

EUROPEAN COMMISSION  
OF HUMAN RIGHTS

First Chamber

**Application No. 15652/89**

**Claus Hermann Paul Bacher  
against  
the Federal Republic of Germany**

**Report of the Commission**

(Adopted on 9 December 1991)

TABLE OF CONTENTS

	PAGE
I. <b>INTRODUCTION</b> (paras. 1 - 15) .....	1 - 2
A.     The application (paras. 2 - 3) .....	1
B.     The proceedings (paras. 4 - 10) .....	1 - 2
C.     The present Report (paras. 11 - 15) .....	2
II. <b>ESTABLISHMENT OF THE FACTS</b> (paras. 16 - 45) .....	3 - 7
A.     The particular circumstances of the case (paras. 16 - 37) .....	3 - 6
B.     Relevant domestic law (paras. 38 - 45) .....	6 - 7
III. <b>OPINION OF THE COMMISSION</b> (paras. 46 - 63) .....	8 - 10
A.     Complaint declared admissible (para. 46) .....	8
B.     Point at issue (para. 47) .....	8
C.     Article 6 para. 1 of the Convention (paras. 48 - 63) .....	8 - 10
1.   General considerations (paras. 48 - 49) .....	8
2.   Period to be considered (paras. 50 - 54) .....	8 - 9
3.   Reasonableness of the length of the proceedings (paras. 55 - 62) .....	9 - 10
4.   Conclusion (para. 63) .....	10
APPENDIX I     :   HISTORY OF THE PROCEEDINGS .....	11
APPENDIX II    :   DECISION ON THE ADMISSIBILITY .....	12

## I. INTRODUCTION

1. The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

### A. The application

2. The applicant, born in 1937, is a German national and resident in Berlin. He is a lawyer by profession. Before the Commission he was represented by MM. F. Tappe, W. Bender, P. Günnewich and J. B. Müller, lawyers practising in Berlin.

The application is directed against the Federal Republic of Germany whose Government were represented by their Agent, Mr. J. Meyer-Ladewig, Ministerialdirigent, of the Federal Ministry of Justice.

3. The application concerns complaints under Article 6 para. 1 of the Convention about the length of criminal proceedings. The proceedings started in December 1975 and lasted at least until February 1989.

### B. The proceedings

4. The application was introduced on 4 August 1989 and registered on 19 October 1989.

5. On 15 February 1990 the Commission decided to invite the respondent Government to submit their observations in writing on the admissibility and merits of the application.

6. After an extension of the time-limit, the Government's observations were submitted on 25 May 1990. The applicant's submissions in reply were also submitted after an extension of the time-limit on 28 August 1990.

7. On 8 January 1991 the Commission referred the application to the First Chamber.

8. On 17 April 1991 the Commission (First Chamber) declared the application admissible.

9. The text of this decision was communicated to the parties on 26 April 1991.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Consultation with the parties took place between 26 April 1991 and 9 September 1991. The Commission now finds that there is no basis on which a friendly settlement can be effected.

### C. The present Report

11. The present Report has been drawn up by the Commission (First Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. F. ERMACORA, Acting President of the First Chamber  
J. A. FROWEIN  
E. BUSUTTIL  
A. S. GÖZÜBÜYÜK  
H. DANELIUS  
Sir Basil HALL  
MM. C. L. ROZAKIS  
L. LOUCAIDES  
A. V. ALMEIDA RIBEIRO  
B. MARXER

12. The text of this Report was adopted on 9 December 1991 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

### A. The particular circumstances of the case

16. Since 1975 the Berlin Tax Office (Finanzverwaltung) suspected the applicant and others of tax evasion committed in 1974 in the context of fictitious business activities and losses of a group of limited partnerships (Kommanditgesellschaften) in Berlin, and thereafter started investigation proceedings. The Berlin Prosecutor's Office (Staatsanwaltschaft) started preliminary investigations in December 1975.

