JUDGMENT OF THE COURT
7 November 1985 *

In Case 145/83

Stanley George Adams, represented by D. Vaughan QC and C. Prout, of the Middle Temple, Barrister, instructed by Messrs Denton Hall and Burgin, Solicitors, with an address for service in Luxembourg at the Chambers of P. Berna, 16 A Boulevard de la Foire,

applicant,

v

Commission of the European Communities, represented by N. Koch, a Legal Adviser, and K. Banks, a member of its Legal Department, acting as Agents, assisted by J. Lever QC, of Gray's Inn, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1985,

gives the following

* Language of the Case: English.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

A. *Summary of the facts*

In early 1973, the applicant, Stanley George Adams, who was employed by Hoffmann-La Roche & Co. (hereinafter referred to as 'Roche') in Basle until 31 October 1973, supplied the Commission of the European Communities with evidence concerning anti-competitive practices engaged in by that company. That information led the Commission to adopt its decision of 9 June 1976 imposing a fine on Roche. That decision was confirmed in all essential respects by the Court's judgment of 13 February 1979 (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).

On 31 December 1974 the applicant was arrested by the Swiss authorities as he crossed the border from Italy into Switzerland. The applicant was charged, in connection with the information which he had supplied to the Commission, under Articles 273 and 162 of the Swiss Penal Code, which concern respectively the disclosure of business information and breach of business confidentiality. On 21 March 1975 the Swiss authorities released the applicant on bail.

By judgment of 1 July 1976 the Strafgericht Basel-Stadt [Criminal Court, Basle] found the applicant guilty of offences against Articles 162 and 273 of the Swiss Penal Code. It sentenced him *in absentia* to one year's imprisonment (suspended). Subsequently the appeals lodged against that decision and an application to reopen the proceedings were dismissed.

On 28 May 1982 the applicant lodged a petition, in which he laid a complaint against Switzerland, with the European Commission of Human Rights. However, by a decision of 9 May 1983, the Commission of Human Rights rejected the petition as inadmissible on the ground that it was out of time.

On 18 July 1983 the applicant brought this action under Article 178 and the second paragraph of Article 215 of the EEC Treaty. He asks the Court to examine the legality of the acts and/or omissions of the Commission of the European Communities and/or its servants in the performance of their duties relating to:

(1) The disclosure on diverse occasions, in breach of confidence, of information leading to the arrest, detention, trial and conviction of the applicant in Switzerland; and

(2) The failure to advise the applicant, in breach of an obligation to give proper professional advice, that he had the right to petition the European Commission of Human Rights.

The applicant also asks the Court to order the Commission to pay damages to make good the injury suffered by the applicant by reason of such wrongful acts and/or omissions.

B. *The applicant's role as the Commission's informant*

1. On 25 February 1973, the applicant, who was at the time a Maltese national (born in 1927) and who had been employed by Roche since 1964, wrote a 'personal and confidential' letter to the Commissioner for Competition in which he described a number of anti-competitive practices engaged in by Roche. The applicant stated that he was still with Roche but that he planned to leave around July 1973 and to start his own meat business in Italy. He concluded his letter as follows:

'I request you not to let my name be connected with this matter. However I remain at your entire disposal for further information, as well as documentary evidence about every point which I have raised in this letter. Furthermore I am prepared to discuss any point with your assistants or yourself at any time, and if necessary I am prepared to fly to Belgium or Rome for this purpose. Additionally, after I leave Roche around July 1973 I would be prepared even to appear before any court to give sworn evidence on my statements. I trust to hear from you soon to know in what direction I can be of further help . . . '.

2. By a letter dated 26 March 1973, Mr Schlieder, then Director-General of the Commission Directorate-General for Competition (DG IV), suggested that the applicant should have a discussion on the points which he had raised with Mr Carisi, the Director for Inspection in Directorate-General IV.

3. On 9 April 1973 the applicant had an interview with Mr Carisi and Mr Rihoux, both Commission officials. In the course of that interview he supplied the Commission with certain information concerning Roche's activities.

4. Following that meeting, with letters addressed to Mr Carisi of 10 and 15 April and 21 July 1973, the applicant sent the Commission photocopies of various internal documents issued by Roche, in particular 14 'Management Information' memoranda dated between February 1970 and September 1972, and a photocopy of a letter of 25 June 1973 to the Roche directors from the president of Roche, Adolphe Jann. The applicant's last letter to Mr Carisi finished with the words:

'I take this opportunity to inform you that I will be with Hoffmann-La Roche until the end of the month of October 1973.'

5. Subsequently all communication between the applicant and the Commission officials ceased. On 31 October 1973 the applicant resigned from Roche and on 1 April 1974 took up residence with his wife and three children in Italy.

C. *The Commission's investigation of Roche under Article 86 of the EEC Treaty*

1. Following the events described above, the Commission commenced an investigation of Roche's activities in the areas described to the Commission by the applicant.

2. As part of that investigation, three officials of Commission DG IV visited the offices of Roche's French subsidiary at Neuilly on 22 October 1974. They saw the director of the subsidiary, Mr de Reynier, and they examined a number of the company's files without finding copies of the documents that the applicant had supplied to the Commission. Mr de Reynier denied knowledge of the existence of such documents. The officials then indicated to him that they knew that such documents existed as they were themselves in

possession of copies and they showed him a bundle of documents without, however, letting him examine any of them. Moreover, when Mr de Reynier asked the officials how the Commission came to possess such documents, they declined to answer that question, stating only that 'the Commission often received information without having solicited it'.

3. On 29 October 1974 an official of DG IV made a second visit to the offices of Roche's French subsidiary, whilst two other officials visited its Belgian subsidiary. The officials took with them copies of the 14 'Management Information' memoranda and of the letter of 25 June 1973 to the directors of Roche from its president. In making those copies they had covered up passages which looked as though they might indicate the particular source of the documents. The Commission officials saw the directors of the two subsidiaries, Mr de Reynier and Mr Vandendael, and showed to them the copies of the documents for verification of their authenticity. At those interviews both Mr de Reynier and Mr Vandendael asked the Commission officials to say how the Commission had come into possession of the documents. The officials refused to reply to that question. Finally the officials handed over the copies in question to the Roche employees and in return received confirmation that the documents were authentic.

4. On 9 June 1976 the Commission adopted Decision 76/642/EEC relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020-Vitamins) (Official Journal 1976, L 223, p. 27). In that decision the Commission found that Roche had abused its dominant position in the market for bulk vitamins and imposed a fine of 300 000 units of account on the company. Subsequently the decision was upheld by the judgment of the Court of 13 February 1979, cited above. However, the Court reduced the fine to 200 000 units of account.

D. *The criminal proceedings instituted by the Swiss authorities against the applicant*

1. On 8 November 1974 Dr Alder, a Swiss lawyer acting on behalf of Roche, made a visit to Commission Directorate-General IV during which he sought to discover how the Commission had come into possession of the documents in question. He raised the question whether it was really necessary to institute, as Roche was considering doing, proceedings under Article 273 of the Swiss Penal Code for 'economic espionage', since what mattered was identifying the source of the 'leak' and taking appropriate steps within Roche to prevent any repetition. Dr Alder intimated that if the Commission agreed to supply the informant's name or to indicate whether or not the informant was at Basle, Roche would be willing to provide the documents and data necessary for the Commission's investigation and, in addition, would not take criminal proceedings against the informant. The officials of DG IV at first refused to indicate the origin of the copies but, in the end, agreed that they would consider informing Dr Alder whether the person who had passed the documents to the Commission was a Roche employee.

2. When Mr Schlieder was informed of Dr Alder's suggestion he gave instructions that in no circumstances would the Commission depart from its general practice of not divulging the identity of informants. Accordingly, on 6 December 1974 Dr Alder was informed that the Commission was not

willing to tell him whether the person who had passed the documents to the Commission was a Roche employee and would not discuss the origin of the documents in its possession.

3. On 18 December 1984 Dr Alder, on behalf of Roche, sent a letter to the office of the Public Prosecutor, Berne, preferring a charge against a person or persons unknown for disclosure of business information in contravention principally of Article 273 of the Swiss Penal Code and asking the Public Prosecutor to open a criminal investigation into the matter. According to that letter, during the visits of the Commission officials to the Roche subsidiaries at Neuilly and Brussels on 29 October 1974 'it was possible with the agreement of the abovementioned Community officials to make photocopies — which are enclosed — of the Roche documents in the possession of the European Commission'. Moreover, Dr Alder disclosed, referring in particular to those copies, that enquiries into the origin of the documents indicated that their source was to be found first and foremost within a certain marketing group and that the applicant was the principal suspect. In that respect Dr Alder stressed that following his interview with the Commission officials on 8 November 1974 he had the impression that the Commission's informant no longer worked for Roche.

4. On 31 December 1974 the applicant was arrested by the Swiss authorities as he crossed the Swiss border from Italy with his wife and three children. On the same day he was interviewed by officials of the police department of the Swiss Federal Prosecutor. The interview was continued on 1 January 1975. In the course of that interview the police officers informed the applicant that Commission officials had shown to staff of the Roche group 'Management Information' memoranda and a letter from the President of Roche. According to the official record of the interview the applicant acknowleged that he had been the Commission's informant and that it was 'certainly within the bounds of possibility' that he had given the Commission the 'Management Information' memoranda.

5. On 1 January 1975 the applicant was formally charged with 'economic espionage' contrary to Article 273 of the Swiss Penal Code. He was not allowed to communicate with his family and was held in solitary confinement in prisons first in Lugano and then in Basle. In the course of his imprisonment he was frequently interviewed by officials of the Swiss Public Prosecutors office. His wife was also questioned at the beginning of January, at the Lugano police office. On 10 January she committed suicide.

