

European Communities

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EUROPEAN PARLIAMENT

# Working Documents

1980 - 1981

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31 March 1980

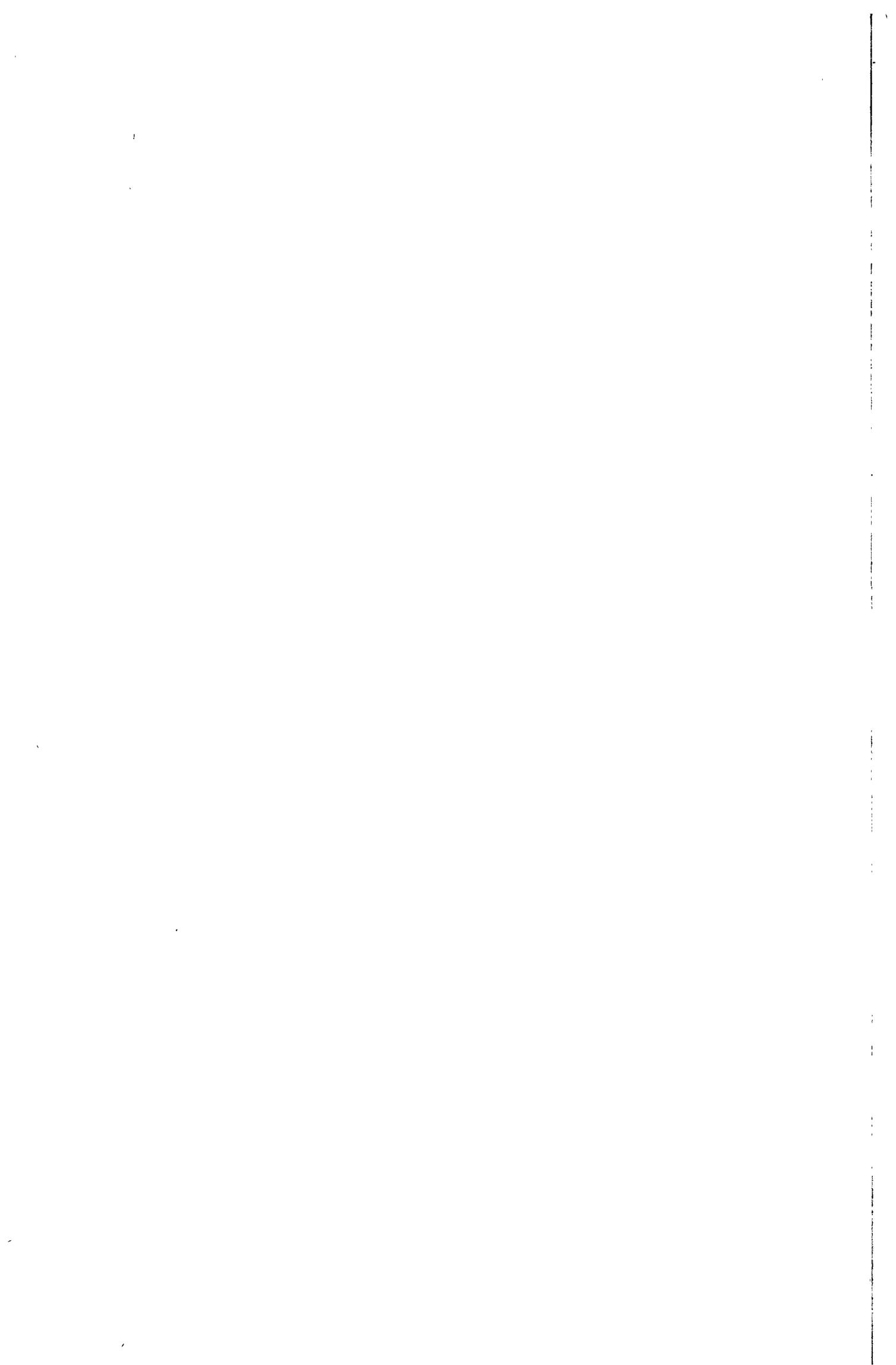
DOCUMENT 1-44/80

## Report

drawn up on behalf of the Legal Affairs Committee

**on the Adams case and on the trade agreement between the EEC and the Swiss Confederation**

**Rapporteur: Mr G. DONNEZ**



On 14 February 1979 the European Parliament adopted (cf. OJ No. C 67 of 12.3.1979, p. 28), a resolution instructing the Legal Affairs Committee to consider the implications of the case of Mr Stanley Adams on the EEC-Switzerland trade agreement and to report to Parliament.

