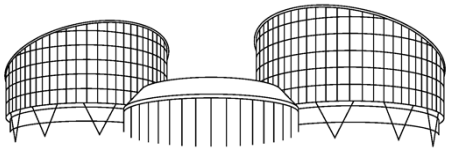

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF STRASSENMEYER v. GERMANY

(Application no. 57818/18)

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Rights of defence • Inability to examine co-accused who refused to testify in court and whose incriminating pre-trial statements carried significant weight in applicant's conviction • Trial court had good reason to admit untested statements • Sufficient counterbalancing factors allowing for fair and proper assessment of reliability of untested evidence • Defence rights not restricted to an extent incompatible with Art 6 guarantees • No indication in circumstances that police's omission to inform accused before questioning of right to court-appointed counsel affected applicant's conviction or fairness of the proceedings • Accused informed in writing at that stage about right to legal assistance • No indication of lack means for obtaining the services of a lawyer

JUDGMENT

STRASBOURG

2 May 2023

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 Strassenmeyer v. Germany,

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

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Branko Lubarda,
Armen Harutyunyan,
Anja Seibert-Fohr,
Ana Maria Guerra Martins*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 57818/18) 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 Marco Straßenmeyer ("the applicant"), on 28 November 2018;

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

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

the comments submitted by the German Federal Bar Association, which was granted leave to intervene by the Vice-President of the Section;

Having deliberated in private on 11 April 2023,

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

INTRODUCTION

1. The case concerns the applicant's conviction for murder based, in particular, on the pre-trial statement of a co-accused who had refused to testify in court. Before being questioned, the police did not inform the accused of their right to court-appointed counsel. The case raises issues under Article 6 §§ 1 and 3 (d) of the Convention.

THE FACTS

2. The applicant was born in 1971 and is currently detained in Tonna Prison. The applicant was represented by Mr Bogatz, a lawyer practising in Bendestorf.

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 may be summarised as follows.

I. THE PRELIMINARY PROCEEDINGS

5. In the early hours of 14 September 1994, a German national, G., was killed in the Czech Republic. The body was discovered the same day by the Czech police in a wooded area, at which time it could not be identified. In Germany, G. was declared missing.

6. Before his death, G. had run a clothing shop in Erfurt with F., who committed suicide in October 1994. In 2012 N., a former friend of F., contacted the German police. She stated that before his death, F. had confided to her that he had been involved in the killing of a co-worker in the Czech Republic.

7. K. had also worked at the clothing shop. On 29 September 2014 the police arrested him. Before being questioned, he was informed in writing about his rights to remain silent and to consult a lawyer. However, owing to the use of an outdated form that did not reflect a recent change in legislation, he was not informed about his right to have court-appointed counsel assigned to him pursuant to Article 136 § 1 of the Code of Criminal Procedure (see paragraph 36 below).

8. When questioned about G.'s death, K. stated that he had been part of a group that had driven from Erfurt to the Czech Republic on 13 September 1994. With him had been G., S., M.S., V. and the applicant. K. claimed that he had not been present during the murder, but that he had been told by the others that the applicant had killed G.

9. On 30 September 2014 the applicant was arrested. Before being questioned, he was informed about his rights in the same manner as K. (see paragraph 7 above). The applicant acknowledged that he had been to the shop in Erfurt before but stated that he did not know G. and had never been to the Czech Republic.

10. On 1 October 2014 S. was heard as a witness by the police. He confirmed that he had been to the Czech Republic with the others but claimed to have no knowledge of any acts of violence.

11. On 9 October 2014 K. asked to be heard again by the police. In the presence of his counsel, he stated that he had seen the applicant hit G. with a truncheon and place the unconscious body in the boot of a car. It was only then that he had fled the scene. K. stated further that S. had been present during the beating.

12. On the same day, S. was again questioned by the police, this time as an accused. He confirmed that he had been present at the scene of the crime and had heard screams but had not seen the murder itself. However, his brother, M.S., who had died in 1995, had told him that the applicant had beaten G. to death.

13. On 10 October 2014 V. was arrested. When asked about his involvement in G.'s death, V. confirmed that he had witnessed the murder. According to him, F. had been angry with G. for squandering the revenue

from their shop. The original plan, according to V., had been to drug G. and abandon him somewhere in the woods in order to teach him a lesson. On 13 September 1994 they had met at the shop and someone had slipped LSD into G.'s drink. G. had been told that they were going to a party and they had driven off in two cars. However, once they had arrived in the Czech Republic, G. had realised that he had been drugged and threatened to report them to the police. At this point the applicant had hit G. on the head with his fist. Somebody had then placed the unconscious G. in the boot of S.'s car and they had driven to a wooded area. When the cars had stopped, the applicant and M.S. had got out of the car and walked around to the back of the car. G. had regained consciousness and the two men had started to beat him with their fists. At this stage, V. had handed the applicant a tonfa, a sort of truncheon with a side grip. When G. had stopped moving, a discussion took place and it was decided that the body should be burned in order to destroy the evidence. K. had left in order to purchase petrol. V. had then assisted the applicant and M.S. to lift the body out of the boot and put him on the ground around 3 to 4 metres from the cars. At that point, they had discovered that G. was still breathing. The applicant had then picked up a rock and thrown it at G.'s head. Later, when K. had returned with the petrol, V. had left the crime scene to sit in his car. He had not witnessed who had set fire to the body but claimed that, as they had driven away, he had seen G. running around like a burning torch.

