; *Beian*, cited above, § 37, and *Iordan Iordanov and Others*, cited above, § 47) could determine the approach to be taken by all courts of appeal on this question. However, it was not open to the applicant to obtain such a decision settling the question – which would have strengthened uniform application of the law – as no appeal against the imposition of the fine on him lay to the Federal Court of Justice. The Federal Constitutional Court, by declining to consider the applicant's constitutional complaint, albeit without giving reasons, appeared to consider that the approach taken by the domestic courts in the applicant's case did not raise an issue under the German Constitution.

55. Despite the above, in determining whether the applicable law could be considered as foreseeable in its consequences and as enabling the applicant to regulate his conduct in this specific case, the Court notes that in the present case it is confronted with a situation of divergences in the case-law of different courts of appeal, that is, several courts at the same level of jurisdiction competent to examine cases within their respective area of territorial jurisdiction.

56. In the instant case, the Hamm Court of Appeal itself, referring to case-law which existed for a considerable period of time (see paragraphs 21 and 30 above), had not been inconsistent in its approach to the question of whether a confidentiality waiver by the former managing directors had been necessary in order to release the applicant from professional secrecy and oblige him to testify in the criminal proceedings against the directors. It had not only given comprehensive reasons in the proceedings at issue as to why it considered a confidentiality waiver by the former managing directors unnecessary in the circumstances but had addressed in that context the arguments brought forward by the opposite view taken by other courts of appeal (see paragraphs 16-22 above). It had, moreover, clearly announced the stance it was going to take on that question in the first set of proceedings in which it had quashed the Regional Court's decision on other grounds and remitted the case to that court (see paragraph 9 above).

57. In these circumstances, no legal uncertainty arose for the applicant from the fact that some other courts of appeal in different areas of territorial jurisdiction interpreted the scope of the right not to testify in circumstances such as those in the present case in a different manner.

58. The Court further takes the view that the interpretation adopted by the domestic courts in the applicant's case was foreseeable also in that that interpretation must be considered as covered by the wording and the aim of the provision of the Code of Criminal Procedure in question. The relevant

law, as interpreted and applied by the domestic courts, can thus be considered to have indicated with sufficient clarity the scope of the legal professional privilege on which the applicant could rely.

59. Furthermore, the Court is not persuaded that, as a result of the divergences in the case-law of the different courts of appeal, in testifying before the Regional Court in the criminal proceedings the applicant ran an actual risk of subsequently being found guilty of the offence of disclosure of private secrets under Article 203 of the Criminal Code (see paragraph 28 above). Even assuming that, in the light of the divergent case-law on the scope of legal professional privilege, a different court came to the conclusion that he had not had the right to testify on information which had been made known to him in exchanges with the former managing directors of the four companies, the applicant would, in any event, have acted without guilt as the domestic courts had obliged him to testify in the proceedings here at issue.

60. Having regard to the foregoing, the Court concludes that the applicable law in the present case, as interpreted and applied by the domestic courts, was foreseeable in its consequences to the applicant. The imposition of an administrative fine on the applicant was therefore "in accordance with the law" for the purposes of Article 8 § 2.

(b) Whether the interference pursued a legitimate aim

61. In the Government's view, the order to pay an administrative fine following the applicant's refusal to testify as a witness in the criminal proceedings at issue pursued the legitimate aim of preventing disorder and crime as it was to secure a comprehensive investigation of the truth in criminal proceedings. The applicant submitted that the order pursued the legitimate aim of maintaining public order and securing an effective criminal prosecution of offences.

62. The Court considers that the order against the applicant to pay an administrative fine was to sanction him for his refusal to testify in the criminal proceedings against the former managing directors of four companies. The order should further enforce the applicant's duty under domestic law, as interpreted and applied by the domestic courts, to testify in those proceedings in order to establish the facts more comprehensively. It thereby served the legitimate aim under Article 8 § 2 of preventing crime, that concept encompassing the securing of evidence for the purpose of detecting and prosecuting crime (compare *Société Colas Est and Others*, cited above, § 44, and *Van der Heijden v. the Netherlands* [GC], no. 42857/05, § 54, 3 April 2012).

