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

FOURTH SECTION

DECISION

Applications nos. 1022/19 and 1125/19
Martin KOCK and Others against Germany
and JONES DAY against Germany

The European Court of Human Rights (Fourth Section), sitting on 22 October 2024 as a Committee composed of:

Faris Vehabović*, President*,
Armen Harutyunyan,
Anja Seibert-Fohr*, judges*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the applications 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 the applicants listed in the appended table ("the applicants"), on the date indicated therein;

the President's decision to grant confidentiality to certain documents submitted by the applicants (Rule 33 § 1 of the Rules of Court);

the decision to give notice of the applications to the German Government ("the Government") represented by two of their Agents, Ms S. Jacoby and Ms N. Wenzel, of the Federal Ministry of Justice;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the German Federal Bar Association (*Bundesrechtsanwaltskammer*) and the Council of Bars and Law Societies of Europe, who were granted leave to intervene by the President of the Section;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The applications concern the search of the business premises located in Munich of a law firm incorporated in the United States of America and the securing of documents and electronic data collected during that search. They were submitted by three lawyers of the law firm in question (Jones Day)

(application no. 1022/19) and by the law firm itself (application no. 1125/19) under Article 8 of the Convention.

2. In 2015 the Volkswagen stock corporation (VW) authorised the law firm (the fourth applicant) to provide it with legal advice and to represent it before the judicial authorities in the United States of America in the context of criminal investigation opened against VW for alleged fraud related to the use of technical devices aimed at manipulating exhaust emissions of diesel vehicles. To that end, the fourth applicant carried out an internal investigation that included, *inter alia*, the questioning of over 700 VW employees. In that context, the first, second and third applicants examined documents and questioned staff members of the Audi stock corporation (Audi), one of VW's subsidiary companies.

3. In 2015 the Braunschweig Public Prosecutor's Office also launched criminal investigation against the persons responsible at VW, and administrative offence proceedings against VW for, *inter alia,* fraud in the context of the alleged manipulation of exhaust emissions.

4. In January 2017 VW pleaded guilty in a Plea Agreement concluded in the United States of America admitting to having sold diesel vehicles with engines built by both VW and Audi equipped with unauthorised emissions control devices.

5. In March 2017 the Munich II Public Prosecutor's Office launched criminal investigation for fraud on account of the use by Audi of unauthorised emissions control devices. During the investigation, two of the applicant lawyers verbally provided, with VW's permission, information to the public prosecutors, on three occasions, about the interim results of the internal investigations.

6. On 6 March 2017 the Munich District Court ordered the search of the fourth applicant's Munich office. The aim of the search was discovery and seizure of documents, which the fourth applicant had collected or created in the context of its internal investigation at Audi regarding the alleged manipulation of exhaust emissions of Audi diesel engines. The warrant explicitly excluded documents concerning diesel engines manufactured by VW.

7. On 15 March 2017 the fourth applicant's Munich office was searched. The prosecutors and police officers present on the scene secured 185 folders and a large amount of electronic data, including the lawyers' email exchanges, concerning the results of the internal investigation. They were removed from the office for further sifting.

8. In May and June 2017 the Munich I Regional Court dismissed the applicants' appeals against the search order. It noted, *inter alia,* that at that time there was no lawyer-client relationship between the fourth applicant and Audi which, moreover, was not (yet) formally a suspect in the investigation instituted by the Munich II Public Prosecutor's Office (see paragraph 5 above). It also held that, even though it was not unlikely that administrative

offence proceedings would be initiated against Audi, it was rather unlikely that such proceedings would be opened against VW by the Munich II Public Prosecutor. Furthermore, even though the applicants had not been suspected of any offence and the confidentiality of the lawyer-client relationship between the fourth applicant and VW had been affected, given the gravity of the alleged offence – fraud in 80,000 cases – and considerable damage caused, the search had been proportionate. The court also explained in detail why no less invasive, but equally effective, measures were available to the public prosecutor.

9. On 27 June 2018 the Federal Constitutional Court declined to admit for adjudication the applicants' constitutional complaints against the above decisions upholding the search and the securing of documents and data (file nos. 2 BvR 1287/17, 2 BvR 1583/17, 2 BvR 1562/17).