17. On 11 February 1976 the Tiergarten District Court (Amts-gericht) issued several search warrants on the suspicion of fraud and other offences which concerned various private and business premises in the Federal Republic of Germany and Switzerland, including the applicant's premises in Berlin. The applicant heard about the search warrants in April 1976 and requested the Berlin Public Prosecutor's Office to be heard upon the charges against him. Following rogatory proceedings and consultation with the Swiss authorities the searches were effected on 22 November 1976. In the applicant's premises 24 files were seized.

18. On 23 November 1976 the applicant again requested the Berlin Public Prosecutor's Office to be heard upon the suspicion against him. Furthermore, in written submissions, he commented upon the search warrant and the charges therein.

19. On 6 December 1976 the Prosecutor's Office requested the Berlin Tax Frauds Department (Steuerfahndungsstelle) to examine the fiscal aspects of the documents seized. The Department submitted its report on 27 April 1977.

20. In the meantime, Mr. M., a Swiss national affected by one of the above searches in Switzerland, had objected to the delivery of various documents seized on the occasion of that search. The Berlin Prosecutor's Office awaited the outcome of these proceedings until January 1979 when it was informed that M. had appealed against a first decision ordering the delivery.

21. From September until November 1979 the Public Prosecutor's Office, having previously examined numerous tax files, heard the accused and several witnesses. The applicant was questioned on 19 September 1979.

22. On 30 January 1980 the Berlin Public Prosecutor's Office preferred an indictment (Anklageerhebung) against the applicant and seven other accused on charges of tax evasion and related financial offences.

23. On 30 June 1980 the Presiding Judge at the Berlin Regional Court (Landgericht) returned the indictment for amendment in view of a judgment of the Federal Court of Justice (Bundesgerichtshof) of 20 June 1980 concerning similar issues.

24. On 15 August 1980 the Public Prosecutor's Office preferred a new indictment against the applicant and two further accused. On 30 March 1981 the Regional Court, following proceedings concerning warrants of arrest, ordered that the indictment be sent to the accused. The indictment was served on 16 April 1981. On 20 October 1981 one of the co-accused commented upon the indictment.

25. Furthermore, in 1981 proceedings were again pending before Swiss authorities concerning the delivery of the documents mentioned above (para. 20). Eventually, some of the documents were delivered in May 1982.

26. On 25 November 1982 the Berlin Regional Court committed the applicant and his co-accused for trial (Eröffnung des Hauptverfahrens) as regards part of the indictment. As regards the remainder of the charges, the Regional Court found that prosecution had become time-barred.

27. On 16 February 1983 the Berlin Public Prosecutor's Office, having regard to the Regional Court's decision of 25 November 1982, preferred an amended indictment.

28. On 12 January 1984 the Berlin Regional Court discontinued the criminal proceedings as regards two counts of the indictment of 16 February 1983, and committed the accused for trial as regards the remainder of the charges.

29. On 30 January 1984 the trial against the applicant and his two co-accused concerning charges of tax evasion and related offences on fourteen counts opened before the Berlin Regional Court. It continued for 182 days until 13 November 1986. It follows from the verbatim record that on numerous days the trial lasted only about 2 to 25 minutes (1984: 27, 28 February; 12 March; 1985: 21 February; 4, 12 July; 5 August; 26 September; 3, 10 October; 4, 11, 18, 25 November; 2, 9, 16, 23, 30 December; 1986: 6, 13, 20, 27 January; 20, 27 February; 13, 20, 25 March; 10, 21, 28 April; 5, 12, 22 May; 9, 16, 25 June; 17, 24, 31 July; 7, 14, 21, 28 August, 4 September).

30. In the course of the trial, i. e. on 12 March 1985, the Regional Court, upon request of one of the accused, ordered that several witnesses residing in Switzerland be heard. The rogatory letters to that effect remained, at the time, unsuccessful. The request was thereupon refused on 30 May 1985. Further requests to hear witnesses residing in Switzerland were dismissed on 10 June and 24 October 1985 as well as on 10 February 1986. One further witness was heard at the German Consulate in New York in April 1986. After appeal proceedings as regards the rogatory letters of March 1985, two witnesses were heard in Switzerland in May and September 1986.