6. According to the record of interviews which took place from 22 to 24 January 1975 the applicant claimed that although he had provided information orally to the Commission, he had not supplied it with any documents. The applicant denied that he had admitted supplying documents to the Commission and he claimed that the record of 31 December 1974 and 1 January 1975 did not properly reflect what he had said, probably because no interpreter was present at those first interviews.

7. On 25 January 1975 an official of Directorate-General IV received an unsigned letter informing him of the applicant's arrest and asking the Commission to intervene in his favour. It was by that letter that the Commission learned for the first time of the applicant's arrest.

8. It appears that at the beginning of February 1975 Dr Alder had a telephone

conversation with Mr Schlieder of the Commission in the course of which the Commission official acknowledged that the applicant was the Commission's informant. In that connection, on 14 February 1975 the Swiss police officer, Mr Wick, according to his notes taken on that day, informed Dr Portmann, a colleague of Dr Bollag, the Swiss lawyer first retained by the applicant, that a high-ranking official of the Commission had named the applicant as the person who had supplied the documents and as the source of the Commission's information. Dr Portmann immediately informed the applicant of his conversation with Mr Wick.

9. On 21 March 1975 the applicant was released on bail of SFR 25 000 put up by friends and relatives.

10. In April 1975 the applicant had a meeting with three Commission officials who promised him that the Commission would pay legal costs reasonably incurred in his defence to the charges brought against him in Switzerland. The Commission did in fact reimburse the bail money and pay Dr Bollag's legal fees. The total amount paid was some SFR 110 000. In addition it commissioned a special study of Article 273 of the Swiss Penal Code. A copy of the study was given to the applicant.

11. On 1 July 1976 the Basle criminal court found the applicant guilty of offences against Articles 162 and 273 of the Swiss Penal Code. It sentenced him *in absentia* to one year's imprisonment (suspended), declared his bail money forfeit, ordered him to pay costs and made an order prohibiting him from entering Switzerland for five years. The judgment, which is in German, contains the following passages:

'*Facts stated in the indictment*

...

On 22 and 29 October 1974, authorized Commission officials called on Michel de Reynier, the director of Hoffmann-La Roche & Co. AG in Neuilly, France, and began by making detailed inquiries into market shares, customers, prices, terms, sales etc. on the vitamin market. Subsequently, they asked for "Management Information" memoranda to be handed over and finally went as far as searching for such documents themselves.

When their efforts proved unsuccessful, they handed de Reynier the abovementioned 16 photocopies (15 "Management Information' memoranda and the letter of 25 June 1973 from the president of Roche) . . . and had him confirm that they were copies of the documents drawn up by Roche Basle ...

Grounds of judgment

...

2. *The facts*

2.1. The *facts* described in the indictment are proved by the evidence provided during the trial, except for two minor points ... First, there were only 14 and not 15 "Management Information' memoranda involved ...

2.2. The *accused admits in particular* that he wrote to the Commission early in 1973 and that soon thereafter, in March or April of 1973, he spent a day in Brussels conferring with various officials from Directorate-General IV, which is responsible for competition. He admits that during the meeting he informed the officials orally of all his observations and experience relating to what, in his opinion, were anti-competitive schemes on the part of his employer and its competitors or customers

on the vitamin market. Adams concedes that the talks revolved around the information and instructions contained in the "Management Information" memoranda and in the Jann letter, focusing mainly on production, sales and price agreements, production cutbacks, fidelity agreements and secret meetings by senior representatives from various chemical firms at which world market sharing arrangements were discussed ...

The fact that Adams was the informant is also evident from the telephone call made by Mr Schlieder of the Commission to Dr Alder, the lawyer representing the complainant ...

2.3. Two secondary charges are *disputed*, namely that *"Management Information" memoranda and a letter from Mr Jann were handed over to Commission officials* and that there were later *telephone calls and letters to Brussels officials.*

2.3.1. It must be taken as fact that the Commission is in possession of photocopies of the incriminating documents, as indicated by the clear statements of the witnesses de Reynier and Dr Vandendael, to whom Commission officials presented the relevant "Management Information" memoranda and the Jann letter ...

2.3.2. Lastly, it must also be noted that, at the time of the visit to Brussels in the spring of 1973, the Jann letter did not yet exist, since it is dated 25 June 1973. Consequently, Adams must necessarily have been in contact with the Commission even after his visit to Brussels.

...'

12. The applicant appealed against that judgment to the Appellationsgericht Basel Stadt [Court of Appeal for the Canton of Basel-Stadt]. On 27 September 1977 that Court dismissed his appeal but revoked the order prohibiting him from re-entering Switzerland. The judgment states *inter alia* that 'on 29 October 1974 EEC officials showed [14 documents headed "Management Information" and the letter of 25 June 1973 from the president of Roche] ... to the witness de Reynier in Paris, and he also took copies ...'. It appears from a letter of 6 January 1978 that the Commission sent an English translation of that judgment to the applicant.

13. Appeals lodged before the Bundesgericht [Swiss Federal Supreme Court] were dismissed on 21 April and 3 May 1978.

14. In February 1979 the applicant discharged his lawyer, Dr Bollag, and retained Dr Diefenbacher, of Berne, to defend him.

15. An application to reopen the proceedings in Switzerland was dismissed by the Court of Appeal, Basel-Stadt, on 25 November 1981 and by the Bundesgericht on 17 February 1982.

E. *The applicant's farming project in Italy*

1. On 1 April 1974 the applicant took up residence with his family in Italy to begin pig farming. To that end he purchased 10 hectares of land for the sum of UKL 75 000 drawn entirely from his own capital resources. In addition he invested UKL 50 000 in preparing the land for building and laying foundations for eight large pig breeding/fattening houses, a feed mill and an office block.

2. On 21 March 1975, when he was released on bail by the Swiss authorities, the applicant returned to his home in Italy. He discovered that the commercial banks and government grant agencies which, prior to his arrest, had agreed to finance the farm, were no longer prepared to do so.

However, in 1977, as a result of, among other things, the intervention of the Commission, the applicant was again promised government loan and grant support in order to finance investment in farm buildings. Accordingly he began building, but the building programme fell behind the schedule agreed with the authorities because he was unable to obtain bridging finance.

3. Because of that shortfall, the government grant agencies foreclosed and accused him of fraud. On 20 December 1979 the applicant was arrested in Italy. He was released on bail on 12 February 1980.

F. *The applicant's petition laying a complaint against Switzerland before the European Commission of Human Rights*

1. On 28 May 1982 the applicant lodged a petition, in which he laid a complaint against Switzerland, with the European Commission of Human Rights. In that petition he alleged that the criminal proceedings instituted against him by the Swiss authorities had been conducted in secret, in his absence and contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Official Journal 1977, C 103, p. 1) which secures to everyone charged with a criminal offence the right to a fair and public hearing by an independent and impartial tribunal and the public pronouncement of the judgments. In addition he alleged that the proceedings constituted a violation of Article 10 of the Convention which guarantees the right to freedom of expression.

2. By a decision of 9 May 1983 the European Commission of Human Rights rejected the petition as inadmissible on the ground that it was out of time, since it was introduced more than six months after the date of the judgment of the Swiss Federal Court.

3. In that respect, the applicant's former lawyer, Dr Bollag, wrote to his client in a letter dated 11 October 1982 that:

'You ask why your case was not submitted to the European Commission of Human Rights. We reply to your question as follows:

We received instructions both from you and from the Commission of the European Communities. Throughout the procedure you were in close contact with the Commission which kept you constantly informed of all the steps which might be taken. ...

We were therefore never instructed to bring your case before the European Commission of Human Rights . . . '.

G. *The applicant's requests to the Commission for compensation for the damage which he claimed to have suffered*

1. By a telex message of 14 March 1980 the applicant informed the Commission that he was in need of money. On 29 May 1980 the Commission gave the applicant a cheque for LIT 50 000 000.

2. By a letter dated 30 May 1980 Dr Diefenbacher informed the Commission that the applicant did not accept that that payment was in final settlement of his claim against the Commission. By a letter dated 24 June 1980 Dr Diefenbacher asked the President of the Commission to 'indicate . . . a date . . . in order to discuss the question of the final settlement of Mr Stanley Adams' compensation for damages suffered in consequence of his conveying

information to the EEC . . . '. Finally by a letter of 18 August 1980 Dr Diefenbacher informed the Commission that he had 'come into possession of evidence proving in a singular way the direct responsibility of the EEC Commission for Mr Adams' most lamentable fate'.

II — Written procedure and conclusions of the parties

By an application lodged at the Court on 18 July 1983 the applicant brought this action.

In his application the *applicant* claims that the Court should:

Order the Commission to pay damages to make good the injury suffered by the applicant by reason of the wrongful acts and/or omissions of the Commission and/or of its servants in the performance of their duties;

In any event, order the Commission to pay the costs.

In its defence the *Commission* contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs.

By an order of the Court (Third Chamber) of 27 October 1983 the applicant was granted legal aid.

By an order of the Court (Third Chamber) of 22 March 1984 lawyers were appointed to assist the applicant.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court ordered a preparatory inquiry which was entrusted to the Second Chamber. In addition it invited the Commission to provide complete copies (without the alterations made by Commission officials) of the documents which the applicant had given it in 1973.

On 31 January and 1 February 1985 the Court (Second Chamber) heard the applicant and took evidence from his former Swiss lawyer, Dr Portmann, and various former and present officials of the Commission.