At its meeting on 20 and 21 November 1979, the Legal Affairs Committee appointed Mr Donnez rapporteur.

At its meeting on 19 and 20 December 1979 the Legal Affairs Committee held an exchange of views on the subject on the basis of a verbal statement by its rapporteur.

At its meeting of 19 March 1980, the Legal Affairs Committee considered the draft report and adopted the motion for a resolution and explanatory statement unanimously, less three abstentions.

Present: Mr Ferri, chairman; Mr Luster, Mr Turner and Mr Chambeiron, vice-chairmen; Mr Donnez, rapporteur; Mr Adonnino (deputizing for Mr Modiano), Mr Dalziel, Mr D'Angelosante, Mrs Ewing (deputizing for Mr Gillot), Mr Fischbach, Mr Geurtsen, Mr Gonella, Mr Goppel, Mr Janssen van Raay, Mr Malangré, Mr Megahy, Mr Pelikan, Mr Peters (deputizing for Mr Vetter), Mr Prout, Mr Sieglerschmidt, Mr Tyrrell and Mrs Vayssade.

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The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution together with explanatory statement:

MOTION FOR A RESOLUTION

on the Adams case and on the trade agreement between the EEC and the Swiss Confederation

The European Parliament,

- having regard to the 1972 trade agreement between the EEC and the Swiss Confederation,<sup>1</sup>
  - having regard to the final decision of 27 September 1977 of the Basle Court of Appeal sentencing Mr Stanley Adams to one year's imprisonment (suspended) and the forfeiture of a surety of 25,000 Swiss francs,
  - having regard to the decision of the Commission of the European Communities of 9 June 1976,<sup>2</sup> and the judgment of the Court of Justice of the European Communities of 13 February 1979<sup>3</sup> on the activities of Hoffman-La Roche<sup>1</sup>,
  - having been informed that Mr Adams, who has taken up residence in the territory of the Republic of Italy, is now in considerable financial difficulty,
  - having regard to the resolution adopted by the European Parliament on 14 February 1979 (doc. 622/78)<sup>4</sup>,
  - having regard to the report of the Legal Affairs Committee (Doc. 1-44/80),
1. Invites the Commission of the European Communities to ask the competent bodies of the Swiss Confederation that amnesty measures be taken in relation to Mr Adams with respect to the consequences of his being found guilty of criminal offences;
  2. Asks the Commission of the European Communities
    - to make an extraordinary payment to Mr Adams in order to make good the psychological and physical consequences of the action he took to put a stop to the illegal practices of Hoffmann-La Roche;
    - to approach the Government of the Republic of Italy with the request that it do all it can to assist Mr Adams should the need arise;

<sup>1</sup> OJ L 300, 31.12.72, p. 188 et seq

<sup>2</sup> OJ L 223, 16.8.76, p. 27 et seq

<sup>3</sup> Case 85/76, European Court reports 1979-2, p. 461 et seq

<sup>4</sup> OJ No. C 67, 12.3.1979, p. 28

3. Invites the Commission of the European Communities to furnish the Legal Affairs Committee with firm assurances that in future any person revealing activities contrary to the EEC-Switzerland trade agreement shall not be prosecuted in the Swiss courts, in particular under Articles 273 and 162 of the Swiss Penal Code;
4. Instructs its Legal Affairs Committee to present a further report should it consider the assurances referred to in paragraph 3 insufficient;
5. Instructs its President to forward this resolution and the report of its committee to the Commission and the Council of the European Communities.