14. Both S. and V. were informed about their rights in the same manner as K. (see paragraph 7 above). After being questioned, the accused were brought before the investigating judge who ordered their detention and assigned lawyers to them. Before the judge, the accused made no further statements.

II. THE PROCEEDINGS BEFORE THE ERFURT REGIONAL COURT

15. The proceedings against the applicant, V., K. and S. before the Erfurt Regional Court began on 20 April 2015.

A. Evidence taken by the Regional Court

16. At the trial, the applicant only made a statement about his drug abuse at the time of the alleged crime. The other accused exercised their right to remain silent. Instead, the Regional Court heard the police officers who had conducted the pre-trial interviews as witnesses. The applicant and the other accused objected to those pre-trial statements being admitted in evidence.

17. The court also heard N., the former friend of F. (see paragraph 6 above). She repeated what F. had told her about the killing, namely, that the victim had been drugged, beaten to death, set on fire and then buried in a forest in the Czech Republic.

18. Furthermore, the court heard the witness L., who had worked for F. and G. at their shop in Erfurt. He stated that he had been in the shop one day in September 1994 when K. had approached him. They had gone to a separate room where several people had been sitting, including the applicant. K. had then disclosed that they had killed G. The applicant had then boasted that it had been him who had "set the finale", that G. "had squealed like a pig" and that the applicant had kept beating him with a club until it was quiet. K. had added that they had then set fire to G.'s body.

19. In connection with this statement, the court also heard the witness B., who told the court about an encounter he had had with L. around the year 2002. At that time, L. had told him about the conversation L. had had with K. and the applicant regarding the death of G., but had asked him not to tell anyone. B. stated that, according to L.'s account, the applicant had been the driving force behind the killing.

20. Furthermore, the court heard the Czech police officers who had discovered the body in 1994 (see paragraph 5 above). The officers stated, in particular, that two rocks with traces of blood on them had been found near the body. The court also heard the forensic expert who had examined the crime scene. The expert considered that the fractures to the victim's head were consistent with blows from the tonfa V. had described (see paragraph 13 above) and described the victim's burns. Regarding the cause of death, the court heard the pathologist who had performed the autopsy and another medical expert. The experts agreed that it was impossible or at least highly unlikely that G., as V. had described it in his statement (see paragraph 13 *in fine* above), had got up and moved around after he had been set on fire.

21. On 24 August 2015 S. submitted a request for an expert opinion regarding the veracity of V.'s pre-trial statement, which was joined by the applicant. They submitted that V. had agreed to talk to a psychologist. The accused emphasised that V.'s statement was evidently partly untrue. In particular, the experts had ruled out the possibility that after being set on fire G. could have moved on his own. Furthermore, V. had stated that he had helped the others to lift G.'s body out of the car and that they had carried it only 3 to 4 metres before putting it on the ground. However, it followed from the statements of the Czech police officers and the photographs of the crime scene that the distance between the cars and the location of G.'s body was noticeably larger.

22. On 30 September 2015 the court dismissed the request. It considered that the assessment of statements given by a witness or the accused fell to the trial judge. An expert opinion would only be necessary under special circumstances, for example if the person in question was a minor or exhibited strong psychopathological limitations, neither of which applied to V.

B. The Regional Court's judgment

23. On 2 June 2016 the court convicted K. and the applicant of murder and deprivation of liberty resulting in death. V. was convicted of murder and S. was acquitted. The applicant was sentenced to life imprisonment.

24. The facts established by the Regional Court regarding the crime itself corresponded largely to V.'s statement to the police (see paragraph 13 above). In its decision, the court stated that its findings were based on the entirety of the evidence collected, including the pre-trial statements by the four accused, in particular V.'s statement, the statements of the witnesses heard at the trial, in particular L. and N. (see paragraphs 17 and 18 above), the evidence found at the crime scene and the expert statements (see paragraph 20 above). With regard to the applicant's statement (see paragraph 9 above), the court considered that, given the evidence before it, his denial was not of a nature to call into question his participation in the crime.

25. The court gave detailed reasons as to why it considered V.'s pre-trial statement reliable. It began by observing that the statement coincided in large part with the statements K. had made during his police questioning (see paragraphs 8 and 11 above). The two accused had given very similar accounts of the trip to the Czech Republic and both had described the applicant hitting G. with a sort of truncheon. The court further considered that any sort of collusion between V. and K. appeared very unlikely. Both had been unaware of the investigation into the death of G. and, according to the police officers, had appeared surprised when confronted with this fact.

26. In addition, V.'s account of G.'s death was corroborated by the findings of the pathologist. In this regard, the court noted that V. had been privy to details which suggested that he had been present during the crime. Lastly, the court observed that, while V. had apparently considered that he bore no criminal responsibility for G.'s death at the time of his questioning by the police, it nevertheless appeared highly unlikely that he would give a false account which incriminated him so heavily.