On conclusion of the preparatory inquiry and upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any other measure of inquiry. However, with the agreement of the parties, it was decided that the scope of the proceedings should for the time being be limited to the questions whether there is a basis for liability and whether the applicant's action is time-barred.

III — Submissions and arguments of the parties

The action is based on the applicant's allegation that the Commision has been guilty of:

(A) Breach of a duty of confidentiality in disclosing on diverse occasions his identity as the Commission's informant, which led to his arrest, his detention, his trial and his conviction in Switzerland; and

(B) Breach of a duty to give proper advice concerning the possibility of petitioning the European Commission of Human Rights.

A. *The alleged breach of a duty of confidentiality owed to the applicant*

(a) *The existence of an unlawful act attributable to the Commission*

(i) The question whether the Commission was bound by a duty of confidentiality owed to the applicant after he had left his position at Roche

1. The *applicant* claims that the relationship between the Commission and

himself and the information which he communicated to the Commission were in fact confidential in nature. That is clear from the letter of 25 February 1973 sent by the applicant to the Commission and from the discussion at the meeting held in Brussels on 9 April 1973. It also follows from the general principles common to the laws of Member States and from the obligations imposed on the Commission by Article 214 of the EEC Treaty and by Article 20 of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87).

1.1. The applicant points out that the fact that he concluded his letter of 25 February 1973 by stating that he would even be prepared to swear an oath in court as to the accuracy of his evidence indicated that the only circumstances in which the informant's identity was to be revealed was by the informant himself, in public and after the Commission investigation had been completed and the proceedings before the Court initiated. That final sentence did not suggest that the applicant was willing to dispense with confidentiality at any stage.

1.2. The applicant denies the Commission's allegation that he himself never believed that the Commission was bound by a duty of confidentiality owed to him. In the first place, when the applicant resigned from Roche and left Switzerland for Italy he gave Mr Carisi, of the Commission, information which would have made it possible for that Commission official to contact him if necessary. Secondly, the fact that the applicant failed to reproach the Commission officials, when he met them in April 1975, with having shown to the Roche employees the documents supplied by him to the Commission does not show that he did not care. At that date the applicant did not know that they had done so and did not appreciate the consequences of that action regarding his identification as the informant. In particular he had no reason to believe and did not believe what the police disclosed to him in that respect since he considered that it was a device to extract admissions from him without having actual proof. Moreover, the mere fact that the Commission had shown certain documents would not of itself have been sufficient to have put the applicant on notice of the circumstances giving rise to the Commission's liability for breach of a duty of confidentiality owed to him. Finally, he denies that he failed to warn the Commission that it was possible to infer from the documents that he was the person who had supplied them.

1.3. The applicant points out that the Commission's conduct proves that it considered that it was bound by a duty of confidentiality towards the applicant. Thus on several occasions, both before and after October 1973, the Commission deliberately refused to name its informant — until the beginning of 1975 when Mr Schlieder disclosed his name. In addition the Commission's efforts to help the applicant show that it acknowledged that there was a direct and immediate connection between the applicant's arrest and his failure to make any progress with his business in Italy and that it was under an obligation to rectify the situation.

2. The *Commission* denies that it was bound by a duty of confidentiality towards the applicant after he had left his employment with Roche. It refers in that respect to the express terms on which the

applicant provided the Commission with the information and documents relating to Roche's business. Moreover subsequent events corroborate the absence of any such duty.

2.1. The Commission cites the express statement made by the applicant in his letter of 25 February 1973 that when he had left Roche he would be prepared to appear 'before any court' in order to give sworn evidence on his statements. That statement cannot sensibly be understood as meaning, as the applicant claims, that he was willing only to give evidence before the Court of Justice after the Commission had taken a formal decision against Roche. Although the applicant did not wish his name to be connected with the matter while he continued to be employed by Roche, he had no such reservations about publicity once he left that employment as he expected to do in July 1973.

2.2. Moreover, the Commission contends that the applicant himself did not thereafter regard the Commission as owing him any such duty. His behaviour showed that once he had left Roche he did not care whether he was identified as the Commission's informant and accordingly the Commission had good reason to believe that it was a matter of indifference to him. When the applicant left his employment with Roche and emigrated from Switzerland to Italy he did not even notify the Commission of his new address so that it did not know his whereabouts. In particular, Mr Carisi denied having received such information. In addition, when the applicant met the Commission officials in April 1975 he in no way reproached the Commission for having disclosed the contents of the documents to Roche, although by then, following the revelations of the police, he was well aware that the Commission had shown to employees of the Roche group 'Management Information' memoranda and a letter addressed to the Roche directors from its President. The judgment of the Basle criminal court stated that 'the documents in question were lying on the table during the interrogation and reference was repeatedly made to them'. At the meeting with the Commission officials in April 1975 the applicant stated that the police had shown him copies of the documents and that he had at once appreciated that they were copies of the documents that he had sent to the Commission. Moreover, the applicant had never informed the Commission of any concern on his part that his identity as the person who had supplied the documents could be inferred from the documents themselves. Finally, in January 1978 the Commission had sent to the applicant an English translation of the judgment of the Basle criminal court which described the use made by the Commission officials of the documents supplied to them by the applicant.

2.3. The fact that the Commission repeatedly declined to identify its informant in no way establishes that it considered itself under a duty of confidentiality. Its conduct was dictated entirely by its general practice of not divulging the identity of informants. In addition the Commission never recognized the existence of any connection whatsoever 'between his arrest and his failure to make any progress with his business enterprise in Italy' or 'an obligation to rectify the situation'. The Commission

did indeed take a number of steps to try to help the applicant. However, those efforts reflected no more than a humane concern on its part.

(ii) The question whether, if the Commission was under a duty of confidentiality towards the applicant, it committed a breach of that duty

1. The *applicant* considers that the Commission committed a breach of its duty of confidentiality. In the first place, the nature of the disclosure of the contents of the 'Management Information' memoranda to the directors of the Roche subsidiaries in Belgium and France was a breach because it enabled Roche to deduce that the applicant was the most likely informant. Secondly, Commission officials on diverse occasions gave information concerning the informant's relationship with Roche. Finally, the applicant was named by the then Director-General of DG IV of the Commission, Mr Schlieder, as the Commission's informant.

Moreover the applicant points out that at the meeting of 8 November 1974 between Dr Alder and the Commission officials, Dr Alder warned those officials that Roche was considering the possibility of criminal proceedings against the applicant. The Commission, however, did nothing to warn the applicant of that possibility, despite the detailed discussion that took place on the matter at the meeting, thereby aggravating the damage that flowed from the breach of its duty of professional confidentiality.

1.1. The applicant denies not having warned the Commission that his identity as the informant could be inferred from the documents supplied to the Commission. Moreover, the Commission acknowledged that it had permitted Roche employees to photocopy the documents and that when it did so its officials had covered up anything on them which seemed as if it might indicate their source. The Commission was therefore fully aware of the danger that the documents might reveal the applicant's identity and should have communicated with him before showing them to anybody.

1.2. According to the applicant the answer given by the Commission officials to Mr de Reynier on 22 October 1974 stating that 'the Commission often received information without having solicited it', revealed to Roche, in breach of the duty of confidentiality, that the documents were obtained not through the Commission's own independent investigations but through someone with access to the documents.

1.3. Finally, the applicant notes that, in the course of a telephone conversation with Roche's lawyer in early February 1975, Mr Schlieder acknowledged that the applicant was the Commission's informant.

2. The *Commission* denies that it committed a breach of an alleged duty of confidentiality towards the applicant. It could not possibly have foreseen that Roche would be able to identify the source of the documents by inspecting the copies supplied by the Commission to Roche. In addition the statements of the Commission officials revealed nothing to Roche and the Swiss authorities which they did not already know.

2.1. The Commission points out that the applicant never warned it not to divulge the contents of the documents supplied by him. He agreed that the Commission could use

the documents as part of a process of investigating Roche and ultimately taking a decision against it, and the Commission itself found it necessary, as part of that process, to disclose to Roche the contents of the documents. Moreover, when they allowed the documents to be photocopied, the Commission officials covered up anything on them which looked as though it might indicate the source of the documents. The copies had nothing on the face of them which would make it possible for persons in the position of the Commission officials to identify their origin. Furthermore the documents were circulars which had no evident connection with the applicant, who could have been identified by Roche only through a complex process of inference and by someone with a highly detailed knowledge of the organization and operation of Roche.

2.2. In the Commission's view the answer given by its officials on 22 October 1974 can in no way have contributed to the identification of the applicant as the source of the documents. Roche knew perfectly well that the Commission had not, by that date, obtained the documents from it. Since the documents were internal Roche also knew that they must have been obtained by someone who had access to the documents.

2.3. The Commission draws attention to the fact that at all times after his arrest by the Swiss authorities on 31 December 1974 the applicant himself consistently admitted that he was the Commission's informant. Since then, any subsequent confirmation by the Commission of the applicant's identity as the informant is wholly irrelevant to these proceedings. The Basle criminal court held that the applicant's original confession was admissible and it was on the basis of that confession that that court found the applicant guilty.

Moreover, it is clear from that judgment that Roche's lawyer did not understand Mr Schlieder's statement as providing any confirmation that the applicant was the source of the Roche documents which had come into the Commission's possession, and it was only on that point that the charges brought against the applicant were contested.

