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

FOURTH SECTION

CASE OF C.O. v. GERMANY

(Application no. 16678/22)

JUDGMENT

Art 6 § 2 • Presumption of innocence • Judgments in criminal proceedings against the co-suspects of the applicant who was tried separately, describing his actions and intentions and assessing them from a legal point of view • No indication that the relevant findings were unnecessary under domestic law for assessing the co-suspects' criminal liability • Criminal courts refrained from making any findings concerning the applicant's "guilt" within the meaning of the domestic criminal law • Absence of any binding or prejudicial effect of the impugned statements on the proceedings against the applicant

Prepared by the Registry. Does not bind the Court.

STRASBOURG

17 September 2024

FINAL

17/12/2024

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of C.O. v. Germany,

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

Gabriele Kucsko-Stadlmayer, *President*,
Faris Vehabović,
Branko Lubarda,
Anja Seibert-Fohr,
Ana Maria Guerra Martins,
Anne Louise Bormann,
Sebastian Răduleţu, *judges*,
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 16678/22) 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 C.O. ("the applicant"), on 30 March 2022;

the decision to give notice to the German Government ("the Government") of the complaints concerning Article 6 § 2 and Article 8 § 1 of the Convention, in so far as they concern statements made about the applicant in decisions of the criminal courts alleging his involvement in certain offences, and to declare inadmissible the remainder of the application;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 27 August 2024,

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

INTRODUCTION

1. The application concerns criminal proceedings against two persons who were found guilty of committing offences jointly with the applicant and/or aiding and abetting offences committed by him as one of the main perpetrators, even though he had not yet been found guilty of the offences. It raises, under Articles 6 § 2 and 8 of the Convention, the question whether the statements made about him in the courts' decisions breached his right to be presumed innocent and his right to respect for his private life.

THE FACTS

2. The applicant was born in 1942 and currently lives in Hamburg. He was represented by Ms E. Steiner, a lawyer practising in Vienna.

3. The Government were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice.

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

I. BACKGROUND TO THE CASE: THE “CUM-EX” SCHEME

5. The applicant is one of the beneficial owners and personally liable shareholders of a German private bank (hereinafter “the W-Bank”). From 2014 to 2019 he was chairman of W-Bank’s supervisory board.

6. W-Bank was involved in the “Cum-Ex” scandal, a large-scale tax fraud scheme in which significant dividend tax refunds were obtained under false pretences.

7. Until the end of 2011 the way in which dividend payments were processed made it factually possible, through complex financial transactions involving share traders and brokers abroad, to fraudulently claim a refund of capital gains tax even though no tax had actually been paid. By 31 December 2021 the volume of suspected cases of “Cum-Ex” tax losses reported to the Federal Tax Office had reached 4.5 billion euros (EUR).

8. After the “Cum-Ex” scheme was exposed, the Cologne public prosecutor’s office (“the prosecutor’s office”) initiated preliminary proceedings against numerous individuals, which were initially conducted as a single set of proceedings. Links to transactions by W-Bank emerged at an early stage of the investigation. On 19 February 2016 the prosecutor’s office opened a separate set of proceedings concerning W-Bank, directed against the applicant and nine others.

9. During the course of the investigation, a large number of other individuals and institutions also came under suspicion of involvement in the fraudulent transactions of W-Bank, including not only its employees, but also brokers, asset management companies and other banks. The investigations concerning the numerous accused persons progressed at different speeds.

II. CRIMINAL PROCEEDINGS AGAINST M.S. AND N.D.

10. Among the accused were M.S. and N.D., a shareholder and an employee of an asset management company based in the Cayman Islands.

11. On 7 March 2019 the prosecutor’s office initiated a separate set of proceedings against M.S. and N.D., who had confessed to their involvement in the fraudulent transactions of W-Bank and provided extensive information to the investigating authorities.

12. On 2 April 2019 M.S. and N.D. were indicted for tax evasion before the Bonn Regional Court (“the Regional Court”) on the grounds that they had been involved in the fraudulent transactions of W-Bank with other persons, including the applicant.

A. Proceedings before the Regional Court

13. During the trial against M.S. and N.D., the applicant had the status of a witness and was called by the court to testify. He was not heard, having exercised the right to remain silent in order not to incriminate himself.