EXPLANATORY STATEMENTI. INTRODUCTION

1. On 1 July 1976 the Court of Summary Jurisdiction of Basle found in his absence Mr Stanley Adams, a Maltese national, guilty of economic espionage and sentenced him to one year's imprisonment (suspended and reduced by the period of detention awaiting trial from 31.12.1974 to 21.3.1975) with a five-year ban on residence in the Swiss Confederation and ordered the forfeit of a surety of 25,000 Swiss francs and payment of costs.

On 27 September 1977 the Basle Court of Appeal upheld that sentence but set aside the ban on residence in the Swiss Confederation.

On 3 May 1978, the Supreme Court of Appeal of Switzerland dismissed an appeal by Mr Stanley Adams asking that the judgment given on appeal be set aside and ordered him to pay the costs of the proceedings.

2. From March 1973 onwards, Mr Adams while employed by Hoffmann-La Roche of Basle, passed to the Commission of the European Communities a number of confidential documents relating to the trade practices of Hoffmann-La Roche in relation to vitamins.

In 1974 the Commission of the European Communities started investigations in connection with the common market, as a result of which it accused the subsidiaries of Hoffmann-La Roche of trade practices contrary to the provisions on competition of the EEC Treaty (Article 86). Following these investigations, Hoffmann-La Roche claimed that confidential documents had disappeared from its head office in Basle. On 31 December 1974 Mr Adams was arrested by the Swiss police and held in custody to help them with their preliminary enquiries. He was later released after payment of a surety and prosecuted before the Court of Summary Jurisdiction on charges of economic espionage.

3. The Basle Court of Summary Jurisdiction found Mr Adams, who had in the meantime taken refuge in Italy, guilty of 'persistent economic espionage' and 'persistent betrayal of trade secrets' under Article 273(2) and Article 162(1) of the Swiss Penal Code.

Article 273(2) punishes any disclosure of secrets to the detriment of the state or of national security, while Article 162(1) protects secrets connected with manufacturing processes and trade practices.

## II. THE ILLEGAL PRACTICES OF HOFFMANN-LA ROCHE

4. The practices of Hoffmann-La Roche exposed by Mr Adams were corroborated by two decisions recording the abuse of a dominant position.

These were the Commission's decision of 9 June 1976 and the judgment of the Court of Justice of the European Communities of 13 February 1979.

5. By its decision of 9 June 1976<sup>1</sup>, taken following the investigation into the activities of Hoffmann-La Roche in connection with the common market (which investigation was in part facilitated by Mr Adams' disclosures), the Commission of the European Communities found that Hoffmann-La Roche had 'committed an infringement of Article 86 by concluding an agreement which contained an obligation upon purchasers, or by the grant of fidelity rebates offered them an incentive, to buy all or most of their vitamin requirements exclusively or in preference from Hoffmann-La Roche'.

By the terms of this decision, Hoffmann-La Roche was enjoined to 'terminate the infringement forthwith' and to pay a fine of 300,000 EUA, i.e. 1,098,000 DM.

6. On 18 August 1976 Hoffmann-La Roche lodged an appeal with the Court of Justice of the European Communities asking it to set aside the Commission's decision of 9 June 1976.

The grounds of the judgment handed down by the Court of Justice on 13 February 1979 on the 'administrative irregularities' alleged to have been committed by the Commission during its investigation and the acknowledgement that Hoffmann-La Roche had since 1970 conducted a deliberate policy of abuse of a dominant position, are particularly important in the Adams case.

7. Among other arguments advanced to contest the decision, Hoffmann-La Roche stated that four documents for internal distribution headed 'Management Information' and the minutes of a directors' meeting held on 12 and 13 October 1972 had come into the possession of the Commission by irregular means. In fact, these documents had been passed to the Commission by an employee of the company, who had obtained them

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<sup>1</sup> OJ L 223, 16.8.1976, p.27

illegally, thus committing an offence punishable under Swiss criminal law<sup>1</sup>.

For Hoffmann-La Roche it was argued that this irregularity in obtaining information had invalidated the proceedings. Furthermore, Hoffmann-La Roche argued that the Commission was in breach of international law in conducting investigations in a sovereign third state.