(b) *The question whether the applicant's action is barred by virtue* of *Article 43 of the Protocol on the Statute of the Court of Justice of the EEC*

1. The *Commission* contends that the action brought by the applicant is in any event barred by virtue of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

1.1. More specifically the Commission points out that it is clear from the facts that, according to the information supplied by the Swiss authorities, the applicant was fully aware from January 1975 onwards that the Commission had disclosed the contents of the documents to Roche. In addition, if the conversation between Mr Schlieder and Roche's lawyer, Dr Alder, in February 1975 had any causal relevance, which the Commission denies, it was known to the applicant's lawyers at the very latest when they received the judgment of the Basle criminal court, in other words 1 July 1976, or shortly thereafter. It seems very difficult to believe that the lawyers did not then mention it to the applicant. The Commission concludes that in substance the acts relied upon by the applicant as constituting a breach of the duty of confidentiality which, he claims, was incumbent on the Commission occurred and were known to the applicant and/or his lawyers more than five years before the institution of these proceedings.

Even if lack of knowledge is relevant under Article 43 of the Protocol on the Statute of the Court of Justice, the person relying upon lack of knowledge as a bar to the commencement of the limitation period must have shown a high standard of diligence to discover the truth. In this instance the applicant has admitted that both he and one of his lawyers knew that a Swiss police officer had alleged that a Commission official had identified the applicant. The applicant simply chose to believe that there was no truth in that allegation and to make no further inquiries in that connection for many years thereafter. In that respect the Commission denies any knowledge of a request from the applicant for an English translation of the judgment of the Basle court of 1 July 1976.

In addition the Commission points out that Article 43 of the Protocol on the Statute of the Court of Justice of the EEC does not refer to any need for a claimant to have any knowledge before time begins to run. Furthermore, in this case, there is no question of fraud by the Commission or fraudulent concealment by it of the acts complained of.

1.2. The Commission contests the applicant's claim that the period prescribed in Article 43 of the Protocol on the Statute of the Court of Justice should begin to run from the date when the Commission ceased to give 'its advice'. The Commission maintains that it never advised Dr Bollag on Community law or on the extent to which it might be in breach of any obligations which it might owe to the applicant.

1.3. The Commission argues that in this case the acts of which the applicant complains were single, non-recurring events. It is willing to accept that if those acts were unlawful *vis-à-vis* the applicant, no cause of action arose out of them in favour of the applicant until they caused damage to him. The applicant claims that the acts in question caused him damage by causing his arrest, his detention and trial and, as a result thereof, further loss and damage. *Prima facie* the latest date on which time began to run was therefore the date of the applicant's conviction, namely 1 July 1976. The fact that, as the applicant maintains, the damage continued to accrue as a result of the earlier alleged wrongful acts of the Commission cannot postpone the commencement of the limitation period. If it were otherwise time would start to run afresh each time the applicant considered that he had suffered some further item of loss.

2. The *applicant* denies that his action is barred by virtue of Article 43 of the Protocol on the Statute of the Court of Justice.

2.1. In the first place he claims that he and his lawyers were not aware of the material events until August 1980.

In that respect the applicant denies that his former laywer, Dr Bollag, knew of those facts and maintains that, even if he did, he did not have good reason to believe them or to draw from them the appropriate inferences concerning the Commission's liability.

In addition the applicant draws attention to the fact that at the beginning of August 1980, his lawyer, Dr Diefenbacher, having obtained the relevant papers after considerable delay, informed him that an examination of the record of the criminal proceedings before the Basle criminal court revealed, in the first place, that Commission officials had shown to Roche copies of documents given to them in confidence by the applicant and, secondly, that Mr Schlieder had named the applicant as the Commission's informant in the course of a telephone conversation with Roche's lawyer.

The applicant had hitherto been unaware of that breach of confidence because he had not seen or had his attention drawn to copies of the relevant documentary evidence. Even if he had seen them they would have told him nothing because he did not read German and could not afford to obtain a translation.

Moreover, the applicant's request for an English translation of the judgment of the Basle court of 1 July 1976 went unanswered by the Commission. The applicant claims that the Commission knew that had such a translation been furnished to him he would immediately have become aware of the part played by the Commission in his arrest.

Furthermore, even if the applicant had believed, or ought to have believed, that the conversation between Dr Alder and Mr Schlieder took place, it would not have put him on notice of the circumstances giving rise to the Commission's liability for his arrest. The Commission itself had stressed that Roche's lawyer had not, on the basis of his conversation with Mr Schlieder, interpreted the latter's statements as confirmation that the applicant was the source of the documents which had come into the Commission's possession.

Finally, neither the applicant nor his lawyer believed the statements of the Swiss police and of Police Officer Wick concerning the information given by Commission officials to Roche representatives. In the context of the relationship of confidentiality that the applicant believed had been established between himself and the Commission, such behaviour was to his mind unthinkable.

2.2. The applicant claims that Community law and, specifically, the extent to which the Commission might be in breach of European Community obligations owed to the applicant was one of the subjects on which the Commission advised Dr Bollag and, through him, the applicant. Since the Commission's advice could not be independent and objective, the limitation period laid down in Article 43 of the Protocol on the Statute of the Court of Justice should begin to run from the date on which the Commission ceased to give its advice and/or when the applicant was himself actually informed of the facts.

2.3. The applicant claims, that in accordance with the case-law of the Court, the period of limitation which applies to proceedings in matters arising from non-contractual liability cannot begin before all the requirements governing the obligation to provide compensation for damage are satisfied and, in particular, before the damage has materialized. In this instance the damage to the applicant which has to be made good did not cease until, at least, the time of his release from prison in Italy on 12 February 1980.

B. *The alleged breach of an obligation to advise the applicant as to his right to petition the European Commission of Human Rights*

1. *The applicant* claims that by virtue of its undertaking in April 1975 to advise Dr Bollag on the preparation of the applicant's defence, the Commission owed a non-contractual duty of care to the applicant to give proper professional advice. The Commission, in breach of that duty, failed to advise the applicant of his right to petition the European Commission of Human Rights on the grounds that the procedure adopted in the course of his arrest, detention and trial was in breach of the European Convention on Human Rights and in particular Articles 6 and 10 thereof.

2. The *Commission* denies that it owed any such duty of care to the applicant by virtue of which it had to give him advice in relation to his right to petition the European Commission of Human Rights. It paid the applicant's legal costs incurred in defending himself against certain charges in the Swiss courts and, save in respect of certain limited topics in relation to which it gave the applicant's Swiss lawyers specialized advice, it paid those lawyers and left it to them to advise the applicant.

Moreover, in its rejoinder the Commission contends that the action brought by the applicant on the basis of the breach of that alleged duty is in any event also time-barred.

C. *The damage suffered by the applicant*

1. The *applicant* claims that by reason of the acts and/or omissions of the Commission and/or its servants he has suffered the following damage:

(i) The loss of reputation in Italy suffered by him as a result of his arrest, detention and trial in Switzerland prevented him from obtaining the hitherto promised official and commercial financial support necessary to exploit his initial investment in his farming enterprise. In its present semi-developed form his farm is unsaleable. His initial investment is now worthless and the applicant has lost the sum of UKL 125 000.

(ii) In order to guarantee repayment of the loans made by the Italian government grant agencies in respect of the development of the pig farm the applicant was required to take out an insurance policy at the cost of UKL 6 000, which sum he has also lost.

(iii) In addition, in order to maintain his home and his family, the applicant borrowed the sum of UKL 25 000, which sum is still owed by him.

(iv) In order to advise and defend him in connection with the legal proceedings in Italy, the applicant instructed Italian lawyers to whom he still owes UKL 6 000 in respect of legal costs.

(v) As a result of the suffering caused by the detention of her husband and the harrowing experience of her own interrogation the applicant's wife committed suicide on 10 January 1975 at the age of 32. Since it was his wife who looked after his home and children, the applicant had to subsequently employ a housekeeper from Monday to Friday who was paid a monthly wage of UKL 125 from 1 October 1975 to 1 October 1980.

(vi) The loss of reputation which the applicant suffered generally as a result of his arrest, detention and trial in Switzerland had prevented him from obtaining any kind of paid employment since January 1976. The applicant is at present aged 60 and at the time he left his employment at Roche in October 1973 was earning an annual salary of UKL 27 000.

(vii) As a consequence of his arrest, detention and trial in Switzerland the applicant lost the pension rights to which he was entitled from his former employers Roche. At the age of 65 the applicant would have been entitled to a yearly pension of UKL 12 000.

(viii) In respect of the mental anguish caused to him as a result of his imprisonment in Switzerland, the applicant claims the sum of UKL 225 000.

(ix) To be deducted: LIT 50 000 000 (UKL 20 000) paid to the applicant by the Commission on 29 May 1980.

2. The *Commission* considers that in any event damages awarded to the applicant must be limited to compensation for his initial imprisonment in Switzerland. Any further loss or damage that the applicant has suffered was not caused by any breach of duty on its part and is too remote to form the subject of compensation.

In any event if the applicant is entitled to damages from the Commission, the Commission submits that the quantum of such damages should be referred to a Chamber of the Court for subsequent detailed assessment.