(c) Whether the interference was necessary in a democratic society

(i) The parties' submissions

63. In the applicant's view it had, in any event, been disproportionate and thus not necessary in a democratic society for the prevention of crime to order him to pay the administrative fine. He stressed, in particular, that a lawyer was only in a position to carry out his important function properly and to work in a relationship of trust with his clients if he could guarantee the confidentiality of their exchanges and correspondence.

64. The Government argued that the order on the applicant to pay an administrative fine had been necessary in a democratic society to attain the legitimate aims pursued. The protection of legal professional privilege did not extend to former managing directors of a company. The latter acted in the interests of the company and had to adapt their conduct accordingly. They could not legitimately trust in their exchanges and correspondence being protected by the legal consultancy contract between the company and their lawyer.

(ii) The Court's assessment

65. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, for example, *S. and Marper*, cited above, § 101; *Fernández Martínez v. Spain* [GC], no. 56030/07, § 124, ECHR 2014 (extracts), and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, §§ 179 and 181, 24 January 2017).

66. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention. A margin of appreciation must be left to the competent national authorities in this assessment (see, *inter alia*, *Paradiso and Campanelli*, cited above, § 181 with further references). The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of "intimate" or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see *S. and Marper*, cited above,

§§ 101-02, and *Van der Heijden*, cited above, §§ 58-60). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or different Convention rights (see, *inter alia*, *Fernández Martínez*, cited above, § 125, and *Paradiso and Campanelli*, cited above, § 182 with further references).

67. In determining whether, in the present case, the interference with the applicant's rights to respect for his correspondence and private life by the order for payment of an administrative fine was "necessary in a democratic society" the Court observes at the outset that different competing interests were at stake. On the one hand, legal professional privilege as relied on by the applicant, which, as is generally accepted, covers only the relationship between a lawyer and his clients (see, for instance, *Kopp*, cited above, § 73), served both the applicant's professional and business interest as a lawyer in the protection of his exchanges with the representatives of his clients and the public interest in guaranteeing a proper administration of justice (see for the weight of these interests, for instance, *Wieser and Bicos Beteiligungen GmbH*, cited above, § 65). These interests competed with the public interest in the prevention of crime, which is served by a comprehensive establishment of the truth.

68. As for the proportionality of that measure to the legitimate aim pursued, the Court observes that domestic law and practice protects legal professional privilege in that it lays down an exception to the said duty to give evidence in criminal proceedings for lawyers in certain circumstances. Under Article 53 § 1 no. 3 of the Code of Criminal Procedure, lawyers may, as a rule, refuse to testify concerning information which was entrusted to them or became known to them in this capacity (see paragraph 26 above). However, under Article 53 § 2 of the said provisions, lawyers no longer have a right not to testify if they have been released from their obligation of secrecy by their client, whose protection that duty serves in the first place.

69. The present case thus only raises the question of whether the limitations to the scope of legal professional privilege under the Code of Criminal Procedure, as interpreted and applied by the domestic courts in the present case, can be considered proportionate. This militates for a rather wide margin of appreciation. The Court observes in this respect that the domestic courts considered, in essence, that the clients of the applicant's law firm in the present case had only been the four companies who had concluded a legal consultancy contract with the law firm and not the individual managing directors representing the companies at the relevant time. In the domestic courts' view, the applicant therefore no longer had a right not to testify in the criminal proceedings when the current representatives of the companies had waived confidentiality.

70. Furthermore, in so far as the severity of the sanction at issue is equally relevant for the proportionality of the impugned measure, the Court

observes that a fine amounting to EUR 600, while not being negligible, cannot be considered excessive, taking account of the interests at stake.