14. On 18 March 2020 the Regional Court found M.S. guilty of ten counts of tax evasion (as a co-perpetrator with the applicant) and one count of aiding and abetting tax evasion (with the applicant as one of the main perpetrators), and N.D. guilty of five counts of aiding and abetting tax evasion (with the applicant as one of the main perpetrators). It also ordered the confiscation from W-Bank of over EUR 176 million, a sum corresponding to the illegally obtained tax credits. At that time, the applicant had not yet been indicted.

15. The Regional Court's written judgment against M.S. and N.D. contained ample factual findings, including with regard to the applicant. For every offence committed by M.S. and N.D., the court also described in detail the applicant's involvement, referring to him as a "separately prosecuted person" (*gesondert Verfolgter*) throughout the judgment. The numerous references to the applicant may be summarised as follows:

(a) he, acting together with other persons, had signed the bank's corporate tax returns and arranged for them to be handed in to the tax authorities;
(b) he, acting together with other persons, had devised a joint plan to obtain tax credits despite the fact that no tax had actually been levied;
(c) he had known that no tax had been levied, that the conditions for obtaining tax credits were not fulfilled and that future tax credits would not be in accordance with German tax law;
(d) he had been fully aware of the mechanism of "Cum-Ex" agreements (see paragraphs 6 and 7 above) and the fiscal effects of such agreements had been evident to him.

16. In its legal classification of the offences committed by M.S. and N.D., the Regional Court also assessed the applicant's involvement as a co-perpetrator or one of the main perpetrators, again referring to him as a "separately prosecuted person" throughout the judgment. The numerous references to the applicant may be summarised as follows:

(a) by personally signing the bank's corporate tax returns, he had participated in the offences in a way that qualified him as a perpetrator;
(b) he, acting together with other persons, had committed tax fraud, a criminal offence under Article 370 § 1 (1) of the Tax Code (see paragraph 24 below);
(c) he had acted in accordance with a joint plan devised together with other persons;
(d) he had acted intentionally;
(e) he had acted unlawfully (*rechtswidrig*);

(f) it was not necessary to determine whether he had also acted with guilt (*Schuld*), in particular whether he could invoke a mistake of law (*Verbotsirrtum*).

B. **Proceedings before the Federal Court of Justice**

17. On 28 July 2021 the Federal Court of Justice largely rejected appeals on points of law lodged by M.S., N.D., W-Bank and the prosecutor's office. In its statement of the facts and assessment of the legal classification of the offences by the Regional Court, it referred to the applicant in almost the same manner as that court (see paragraphs 15 and 16 above), referring to him as a "separately prosecuted person" throughout the judgment.

C. The applicant's constitutional complaint

18. On 20 October 2021 the applicant lodged a constitutional complaint against the criminal courts' decisions, claiming that their statements alleging his involvement in the offences committed by M.S. and N.D. had prematurely portrayed him as guilty and had breached his right to be presumed innocent. He also claimed that the impugned statements had severely damaged his reputation and public image before his criminal trial had even started, thus violating his personality rights.

19. On 22 November 2021 the Federal Constitutional Court decided not to accept the constitutional complaint for adjudication on the grounds that it was inadmissible (2 BvR 1872/21).

III. CRIMINAL PROCEEDINGS AGAINST C.S.

20. On 1 June 2021 the Regional Court sentenced C.S., an authorised signatory of W-Bank, to five and a half years in prison for tax evasion in connection with the "Cum-Ex" scheme (see paragraphs 6 and 7 above). The written judgment also contained findings implicating the applicant in the offences committed by C.S., with the court referring to him as a "separately prosecuted person" throughout the judgment.

IV. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

21. On 1 July 2022 the prosecutor's office indicted the applicant for tax evasion before the Regional Court.

22. On 12 April 2023 the Regional Court opened the trial against him.

23. On 24 June 2024 the Regional Court discontinued the proceedings on the grounds that the applicant was no longer fit to stand trial due to his poor health. This decision is not yet final as both the applicant and the prosecutor's office have lodged an appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. TAX CODE

24. Article 370 of the Tax Code (*Abgabenordnung*) concerns tax evasion and reads, in so far as relevant, as follows:

> "(1) A sentence of five years' imprisonment or a fine shall be imposed on any person who:
>
> 1. provides the tax authorities or other authorities with incorrect or incomplete information concerning matters that are relevant for tax purposes,
>
> ...
>
> and thereby reduces tax revenues or obtains unjustified tax benefits for himself or another.
>
> ...
>
> (3) In particularly serious cases, the offence shall be punished by six months to ten years' imprisonment. As a general rule, a particularly serious case is one in which the perpetrator:
>
> 1. reduces tax revenues or obtains unjustified tax benefits on a large scale [*until 31 December 2007:* while acting out of 'gross self-interest'] ..."