10. With a separate decision of the same date, the Federal Constitutional Court also declined to admit for adjudication a constitutional complaint brought by VW about the search of the fourth applicant's Munich office and the securing of documents and data (file nos. 2 BvR 1405/17 and 1780/17). The court found, in particular, that the securing and subsequent analysis of the documents and data collected during the search had interfered with VW's right to informational self-determination (*Recht auf informationelle Selbstbestimmung* – see *Breyer v. Germany*, no. 50001/12, § 25, 30 January 2020). However, that interference had been lawful, justified and proportionate. The criminal courts' interpretation of the relevant provisions was in accordance with the prevailing opinion expressed in the domestic jurisprudence and legal doctrine and was compatible with the Constitution. Furthermore, the criminal courts were right to interpret the Code of Criminal Procedure restrictively, so as to proscribe seizure of material only in the context of relationships of trust between the accused and his or her lawyer. In the case at issue, VW had not been charged by the Munich II Public Prosecutor's Office for the alleged fraud by Audi in relation of the use of unauthorised exhaust emissions control devices built in the latter's vehicles. Audi, as a subsidiary company, had not been included in the protection of the lawyer-client relationship, which only existed between the parent company VW and the fourth applicant. In addition, Article 160a of the Code of Criminal Procedure barred the Braunschweig Public Prosecutor's Office from using any documents, data or information, obtained during the search in question in the proceedings against VW. Lastly, the criminal courts' finding that the securing of documents and data had been proportionate was equally compatible with the Constitution. The courts had taken account of the constitutional protection of the lawyer-client relationship between Jones Day and VW. As VW had authorised Jones Day to conduct an independent internal investigation, that relationship had not, however, been characterised by a particular relationship of trust.

11. The applicants complained that the search of the fourth applicant's Munich office, as well as the securing of documents and data which the three applicant lawyers had compiled or created during the internal investigation, had violated their rights under Article 8 of the Convention. They argued, in particular, that the relevant provisions of the Code of Criminal Procedure (Articles 97 and 160a) and the courts' interpretation thereof had not been sufficiently clear and foreseeable and that the search and securing of documents complained of had been neither necessary in a democratic society nor proportionate.

THE COURT'S ASSESSMENT

12. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single decision.

13. The Government raised non-exhaustion objection arguing that the applicants had not raised certain arguments in the domestic proceedings on which they subsequently relied before the Court. The Court considers that it does not need to address the Government's objection as the applications are, in any event, manifestly ill-founded for the following reasons.

14. The Court considers that the search of the fourth applicant's Munich office and the securing of documents and electronic data constituted an interference with the applicants' rights, as guaranteed under Article 8 § 1 of the Convention (see *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, § 45, ECHR 2007-IV, and *André and Another v. France*, no. 18603/03, §§ 36-37, 24 July 2008).

15. In so far as the applicants argue that the legal basis for the interference was not sufficiently clear and foreseeable and, therefore, not in accordance with the law, the Court notes that the relevant principles, in particular in the context of divergent case-law, as in the present case, have recently been reiterated in *Klaus Müller v. Germany* (no. 24173/18, §§ 48-52, 19 November 2020). The Constitutional Court established that the domestic courts' interpretation of Articles 97 and 160a of the Code of Criminal Procedure was in accordance with the prevailing domestic jurisprudence, as well as the legal doctrine (see paragraph 10 above). In the absence of any evidence casting doubt on that finding, the Court is satisfied that the domestic law, as applied by the domestic courts, was foreseeable and that the search for and securing of documents and data were "in accordance with the law" for the purposes of Article 8 § 2 of the Convention.

16. The Court is also satisfied that the interference served the legitimate aim under Article 8 § 2 of preventing crime.

17. To determine whether the interference complained of was "necessary in a democratic society", the Court would begin by pointing out that the Munich II Public Prosecutor's Office's investigation was, at the time of the search, directed at persons with unknown identity employed by Audi and,

while the Regional Court considered that it was not unlikely that administrative offence proceedings would be initiated against Audi, it considered it rather unlikely that such proceedings would be opened against VW by the Munich II Public Prosecutor (see paragraph 8 above). In addition, the Constitutional Court held that none of the documents, data or information obtained during the search could be used in the proceedings against VW in Braunschweig (see paragraphs 3 and 10 above). The Court therefore concludes that the search for and securing of documents did not affect VW's right not to incriminate itself. This is also relevant for the applicants in that the protection of professional secrecy is the corollary of the right of a lawyer's client not to incriminate himself (see, for example, *André and Another*, cited above, § 41).