A passage in the judgment of the Court given on 13 February 1979 concerns 'Irregularities in the administrative procedure'<sup>2</sup>. Paragraph 7 of the judgment states:

'7. On this point the applicant in the first place submitted in its application that the procedure initiated by the Commission on its own initiative against it pursuant to Articles 3 and 15 of Regulation No. 17 of the Council was irregular having regard to the fact that documents for internal use by its departments came unlawfully into the possession of the Commission.

However, during the written and oral procedure before the Court it stated that it withdrew the submission and itself produced for the Court's file with other documents the documents the use of which by the Commission it had previously regarded as being unlawful.

In these circumstances this submission may be rejected without any further examination since the Court is of the opinion that it need not examine it of its own motion'.

8. In that part of the judgment entitled 'Infringement of Article 86 of the EEC Treaty' (section 5: 'The applicant's conduct on the market'), the Court stated: 'Consequently the Commission was right to find in the contested decision that there was such a position (dominant) as far as concerned the market in vitamins A, B2, B6, C, E and H', while 'on the other hand it was wrong to find that there was such a position on the vitamin B3 market'<sup>3</sup>.

In that part of the judgment entitled 'The existence of an abuse of a dominant position' which considers the practices of Hoffmann-La Roche and the contractual clauses employed by that company, the Court recognized that, in the various circumstances considered, the company was guilty of an abuse of a dominant position<sup>4</sup> and therefore found:

<sup>1</sup> Cf. text of the judgment of the Court of Justice in Case 85/76, Hoffmann-La Roche v. Commission 13.2.1979, PE 59.679, p. 16

<sup>2</sup> Text of judgment, p. 79

<sup>3</sup> Text of judgment, point 179, p. 114

<sup>4</sup> Ibid, p. 126 (point 101), p. 130 (point 108), p. 132 (point 111) and p. 138 (point 121)

'127. The foregoing shows that the course of conduct at issue was capable of both affecting competition and affecting trade between Member States'<sup>1</sup>.

As far as the wilful intent of Hoffmann-La Roche is concerned, the Court stated in the second paragraph of point 139 of its judgment:

'The increase from 1970 of contracts under which the purchaser obtains his supplies exclusively from Hoffmann-La Roche or is induced to do so confirms this intention'<sup>2</sup>.

Finally, in view of the fact that 'as far back as the stage of the administrative procedure Roche stated that it was ready to amend the contracts at issue and in fact amended them in conjunction with the Commission's departments'<sup>3</sup>, the Court reduced the amount of the fine to 200,000 EUA, i.e. 732,000 DM.

### III. THE AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE SWISS CONFEDERATION

9. The commercial relations between the European Economic Community and the Swiss Confederation are governed by an agreement concluded on 22 December 1972<sup>4</sup>.

In the preamble to that agreement the two contracting parties declared themselves desirous 'to consolidate and to extend, upon the enlargement of the European Economic Community, the economic relations existing between the Community and Switzerland and to ensure with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe'.

Furthermore, Article 1 of the agreement states that the aim of the agreement is:

- '(a) to promote, through the expansion of reciprocal trade, the harmonious development of economic relations between the European Economic Community and the Swiss Confederation and thus to foster in the Community and in Switzerland the advance of economic activity, the improvement of living and employment conditions and increased productivity and financial stability,
- (b) to provide fair conditions of competition for trade between the contracting parties,
- (c) to contribute in this way, by the removal of barriers to trade, to the harmonious development and expansion of world trade.'

<sup>1</sup> Ibid, p. 141

<sup>2</sup> Ibid, p. 147

<sup>3</sup> Text of judgment, p. 148, point 140, 3rd paragraph

<sup>4</sup> OJ No. L 300, 31.12.1972, p. 191 et seq.

10. Articles 23 and 22 of the agreement are of particular importance for a proper assessment of the Adams case. Article 23(1) provides that: 'the following are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and Switzerland:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.'

Paragraph 1 and the first subparagraph of paragraph 2 of Article 22 provide:

- '1. The Contracting Parties shall refrain from any measure likely to jeopardize the fulfilment of the objectives of the Agreement.
- 2. They shall take any general or specific measures required to fulfil their obligations under the Agreement.'

11. To monitor the implementation of the agreement, Article 29 established a 'Joint Committee' consisting of representatives of the Commission and representatives of the Swiss Confederation. Article 29(2) states that 'the Contracting Parties shall exchange information'.