II. CRIMINAL CODE ("THE CC")

25. Under German criminal law, three basic conditions must be met in order to establish criminal liability (*Strafbarkeit*).

26. Firstly, the accused must have fulfilled the constituent elements (*Tatbestand*) of the criminal offence. These include the question of *actus reus* (*objektiver Tatbestand*), that is, whether the accused carried out or failed to carry out certain acts described in the relevant legal provision, and the question of *mens rea* (*subjektiver Tatbestand*), that is, whether the accused acted intentionally or negligently, depending on the legal provision in question.

27. Secondly, the accused must have acted unlawfully (*rechtswidrig*), that is, in the absence of any exonerating circumstances such as self-defence.

28. Thirdly, the accused must have "acted with guilt" (*Schuld*), that is, with the ability to recognise the wrongfulness of his or her actions and to act accordingly. This is not the case, for instance, if he or she was not of sound mind at the time of the offence. The accused has also acted without guilt if he or she mistakenly considered his or her actions to be lawful and could not have avoided such an error; he or she can then invoke a mistake of law (*Verbotsirrtum*).

29. An accused person can only be found guilty of an offence if all three basic conditions of criminal liability – constituent elements, unlawfulness and guilt – have been fulfilled.

30. In order to find a person guilty of committing an offence as a co-perpetrator under Article 25 § 2 of the CC, it is necessary to establish that he or she took a joint decision to act together with other persons (*gemeinschaftlicher Tatentschluss*) and then put that decision into effect together with other persons (*gemeinschaftliche Tatausführung*).

31. In order to find a person guilty of aiding and abetting an offence committed by another person under Article 27 § 1 of the CC, it is necessary to establish that he or she intentionally assisted another person (the main perpetrator) in intentionally committing an unlawful act. It must therefore be established that the main perpetrator has fulfilled the constituent elements of the offence in question and that he or she has acted unlawfully. It is not necessary, however, to establish that the main perpetrator has also acted with guilt either. This follows, on the one hand, from Article 27 § 1 of the CC, which does not refer to the main perpetrator's guilt and, on the other hand, from Article 29 of the CC, which provides that each person involved in an offence is to be punished according to his or her own guilt, without regard to the guilt of the other persons involved. The fact that the criminal liability of a person aiding and abetting an offence depends on the main perpetrator having fulfilled two of the three basic conditions for his or her own criminal liability is also referred to as the "limited accessoriness of aiding and abetting" (*limitierte Akzessorietät der Beihilfe*, see the Federal Constitutional Court's decision of 27 January 2023, 2 BvR 1122/22, § 39).

III. CODE OF CRIMINAL PROCEDURE ("THE CCP")

32. A number of provisions in the CCP provide that statements contained in a written judgment against a person involved in an offence have no binding effect on the trial of another person involved in the offence. For instance, Article 155, read in conjunction with Article 264, provides that a criminal court's decision only applies to the offence specified and the persons accused in the indictment. Article 261 provides that the trial court makes its decision in accordance with its free conviction, on the basis of the evidence presented at the trial (*Inbegriff der Hauptverhandlung*), that is, not on the basis of the hearing of a different trial.

33. Furthermore, under German criminal procedural law, there is an obligation to conduct criminal proceedings expeditiously (*Beschleunigungsgrundsatz*), which is reflected in several provisions of the CCP and has been recognised by the Federal Constitutional Court (see, for instance, its decision of 21 June 2006, 2 BvR 750/06, 2 BvR 752/06, 2 BvR 761/06).