18. The Court also observes that Audi and VW are, notwithstanding the fact that Audi is a subsidiary of VW, separate legal entities. Unlike VW, Audi, whose data was targeted with the search, had, however, not authorised the fourth applicant; nor had it been included in the legal consultancy contract. The Court therefore concludes, as did the domestic courts (see paragraphs 8 and 10 above), that there was no lawyer-client relationship between Audi and the applicants.

19. In so far as the search affected, as recognised by the domestic courts (see paragraphs 8 and 10 above), the lawyer-client relationship between the applicants and VW, the Regional Court also held that the fourth applicant was only authorised by VW to represent it before the judicial authorities in the United States of America but not before the judicial authorities in Germany. The Court observes that by the time the search was ordered and conducted in March 2017, the investigation against VW in the United States of America had already been concluded with the Plea Agreement, signed by VW in January 2017 (see paragraph 4 above). In the German criminal proceedings VW was, however, represented by other law firms. The Court notes that the main task of the mandate was for the fourth applicant to conduct an internal investigation (see paragraph 2 above). In this context the Court takes note of the fact that the Munich II Public Prosecutor's Office was, prior to the search, provided with verbal reports about the internal investigation by two of the applicants and with VW's permission (see paragraph 5 above). The search for and securing of documents therefore did not go to the very essence of a lawyer's defence role, which forms the very basis of legal professional privilege (see *Michaud v. France*, no. 12323/11, § 118, ECHR 2012). There are also no indications that the special relationship of trust between VW and the applicants was affected or that the search and securing of evidence had negatively impacted the administrative offence and criminal investigation proceedings against VW in Braunschweig or the United States of America.

20. In sum, the search for and securing of documents in the present case did not concern documents and data protected by legal professional privilege in the criminal investigation at issue. It only concerned material regarding a

third party obtained by the applicants in the exercise of their profession on behalf of a client not targeted in the criminal investigation and some of which the client had, in any case, permitted to be shared with the authorities (see paragraph 5 above). In addition, the criminal investigation proceedings in the United States of America, in which context the applicants had been mandated, had already been concluded at the time of the search in March 2017. In these circumstances, the national authorities had a wider margin of appreciation in the context of the assessment of the necessity of the impugned measures (see *Klaus Müller*, cited above, §§ 67 and 69).

21. Regarding the necessity, the Court takes into account that the search warrant was made in the context of an investigation that concerned serious allegations, namely suspicion of fraud in some 80,000 cases, having caused a considerable damage (see paragraph 8 above). The suspicion was further corroborated by the prior Plea Agreement which VW had signed in the United States of America (see paragraph 4 above).

22. As for the safeguards accompanying the search and the securing of documents, the Court observes that the warrant was issued by a judge and that the scope of the warrant, concerning documents which the applicants had collected or created in the context of the internal investigation at Audi regarding the manipulation of emissions of diesel engines, was also sufficiently precise and circumscribed. As noted above, the warrant specifically excluded documents concerning diesel engines manufactured by VW (see paragraph 6 above). Moreover, judicial review of the search and the securing of documents and data was available to the applicants and VW and, although not automatically, the applicants were able to apply for a preliminary injunction seeking to stop the public prosecutor sifting the secured files.

23. Lastly, the domestic courts adduced relevant and sufficient reasons in their decisions justifying the search for and the securing of documents, taking into account the different interests at stake and having regard, in particular, to legal professional privilege and its scope. In particular, the Regional Court elaborated in detail why the results of the internal investigation at Audi were important evidence in investigating the charges, and why the public prosecutor would have been unable to obtain that evidence in any other way (see paragraph 8 above).

24. Having regard, in particular, to the fact that Audi was not the applicants' client; the specific nature of the lawyer-client relationship between VW and the applicants; that the secured documents and data could not be used in the Braunschweig investigation; and the wide margin of appreciation afforded to the national authorities in these circumstances, the Court considers that in the specific circumstances of the case, the safeguards were sufficient to prevent abuse in the context of searches and seizures. The interference with the applicants' rights under Article 8 of the Convention can

therefore be regarded as necessary in a democratic society and justified in accordance with paragraph 2 of this provision.

25. In view of the foregoing, the Court concludes that the applications are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 21 November 2024.

Simeon Petrovski Deputy Registrar	Faris Vehabović President

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Place of Residence (professional seat) Nationality	Represented by
1.	1022/19	Kock and Others v. Germany	20/12/2018	**Martin KOCK** **Thomas BERG** **Michael MAYER** Munich (all) German (all)	Ansgar REMPP
2.	1125/19	JONES DAY v. Germany		**JONES DAY** Cleveland, Ohio American	Ansgar REMPP