As regards in particular Article 23 of the agreement, which expressly prohibits the abuse of a dominant position, Article 27(3) (a) provides:

'The Contracting Parties shall provide the Joint Committee with all relevant information and shall give it the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.'

12. It is legitimate to ask whether the Swiss Confederation has in fact applied these provisions. The Swiss courts, at least, seem to attach precious little importance to them, since the judgment given against Mr Adams considers that the practices of Hoffmann-La Roche should remain secret and regards the fact that these practices were brought to the attention of the Commission of the European Communities as an attack on national sovereignty.

IV. THE PROVISIONS OF THE CRIMINAL LAW APPLIED IN THE ADAMS CASE

13. As stated earlier, Mr Adams was found guilty on the basis of Articles 273 and 162 of the Swiss Penal Code.

14. Article 273 of the Swiss Penal Code comes under Title 13 ('Crimes against the State and against national security'). It originated in a decree of 6 August 1914 issued during wartime. Article 5 of the decree provided for the imprisonment of, and imposition of fines on, any person committing on Swiss territory acts of espionage for the benefit of a foreign power, and its main object was to put a stop to the German Government's efforts to discover details of the bank accounts of German citizens resident in Switzerland.

A further federal decree, of 21 June 1935, on the protection of the security of the Swiss Confederation contained (Article 4) provisions for the prevention of economic espionage. These provisions were reenacted in Article 273 of the Penal Code now in force.

In 1947 (Federal Court judgment - 74 IV 206, Duval case), the Swiss Federal Court stated in relation to this rule of the criminal law that economic espionage damaging the interests of a private undertaking also constituted an attack on the general interests of the Swiss economy where it took the form of a civil offence or a crime punishable under the provisions of Title 13 of the Penal Code.

Although it was admitted that, under the principles generally applied in Switzerland, it is not usual to equate private economic interests with national interests, the Federal Court considered that Article 273 of the Penal Code found its justification not so much in the internal economic policy of the State but rather in its foreign policy. In this connection, the following sentence is instructive:

'The result of the tendency for national economies to adopt an increasingly inward-looking attitude has been that the Swiss economy has also become increasingly a matter of general interest and that the state has had to intervene and continues to do so constantly in various ways to protect it as against outside forces'.

15. Although such considerations might have been justified at the time of the Duval trial, they would seem groundless in the light of the preamble to the agreement concluded in 1972 between the European Economic Community and the Swiss Confederation. They were still less valid in 1976, when sentence was pronounced on Mr Adams.

Nevertheless, this did not stop Article 273 of the Penal Code being applied in this and subsequent cases<sup>1</sup> as a provision for the protection of the Swiss economy from the harm which it might sustain following disclosure of the manufacturing secrets or trade practices of a private undertaking.

16. Whereas Article 273 protects the State's interest in the matter of secrecy, Article 162 of the Swiss Penal Code is intended to protect a private interest, i.e. an interest in preserving secrecy in relation to the trade practices of undertakings registered in Switzerland.

17. By applying that provision, the Basle Court of Summary Jurisdiction found that Mr Adams was guilty of disclosing secret practices of Hoffmann-La Roche whose preservation was for the company an interest worthy of protection ('schützenswertes Geheimhaltungsinteresse').

18. Although Mr Adams' conduct in itself might have justified the application of this provision<sup>2</sup>, the question is whether Hoffmann-La Roche could in fact claim an interest worthy of protection with respect to trade practices contrary to the aims pursued by the Swiss state under its agreement with the European Economic Community.

On the one hand, then, there is Hoffmann-La Roche's interest in preserving its secrets and, on the other hand, in the matters of which Mr Adams is accused there is the higher interest of the Swiss Confederation which considers incompatible with the proper functioning of the agreement which it signed 'abuse by one or more undertakings of a dominant position'<sup>3</sup>.

Moreover, under Article 27 of the agreement, the illegal trade practices of Hoffmann-La Roche could not remain secret, since the contracting parties were required to refer to the Joint Committee 'all relevant information' to eliminate the practice objected to<sup>4</sup>.