IV. CASE-LAW OF THE FEDERAL CONSTITUTIONAL COURT

34. In its decision of 27 January 2023 (2 BvR 1122/22), which also concerned criminal proceedings in a "Cum-Ex" case (see *Schmid v. Germany*, no. 25095/23, currently pending), the Federal Constitutional Court stated that in complex criminal proceedings it was not always possible for the courts to try several accused persons at the same time. It held that the complexity of "Cum-Ex" proceedings had justified the criminal court's decision to conduct separate trials against several accused persons who had been indicted together. A single trial directed against all of them would have burdened those who were of secondary importance to the case with a long trial and would thus have been contrary to the obligation to conduct criminal proceedings expeditiously (see paragraph 33 above).

35. It further found that in order to find an accused person guilty of aiding and abetting an offence, it was indispensable for the criminal courts to establish that the main perpetrator had intentionally committed an unlawful act, and they had to establish these elements as accurately and precisely as possible without presenting them as mere allegations or assumptions. Moreover, in the context of the underlying "Cum-Ex" proceedings, the criminal courts could not simply describe the main perpetrator's actions in a more general manner and refrain from disclosing the main perpetrator's identity. In order to establish that the main perpetrator had acted intentionally, his identity, in particular his professional status and his knowledge of tax legislation, was of critical importance.

V. CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ("THE CJUE")

36. In its judgment of 5 September 2019 (*AH and Others* (presumption of innocence), C-377/18), the CJEU stated that if one of several accused persons entered into a plea-bargaining agreement, the agreement was only allowed to refer to the other accused persons who had not recognised their guilt and were being prosecuted in separate criminal proceedings if, firstly, such reference was necessary for the purpose of categorising the legal liability of the person who had entered into the agreement and, secondly, the agreement made it clear that those other persons were being prosecuted in separate criminal proceedings and that their guilt had not been legally established.

37. Furthermore, in its judgment of 18 March 2021 (*Pometon v. Commission*, C-440/19, § 63), the CJEU, referencing the Court's case-law (in particular *Karaman v. Germany*, no. 17103/10, §§ 64-65, 27 February 2014), stated that in complex criminal proceedings involving several persons who could not be tried together, references by the competent court to the participation of third persons, who might later be tried separately, might be indispensable for the assessment of the guilt of those who were on trial.

However, if facts related to the involvement of third parties had to be introduced, the relevant court should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who were accused in the trial before it. In addition, the reasoning of judicial decisions had to be worded in such a way as to avoid a potential prejudgment about the guilt of the third parties concerned, capable of jeopardising the fair examination of the charges brought against them in the separate proceedings.

THE LAW

I. SCOPE OF THE CASE

38. The Court notes that, in his observations following communication of the application, the applicant stated that his right to be presumed innocent had been breached not only by the aforementioned statements in the decisions of the Regional Court of 18 March 2020 (see paragraphs 14-16 above) and the Federal Court of Justice of 28 July 2021 (see paragraph 17 above), but also by certain statements made about him in a judgment of the Regional Court of 13 December 2022 in criminal proceedings against H.B., a tax lawyer, in connection with the "Cum-Ex" scheme (see paragraphs 6 and 7 above). The applicant argued that these findings further aggravated the violation of his right to be presumed innocent and constituted a fresh violation of that right.

39. The Court considers that this new complaint does not constitute an elaboration of the applicant's original complaints in his application lodged on 30 March 2022. Consequently, it falls outside the scope of the present application (see, *mutatis mutandis*, *Pirtskhalava and Tsaadze v. Georgia*, no. 29714/18, § 36, 23 March 2023, and *Skubenko v. Ukraine* (dec.), no. 41152/98, 6 April 2004).

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

40. The applicant claimed that the statements in the written judgments of the Regional Court of 18 March 2020 and the Federal Court of Justice of 28 July 2021 alleging his involvement in the offences committed by M.S. and N.D. had amounted to a premature expression of his guilt. He relied on Article 6 § 2 of the Convention, which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility

1. Abuse of the right of individual application

41. The Government alleged that, in his application to the Court, the applicant had made repeated use of an incorrect translation of the judgments

of the domestic courts. In particular, he had wrongly claimed that the judgments contained findings regarding his “guilt” (*Schuld*), whereas the domestic courts had in fact refrained from making such findings. The Government argued that it was at least conceivable that the applicant had attempted to mislead the Court.

42. The applicant denied that he had mistranslated any part of the judgments of the domestic courts. He argued that the problem in the present case was not a misleading translation, but a difference in interpretation of the word “guilt” under German criminal law and under the Convention.