71. The Court further does not overlook that following that fine, the applicant was liable to detention in order to force him to testify (Article 70 § 2 of the Code of Criminal Procedure, see paragraph 27 above). However, domestic law contained sufficient safeguards regarding the maximum duration of such detention (compare in respect of such safeguards also *Van der Heijden*, cited above, § 77). Such detention could be extended neither beyond the termination of the proceedings before the court in question, nor beyond a period of six months for the same offence, see Article 70 §§ 2 and 4 of the Code of Criminal Procedure).

72. Moreover, the Court refers to its above finding (see paragraph 59) that in testifying before the Regional Court in the criminal proceedings against the former managing directors of the four companies, the applicant did not run an actual risk of committing the offence of disclosure of private secrets under Article 203 of the Criminal Code (see paragraph 28 above).

73. The Court finally considers that the reasons adduced by the domestic courts to justify the interference were "relevant and sufficient", as required for the interference to have been "necessary in a democratic society". As shown above (see paragraphs 16-22 and 56), the domestic courts thoroughly reasoned their decisions imposing the administrative fine, explaining in this context their stance on the scope of the legal professional privilege, and their interpretation was, for the reasons explained previously, formulated with sufficient precision to enable the applicant to regulate his conduct (see paragraph 58 above).

74. Accordingly, the impugned interference with the applicant's right to respect for his correspondence and his private life can be regarded as necessary in a democratic society. It was therefore justified in accordance with Article 8 § 2.

75. There has therefore been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 19 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Yudkivska is annexed to this judgment.

S.O.L.
V.S.

DISSENTING OPINION OF JUDGE YUDKIVSKA

In the dark ages of the Russian Empire, lawyer Fyodor Plevako became a symbol of the highest legal professionalism. He explained the challenge of the legal profession in the following way: "Behind the back of the prosecutor there is a silent, cold, unshakable law, behind the back of the defender there is a human being with his fate, his wants and needs; and this human being climbs onto shoulders of his defender, seeks his protection; and it's scary to slip with such a burden!"[1].

For Mr Müller, our applicant, to whom the four managing directors of his four client companies had entrusted their "wants and needs", it was also scary "to slip" – to make a deontological mistake in a situation where these persons, who had placed their trust in him, were under criminal investigation.

I respectfully dissent from the decision of the majority finding that the imposition of the administrative fine on him for his refusal to testify as a witness in criminal proceedings against the managing directors of his client companies did not constitute a violation of Article 8.

I believe that it did constitute such a violation, for two main reasons.

Firstly, I disagree that the interference in question was in accordance with the law. The majority noted a divergence in the interpretation of Article 53 of the Code of Criminal Procedure by different courts of appeal. In other words, the applicant had to take a delicate decision in a situation where there had been an opposite approach to this issue by courts at the same level of jurisdiction in different regions. The majority accepted that "this situation differ[ed] from that which ha[d] most often raised an issue under the Convention of conflicting case-law within the same supreme court", and that it was a role of the Federal Court of Justice, to which, however, the applicant did not have access (paragraph 54 of the judgment), to clarify the approach. Nevertheless, in their opinion the consistency of jurisprudence in the applicant's particular region was enough to make the law foreseeable.

I cannot share this view. A situation where lawyers in the same State in comparable situations did or did not have a right to refuse to testify, depending only on the area of territorial jurisdiction in which the proceedings at issue were adjudicated (with at least a theoretical possibility that a case might – for different reasons – be transferred to another area or go to a higher court) creates an obvious state of legal uncertainty, incompatible with the rule of law.

As stated by the US Supreme Court in the case of *Upjohn Company*[2]:

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[1] See Plevako F., N. Izbrannye rechi. - M. : Jurait, 2017, T.1, p.30.

[2] *Upjohn Company v. United States*, 449 U.S. 383, 393, 101 S. Ct. 677 (1981), emphasis added.

> "If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. *An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all*."