#### V. THE ADAMS CASE AND THE SWISS CONFEDERATION

19. According to the general theory of international law, the signature of an agreement between two entities recognized under international law gives rise to reciprocal rights and duties on the part of the contracting parties.

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<sup>1</sup> Federal Court judgment 85 IV 139, Blunier case  
Federal Court judgment 97 IV III, Frauenknecht case  
Federal Court judgment 98 IV 209, A case

<sup>2</sup> See note of the European Parliament's legal service (PE 59.273, Doc. i, p.2)

<sup>3</sup> See Article 23(1)(ii)

<sup>4</sup> Article 27(3)(a) second subparagraph

Non-observance of obligations undertaken by the signature of an international treaty may be the result of a specific act or an omission. Thus it may result either from the performance or non-performance of functions for which the contracting parties are responsible, whether in the legislative, judicial or administrative sphere.

20. The judgment in the Adams case suggests an attitude on the part of the Swiss Confederation which is in contradiction with the general obligations set out in Article 22(1) and (2) of the agreement. For the Swiss Confederation should, in order to fulfil its obligations under the agreement, have taken the 'general or specific measures' required to put a stop to the illegal practices of Hoffmann-La Roche.

As regards its duty to refrain from 'any measure likely to jeopardize the fulfilment of the objectives of the agreement', it is reasonable to suggest that the Swiss Confederation could not thereafter protect the secrecy of such practices by punishing their disclosure with the same penalties as those provided for offences against its sovereignty.

Moreover, Article 23 of the agreement concluded between the European Economic Community and the Swiss Confederation, which specifies the practices which are incompatible with the proper functioning of that agreement, provides for the contracting parties to terminate those practices in accordance with the procedures laid down in Article 27 of the agreement. Article 27 contains the explicit obligation to supply 'all relevant information' to eliminate the practice objected to.

21. The Court of Summary Jurisdiction and the Court of Appeal of Basle, as also the Swiss Supreme Court of Appeal, all felt constrained to look at the allegations against Mr Adams in the light of the provisions of the Swiss national penal code without taking any account of the existence of international provisions which might present the matters under consideration in a rather different perspective. The judgment in the Adams case raises grave doubts, particularly in view of the fact that the international treaties concluded by the Swiss Confederation are an integral part of Swiss law. They require no ratification and take precedence over prior laws.

22. The fact is that the judge merely applied the provisions of the Penal Code in force in Switzerland. It is incumbent upon the Swiss Confederation to modify its laws so as to avoid a situation where an act which it is required under international law to uphold (duty of information) continues to be punished as an offence against the higher interests of the State under municipal law, where that act is committed by an individual.

Although the scope of Article 273 of the Swiss Penal Code remains intact in cases of economic espionage proper, it is reduced if not nullified when it comes to proceeding against acts which are not incompatible with the aims pursued by the Swiss Confederation under an international agreement.

23. It should also be pointed out that Article 105 of the law of 15 June 1934<sup>1</sup>, which specifically concerns economic espionage, would, having regard to the foregoing observations, have permitted the Swiss Government to abstain from bringing criminal proceedings against Mr Adams.

Since the Swiss Government did not take that option, the conclusion must be that, despite the agreement of 22 July 1972 and the obligations flowing therefrom, it preferred to apply its municipal law, making no allowance for mitigating circumstances.

24. In conclusion, the Legal Affairs Committee considers that the Swiss Confederation erred in its assessment of the allegations against Mr Stanley Adams, having regard to its agreement with the European Community. The Swiss Confederation has been guilty of shortcomings under the following heads:

- (a) legislative: insofar as Swiss criminal law has not been brought into line with the new situation created by the agreement of 22 July 1972;
- (b) judicial: in the sense that the judgment in the Adams case did not take due account of all the rights and duties flowing from an international treaty, whose provisions are an integral part of Swiss municipal law;
- (c) administrative: since the Swiss Government did not feel obliged to take the option of not bringing criminal proceedings provided for under Article 105 of the law of 15 June 1934, despite the fact that Hoffman-La Roche's practices were contrary to the aims pursued by the Swiss Confederation following the conclusion of the agreement of 22 July 1972.