43. The Court considers that the Government’s allegation must be understood as a preliminary objection that the application should be rejected as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention.

44. The Court reiterates that an application may be rejected as an abuse of the right of application under this provision if, among other reasons, it is knowingly based on untrue facts with a view to deceiving the Court (see *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; *Gogitidze and Others v. Georgia*, no. 36862/05, § 76, 12 May 2015, with further references; and *Gashi and Gina v. Albania*, no. 29943/18, § 32, 4 April 2023). Applicants must reproduce the facts correctly and their legal views must not limit the account of the facts. In the present case, there is no sufficient indication that the applicant knowingly submitted misleading information to the Court. In so far as the Government objected to the applicant’s use of the word “guilt”, the Court considers that this is a matter to be assessed when dealing with the examination of the content and meaning of the domestic decisions challenged by the applicant (see paragraph 65 below).

45. The Government’s preliminary objection is therefore dismissed.

2. *Other grounds for inadmissibility*

46. The Court notes that the complaint 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. *The parties’ submissions*

(a) The applicant

47. The applicant complained that the domestic courts had described his actions and intentions in detail, even though he had not had the opportunity to deny or refute these assumptions. Moreover, the courts had assessed his actions from a legal point of view. While they had not made any findings regarding his “guilt” (*Schuld*) within the meaning of German criminal law, they had explained in detail that he had fulfilled all the other basic conditions

of criminal liability (see paragraphs 25 to 28 above). They had clearly expressed their belief that he was guilty, instead of merely expressing a suspicion that he had committed the offences in question. Furthermore, the courts had used strong language, repeatedly stating that they were "convinced" (*überzeugt*) and never using the terms "alleged" or "allegedly" (*angeblich*) when describing his involvement in the offences. They had also unnecessarily disclosed his identity. Overall, they had gone far beyond what was necessary to establish the criminal liability of M.S. and N.D., who had already assumed responsibility for their actions and cooperated with the authorities. By comparison, the Regional Court had used much more restrained language when referring to him in its written judgment against C.S. (see paragraph 20 above).

48. The applicant also maintained that the fact that the domestic courts had referred to him as a "separately prosecuted person" throughout their written judgments had not been a sufficient safeguard of his right to be presumed innocent. Any protective effect of that expression had ultimately been cancelled out by the excessive factual findings and legal assessment concerning his alleged involvement in the offences, as well as by the strong language used by the domestic courts. The applicant argued that further procedural safeguards would have been necessary to protect his right to be presumed innocent, in particular the use of more moderate language and a clear indication that his guilt could only be established in the separate criminal proceedings pending against him. Relying on the CJEU's judgment of 5 September 2019 in the case of *AH and Others* (see paragraph 36 above), he complained that the criminal courts had not made any explicit reference to the presumption of innocence or any explicit statement that his guilt could only be established in the proceedings initiated against him personally.

49. Furthermore, the applicant claimed that it was problematic, in the light of the presumption of innocence, to convict persons accused of aiding and abetting an offence before trying the main perpetrator, as the courts had done in the present case.

50. The applicant argued that the impugned statements had compromised the fairness of the (then ongoing) criminal proceedings against him because the findings of the criminal courts in the proceedings against M.S. and N.D. had been legally binding on the court hearing the case against him and had thus *de facto* prejudged the outcome of the criminal proceedings against him.

(b) The Government

51. The Government submitted that the mere fact that M.S. and N.D. had been tried and sentenced separately before the applicant's trial was not a cause for concern. Owing to the complex nature of "Cum-Ex" cases and the large number of accused persons, it had not been possible to try them all at the same time. Since M.S. and N.D. had been among the few accused persons who had confessed to their involvement in the fraudulent transactions, it had

been decided, for organisational reasons and in the interests of procedural economy, to indict them separately shortly after their confession. That decision had also been in line with the obligation under German law to conduct criminal proceedings expeditiously (*Beschleunigungsgrundsatz*, see paragraph 33 above).

52. Furthermore, the Government essentially claimed that in the absence of any findings regarding the applicant's "guilt" (*Schuld*) within the meaning of German criminal law, a violation of his right to be presumed innocent could be ruled out from the outset. They argued that the presumption of innocence, as guaranteed by Article 6 § 2 of the Convention, was at issue where the criminal liability of an individual had been prejudged, that this criminal liability was determined in accordance with domestic law, and that under German criminal law, "guilt" (*Schuld*) was only one of several elements necessary to establish criminal liability (see paragraphs 25 to 28 above). The Government stressed that the criminal courts had refrained from making any findings regarding the applicant's "guilt" (*Schuld*).