27. Regarding the alleged inaccuracies in V.'s statement, the court considered that these were not of a nature to call into question the statement in its entirety. The court concurred that, given the statements by the medical experts (see paragraph 20 *in fine* above), it was highly unlikely that V. had seen G. moving around after he had been set on fire. However, the court considered it entirely possible that V. did indeed believe that he had seen G. on fire. The observation in question had been made at night-time out of a moving car. Under these circumstances, V. could easily have mistaken the flames from the burning petrol for a human figure. Furthermore, with regard to the distance between the body and the place where the cars had been parked (see paragraph 21 *in fine* above), the court concluded from the tracks on the ground that G. had first been put on the ground near the cars, which was where the first rock had been thrown at his head. The injured G. had then managed

to get up and attempt to flee but one of the aggressors had hit him with another rock and he had fallen to the ground again a little further away.

28. With regard to the weight to be given to V.'s statement, the Regional Court considered that it had to be taken into account that the accused had exercised their right to remain silent at the trial (see paragraph 16 above) and that no video or audio-recording of the police interviews existed.

29. The Regional Court further attached importance to the statements given by N. and L. (see paragraphs 17 and 18 above). It noted that V.'s account of the crime was partly confirmed by L.'s testimony about the conversation L. had had with K. and the applicant in September 1994. The details of the murder L. had been able to provide, the fact that it had occurred in the Czech Republic and that G. had been beaten to death, corresponded with V.'s statement. The veracity of L.'s statement was further strengthened by B. (see paragraph 19 above), to whom L. had confided this conversation. Again, the court considered that there was no indication that either of the witnesses had intentionally given an untruthful statement.

30. Lastly, the fact that the accused had not been informed about their right to court-appointed counsel (see paragraphs 7, 9 and 14 above) did not make the statements inadmissible in the court's view. The court noted that owing to the seriousness of the crime, the State had a very strong interest in prosecuting the accused. Furthermore, the failure to inform the accused of this right had not been intentional but rather an oversight by the police officers. In addition, the court observed that, according to the police officers, V. had himself emphasised during his questioning that he wanted to be heard without a lawyer. Since V. had been arrested and questioned by the police on several occasions and for various offences prior to his arrest in 2014, the court considered that he had been well aware of the potential consequences of making a statement without legal counsel present.

31. The court concluded that despite the fact that neither the prosecution nor the applicant had been able to put questions to the accused regarding their pre-trial statements, it had sufficient evidence at its disposal for a conviction.

III. THE PROCEEDINGS BEFORE THE FEDERAL COURT OF JUSTICE

32. On 3 June 2016 the applicant lodged an appeal on points of law against the judgment of the Erfurt Regional Court. He complained, in particular, that the Regional Court had primarily based his conviction on the pre-trial statements given by his co-accused who he had been unable to examine at any stage of the proceedings. While he acknowledged that the fact that the other accused had relied on their right to remain silent was not imputable to the Regional Court, he considered that there had been insufficient counterbalancing factors, in particular given that the court had denied his request for a psychological examination of V. (see paragraph 21 above). In addition, he argued that the failure to inform him and the other accused of

their right to court-appointed counsel had rendered the pre-trial statements inadmissible.

33. On 6 February 2018 the Federal Court of Justice dismissed the appeal on points of law. Regarding the argument that the accused had not been properly informed about their rights, the court reiterated that owing to the gravity of the charges the State had a very strong interest in prosecuting the accused and that the error had been unintentional. Lastly, the court observed that there was no indication that the accused had not obtained legal counsel owing to a lack of funds.

IV. THE PROCEEDINGS BEFORE THE FEDERAL CONSTITUTIONAL COURT

34. On 28 May 2018 the applicant lodged a constitutional complaint with the Federal Constitutional Court, relying essentially on the same arguments as he had before the Federal Court of Justice (see paragraph 32 above).

35. On 26 June 2018 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without providing reasons.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

36. Article 136 § 1 of the Code of Criminal Procedure, as applicable at the relevant time, provided that from the time of the first questioning the accused was to be informed of his or her rights to remain silent and to consult a lawyer. Furthermore, the accused was to be informed that under certain conditions he or she could request court-appointed counsel, particularly if the charge concerned a criminal offence with a minimum term of imprisonment of one year. Sentence 3 of Article 136 § 1 of the Code of Criminal Procedure had been amended to include this obligation, effective from 6 July 2013, in order to implement Directive 2012/13/EU (see paragraph 39 below). Under German law, a conviction for murder carries a mandatory life sentence.

37. Article 168c § 2 of the Code of Criminal Procedure provides that the accused and his counsel are permitted to be present during the judicial examination of a witness or expert prior to the opening of the main proceedings. According to the domestic case-law, this provision does not apply when a co-accused is being heard during the investigation phase.

38. At the relevant time the Code of Criminal Procedure did not provide for the statements of an accused before the police to be recorded. On 1 January 2020 Article 136 § 4 of the Code of Criminal Procedure was amended to provide for such a possibility. In particular, a video-recording of the interview is now mandatory for persons charged with premeditated killing.

II. RELEVANT EUROPEAN UNION LAW

39. The relevant part of Article 3 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings reads as follows:

> "1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:
>
> ...
>
> (b) any entitlement to free legal advice and the conditions for obtaining such advice;
>
> ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

40. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicant complained that the criminal proceedings against him had been unfair. He complained, in particular, that he had been unable to examine his co-accused. Relying on Article 5 § 1 (c) and Article 6 § 1 of the Convention, he complained, furthermore, that none of the accused had been informed of their right to court-appointed counsel before being questioned by the police.