3. The *applicant* requests the Court to accept that last proposal.

IV — Summary of the hearing of 31 January and 1 February 1985

At the hearing the applicant explained *inter alia* that by his letter of 25 February 1973 he had sought to impose on the Commission an obligation of confidentiality which was continuous and without any date of expiry. It is true that he had stated in that letter that after he left Roche he would be prepared to appear before 'any court' to give sworn evidence on his statements. However, he did not think that it would be necessary for him to do so and, even if it were, he considered that his identity could be kept secret. In the course of his meeting with Mr Carisi and Mr Rihoux in Brussels on 9 April 1973, the applicant stated that the documents which he sent to the Commission were solely for its own use so that it might acquaint itself with Roche's activities. He believes that he did not expressly state that the documents were not to be shown to third parties; he did not do so because he did not imagine that the Commission would use them outside the institutions and the Commission officials never suggested that they wished to show the documents to anyone. The Commission needed the documents merely to acquaint itself with their contents. At the meeting, moreover, Mr Carisi and Mr Rihoux promised that the applicant's name would not be mentioned since the Commission was in a position to open its own inquiry. In the applicant's view it was easily foreseeable that Roche would identify him as the Commission's informant by means of the altered copies provided by it to Roche in October 1974. Certain of the documents contained notes in the applicant's hand, and in addition, in combination, they clearly indicated the source of the leak. However, the applicant concedes that that point was never discussed with the Commission. After he had supplied the documents to the Commission, the applicant considered that there was no reason for him to know anything more about what the Commission was going to do. He did not therefore ask to be kept informed about when the Roche investigation was to begin and the way in which it was proceeding. However, according to the applicant, it would have been possible for the Commission to keep him so informed because as from the time when it received the applicant's letter of February 1973 it was aware of his plans in Italy. Moreover, at the meeting in April 1973 the applicant told Mr Carisi that he intended to live in Latina. On the same occasion the applicant told Mr Carisi about his family and informed him in particular that his wife was Swiss and that his parents-in-law lived in Italy. Finally, in the course of a telephone conversation with Mr Carisi in early November 1973, the applicant explained that he intended to spend five months with his parents-in-law before going on to Latina and he gave their telephone number. After the applicant had been

arrested in Switzerland, he managed to inform the Commission of his arrest by means of an anonymous letter. He hoped in that way to obtain the Commission's help in getting him out of the 'mess' he was in. During his interrogation by the Swiss police the applicant admitted in general terms that he had supplied the Commission with information regarding Roche. On that occasion Police Officer Wick interrogated him on the basis of documents which he described as documents that the Commission officials had shown to the directors of the Roche subsidiaries in Paris and Brussels. However, at that time the applicant believed that it was only a trick to obtain his confession. He could not believe that the Commission, which was a 'friend' to him, could have given that infomation to Roche. The applicant had entrusted his defence to Dr Bollag. When Dr Bollag's colleague, Dr Portmann, informed the applicant later that Mr Wick had told him that someone at the Commission had named him as the informant, neither the applicant nor Dr Portmann himself believed it. From the outset, moreover, Dr Bollag advised him that he would in any event be convicted by the Basle criminal court. Consequently when that prediction proved correct Dr Bollag simply informed him of the result of the case and asked him for his agreement in lodging an appeal. The details of that judgment were not discussed in any way and it was not until 1980, after he had changed lawyers, that the applicant received details of it. The copy of that judgment did not reach him until 1982. As regards the judgment of the Court of Appeal of 27 September 1977, as far as the applicant remembers he did not receive a copy of that either. In any event he had informed his lawyer and the Commission that there was absolutely no point in sending him documents in German which he did not understand. He does not remember having received the letter of 6 January 1978 with which the Commission sent him an English translation of the Court of Appeal's judgment, although he agrees that he must have told his present lawyers that he had received the translation, since they have admitted that this was so and would not have invented it. After his release in Switzerland he never attempted to discover how the Swiss police came into possession of the incriminating documents. Finally the applicant acknowledges that the Commission has never admitted liability for his arrest.

The witness *Dr Portmann*, a Swiss lawyer, stated that the applicant's defence had been undertaken at his request at the beginning of 1975. Initially the applicant's lawyers had received instructions only from the applicant himself. Later, when he had been released on bail, the lawyers received information from the Commission but no specific instructions. During the period of the applicant's imprisonment in Switzerland it was not possible for his lawyers to consult the prosecutor's file. Finally, the question whether the applicant had given information to the Commission verbally or in writing was not essential for his defence. The means by which the information was passed would have changed nothing in view of the fact that the applicant had not denied that he had informed the Commission of Roche's unlawful acts. It was customary in Dr Bollag's Chambers to send judgments to clients as soon as they were received. Doubtless the same procedure had been

adopted in the case in question. Dr Portmann knew that the applicant did not speak German but he had never had the judgments relating to him translated into English.

Mr Schlieder, the former Director-General of the Directorate-General of Competition (DG IV) of the Commission, stated *inter alia* that the Commission realized as soon as it received the applicant's letter of 25 February 1973 that it was faced with a very delicate case. Consequently it decided to approach the case with very great care. It was clear to the Commission that the inquiry to be undertaken in relation to Roche would have to wait in any event until the applicant had left the company. The need to protect him after his departure was not however discussed because no one seriously thought that there was a possibility that criminal proceedings might be instituted against him. Mr Schlieder did not give instructions for the use of the documents passed by the applicant to the Commission and he did not know at the time that they had been given to Roche. After the visits to the Roche subsidiaries in October 1974, lawyers representing the company attempted to reach an amicable settlement of the case. At the same time a threat was made that criminal proceedings might be brought against Commission officials. The visit of Dr Alder, Roche's Swiss lawyer, on 8 November 1974 was part of that process and in the course of that visit he asked to be informed of the informant's identity so that criminal proceedings against him could be avoided. As no one at the Commission believed in the possibility of such proceedings, Dr Alder's threats were merely regarded as a trick for the purposes of obtaining the informant's name. That is why the Commission did not consider it necessary to inform the applicant. Furthermore it was clear from a letter from the applicant that he had left Roche, and therefore Switzerland, to set up home in Italy. When at the end of January 1975 the Commission received an anonymous letter informing it of the applicant's arrest it was decided immediately to ask the Communities' representative in Switzerland, Mr Kohlhase, to make enquiries into the matter. It was clear that the Commission had to give the applicant its formal support and help him. In consequence Commissioner Borschette and Mr Schlieder decided that the Commission should intervene with the Swiss authorities in the applicant's favour. The Commission subsequently asked for a study to be made of Swiss law, from which it appeared to the great surprise of the Commission, and in particular of its Legal Department, that criminal proceedings against the applicant were entirely possible. Finally, the Commission decided to pay the costs of the applicant's defence which had been entrusted to the latter's Swiss lawyers subject to the supervision of the Commission's Legal Department. Mr Schlieder does not remember having had a telephone conversation with Dr Alder at the beginning of February 1975.

Mr Rihoux, a Commission official, stated, *inter alia*, that he had understood the applicant's letter of 25 February 1973 to mean that after the applicant's departure from Roche the Commission was free to do as it thought fit. Moreover, he received no

instructions as to the manner in which the information obtained from the applicant should be treated. At the meeting of 9 April 1973 with the applicant, the question of 'confidentiality' was not raised. In addition the applicant did not refer to his family circumstances and he gave no information regarding his future address. There was not even any discussion concerning the applicant's letter. In October 1974 Mr Rihoux and two of his colleagues, including Mr Pappalardo, visited the Roche subsidiary in Paris. They made every attempt, without success, to obtain copies of the documents supplied to the Commission by the applicant. To that end they read to the staff of the subsidiary extracts from the 'Management Information' memoranda, without however showing them the documents in question. They then left without having obtained what they were looking for. The question then arose as to whether it was necessary to close the investigation despite the overwhelming proof that the Commission had in its possession or whether to continue with it. It was necessary to weigh up carefully the interests at stake, namely, on the one hand the public interest which required that the provisions of the Treaty should be enforced and, on the other hand, the individual interest which prevented the Commission from disclosing the informant's identity. In particular, the method by which the documents had been passed to the Commission and the indications on the face thereof militated against their use. The decision to use them was therefore limited to those documents which were both sufficiently convincing for the prosecution of the inquiry and anonymous in character, such as the circulars, numerous copies of which must have been distributed. In that respect Mr Rihoux stated that the applicant had never forbidden the Commission to use the documents in a manner which was not confidential. Altered copies of the documents were therefore prepared and it subsequently proved necessary to pass them to Roche during the visit to the subsidiaries on 29 October 1974 in order to obtain from Roche confirmation of their authenticity. On 8 November 1974 Mr Rihoux was at the meeting which took place between Dr Alder on the one hand and Mr Pappalardo and Mr Carisi on the other. During that meeting, of which Mr Schlieder was informed, Dr Alder attempted to bring pressure to bear on the Commission to terminate its inquiry against Roche and to provide Roche with the name of the informant. Dr Alder even threatened the Commission officials with criminal proceedings and an action under Article 273 of the Swiss Penal Code against 'an informant or informants unknown' if the Commission did not supply the information requested. At the time no one thought to inform the applicant of those threats. After 9 April 1973 the Commission was no longer in contact with the applicant, who had disappeared without giving the Commission his address. In addition it had no reason to believe that the applicant would return to Switzerland. In his letter of 21 July 1973, the applicant had stated that after 31 October of the same year he was going to leave Roche. Finally from the Commission's point of view it was permissible to think that Dr Alder's threats were merely 'bluff'. The Commission never believed that Roche would publicly institute proceedings against the informant for disclosure of its own unlawful acts.

Mr Pappalardo, a Commission official assigned to DG IV since September 1973, essentially confirmed Mr Rihoux's statements. He added that by giving to the Roche staff the incriminating documents the Commission officials had acted with the conviction that the applicant had no particular reason to hide his identity after he had left Roche, which, in Mr Pappalardo's view, was clear from the applicant's letter of 25 February 1973. Nevertheless the officials made every effort to prevent identification of the applicant. During his visit to the Commission on 8 November 1974 Dr Alder had explained the contents of Article 273 of the Swiss Penal Code. The explanation was, however, superficial and it did not appear probable to Mr Pappalardo and his colleagues that a person could be prosecuted in Switzerland for having supplied information which provided proof of unlawful conduct. Dr Alder's threats did not therefore seem to entail any risk for the applicant who had declared in his letter that he was leaving Roche in autumn 1973 to go to Italy, near Rome. In early April 1975 after the applicant's release he had a meeting with Mr Pappalardo, Mr Rihoux and Mr Carisi in the course of which they tried to work out how the applicant could have been identified. Mr Pappalardo stated expressly on that occasion that during their visit to the Roche subsidiaries in October 1974 copies of the documents had been passed to Roche staff.