53. The Government also submitted that, by referring to the applicant as a "separately prosecuted person" throughout their written judgments, the criminal courts had made it clear that he was not the defendant and that his guilt (criminal liability) was not to be established in the proceedings against M.S. and N.D. Relying on the Court's judgment in the case of *Bauras v. Lithuania* (no. 56795/13, § 54, 31 October 2017), the Government argued that, by using this linguistic device, the criminal courts had avoided, as far as possible, giving the impression that they were prejudging the applicant's guilt (criminal liability).

54. The Government further maintained that the statements regarding the applicant's involvement in the offences committed by M.S. and N.D. had been indispensable. In order to find M.S. guilty of tax evasion as a co-perpetrator, the criminal courts had been required by law to establish that M.S. had acted jointly with another person (the applicant) in accordance with a joint plan devised with that other person (see paragraph 30 above). In order to find M.S. and N.D. guilty of aiding and abetting tax evasion, the criminal courts had been required by law to establish that another person (the applicant) had intentionally and unlawfully committed tax evasion as one of the main perpetrators (see paragraph 31 above). These findings had been necessary irrespective of the fact that M.S. and N.D. had already confessed to their involvement in the offences. In this regard, the Government stressed that the criminal courts had not made any findings other than those strictly necessary to find M.S. and N.D. guilty and had not made any unfounded assumptions about the applicant's involvement in the offences.

55. In so far as the applicant referred to the judgment against C.S. (see paragraph 20 above), the Government argued that it could not be compared to the judgment against M.S. and N.D., as C.S. had been found guilty of tax evasion as one of the main perpetrators (and not merely of aiding and abetting

tax evasion), and that therefore less pronounced references to the applicant's involvement in the offences had been sufficient.

56. The Government further submitted that there was nothing to indicate that the statements contained in the written judgments of the criminal courts had compromised the overall fairness of the (then ongoing) criminal proceedings against the applicant. It stressed, in this connection, that the findings of the criminal courts in the proceedings against M.S. and N.D. had not been legally binding on the criminal court hearing the case against the applicant and that that court was required by law to make its own findings and reach its own conclusions on the basis of the evidence presented during the subsequent trial against the applicant (see paragraph 32 above).

2. *The Court's assessment*

(a) Relevant principles

(i) General principles regarding the presumption of innocence

57. The Court reiterates that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair criminal trial that is required by paragraph 1 (see, among many other authorities, *Deweer v. Belgium*, 27 February 1980, § 56, Series A no. 35; *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308; and *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, § 103, ECHR 2014 (extracts)). Article 6 § 2 prohibits the premature expression by the tribunal of the opinion that the person "charged with a criminal offence" is guilty before he or she has been so proved according to law (see, among many other authorities, *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62, and *Peša v. Croatia*, no. 40523/08, § 138, 8 April 2010). It also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Allenet de Ribemont*, cited above, § 41; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-43, ECHR 2000-X; and *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II (extracts)).

58. The Court further reiterates that a fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. In this connection the Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Daktaras*, cited above, § 41; *Böhmer v. Germany*, no. 37568/97, § 56, 3 October 2002; and *Khuzhin and Others v. Russia*, no. 13470/02, § 94, 23 October 2008). While the use of language is of critical importance in this respect, the Court has further pointed out that whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the

particular circumstances in which the impugned statement was made (see *Daktaras*, cited above, § 43; *A.L. v. Germany*, no. 72758/01, § 31, 28 April 2005; and *Paulikas v. Lithuania*, no. 57435/09, § 55, 24 January 2017). When regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive. The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised (see *Nealon and Hallam v. the United Kingdom* [GC], nos. 32483/19 and 35049/19, §§ 150 and 176, 11 June 2024, and *Allen v. the United Kingdom* [GC], no. 25424/09, § 126, ECHR 2013, and the cases cited therein).