31. On 13 November 1986 the Berlin Regional Court convicted the applicant of having acted as an accessory to tax evasion on one count and sentenced him to six months' imprisonment on probation. One co-accused was convicted of tax evasion on one count. The proceedings against the third co-accused were discontinued; the proceedings against the applicant and the second co-accused were discontinued as regards the remaining counts of the indictment on the ground that prosecution had become time-barred in the meantime.

32. In its judgment comprising 391 pages, the Regional Court found that the accused had been manager and accountant, respectively, of a group of limited partnerships formed to take advantage of the tax allowances for depreciation (Abschreibungsgesellschaften), in particular tax allowances in support of the Berlin industry under the Berlin Assistance Act (Berlinförderungsgesetz). The Court had regard to fictitious business activities of these firms conducted from 1970 until 1974 which had resulted in fictitious losses and thus incorrect tax assessments in respect of the limited partners. In the course of the trial, the prosecution as regards the majority of these charges became time-barred, only one count of tax evasion and being an accessory to tax evasion in connection with business activities in 1974 remaining to be considered. With regard to the fixing of the sentence, the Regional Court considered as mitigating circumstances the fact that since 7 April 1975 the Berlin Tax Office had considered tax evasion possible. Furthermore, the offences had been committed a long time ago, the accused had not been previously convicted and had been considerably burdened as a result of the length of the proceedings for which they could not be held responsible - burdens which they had never tried to avoid. As far as their defence strategy had allowed, they had to a large extent co-operated in the establishment of the facts ("Im übrigen wirkte sich bei beiden Angeklagten aus, daß die Tatzeit lange zurückliegt, daß sie bisher nicht bestraft sind und durch die lange, von ihnen nicht zu verantwortende Verfahrensdauer großen Belastungen ausgesetzt waren, denen sie sich zu keiner Zeit zu entziehen suchten. Soweit es ihre Verteidigungsstrategie erlaubte, haben sie auch in weitem Umfang zur Aufklärung des Sachverhalts beigetragen.")

33. The Regional Court also decided that the accused had to bear the costs of the proceedings insofar as they had been convicted; the remainder had to be borne by the Treasury. However, in accordance with S. 467 para. 3, second sentence, of the Code of Criminal Procedure (Strafprozeßordnung), the Regional Court declined to order the Treasury to bear the accused's own expenses - insofar as the proceedings had been discontinued. In this respect, the Regional Court considered that, having regard to its above findings as regards the accused's business activities for years, they would certainly have been convicted on the other counts of the indictment, had the prosecution not become time-barred in the course of the trial. Furthermore, after the taking of evidence had already been closed on 24 October 1985, one of the applicant's co-accused, in requesting to take further evidence in hearing witnesses living abroad, had prevented the Regional Court from terminating the trial before prosecution had become time-barred. The cost and time spent in the further taking of evidence and the intermediate hearings (Zwischentermine) were necessary in order to avoid a completely new start of the trial under S. 229 of the Code of Criminal Procedure (old version).

34. The applicant lodged an appeal on points of law (Revision). The written judgment was served upon the applicant on 21 September 1987.

35. On 16 October 1987 the applicant submitted the reasons of his appeal on points of law. He complained inter alia about the length of the proceedings and referred to Article 6 para. 1, first sentence, of the Convention.

36. On 27 January 1989 the Federal Court of Justice dismissed the applicant's appeal on points of law. The decision was served on 6 February 1989.

37. On 19 April 1989 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde). The Constitutional Court found that the complaint was inadmissible as regards the proceedings before the Berlin Regional Court, and that the remainder offered no prospect of success.

B. Relevant domestic law

38. The Berlin Assistance Act (Berlinförderungsgesetz, Neufassung vom 29. Oktober 1970, Bundesgesetzblatt I, S. 1481) provided inter alia for reduced rates of income tax in respect of persons employed in West Berlin and granted particular investment allowances for companies with a registered seat in West Berlin; It also provided for higher tax deduction rates in respect of production and purchase costs incurred upon acquisition of assets forming part of the fixed assets of a plant in West Berlin; such tax benefits could be acquired by merely paying an advance on the purchase price of the assets concerned. Investors resident outside West Berlin could profit from these tax advantages where the acquisitions or deposit payments were made by a limited partnership (Kommanditgesellschaft) with its seat in West Berlin.