In the present case we are dealing precisely with "an uncertain privilege".

An argument in paragraph 59 that "the applicant would, in any event, have acted without guilt" fails to remove not only the issue of the unforeseeability of the law, but also a much more important deontological dilemma that he faced, and a risk of "slipping with such a burden". We should not forget that "where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice ... In addition, the attendant publicity must have been capable of affecting adversely the applicant's professional reputation, in the eyes both of his existing clients and of the public at large"[3].

With that I move to another, and far more significant, issue that the present case raises, namely whether the interference complained of was "necessary in a democratic society".

Referring to a wide margin of appreciation and to the decisions of the domestic courts, as well as to the lack of severity of the sanction (although detention had been envisaged – see paragraphs 25 and 71 of the judgment), the majority found that the interference had been proportionate, having again concentrated on the fact that "the applicant did not run an actual risk of committing the offence of disclosure of private secrets under Article 203 of the Criminal Code" (see paragraph 72 of the judgment).

I regretfully find that this limited perspective prevented the majority from looking at the very heart of the purpose of lawyer-client privilege and from carefully defining its scope in the present case.

This Court has held many times that the lawyer-client relationship is, in principle, privileged[4] and that confidential communication with one's lawyer is protected by the Convention as an important safeguard of the right to defend oneself[5]. The US Supreme Court has also expressed its belief that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law... [that] may be asserted by an individual or any entity, including a corporation"[6]. In its view the privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice"[7].

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[3] See *Niemietz v. Germany*, 16 December 1992, § 37, Series A no. 251-B.
[4] See *Campbell v. the United Kingdom*, 25 March 1992, § 46, Series A no. 233.
[5] See *Apostu v. Romania*, no. 22765/12, § 96, 3 February 2015.
[6] See *Upjohn Company v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677 (1981).
[7] Ibid.

In the present case the applicant had provided legal advice on different transactions to four companies prior to their insolvency. He argued – repeating a position of a number of German appeal courts in this respect (see paragraph 19 of the judgment) – that although formally he represented legal entities, only natural persons, i.e. the companies' managers, were capable of undertaking actions on behalf of the companies and were thus *de facto* his clients. It is difficult to contest this: as a figurative "person", the corporation cannot act on its own, and all its acts, including communication with counsel, are performed by physical "persons" – employees. Human clients have an indivisible identity, but for a company the client's identity and that of the communicator are different. This split should be recognised when lawyer-client privilege is at stake, i.e. the privilege covers both the company as client and the natural person – the communicator (a director or manager), who acts on its behalf and expresses its will. To do otherwise, i.e. to exclude the director, would run counter to the logic and spirit of this privilege, and would not take account of the nature of a legal person.

This concept was elegantly formulated by Lord Denning in *Bolton (Engineering) Co. Ltd.* as follows[8]:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. *The state of mind of these managers is the state of mind of the company and is treated by the law as such*."

American courts share the same view[9]:

> "... if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, ... then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply."

Apparently, this is also the settled position of a number of Courts of Appeal in Germany.

As the companies' lawyer advising on transactions, the applicant was perhaps required to carry out different tasks of commercial law, competition law or other fields of law, which definitely had a bearing on the commercial policy of the companies. When companies were seeking his advice, they provided him with information upon which the advice was to be based. But who provided such information – a figurative person or a physical one? The

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[8] *H L Bolton (Engineering) Co. Ltd. v. T J Graham & Sons Ltd.* [1957] 1 Q.B. 159, emphasis added.

[9] *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483,485 (E.D. Pa. 1962), emphasis added.

answer is obvious: communication occurred between physical persons. Thus a crucial problem arises – this communication might have consequences both for the legal entities and their managers: given the role of the latter in decision-making, where the wrong decision is taken the issue of their personal liability is self-evident. If, as in the present case, they are consequently held to be criminally liable, the legal advice to the companies and to themselves as managing directors clearly overlaps. Thus, the lawyer-client privilege granted to this communication covers both the companies and the communicators – the managing directors. As rightly noted by the German appeal courts, it "usually could not be ruled out that in his lawyer-client exchanges, the lawyer had obtained knowledge of personal secrets of the former managing director acting for the company in addition to secrets of the company" (see paragraph 19).