(ii) Principles regarding statements made in parallel criminal proceedings against co-suspects

59. The Court reiterates that the principle of the presumption of innocence may in theory also be infringed on account of premature expressions of a suspect's guilt made within the scope of a judgment against separately prosecuted co-suspects (see *Karaman v. Germany*, no. 17103/10, § 42, 27 February 2014).

60. The Court has previously accepted that in complex criminal proceedings involving several persons who cannot be tried together, references by the trial court to the participation of third persons, who may later be tried separately, may be indispensable for the assessment of the guilt of those who are on trial. Criminal courts are bound to establish the facts of the case relevant for the assessment of the legal responsibility of the accused as accurately and precisely as possible, and they cannot present established facts as mere allegations or suspicions. This also applies to facts related to the involvement of third persons. However, if such facts have to be introduced, courts should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it (see *Karaman*, cited above, § 64; see also, *mutatis mutandis,* in respect of Article 6 § 1, *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 99, 23 February 2016; *Mucha v. Slovakia*, no. 63703/19, § 58, 25 November 2021; *Meng v. Germany*, no. 1128/17, § 47, 16 February 2021; and *Alarich v. Germany* (dec.), no. 37027/20, § 11, 17 October 2023. See also the CJEU's judgment in the case of *Pometon v Commission,* § 63, cited in paragraph 37 above, in reference to the Court's case-law).

(b) Application of these principles to the present case

61. The Court observes that the preliminary proceedings concerning "Cum-Ex" transactions in connection with W-Bank were initially conducted as a single set of proceedings directed against numerous accused persons, and that the prosecutor's office then decided to initiate a separate set of

proceedings against only M.S. and N.D. and to indict them earlier than the other accused persons, including the applicant (see paragraphs 11 and 12 above). The Court takes note of the grounds on which the prosecutor's office separated the proceedings, namely the complexity and scale of "Cum-Ex" proceedings and the fact that the case against M.S. and N.D. was ready for trial because of their confessions, unlike the case against the other accused persons (see paragraph 11 above). It considers that the decision to separate the proceedings was in line with the obligation, under German law, to conduct criminal proceedings expeditiously (see paragraph 33 above) and with M.S. and N.D.'s right to a fair hearing within a reasonable time under Article 6 § 1 of the Convention. The Court therefore sees no reason to consider this decision unjustified (see, *mutatis mutandis*, *Bauras*, cited above, § 54).

62. The Court notes that, in their written judgments concerning M.S. and N.D., the Regional Court and the Federal Court of Justice not only described in detail the applicant's actions and intentions from a factual point of view, but also assessed them from a legal point of view. In particular, the criminal courts found that the applicant had fulfilled the constituent elements (*actus reus* and *mens rea*) of the criminal offence of which he had been accused (tax evasion) and that he had done so unlawfully (see paragraphs 14-17 above). They thus found that the applicant had fulfilled two of the three basic conditions required to establish criminal liability under domestic law (see paragraphs 25 to 28 above).

63. The Court has to examine to what extent the impugned statements constitute a premature expression of guilt. It reiterates in this respect that if facts related to the involvement of third persons have to be introduced in criminal courts' decisions, the courts should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it (see paragraph 60 above). The Court observes that, according to the Government's submissions, in so far as the criminal courts referred to the existence of a joint plan devised and implemented by the applicant together with other persons (see paragraphs 15 and 16 above), these findings were necessary, in the light of Article 25 § 2 of the CC (see paragraph 30 above), to establish that M.S. had committed tax evasion as a co-perpetrator. It further observes that, according to the Government's submissions (see paragraph 54 above), in so far as the criminal courts stated that the applicant had intentionally and unlawfully committed tax evasion (see paragraph 16 above), these findings were necessary, in the light of Article 27 § 1 of the CC (see paragraph 31 above), to establish that M.S. and N.D. had aided and abetted that offence. The Court notes that the applicant has neither contested these submissions nor demonstrated how the criminal courts could have convicted M.S. and N.D. without making the impugned statements. He merely claimed that the Regional Court had used much more restrained language when referring to him in its written judgment against C.S. (see paragraphs 20 and 47 above). The Court takes note, in this

respect, of the Government's argument that the judgment against C.S. was not comparable to the one against M.S. and N.D. (see paragraph 55 above). It therefore considers that there is no indication that the impugned statements were unnecessary under domestic law for the assessment of M.S. and N.D.'s criminal liability, irrespective of the fact that they had both confessed to their involvement in the offences. In this connection, the Court takes note of the Federal Constitutional Court's decision of 27 January 2023, in particular concerning the requirement of accurate and precise language (see paragraph 35 above).