Mr Kohlhase, former director of the Commission Representation in Geneva, explained that he had been called to Brussels on 27 January 1975 at Mr Schlieder's request. Mr Schlieder explained to him that the Commission had received an anonymous letter stating that the applicant had been arrested and he requested Mr Kohlhase to contact Dr Alder in order to obtain confirmation of that information. The following day Mr Kohlhase therefore met Dr Alder and asked him directly whether it was true that the applicant was in prison, which Dr Alder confirmed immediately.

Finally, *Mr Mensching*, Mr Schlieder's assistant from August 1975, explained that the Commission's intention had been at that time to assist the applicant in every possible way. With Dr Portmann, the Commission discussed *inter alia* the question of to what extent the Free Trade Agreement might usefully be relied on before the Swiss courts. Mr Mensching believes that he recalls that the Commission sent the applicant a translation of the judgment of the Basle Court of Appeal.

V — Oral procedure

At the sitting on 21 May 1985, the applicant, represented by Mr D. Vaughan, and the Commission, represented by Mr J. Lever, presented oral arguments.

At the sitting it was stated on behalf of the applicant that the Commission had acted in breach of the duty of confidentiality since it owed to him in particular on three occasions. In the first place the disclosure of the copies of the documents to the Roche employees in October 1974 enabled Roche to deduce therefrom that in all probability the applicant was the Commission's informant. Secondly the Commission failed to warn the applicant of the risk that he would inevitably run if he returned to Switzerland, although it was its duty to do

so, either after the documents had been handed over to the Roche employees or, and in any event, after Dr Alder's first visit to the Commission in November 1974, when the Commission was made fully aware of the gravity of that risk. Dr Alder told the Commission officials that Roche was considering the possibility of criminal proceedings against the informant and even explained the content of the relevant provision of the Swiss Penal Code. Thirdly and finally, the applicant was named as the Commission's informant in February 1975 by Mr Schlieder.

The Advocate General delivered his Opinion at the sitting on 11 July 1985.

Decision

1 By an application lodged at the Court Registry on 18 July 1983 Stanley George Adams brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty against the Commission of the European Communities for compensation for the damage which he claims to have suffered as a result of wrongful acts or omissions on the part of the Commission, or of its servants in the performance of their duties, which led *inter alia* to his arrest, detention and conviction in Switzerland.

2 The acts and omissions which, according to the applicant, gave rise to the damage which he claims to have suffered are more particularly the following:

(i) The disclosure on various occasions, in breach of confidence, of information and documents which made it possible to identify the applicant as the source of information which led the Commission to impose a fine on the applicant's former employer, the Swiss company Hoffmann-La Roche, for certain anti-competitive practices;

(ii) The failure to advise the applicant that he had the right to petition the European Commission of Human Rights in respect of the criminal proceedings instituted against him by the Swiss authorities as a result of his activities as the Commission's informant.

In his reply the applicant complains in addition that the Commission failed to warn him of the risk that he would run if he returned to Switzerland.

3 With the agreement of the parties the Court decided that the scope of the proceedings should for the time being be limited to the questions whether there is a basis for liability and whether the applicant's action is time-barred.

The events which gave rise to the dispute

4 The applicant, who was at the time employed by the Swiss company Hoffmann-La Roche & Co. AG (hereinafter referred to as 'Roche'), Basle, sent a letter on 25 February 1973 to the Commissioner for Competition in which he described a number of anti-competitive practices engaged in by Roche. In that letter, which was headed 'personal and confidential', the applicant stated that he was still working for Roche but that he planned to leave around July 1973 and to start his own meat business in Italy, near Rome. He concluded his letter as follows:

'I request you not to let my name be connected with this matter. However, I remain at your entire disposal for further information, as well as documentary evidence about every point which I have raised in this letter. Furthermore, I am prepared to discuss any point with your assistants or yourself at any time, and if necessary I am prepared to fly to Belgium or Rome for this purpose. Additionally, after I leave Roche around July 1973 I would be prepared even to appear before any court to give sworn evidence on my statements. I trust to hear from you soon to know in what direction I can be of further help . . . '.

5 Following a reply dated 26 March 1973 from Mr Schlieder, then Director-General of the Commission's Directorate-General for Competition (DG IV), the applicant had an interview in Brussels on 9 April 1983 with two Commission officials, Mr Carisi and Mr Rihoux. In the course of that interview, he supplied the Commission with certain additional information concerning Roche's activities. Moreover, in April and July 1973 the applicant sent the Commission photocopies of a considerable number of internal documents issued by Roche, including 14 'Management Information' memoranda and a letter to the directors of Roche from the company's President.

6 In a letter dated 21 July 1973 the applicant informed the Commission that he would be staying with Roche until the end of October 1973. He did in fact leave Roche on 31 October 1973 and on 1 April 1974 he took up residence with his wife and children in Italy.

7 Subsequently the Commission commenced an investigation into Roche's activities in the areas which the applicant had described to it. As part of that investigation Commission officials, among them Mr Rihoux and Mr Pappalardo, visited the offices of Roche's subsidiaries in Paris and in Brussels on 22 and 29 October 1974 and attempted to obtain copies of the documents supplied to the Commission by the applicant. As the Roche representatives denied any knowledge of those documents, the Commission officials finally handed over edited copies of the 'Management Information' memoranda in question and the letter to the Roche directors from their President. Before doing so they covered up certain details and handwritten notes which they thought might indicate the specific source of the documents copied. In return the Commission officials received confirmation that the documents were authentic.

8 On 9 June 1976 the Commission adopted Decision 76/642/EEC relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (Official Journal 1976, L 223, p. 27), in which the Commission found that Roche had abused its dominant position in the market for bulk vitamins and imposed a fine of 300 000 units of account on that company. That decision was confirmed in all essential respects by the Court's judgment of 13 February 1979 (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).

9 In the meantime, on 8 November 1974, Dr Alder, a Swiss lawyer acting on behalf of Roche, visited the Commission in order to discover how it had come into possession of the documents in question. On that occasion Dr Alder intimated that if the Commission provided information as to the informant's identity, Roche would be willing to provide the necessary data for the Commission's investigation and, in addition, would not institute criminal proceedings against the informant, a step which it was otherwise proposing to take on the basis of Article 273 of the Swiss Penal Code which concerns economic espionage in the form of the disclosure of business information. According to the Commission, the officials who took part in the meeting finally 'agreed that they would consider informing Dr Alder whether the person who had passed the documents to the Commission was a Roche employee'. However, when Mr Schlieder was informed of Dr Alder's proposal he gave instructions that in no circumstances would the Commission depart from its general practice of not divulging the identity of its informants. Accordingly, on 6 December 1974 Dr Alder was informed that the Commission had no intention of discussing the origin of the documents in its possession.

10 By a letter dated 18 December 1974, addressed to the Public Prosecutor's Office, Berne, Dr Alder, on behalf of Roche, laid a complaint against a person or persons unknown for economic espionage within the meaning of the abovementioned Article 273 of the Swiss Penal Code. On the basis in particular of the copies of the documents handed over by the Commission officials to the Roche employees in October 1974, Dr Alder drew the conclusion that the applicant was the main suspect.

11 On 31 December 1974, the applicant was arrested by the Swiss authorities as he crossed the border from Italy with his family. According to the police record of the interrogations which took place on 31 December 1974 and 1 January 1975, the applicant acknowledged that he was the Commission's informant and that it was 'certainly within the bounds of possibility' that he had given the Commission the documents in question. On 1 January 1975 the applicant was charged with economic espionage contrary to Article 273 of the Swiss Penal Code. In the course of subsequent interrogations he claimed that he had given the Commission information only verbally and that the record of 31 December 1974 and 1 January 1975 did not properly reflect what he had said.

12 While he was in prison, the applicant was held in solitary confinement and he was not allowed to communicate with his family. His wife was also interrogated by the Swiss police and on 10 January 1975 she committed suicide. On 25 January an official of the Commission received an unsigned letter informing him of the applicant's arrest and asking the Commission to intervene in his favour.

13 At the beginning of February 1975 Dr Alder had a telephone conversation with Mr Schlieder, in the course of which the latter confirmed that the applicant was the Commission's informant. There is however some dispute as to whether Mr Schlieder confirmed that the applicant was the person who had supplied the documents. In any event, on 14 February 1975 a police officer informed Dr Portmann, a colleague of Dr Bollag, the Swiss lawyer retained by the applicant, that a high-ranking official of the Commission had named the applicant as the person who had supplied the documents and as the Commission's informant. Dr Portmann immediately informed the applicant of this.

14 On 21 March 1975 the applicant was released on bail of SFR 25 000. The Commission subsequently reimbursed that sum and in addition paid the fees of the applicant's lawyers in connection with the criminal proceedings.

15 On 1 July 1976 the Strafgericht Basel-Stadt [Criminal Court, Basle] found the applicant guilty, *inter alia*, of an offence against Article 273 of the Swiss Penal Code and sentenced him *in absentia* to one year's imprisonment (suspended). It is clear from the text of the judgment, which was drafted in German, that in the course of the visits of the Commission officials to the Roche subsidiaries in October 1974, the officials had handed over to the Roche employees photocopies of documents supplied by the applicant to the Commission. In addition, it is pointed out in the judgment that the applicant admitted having informed the Commission officials orally of the activities of Roche which, in his view, constituted anti-competitive schemes. Finally, the judgment indicated that the applicant's identity as the Commission's informant also emerged from the telephone call from Mr Schlieder to Dr Alder.