#### VI. ACTION TO BE TAKEN BY THE COMMUNITY IN RELATION TO MR ADAMS

25. It is clear that the European Community has a particular responsibility to Mr Adams, whose statements enabled practices contrary to the EEC-Switzerland trade agreement and the EEC Treaty to be punished and stopped. Mr Adams has suffered considerable misfortune in his personal and family life as well as substantial financial loss.

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<sup>1</sup> 'Bundesgesetz über die Bundesstrafrechtspflege'

It should here be recalled that the European Parliament has on many occasions<sup>1</sup> concerned itself with this case and its consequences.

26. Therefore the Community must act to help Mr Adams.

First of all the Commission of the European Communities should ask the competent bodies of the Swiss Confederation to take amnesty measures in favour of Mr Adams to erase all the consequences of his trial.

Furthermore, as Mr Prescott told Parliament<sup>2</sup> 'an application to the Human Rights Court will ensure that this matter continues'. If such an application is made, then clearly the Commission should provide Mr Adams with every assistance.

27. As far as Mr Adams' financial loss is concerned, the Commission of the European Communities should consider the possibility of making a payment to him from the Community's budget to make good that loss.

The Commission could also ask the Italian Government (it will be recalled that Mr Adams has taken up residence in Italy), to do what it can for Mr Adams.

VII. ACTION TO BE TAKEN BY THE COMMUNITY IN RELATION TO THE EEC-SWISS CONFEDERATION TRADE AGREEMENT

28. Quite apart from the individual case of Mr Adams, the Community must take steps to resolve what seems to be the most striking contradiction in the whole affair: namely, the fact that a state which has signed an agreement with the Community continues to apply its internal laws punishing anyone who exposes conduct contrary to the agreement. The application of Articles 273 and 162 of the Swiss Penal Code to the situation envisaged by the EEC-Swiss Confederation agreement represents in practice a form of protection to natural or legal persons acting contrary to the provisions of the agreement.

<sup>1</sup> In addition to the motion for a resolution tabled by Mr Prescott on behalf of the Socialist Group which led to this report being compiled (see OJ C 67, 12 March 1979, p. 28), see also:

- debate on question No. 15 by Mr Prescott tabled during Question Time at the sitting of 15 September 1976 (OJ Annex No. 206, debates, p. 82 and p. 83);
- written question No. 358/76 by Mr Bangemann and the Council's answer (OJ C 294, 13 December 1976, p. 6);
- debate on an oral question to the Commission (Doc. 499/76) tabled by Mr Prescott on behalf of the Socialist Group at the sitting of 12 January 1977 (OJ Annex No. 211, debates, p. 130 et seq.);
- debate on question No. 7 by Mr Prescott tabled during Question Time at the sitting of 15 December 1977 (OJ Annex No. 224, debates, p. 245).

<sup>2</sup> OJ Annex No. 239, debates, p. 81

29. The Commission of the European Communities should therefore approach the Swiss authorities to seek firm assurances that there will not be a repetition of cases of this kind in future, and the Commission should provide evidence of such assurances to the European Parliament.

30. It will be recalled in this connection that during the sitting of Tuesday, 13 February 1979<sup>1</sup>, a question by Mr Prescott ('What assurances have the Commission received from the Swiss Government that should any other citizen provide similar information about illegal acts they will not face charges of espionage?'), received the following answer from Vice-President Haferkamp:

'Fourth question: the Swiss Government has made no declaration of the kind referred to in the question. There are permanent contacts between the Commission's offices and the Swiss mission in Brussels. The Commission assumes that this will ensure that there is no repetition of a case like this'.

31. The Commission must therefore inform us whether its assumptions have proved to be justified by communicating evidence of the assurances referred to above.

32. Should the Commission not be able to supply such evidence, it must find a different solution to achieve the same result. By way of example, the Legal Affairs Committee would suggest the possibility of having an explanatory note added to the text of the agreement which would specify that Article 273 and 162 of the Swiss Penal Code do not apply to acts intended to facilitate the enforcement of the agreement.

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<sup>1</sup> OJ Annex No. 239, debates, p. 83