In the words of the Supreme Court of New South Wales, Australia[10]:

> "the privilege attached to legal advice obtained by a company is not lost when the advice is disclosed to its directors, but this is not because of their common interest. *The company can only manifest its acts and intentions by the actions and declarations of human beings*."

That relationship reinforced the ties of trust and loyalty between the applicant and his clients' managing directors. Under the lawyer-client privilege, the managing directors could be assured that the information communicated by them to the applicant would not later be used against them. As soon as they became suspects, their privilege against self-incrimination came to the fore.

Therefore, it is difficult to agree with the majority that a wide margin of appreciation must be afforded in this area (see paragraph 69 of the judgment): the Court has always insisted that the margin of appreciation tends to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of key rights[11], and the privilege against self-incrimination has been identified by the Court as lying at the heart of the rights which the defence enjoys under Article 6 of the Convention[12].

The Belgian Constitutional Court, for example, stressed this connection between lawyer-client confidentiality and privilege against self-incrimination, in setting aside a provision that laid down the conditions in which any person holding confidential information through status or occupation might depart from the professional duty of confidentiality in certain cases (crimes against minors and vulnerable persons). That court held[13]:

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[10] *Farrow Mortgage Services PL (In Liqn) v. Webb and Ors* [1996] NSWSC 259 (5 July 1996), emphasis added.

[11] See, for example, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008.

[12] See *Van der Heijden v. the Netherlands* [GC], no. 42857/05, § 64, 3 April 2012.

[13] *Gw.H.*, no. 127/2013, 26 September 2013.

> "In terms of confidential information conveyed by [lawyers'] clients and likely to incriminate those clients, the right of lawyers to depart from their professional duty of confidentiality related to activities which were central to their role of defence in criminal proceedings. Thus, the rule of professional confidentiality should give way only if that could be justified by a pressing reason of general interest and if the lifting of confidentiality was strictly proportionate to that objective."

No such careful proportionality analysis was carried out in the present case. Although, according to this Court, public interest concerns cannot justify measures that extinguish the very essence of defence rights, including the privilege against self-incrimination[14], in the present case the majority did not give thorough reasons to explain why they considered that the interference in question was in the interest of justice and outweighed the managing directors' defence rights.

Interestingly enough, the majority, speaking about a balancing of different interests at stake in paragraph 67, refer to the case of *Wieser and Bicos Beteiligungen GmbH v. Austria* (no. 74336/01, ECHR 2007-IV). But the Court reached an opposite conclusion in that case. There, the domestic authorities had argued that the first applicant (a lawyer) was not the applicant company's counsel and that the data seized did not concern their client-lawyer relationship. However, the mere fact that the first applicant had acted as counsel for companies whose shares were held by the applicant company was enough to conclude that his communication with the shareholder of his clients (the applicant company) was covered by lawyer-client privilege (ibid., § 65).

In the present case, given that the managing directors whom the applicant assisted on different transactions were subsequently criminally charged in respect of these very transactions, I am unable to separate the interests of these directors from those of the companies they had managed. The communication between them and the applicant was undoubtedly covered by lawyer-client privilege.

I thus find that in the absence of agreement of three (out of four) of the managing directors to release the applicant from professional secrecy, his refusal to testify in the proceedings against them represented the pinnacle of fidelity to his profession and commitment to deontological principles.

Therefore, having punished him for refusing to testify, the authorities overstepped the margin of appreciation afforded to them. Consequently, Article 8 has been violated.

[14] See *Jalloh v. Germany* [GC], no. 54810/00, § 97, ECHR 2006-IX.