41. The Court, being master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114, 124 and 126, 20 March 2018), will examine the complaints solely under Article 6 §§ 1 and 3 (d) of the Convention which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

42. The Government submitted that the applicant had failed to exhaust domestic remedies regarding the inability to examine his co-accused, arguing that he had not properly raised the complaint before the domestic courts. The

Government pointed to the fact that in his appeals the applicant had stated that this shortcoming was not imputable to the Regional Court (see paragraph 32 above), whereas in his complaint to the Court he had argued that his inability to put questions to his co-accused could be attributed to the judiciary.

43. The applicant retorted that he had never alleged that the judiciary was to blame for his inability to challenge the statements made by his co-accused.

44. The general principles concerning exhaustion of domestic remedies are summarised in *Vučković and Others v. Serbia* ([GC] (preliminary objection), nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). The Court reiterates, in particular, that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

45. The Court observes that the applicant raised the issue that he had been unable to examine his co-accused and the lack of sufficient counterbalancing factors before all levels of jurisdiction domestically (see paragraphs 16, 32 and 34 above). In doing so, he provided the State with the opportunity to remedy the alleged breach, regardless of whether he attributed the inability to put questions to his co-accused to the domestic authorities. Accordingly, the Court finds that the applicant exhausted domestic remedies as required by Article 35 § 1 of the Convention and dismisses the Government's objection in this respect.

46. Furthermore, the Court notes that the applicant's complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) Inability to challenge the statements of the applicant's co-accused

(i) The applicant

47. The applicant complained that he had been unable to examine his co-accused V., K. and S. either in court or during the pre-trial proceedings. Moreover, M.S.'s account of the crime had been provided by his brother, S., who had mentioned it during his second questioning by the police (see paragraph 12 above).

48. The applicant acknowledged that V., K. and S. had had the right to remain silent and that their pre-trial statements could be introduced at trial by the police officers who had conducted the interviews.

49. As regards the significance of the statements, the applicant argued that V.'s statement before the police (see paragraph 13 above) had been decisive

for his conviction. Regarding the witnesses N. and L. (see paragraphs 17 and 18 above), he emphasised that their witness statements had been hearsay.

50. Lastly, he submitted that the handicaps under which the defence had laboured as a result of the admittance of the pre-trial statements had not been compensated for by sufficient counterbalancing factors. In particular, the court had denied his request to have V. examined by a psychologist (see paragraph 21 above). In his view, such an examination would have allowed the applicant to challenge V.'s statement through a court-appointed expert, thus constituting an important counterbalancing factor.

(ii) The Government

51. The Government submitted that in view of the Court's case-law on the matter, the applicant's right to examine witnesses had not been breached.

52. In the Government's view there had been a good reason for the applicant's inability to examine his co-accused and, consequently, to admit the untested statements in evidence. The accused had exerted their right to remain silent and the Regional Court had thus been unable to provide the applicant with the opportunity to put questions to them.

53. The Government further submitted that the statements by his co-accused had not been the sole or decisive basis for the applicant's conviction. Rather, the Regional Court had based its decision on an overall assessment of the evidence before it. In particular, the court had had regard to the testimony by L. who had stated that the applicant had admitted the crime in his presence (see paragraph 18 above). Furthermore, V.'s statement regarding G.'s injuries had been corroborated by the evidence discovered at the crime scene and the statements of the medical experts (see paragraph 20 above).

54. Lastly, even assuming that the untested statements had been the decisive basis for the conviction, the Government submitted that there had been sufficient counterbalancing factors. In examining the pre-trial statements by V. and K. in detail, the court had demonstrated the necessary caution. Furthermore, the applicant had been provided with the opportunity to give his own account of the facts at the trial.

55. With regard to the request for a psychological examination of V. regarding the veracity of his pre-trial statement (see paragraph 21 above), the Government submitted that such an examination had not been necessary or appropriate. As the Regional Court had stated in its decision denying the request (see paragraph 22 above), the assessment of the credibility of a witness fell to the trial judge. Lastly, the Government argued that such an examination would not have served as an effective counterbalancing factor. Contrary to the applicant's position, an expert opinion would not have provided the applicant with the opportunity of examining V. Furthermore, indirect questioning of V. by the applicant's counsel using the expert as a "mouthpiece" would have been contrary to V.'s right to remain silent.

56. Further counterbalancing factors had not been available to the domestic authorities. Referring to *Sievert v. Germany* (no. 298881/07, 19 July 2012), the Government submitted that there had been no indication for the police or the prosecution that the accused would subsequently exercise their right to remain silent. Furthermore, the domestic law did not allow for the accused or his counsel to be present for the pre-trial questioning of another accused (see paragraph 37 above). In addition, at the relevant time, the possibility of video or audio-recordings of the questioning had not been provided for by the domestic law (see paragraph 38 above). Accordingly, such a recording would have required the consent of the other accused.

(b) Failure to inform the accused about the right to court-appointed counsel

(i) The applicant

57. The applicant maintained that the failure of the police officers to inform him and the other accused of their right to have court-appointed counsel should have led to the pre-trial statements being inadmissible. He argued that the domestic courts' interpretation of the relevant provisions had been contrary to Directive 2012/13/EU (see paragraph 39 above). The aim of the Directive to strengthen the rights of the accused during the investigation stage could only be achieved if a breach resulted in the inadmissibility of the evidence. Had the other accused been properly informed of this right, it could not be excluded that they would have obtained counsel and subsequently made use of their right to remain silent. Furthermore, the violation had been perpetuated when the investigating judge who had issued the arrest warrants had failed to inform the accused about the inadmissibility of their pre-trial statements owing to this breach.