64. Furthermore, the Court observes that the criminal courts refrained from making any findings regarding the applicant's "guilt" (*Schuld*) within the meaning of German criminal law, in particular the question whether the applicant could invoke a mistake of law (*Verbotsirrtum*) concerning the fraudulent nature of "Cum-Ex" transactions (see paragraphs 16 (f) and 28 above), and that that decision was in line with the principle of "limited accessoriness of aiding and abetting" under domestic law (see paragraph 31 above).

65. The Court takes note of the Government's argument that the absence of any findings regarding the applicant's "guilt" (*Schuld*) within the meaning of German criminal law meant that the criminal courts had not prejudged the applicant's guilt, that is, his criminal liability (see paragraph 52 above). The Court points out that while a violation of the presumption of innocence is determined according to the autonomous meaning of the Convention, the well-established meaning and effect of legal terms under domestic law must be taken into account when determining whether a statement can be qualified as a statement of criminal guilt (see *Fleischner v. Germany*, no. 61985/12, §§ 65 and 69, 3 October 2019; concerning the relevance of domestic law in this context see also *Karaman,* cited above, § 69).

66. The Court also notes that, contrary to the applicant's misleading argument (see paragraph 50 above), the impugned statements had no binding effect under German criminal law on the court dealing with the case against him. According to the provisions of German law, no inferences about a person's guilt may be drawn from criminal proceedings in which he or she has not participated (see paragraph 32 above and also *Karaman*, cited above, § 65) and an accused person is protected by the presumption of innocence.

67. Nevertheless, the Court has to examine whether the criminal courts' reasoning in the present case was worded in such a way as to give rise to doubts as to a potential prejudgment about the applicant's guilt (*Karaman*, cited above, § 65).

68. The Court considers that, by referring to the applicant throughout the written judgments as a "separately prosecuted person", the criminal courts emphasised the fact that they were not called upon to determine the applicant's guilt but, in line with the provisions of domestic law on criminal procedure, were only concerned with assessing the criminal liability of those

accused within the scope of the proceedings at issue, namely M.S. and N.D. (see *Karaman*, § 69, and *Bauras*, § 54, both cited above; compare the CJUE's judgment in the case of *AH and Others*, cited in paragraph 36 above, concerning statements in a pleabargaining agreement concluded by only one of several accused persons).

69. Furthermore, the Court observes that the criminal courts' statements have not ultimately had any prejudicial effect on the proceedings against the applicant (see paragraph 23 above).

70. In view of the above considerations, the Court concludes that the impugned statements in the reasoning of the Regional Court's judgment of 18 March 2020 and the Federal Court of Justice's judgment of 28 July 2021 have not had any prejudicial effect and thus did not breach the principle of the presumption of innocence.

71. There has accordingly been no violation of Article 6 § 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 § 1 OF THE CONVENTION

72. The applicant further alleged that the impugned statements in the decisions of the criminal courts had stigmatised him and adversely affected his private and professional life. In particular, he submitted that as a result of those statements, he had had to resign from his mandates in W-Bank and other companies, that his voting rights in W-Bank had been withdrawn and that his right to dispose of his shares in W-Bank had been limited. He relied on Article 8 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "Everyone has the right to respect for his private ... life ..."

73. The Government submitted that the statements had not violated Article 8 § 1 for the same reasons that they had not violated Article 6 § 2.

A. Admissibility

74. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

B. Merits

75. Having regard to its above finding that the statements in the decisions of the Regional Court and the Federal Court of Justice alleging the applicant's involvement in the offences committed by M.S. and N.D. have not breached Article 6 § 2 of the Convention (see paragraphs 61-71 above), the Court considers that those statements do not, in the circumstances of the present case, raise a separate issue under Article 8 § 1 of the Convention (see, *mutatis mutandis*, *Erikan Bulut v. Turkey*, no. 51480/99, § 59, 2 March 2006).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 2 of the Convention;

3. *Holds* that no separate issue arises under Article 8 § 1 of the Convention.

Done in English, and notified in writing on 17 September 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Registrar	Gabriele Kucsko-Stadlmayer President