16 On 27 September 1977 the Appellationsgericht Basel-Stadt [Court of Appeal for the Canton of Basel-Stadt] dismissed the applicant's appeal. That judgment stated, *inter alia*, that in the course of their visit to the Roche's French subsidiary, the Commission officials had shown the documents in question to the director of the subsidiary, who had taken copies of them. On 6 January 1978 the Commission sent a letter to the applicant enclosing an English translation of that judgment.

17 The appeals brought by the applicant before the Bundesgericht [Swiss Federal Supreme Court] and an application to reopen the proceedings were subsequently dismissed.

18 In February 1979 the applicant discharged his lawyer, Dr Bollag, and retained Dr Diefenbacher, of Berne. By a letter of 18 August 1980 Dr Diefenbacher informed the Commission that he had come into possession 'of evidence proving in a singular way the direct responsibility of the EEC Commission for Mr Adams' most lamentable fate'.

19 Finally, on 28 May 1982 the applicant lodged a petition, in which he laid a complaint against Switzerland, with the European Commission of Human Rights. In that petition he alleged that the criminal proceedings instituted against him by the Swiss authorities had been conducted in breach of Articles 6 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. By a decision of 9 May 1983 the European Commission of Human Rights rejected the petition as inadmissible on the ground that it was out of time.

The hearing before the Court

20 In the course of the proceedings the Court (Second Chamber) heard the applicant and took evidence from Dr Portmann, his former lawyer, and various former and present Commission officials.

21 At that hearing the applicant explained *inter alia* that by his letter of 23 February 1973 he had sought to impose on the Commission an obligation of confidentiality which was continuous and without any date of expiry. Although he had stated in that letter that after he had left Roche he would be prepared to appear before any court, he did not think that it would be necessary for him to do so and, even if it were, he considered that his identity could be kept secret. In addition, Mr Carisi and Mr Rihoux promised that the applicant's name would not be mentioned in the course of the investigation. The applicant believes that he did not expressly state that the documents sent to the Commission were not to be shown to third parties, or that, taken together, they might reveal to Roche the division from which they came, because he did not for a moment imagine that the Commission would use them outside the institution. Nor did he ask to be kept informed about the progress of the investigation of Roche. It would, however, have been possible for the Commission to keep him so informed, because, as a result of the letter of 25 February 1973, it was already aware of his plan to set up home in Italy and, in the course of the meeting with Mr Carisi and Mr Rihoux in April 1973, the applicant had stated that he was going to live in the small town of Latina.

22 Mr Schlieder stated *inter alia* that it had been clear to the Commission that the investigation of Roche would have to wait in any event until the applicant had left

the company. The need to protect him after his departure was not discussed because no one seriously thought that there was a possibility that criminal proceedings might be instituted against him. Mr Schlieder did not give instructions for the use of the documents passed by the applicant to the Commission. Even after Dr Alder's visit of 8 November 1974, no one at the Commission believed in the possibility that criminal proceedings might be instituted against the applicant. Dr Alder's threats were therefore merely regarded as a trick for the purpose of obtaining the informant's name. That was why the Commission did not consider it necessary to inform the applicant of those threats. Furthermore it was clear from a letter from the applicant that he had left Roche, and therefore Switzerland, to set up home in Italy. Finally, Mr Schlieder did not remember having had a telephone conversation with Dr Alder at the beginning of February 1975. He stated, however, that after the Commission had received the anonymous letter informing it of the applicant's arrest, it was clear that it had to give the applicant its formal support and help him.

23 Mr Rihoux stated *inter alia* that he had understood the applicant's letter of 25 February 1973 to mean that after the applicant's departure from Roche the Commission was free to do as it thought fit. Moreover, he received no instructions from his superiors as to the manner in which the information obtained from the applicant should be treated. At the meeting of 9 April 1973 with the applicant the question of the confidentiality of the applicant's information was not raised and the applicant gave no information regarding his future address. In October 1974, Mr Rihoux and two of his colleagues, including Mr Pappalardo, visited the Roche subsidiary in Paris, where they made every attempt, without success, to obtain copies of the documents supplied by the applicant. To that end, they read to the Roche employees extracts from those documents, without however showing the said documents to them. The question then arose as to whether the investigation would have to be closed despite the overwhelming proof that the Commission had in its possession. It was therefore necessary to weigh up carefully the interests at stake, namely, the public interest, which required that the provisions of the Treaty should be enforced, and the individual interest, which was contrary to the Commission's disclosing the informant's identity. In particular, the method by which the documents had been passed to the Commission and the indications on the face thereof militated against their use. It was therefore decided to use, and to pass on to Roche, edited photocopies of the documents which were both

anonymous in character and sufficiently convincing for the prosecution of the inquiry. Mr Rihoux stated that no-one at the Commission had thought of informing the applicant of the threats made by Dr Alder during his visit to the Commission on 8 November 1974. The applicant had in fact disappeared without informing the Commission of his address and there was no reason to believe that he was going to return to Switzerland. Finally the Commission took the view that Dr Alder's threats were merely 'bluff'.

24 Mr Pappalardo, who has been assigned to DG IV since September 1983, supplemented Mr Rihoux's evidence by stating that during his visit to the Commission on 8 November 1974 Dr Alder had explained the contents of Article 273 of the Swiss Penal Code.

25 Dr Portmann explained that the applicant's defence had been undertaken at his request at the beginning of 1975. Initially the applicant's lawyers had received instructions only from the applicant himself. Later the lawyers received information from the Commission but no specific instructions.

The objection that the action is time-barred

26 The Commission raises the objection that the applicant's action is time-barred by virtue of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

27 In view of the fact that the action is founded on several events which occurred at different times and which became known to the applicant at different times, the pertinence of the objection that the action is time-barred cannot be considered before the question whether any of those events, and if so which, are capable of giving rise to the non-contractual liability of the Commission has been examined. Only after that question has been resolved will it be possible to determine whether the action is barred by virtue of the five-year limitation period laid down in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. It is therefore necessary, in the first place, to consider the submissions regarding the existence of a basis for liability.

The existence of a basis for liability

(a) *Breaches of the duty of confidentiality and the duty to warn the applicant*

28 The applicant claims that the relationship between the Commission and himself was in fact confidential in nature, as is clear both from his first letter to the Commission, dated 25 February 1973, and the discussion which he had with the Commission officials at the meeting on 9 April 1973. The existence of a duty of confidentiality follows, moreover, from the general principles common to the laws of the Member States and from the obligations imposed on the Commission by Article 214 of the EEC Treaty and by Article 20 of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87).

29 In particular the applicant points out that the fact that he indicated in his letter of 25 February 1973 that he would be prepared to give evidence on oath before the Court as to the accuracy of his statements showed that his identity was to be disclosed by himself alone after the Commission investigation had been completed and the proceedings before the Court initiated. The applicant maintains that he never gave the Commission to understand that after he had left Roche he would no longer insist on that duty of confidentiality in regard to him. Finally, in the applicant's view, the Commission's conduct proved that it considered itself bound by such a duty. Thus on several occasions, both before and after the applicant had left Roche, the Commission deliberately refused to name its informant — until the beginning of 1975 when Mr Schlieder disclosed his name.

30 Although the Commission was therefore bound by a duty of confidentiality towards the applicant, in his view it acted in breach of that obligation on three occasions in particular. In the first place, the disclosure of the copies of the documents to the Roche employees in October 1974 enabled Roche to infer therefrom that the applicant was the most likely informant. Secondly, the Commission failed to warn the applicant of the risk that he would inevitably run if he returned to Switzerland. In the applicant's view, it was the Commission's duty to warn him of that risk, either after the documents had been handed over to the Roche employees or, and in any event, after Dr Alder's first visit to the Commission in November 1974, when the Commission was made fully aware of the gravity of that risk. In that respect, the applicant points out that Dr Alder had told the Commission officials that Roche was considering the possibility of

criminal proceedings against the informant and that the lawyer had even explained the contents of the relevant provision of the Swiss Penal Code. Thirdly, and finally, in February 1975 Mr Schlieder named the applicant as the Commission's informant.

31 The Commission denies that it was bound by a duty of confidentiality towards the applicant after he had left his employment with Roche. It bases its contention in particular on the applicant's express statement in his letter of 25 February 1973 that, after he had left Roche, he would be willing to appear before any court, in other words not only before the Court of Justice, to confirm on oath the statements he had made. Moreover, the applicant's conduct after he had left Roche gave the Commission good reason to believe that it was a matter of indifference to him whether he was identified as the informant, since he had not even informed the Commission of his new address. According to the Commission the fact that it repeatedly declined to identify its informant in no way establishes that it considered itself bound by a duty of confidentiality. Its conduct was dictated entirely by its general practice of not divulging the identity of its informants.

32 In any event the Commission contends that even if it were under a duty of confidentiality regarding the applicant's identity, it did not act in breach of that duty. The fact that it handed over photocopies to the Roche employees did not amount to such a breach, since it could not possibly have been foreseen that Roche would be able to identify the source of the documents by examining the copies. The applicant never requested the Commission not to disclose those documents to Roche. On the other hand, he agreed that the Commission could use the documents in connection with an investigation of that firm. The Commission had considered that it was necessary to disclose them to Roche but it nevertheless took care to remove anything which looked as though it might indicate their specific source. Moreover, the documents in question had no evident connection with the applicant, who could have been identified only by someone with a highly detailed knowledge of the organization and the operation of Roche. The applicant had never warned the Commission of such a risk.