(ii) The Government

58. The Government first submitted that Article 6 § 3 (c) of the Convention only guaranteed the right to court-appointed counsel if the accused lacked sufficient means to pay for legal assistance. Since this did not occur in the present case, the right of the accused to have court-appointed counsel assigned to them had merely been based on the corresponding provisions of the domestic law. Accordingly, the Government submitted that the failure to inform the accused of this right had not been in breach of Article 6 § 1 of the Convention.

59. Moreover, this error did not necessarily lead to the inadmissibility of the pre-trial statements. Referring, in particular, to *Allan v. the United Kingdom* (no. 48539/99, § 42, 5 November 2002), the Government pointed out that Article 6 of the Convention did not lay down any rules on the admissibility of evidence as such, which was therefore primarily a matter for regulation under national law. The question the Court had to answer was

whether the proceedings as a whole, including the way in which the evidence had been obtained, had been fair.

60. Furthermore, the Government submitted that the domestic courts had properly balanced the competing interests. The courts had correctly held that the information concerning the right to be assigned a court-appointed lawyer was not of equal importance to the information regarding access to a lawyer itself. While the obligation to inform an accused of his or her right to a lawyer was provided for in a number of international treaties, a corresponding obligation regarding information about court-appointed counsel was significantly less prevalent.

61. Regarding the accused, the Government stressed that there had been no indication of any specific vulnerability in their regard and that no pressure had been exerted on them in order to obtain their statements. In addition, the accused, in particular V., had previously been the subject of criminal charges and had thus been aware of the possibility of obtaining court-appointed counsel.

62. Lastly, the Government emphasised that there was no indication that the police officers had deliberately withheld the information from the accused. While it was true that the new provisions had already been in force for several months at the time of the interviews (see paragraph 36 above), there was always a risk that outdated forms might still be in use for some time after a change in legislation (see paragraph 7 above).

2. The third-party intervener's submissions

63. The Federal Bar Association submitted that the fact that a co-accused had exercised his right to remain silent could not be considered a good reason for admitting an untested pre-trial statement in evidence.

64. With regard to counterbalancing factors, it held that the applicant's counsel should have been given the opportunity to question the co-accused during the investigation phase of the proceedings. Furthermore, it submitted that the applicant should at least have been provided with the opportunity to have the veracity of the statements given by his co-accused examined by a psychologist.

65. Lastly, the Federal Bar Association was of the view that admitting the pre-trial statements in evidence despite the fact that the accused had not been informed of their right to court-appointed counsel had been in violation of Article 6 § 3 (c) the Convention. In this regard, it pointed out that a failure to appoint counsel where it was required by law constituted grounds for an appeal under the domestic law. However, no similar protection existed for the pre-trial phase where a lack of legal counsel was only taken into account in the assessment of the overall fairness of the proceedings.

3. The Court's assessment

66. The Court would begin by noting that the applicant's complaints give rise to different but interrelated issues, namely his inability to examine the other accused and the fact that the police had not properly informed the accused of their rights before they were questioned. Where an applicant complains of numerous procedural defects, the Court may examine the various grounds giving rise to the complaint in turn in order to determine whether the proceedings, considered as a whole, were fair (see *Blokhin v. Russia* [GC], no. 47152/06, § 194, 23 March 2016, and *Tuskia and Others v. Georgia*, no. 14237/07, § 98, 11 October 2018).

67. The Court will do so in the present case, and will start its analysis with the alleged violation of the applicant's right to examine his co-accused. It will then turn to the question whether the failure to inform the applicant and the other co-accused about their right to court-appointed counsel has amounted to a breach of Article 6.

(a) The applicant's inability to examine his co-accused

(i) General principles

68. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that Article which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015, and *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010, with further references). In making this assessment the Court will look at the proceedings as a whole, having regard to the rights of the defence but also to the interests of the public and the victim(s) in seeing crime properly prosecuted (see *Schatschaschwili*, cited above, § 101, and *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010) and, where necessary, to the rights of witnesses (see, among many other authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). It is also notable in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see *Gäfgen*, cited above, § 162, and the cases cited therein).

69. In *Al-Khawaja and Tahery* (cited above, §§ 119-47) the Grand Chamber clarified the principles to be applied when a witness did not attend a public trial. These principles may be summarised as follows (see *Seton v. the United Kingdom*, no. 55287/10, § 58, 31 March 2016).

(i) The Court should first examine the preliminary question whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule

give evidence during the trial and that all reasonable efforts should be made to secure their attendance.

(ii) Typical reasons for non-attendance are, as in the case of *Al-Khawaja and Tahery* (cited above), the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness might not attend trial.

(iii) Where a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort.

(iv) The admission in evidence of statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him or her. In particular, he or she should be able to test the truthfulness and reliability of the evidence given by witnesses by having them orally examined in his or her presence, either at the time the statement is given or at some later stage of the proceedings.

(v) According to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his or her defence rights are unduly restricted.

(vi) In this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence: the stronger the other incriminating evidence, the less likely it is that the evidence of the absent witness will be treated as decisive.