39. SS. 94 to 111n of the Code of Criminal Procedure (Strafprozeßordnung) govern the seizure of evidence, the surveillance of telecommunications and the search of a person's home or other premises. S. 94 provides that objects which can, as evidence, be relevant to the investigations have to be taken into official custody, or, if they are in another person's custody and not handed over voluntarily, have to be seized.

40. SS. 151 to 177 of the Code of Criminal Procedure regulate the principles of criminal prosecution and the preparation of the indictment. S. 151 provides that the opening of a trial presupposes an indictment. According to S. 152 the indictment is preferred by the Public Prosecutor's Office which is, unless otherwise provided, obliged to investigate any criminal offence of which there is a reasonable suspicion.

41. Preliminary investigations are conducted by the Public Prosecutor's Office according to SS. 160 and 161 of the Code of Criminal Procedure. On the basis of these investigations the Public Prosecutor's Office decides under S. 170 whether to prefer an indictment or to discontinue the proceedings.

42. In accordance with S. 229 of the Code of Criminal Procedure (old version, new promulgation of the Code of Criminal Procedure in 1987) a main court hearing (Hauptverhandlung) could be adjourned up to ten days. If the main court hearing had been conducted for at least



ten days, it could be once adjourned for up to thirty days, and, if then continued for another ten days, it could be adjourned a second time for up to thirty days. If the court hearing was not continued at the latest on the day after expiry of the above time-limits, it had to be started afresh.

43. S. 244 to S. 246 of the Code of Criminal Procedure regulate the taking of evidence and in particular the handling of requests to take evidence.

44. S. 467 para. 1 of the Code of Criminal Procedure provides that, if the accused is acquitted or if he is not committed for trial or if the proceedings against him are discontinued, the costs of the proceedings and the accused's necessary costs and expenses shall be borne by the Treasury. According to paragraph 3 the court may decline to award the accused's necessary costs and expenses against the Treasury where, inter alia, the accused has avoided conviction merely because of a technical bar to the proceedings (Verfahrenshindernis).

45. S. 78 to S. 78c of the Penal Code (Strafgesetzbuch) concern the limitation of prosecution (Verfolgungsverjährung), in particular the beginning of the relevant period (S. 78a), the suspension (Ruhen) of the limitation period under particular circumstances (S. 78b), and the interruption (Unterbrechung) of the limitation period by various prosecution measures until expiry of, as a rule, a period of twice the length of the statutory limitation.

### III. OPINION OF THE COMMISSION

#### A. Complaint declared admissible

46. The Commission has declared admissible the applicant's complaint under Article 6 para. 1 of the Convention about the length of the criminal proceedings against him.

#### B. Point at issue

47. Accordingly, the issue to be determined is whether there has been a violation of Article 6 para. 1 of the Convention.

#### C. Article 6 para. 1 of the Convention

##### 1. General considerations

48. The applicant complains under Article 6 para. 1 of the Convention that he has not received a hearing within a reasonable time in the criminal proceedings against him.

Article 6 para. 1, first sentence, states:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

49. The applicability of Article 6 para. 1 to the present proceedings is not in dispute between the parties. The Commission must examine the length of the proceedings in the light of the case-law of the European Court of Human Rights and the Commission.

##### 2. Period to be considered

50. The respondent Government submit that the starting point of the period the reasonableness of which is at issue is 22 November 1976 when the applicant's premises were searched.

51. The Commission recalls that, in criminal matters, the "reasonable time" referred to in Article 6 para. 1 begins to run as soon as a person is "charged", i.e. officially notified by the competent authority of an allegation that he has committed a criminal offence, or otherwise, if the situation of the suspect has been substantially affected as a result of criminal investigations against him (cf. Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, pp. 33/34, paras. 73, 74 with further references).

52. In the present case, the preliminary investigations against the applicant started in December 1975. On 11 February 1976 the Tiergarten District Court issued, inter alia, a search warrant concerning the applicant's premises in Berlin, and the search was effected on 22 November 1976. At that date the applicant was officially notified about the charges against him. However, the Commission considers that the negative consequences resulting from criminal proceedings already affected the applicant in April 1976 when he learnt about the criminal investigations instituted against him, in particular the search warrants, and thereupon took the initiative to apply to the Berlin Public Prosecutor's Office. The starting date is therefore April 1976.