(vii) However, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner.

(viii) In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission in evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most careful scrutiny. Because of the dangers of admitting such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including

measures that allow a fair and proper assessment of the reliability of that evidence. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

70. Those principles were further clarified in *Schatschaschwili* (cited above, §§ 111-31), in which the Grand Chamber confirmed that the absence of a good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that its concern was to ascertain whether the proceedings as a whole were fair, the Court should not only review the existence of sufficient counterbalancing factors in cases where the evidence of the absent witness was the sole or decisive basis for the applicant's conviction, but also in cases where it found it unclear whether the evidence in question was the sole or decisive factor but was nevertheless satisfied that it carried significant weight and that its admission might have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair.

71. In *Schatschaschwili* (cited above, §§ 125-31), the Court identified some of the counterbalancing factors that might compensate for the handicaps under which the defence laboured as a result of the admission of untested witness evidence at trial. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence. They include the following.

(i) Whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available. Any directions given to the jury by the trial judge regarding the absent witnesses' evidence is another important consideration.

(ii) Reproduction at the trial of a video-recording of the absent witness's questioning at the investigation stage in order to allow the court, prosecution and defence to observe the witness's demeanour under questioning and to form their own impression of his or her reliability.

(iii) Availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; further factual evidence,

forensic evidence and expert reports; similarity in the description of events by other witnesses, in particular if such witnesses are examined at trial.

(iv) Possibility for the defence to put their own questions to the witness indirectly, for instance in writing, in the course of the trial.

(v) Possibility for the applicant or defence counsel to question the witness at the investigation stage. The Court has found in this context that where the investigating authorities had already taken the view at the investigation stage that a witness would not be heard at the trial, it was essential to give the defence an opportunity to have questions put to him or her during the preliminary investigation.

(vi) The defendant must be afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses. Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation.

72. The Court reiterates that the term "witness" has an "autonomous" meaning in the Convention system (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). Thus, where a statement may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II, and *Kaste and Mathisen v. Norway*, nos. 18885/04 and 21166/04, § 53, ECHR 2006-XIII).

(ii) Application of these principles to the present case

(α) Whether there was a good reason

73. The Court reiterates that a good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. If there was a good reason for the witness's non-attendance in that sense, it follows that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness in evidence (see *Schatschaschwili*, cited above, § 119). The same principles apply to co-accused (see *Vidgen v. the Netherlands*, no. 29353/06, §§ 38-42, 10 July 2012). In this regard, the Court notes that the co-accused V., S. and K. were not absent in the sense of being unreachable. Rather, they were present during the whole of the trial but refused to testify (see paragraph 16 above).

74. In *Vidgen* (cited above, § 42) the court recognised that the refusal of co-accused who refuse to give evidence relying on the right not to incriminate themselves constitutes a good reason. In this respect the present case differs from *Oddone and Pecci v. San Marino* (nos. 26581/17 and 31024/17, §§ 98-101, 17 October 2019) and *Kuchta v. Poland* (no. 58683/08, §§ 50-53, 23 January 2018), where the domestic courts had failed to secure the attendance of the co-accused at the trial. In conclusion, the Court considers that the Regional Court had good reason to admit the untested statements of V., K. and S. as reported by the police officers at the trial (see paragraph 16 above).

75. With regard to M.S., the Court notes that he died in 1995 and thus before the investigation in Germany began in 2012 (see paragraph 12 above). In any event, however, the Court observes that the Regional Court did not rely on M.S.'s account of the crime in its decision. He cannot therefore be considered a "witness" within the meaning of Article 6 § 3 (d) of the Convention (see the case-law quoted in paragraph 72 above).

(β) Whether the evidence was the sole or decisive basis

76. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness (see *Schatschaschwili*, cited above, § 116). In determining the weight of the evidence given by an absent witness and, in particular, whether the evidence given by him or her was the sole or decisive basis for an applicant's conviction, the Court has regard, in the first place, to the domestic courts' assessment. The Court must make its own assessment of the weight of the evidence given by an absent witness only if the domestic courts did not indicate their position on that issue or if their position is not clear (ibid., § 124).

77. The Court would first observe that the Regional Court did not formally consider the pre-trial statements provided by the co-accused to be the sole evidence against the applicant (see paragraphs 24, 26 and 29 above). Accordingly, regard must be had to the question whether the court considered the evidence to be decisive, that is evidence of such significance or importance as is likely to be determinative of the outcome of the case (ibid., § 123). While the Regional Court did stress the importance of the pre-trial statements made by the applicant's co-accused, in particular V., it also went to some length in assessing the other evidence before it, in particular the testimonies given at trial by L. and B. (see paragraph 29 above). In conclusion, the Court finds that the Regional Court's position was not clear in this regard.

78. In making its own assessment of whether the untested evidence was decisive for the applicant's conviction, the Court will have regard to the strength of the supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as

decisive (see *Schatschaschwili*, cited above, § 123). The Court observes that the Regional Court had before it numerous pieces of evidence regarding the murder itself, namely the testimonies of the Czech police officers and the expert reports regarding G.'s injuries (see paragraph 20 above). While these did not directly link the applicant to the crime, the Regional Court was also able to rely on the testimony given by L. at the trial (see paragraph 18 above). In the Court's view, this witness statement must be accorded significant weight. Based on the reported conversation between the applicant and K., the witness was able to provide specific information about the crime, particularly as regards the nature of G.'s injuries and the attempt to burn the body. Moreover, L.'s testimony was supported by B., to whom L. had confided this information several years later (see paragraph 19 above). Lastly, while L. was only a hearsay witness regarding the crime itself, he had witnessed first-hand the applicant's confession to the murder.

79. With regard to the fact that a narrow interpretation of the term is required (see *Schatschaschwili*, cited above, § 123), the Court concludes that the evidence provided by the pre-trial statements of the accused was not decisive in the present case. However, the Court recognises that these statements carried at least significant weight and that their admission may have handicapped the defence to an important degree. In order to assess the overall fairness of the proceedings, the Court will thus review the existence of sufficient counterbalancing factors (ibid., § 116).

(γ) Whether there were sufficient counterbalancing factors

80. The Court points out that the following elements are relevant in determining whether there were sufficient counterbalancing factors: the trial court's approach to the untested evidence; the availability and strength of further incriminating evidence; and the procedural measures taken to compensate for the lack of opportunity to directly examine the witnesses at trial (ibid., § 145).

81. The Court would begin by observing that the Regional Court approached the untested evidence with caution. It pointed out that neither the court nor the defence had had the possibility of putting questions directly to the co-accused, who had relied on their right to remain silent (see paragraphs 31 and 28 above). Furthermore, the court recognised that no video or audio-recording of the police interviews existed (see paragraph 28 above). In assessing the pre-trial statements, the court gave detailed reasons why it considered the statements to be reliable, referring, in particular, to the degree of conformity between the testimonies of V. and K. and the supporting evidence from the crime scene (see paragraphs 25-27 above; compare *Przydział v. Poland*, no. 15487/08, § 57, 24 May 2016, and compare and contrast *Daştan v. Turkey*, no. 37272/08, § 31, 10 October 2017).

82. In addition, as detailed in paragraph 78 above, the Regional Court had at its disposal strong corroborating evidence implicating the applicant.

83. With regard to the procedural measures taken at the investigation stage, the Court notes that the applicant had not been given the opportunity of putting questions to V., K. and S. when they gave their statements. In *Schatschaschwili* (cited above, § 155) the Court attached importance to the fact that the prosecution authorities could have appointed a lawyer for the applicant who would have had the right to be present at the witness hearing (see also *Hümmer v. Germany*, no. 26171/07, § 48, 19 July 2012). However, V., K. and S. were heard as accused when they gave their statements incriminating the applicant. Regardless of the applicant's legal representation at the time of the different hearings, the domestic law did not provide for an accused or his counsel to be present at the questioning of another accused during the investigation stage (see paragraph 37 above). In this regard, the Court would reiterate that it is not its role to examine whether or not the domestic law provided for the possibility of questioning a co-accused at the investigation stage (see *Oddone and Pecci*, cited above, § 113).

84. In any case, the Court observes that it is vital for the determination of the fairness of the trial as a whole to ascertain whether or not the authorities, at the time of the witness hearing at the investigation stage, proceeded on the assumption that the witness would not be heard at the trial (see *Schatschaschwili*, cited above, § 157). Consequently, in *Oddone and Pecci* (cited above, § 113) the Court criticised the fact that the investigating judge had refused the accused's request to cross-examine two witnesses at the investigation stage but had not included them on the list of witnesses to be heard at the trial. Furthermore, in *N.K. v. Germany* (no. 59549/12, § 60, 26 July 2018), the Court considered it a foreseeable risk that a witness who was married to the accused could refuse to testify at the trial. The Court reiterates, however, that the mere fact that a person could rely on his right not to incriminate himself does not constitute by itself such a risk (compare *Sievert*, cited above, § 60). Regarding the present case, the Court observes that the applicant did not claim that there had been an indication that his co-accused would refuse to testify in court.

85. Lastly, the Court notes that no video or audio-recording of the pre-trial statements exists, since the domestic law at the relevant time did not provide for such a possibility. As of 1 January 2020, the provisions in question were amended to allow for video-recordings of statements given by an accused (see paragraph 38 above). The Court welcomes this legislative change.

86. Having regard to the procedural measures during the trial phase, the Court observes that the applicant had the opportunity to present his own version of the events and to put questions to the police officers who had questioned the accused (see paragraph 16 above). In addition, he was able to contest V.'s credibility or identify any motive he might have had for falsely incriminating him. The applicant criticised, however, the Regional Court's

refusal of his request to have V.'s statement assessed by a psychologist (see paragraphs 21-22 above).

87. The Court would begin by reiterating that where the defence demands an expert report, it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 718, 25 July 2013). Furthermore, the mere fact that untested statements were admitted in evidence does not require the trial court to admit and examine every witness or expert on the accused's behalf (compare *Lobarev and Others v. Russia*, nos. 10355/09 and 5 others, § 44, 28 January 2020).

88. The Court reiterates that the veracity of the witness evidence is for the trial court to assess. In a situation where the co-accused refused to give evidence during trial, the court has accepted that it can constitute a counterbalancing factor if in assessing the veracity of the statement in question the trial court has sought the assistance of a psychological expert. Such a safeguard was given weight primarily in cases concerning statements made by minors (see *González Nájera v. Spain* (dec.), no. 61047/13, § 53, 11 February 2014; *D.T. v. the Netherlands* (dec.), no. 25307/10, § 51, 2 April 2013; and *Przydział*, cited above, § 56). The Court observes, however, that also in cases where questions could not be put to an adult witness by the accused, a psychological expertise regarding the motivation and psychological context in which a statement was made may constitute a valid counterbalancing factor (see *Sievert*, cited above, § 65).