53. The proceedings lasted at least until 6 February 1989 when the decision of the Federal Court of Justice of 27 January 1989, which dismissed the applicant's appeal on points of law, was served upon the applicant. The Commission does not find it necessary, in the present case, to determine whether the subsequent proceedings before the Federal Constitutional Court also fall within the period which is relevant under Article 6 para. 1.

54. The length of the period to be examined under Article 6 para. 1 thus amounts to more than twelve years and nine months.

### 3. Reasonableness of the length of the proceedings

55. The parties discussed the application of the different criteria in the case-law of the Convention organs, such as the complexity of the case, the conduct of the parties and of the authorities concerned.

56. The Commission recalls that the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case. In the present case which lasted more than twelve years those circumstances call for a global assessment (cf. Eur. Court H.R., Motta/Manzoni/Pugliese (I)/Alimena/Frau judgments of 19 February 1991, Series A no. 195, p. 10, para. 17; p. 29, para. 18; p. 42, para. 16; p. 56, para. 17; pp. 73/74, para. 16; respectively; and, mutatis mutandis, Obermeier judgment of 28 June 1990, Series A no. 179, p. 23, para. 72).

57. The charges against the applicant and others concerned tax evasion and related financial offences in the context of fictitious business activities and losses of a group of limited partnerships in Berlin. The investigations were of some complexity as to the facts and the law, and the case involved rogatory proceedings. However, in the course of the proceedings prosecution as regards numerous offences became time-barred.

58. It does not appear that the applicant unduly delayed the proceedings. In this respect, the Commission notes in particular that the Berlin Regional Court, in its judgment of 13 November 1986, stated that the applicant and the co-accused had to a large extent co-operated in the establishment of the facts, and concluded that the accused could not be held responsible for the length of the proceedings (see para. 32 above).

59. As regards the conduct of the German authorities, the Commission notes that the Berlin Public Prosecutor's Office questioned the applicant for the first time in September 1979, i.e. nearly four years after investigations had started. A first indictment was preferred on 30 January 1980. It was amended on 15 August 1980, and again on 16 February 1983 (see paras. 22, 24, 27 above). The proceedings at this stage accordingly lasted about six years and ten months.

60. The Berlin Regional Court started the trial against the applicant and the co-accused only on 30 January 1984. In the course of this trial which lasted two years and nine months, the number of extremely short hearings is striking (see para. 29 above). Finally, the applicant and one co-accused were only convicted of a minor offence, prosecution of the major part of the charges having become time-barred. Nevertheless, the Berlin Regional Court, in its judgment of 13 November 1986, established in detail the facts as regards all the charges in order to reason its refusal to award the applicant's necessary costs and expenses against the Treasury (see para. 33 above). The written judgment was only served on 21 September 1987. Thus the proceedings at first instance took four years and seven months.


61. The proceedings before the Federal Court of Justice concerning the applicant's appeal on points of law lasted from 16 October 1987 until 6 February 1989, i.e. about one year and three months.

62. In these circumstances, the Commission, having regard in particular to the length of the preliminary investigations and the trial before the Regional Court, finds that, in the determination of the criminal charges against him, the applicant did not receive a hearing within a reasonable time.

#### 4. Conclusion

63. The Commission concludes, unanimously, that there has been a violation of Article 6 para. 1 of the Convention.

Secretary to the First Chamber    Acting President of the First Chamber



(M. DE SALVIA)



(F. ERMACORA)

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
4 August 1989	Introduction of the application
19 October 1989	Registration of the application
<u>Examination of Admissibility</u>	
15 February 1990	Commission invites the respondent Government to submit observations on the admissibility and merits
25 May 1990	Submission of Government's observations
28 August 1990	Submission of applicant's observations in reply
8 January 1991	Commission refers the case to the First Chamber
17 April 1991	Commission declares the application admissible
<u>Examination of the merits</u>	
9 December 1991	Final vote and adoption of the Report