89. The Regional Court denied the applicant's request, stating that, as a general rule, the task of assessing the veracity of a witness statement fell to the trial court. A psychological expertise could, however, prove necessary in certain circumstances, owing to the witness's age or mental capacity (see paragraph 22 above). As stated above, the Court sees no reason to disagree with this starting-point. Furthermore, the Court observes that the Regional Court gave detailed reasons why it considered V.'s account of the crime credible. It referred to the high level of concordance between the pre-trial statements made by V. and K., and the facts that the statements were corroborated by the evidence found at the crime scene and that V. had incriminated himself with his statement (see paragraphs 25-26 above). With regard to these factors, the Court can agree that the Regional Court was in a position to assess their probative value itself.

(δ) Conclusion

90. Having regard to the above, in particular the corroborating evidence supporting the pre-trial statements available to the Regional Court and its thorough reasoning in this regard, the Court finds that these counterbalancing factors allowed for a fair and proper assessment of the reliability of the untested evidence.

91. Thus, despite the applicant's inability to examine his co-accused and assessing the overall fairness of the proceedings, the Court finds that the applicant's defence rights were not restricted to an extent incompatible with the guarantees provided by Article 6 of the Convention. Accordingly, it finds no violation of Article 6 §§ 1 and 3 (d) of the Convention on account of the applicant's inability to examine his co-accused.

(b) The failure to inform the accused about their right to court-appointed counsel

(i) General principles

92. The Court reiterates that its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully within the meaning of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-95, ECHR 2006-IX, and *Allan*, cited above, § 42). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (see *Gäfgen*, cited above, § 164).

(ii) Application of these principles to the present case

93. The Court would begin by observing that while the accused were not assisted by counsel when first questioned by the police, no complaint was brought before the Court in this regard. Rather, the applicant's complaint concerned the fact that the police had failed to inform both him and the other accused about the possibility to have court-appointed counsel assigned to them.

94. With regard to the applicant, the Court notes that while he did make a statement to the police, he merely denied having participated in the crime (see paragraph 9 above). Accordingly, in its decision the Regional Court only referred to the applicant's pre-trial statement in so far as his claim that he had not known G. and had never been to the Czech Republic had been refuted by the evidence before it (see paragraph 24 above). It follows that no evidence capable of being used against the applicant was obtained in connection with the failure to inform him of his right to court-appointed counsel. The Court thus considers that this failure did not prejudice his right not to incriminate himself (compare in respect of a complaint under Article 6 § 3 (c) *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 136-40, 12 May 2017). Moreover, before being questioned by the police, the applicant was informed in writing of his

right to consult a lawyer (see paragraphs 7 and 9 above). The authorities only failed to notify him of the possibility of requesting a court-appointed counsel. The applicant did not claim, either before the domestic courts (see paragraph 33 *in fine* above) or before the Court, that he lacked means to obtain the services of a lawyer, or that his financial situation made him eligible for legal aid. Under these circumstances, the Court does not see how the omission complained of could have affected his position and/or violate his right to a fair trial.

95. Regarding the pre-trial statements given by V., K. and S., the Court observes that, regardless of whether the right to be informed of the possibility to have court-appointed counsel falls under the scope of Article 6 of the Convention, the procedural guarantees protected under that Article are primarily meant to protect the defendant himself (compare *Tonkov v. Belgium*, no. 41115/14, § 68, 8 March 2022). In any case, the Court observes that before being questioned by the police, all the accused were informed about their right to legal assistance but decided to give statements without a lawyer present (see paragraphs 7 and 14 above). In addition, as the Federal Court of Justice pointed out (see paragraph 33 *in fine* above), there is no indication that the accused did not have the means to consult a lawyer. The mere possibility that, after being informed of their right to have court-appointed counsels, the applicant's co-accused could have requested legal aid and subsequently refrained from making statements is not sufficient to establish a connection between the lack of information and the pre-trial statements. In this context, the Court also notes that K. chose to make an additional statement to the police after he had been assigned a lawyer (see paragraph 11 above). It follows that, regardless of whether such a procedural error concerning a third party can call into question the fairness of the proceedings, the applicant has failed to substantiate how the failure to inform his co-accused about their right to court-appointed counsel affected his conviction.

96. The fact that the domestic provision securing the right to be informed of the right to court-appointed counsel had been introduced in order to implement Directive 2012/13/EU (see paragraphs 36 and 39 above) is not of a nature to change this assessment. Under the terms of Article 19 and Article 32 § 1 of the Convention, the Court is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014). The interpretation of the provisions in question by the domestic courts does not reveal any shortcomings in this regard.

97. Lastly, given that the accused made no additional declarations before the investigating judge (see paragraph 14 *in fine* above), the question of whether the judge should have provided them with additional information does not arise.

98. In conclusion, there has been no violation of Article 6 § 1 of the Convention on account of the failure to inform the accused about their right to court-appointed counsel.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 2 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Gabriele Kucsko-Stadlmayer President