33 As regards the possible existence of a duty on the part of the Commission to warn the applicant, the Commission contends that such a duty cannot be inferred from any duty of confidentiality which may have existed. In so far as the applicant is

putting forward a separate submission in this respect, the Commission adds that it is impossible to establish in law that, following Dr Alder's visit, it was under a duty to warn the applicant of the risks that he would run if he returned to Switzerland. In addition, the Commission had no reason to believe that Roche would be able to identify the applicant as the informant. Finally, during his telephone conversation with Dr Alder at the beginning of February 1975, Mr Schlieder revealed nothing that Roche and the Swiss authorities did not already know, since by then the applicant had already admitted that he was the Commission's informant.

34 As regards the existence of a duty of confidentiality it must be pointed out that Article 214 of the EEC Treaty lays down an obligation, in particular for the members and the servants of the institutions of the Community 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'. Although that provision primarily refers to information gathered from undertakings, the expression 'in particular' shows that the principle in question is a general one which applies also to information supplied by natural persons, if that information is 'of the kind' that is confidential. That is particularly so in the case of information supplied on a purely voluntary basis but accompanied by a request for confidentiality in order to protect the informant's anonymity. An institution which accepts such information is bound to comply with such a condition.

35 As regards the case before the Court, it is quite clear from the applicant's letter of 25 February 1973 that he requested the Commission not to reveal his identity. It cannot therefore be denied that the Commission was bound by a duty of confidentiality towards the applicant in that respect. In fact the parties disagree not so much as to the existence of such a duty but as to whether the Commission was bound by a duty of confidentiality after the applicant had left his employment with Roche.

36 In that respect it must be pointed out that the applicant did not qualify his request by indicating a period upon the expiry of which the Commission would be released from its duty of confidentiality regarding the identity of its informant. No such indication can be inferred from the fact that the applicant was prepared to appear

before any court after he had left Roche. The giving of evidence before a court implies that the witness has been duly summoned, that he is under a duty to answer the questions put to him, and is, in return, entitled to all the guarantees provided by a judicial procedure. The applicant's offer to confirm the accuracy of his information under such conditions cannot therefore be interpreted as a general statement releasing the Commission from its duty of confidentiality. Nor can any such intention be inferred from the applicant's subsequent conduct.

37 It must therefore be stated that the Commission was under a duty to keep the applicant's identity secret even after he had left his employer.

38 Of the events mentioned by the applicant, the only occasion on which the Commission directly revealed the identity of its informant was the telephone conversation between Mr Schlieder and Dr Alder at the beginning of February 1975. However, that conversation took place after the applicant had caused an anonymous letter to be sent to the Commission informing it of his detention and seeking its help. It is difficult to see how the Commission could have acted on that request without confirming, at least by implication, that the applicant was indeed its informant. Moreover, it transpired subsequently that at that time the applicant had already admitted to the Swiss police that he had given information, at least orally, to the Commission and it is clear from the decisions of the Swiss courts that the confirmation of that fact by Mr Schlieder did not have a decisive bearing on the applicant's conviction. The disclosure of the applicant's identity at that time and in those circumstances cannot be regarded as constituting a breach of the duty of confidentiality which could give rise to the Commission's liability *vis-à-vis* the applicant.

39 On the other hand, it is clear that the handing over of the edited photocopies to members of the staff of the Roche subsidiaries enabled Roche to identify the applicant as the main suspect in the complaint which it lodged with the Swiss Public Prosecutor's Office. It was therefore that handing over of the documents which led to the applicant's arrest and which in addition supplied the police and the Swiss courts with substantial evidence against him.

40 It appears from the documents before the Court that the Commission was fully aware of the risk that the handing over to Roche of the photocopies supplied by the applicant might reveal the informant's identity to the company. For that reason

the Commission officials first attempted to obtain other copies of the documents in question from the Roche subsidiaries in Paris and Brussels. When that attempt failed, the Commission prepared new copies of the documents which it considered were the least likely to lead to the discovery of the applicant's identity and it took care to remove from those copies any indication which it considered might reveal the source of the documents. However, since it was not familiar with Roche's practices regarding the distribution of the documents in question within the company, the Commission could not be sure that those precautions were sufficient to eliminate all risk of the applicant's being identified by means of the copies handed over to Roche. The Commission was therefore, in any event, imprudent in handing over those copies to Roche without having consulted the applicant.

41 It is not however necessary to decide whether, in view of the situation at the time and in particular of the information in the Commission's possession, the handing over of the documents is sufficient to give rise to the Commission's liability regarding the consequences of the applicant's being identified as the informant. Although the Commission was not necessarily aware, when those documents were handed over, of the gravity of the risk to which it was exposing the applicant, Dr Alder's visit on 8 November 1974, on the other hand, provided it with all the necessary information in that respect. Following that visit the Commission knew that Roche was determined to discover how the Commission had come into possession of the documents in question and that it was preparing to lay a complaint against the informant under Article 273 of the Swiss Penal Code, the contents of which Dr Alder even took care to explain. The Commission also knew that there was a possibility of obtaining from Roche, in return for the disclosure of the informant's identity, an undertaking not to take action against him. It could not however pursue that possibility without the applicant's consent.

42 In those circumstances it was not at all sufficient for the Commission merely to take the view that it was unlikely that the applicant would be identified, that he was probably never going to return to Switzerland and that, in any event, the Swiss authorities did not intend to institute criminal proceedings against him. On the contrary, the Commission was under a duty to take every possible step to warn the applicant, thereby enabling him to make his own arrangements in the light of the information given by Dr Alder, and to consult him as to the approach to be adopted in relation to Dr Alder's proposals.

43 Although the applicant had not left any precise address making it possible for the Commission to contact him easily, in his letter of 25 February 1973 he had already indicated his intention of setting up his own meat business in Italy, near Rome. Even in the absence of other indications, that information would have enabled the Commission to make inquiries with a view to discovering where the applicant was staying. It is common ground that the Commission did not even attempt to find the applicant although it allowed almost one month to elapse before communicating to Dr Alder its final refusal to discuss the origin of the documents in its possession, a refusal which was followed by the lodging of Roche's complaint at the Swiss Public Prosecutor's Office.

44 It must therefore be concluded that, by failing to make all reasonable efforts to pass on to the applicant the information which was available to it following Dr Alder's visit of 8 November 1974, even though the communication of that information might have prevented, or at least limited, the damage which was likely to result from the discovery of the applicant's identity by means of the documents which it had handed over to Roche, the Commission has incurred liability towards the applicant in respect of that damage.

(b) *The duty to advise the applicant with regard to the Convention for the Protection of Human Rights*

45 The applicant's final claim is that inasmuch as it undertook in April 1975 to advise Dr Bollag on the preparation of the applicant's defence, the Commission owed a duty of care to the applicant, which consisted in giving him proper professional advice. By failing to advise the applicant in good time of his right to petition the European Commission of Human Rights, the Commission failed to fulfil that duty.

46 The Commission contends that it never undertook to advise the applicant or his lawyer regarding the possibility of petitioning the European Commission of Human Rights. It merely paid the legal costs of the applicant's defence and left it to his lawyers to advise him.

47 The applicant's submission is clearly ill-founded. It is clear from the information before the Court, and in particular from the evidence of Dr Portmann, that the applicant himself retained his lawyers for his defence and that they received instructions only from him. The Commission merely provided the information

requested, in particular in relation to the Free Trade Agreement concluded between the Community and the Swiss Confederation and, in addition, paid the legal costs. The Court considers that the Commission was under no additional duty and that it was not therefore negligent in failing to give specific instructions to the applicant's lawyers in regard to his defence and in not directly advising him in that respect.

The question whether the applicant's action is time-barred

48 According to the Commission, the applicant's action is, in any event, time-barred under Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. All the events on which the applicant has founded his action occurred more than five years before it was brought. In its view, Article 43 does not require that the applicant should have had knowledge of those events in good time. In any case the applicant had sufficient knowledge of those events to be able to assert any rights which he may have had after receiving the information supplied by the Swiss police during the interrogations and, at the latest, when he read the Swiss judgments.

49 The applicant claims that, broadly speaking, the events on which he relies did not become known to him until 1980, after his new lawyer, Dr Diefenbacher, had had the opportunity to study the documents relating to the criminal proceedings. He did not believe the information supplied by the Swiss police and he was not able to read the Swiss judgments, which were drafted in German. In any event, he could not possibly have known of the events relating to Dr Alder's visit to the Commission on 8 November 1974.

50 According to Article 43 of the Protocol on the Statute of the Court of Justice of the EEC 'proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto'. That provision must be interpreted as meaning that the expiry of the limitation period cannot constitute a valid defence to a claim by a person who has suffered damage where that person only belatedly became aware of the event giving rise to it and thus could not have had a reasonable time in which to submit his application to the Court or to the relevant institution before the expiry of the limitation period.

51 In this case it must be borne in mind that the Court has based its conclusion in regard to the Community's liability on the fact that the Commission had not

attempted to inform and to consult the applicant following Dr Alder's visit of 8 November 1974. It is clear from the information before the Court that the applicant could not have become aware of that fact until the preparatory inquiry in these proceedings, since Dr Alder's visit was mentioned for the first time in the Commission's defence. Therefore he could not have sought to establish the Community's liability on that basis before the normal date of expiry of the limitation period.

52 It follows that the Commission's objection must be dismissed.

Damages

53 It must therefore be concluded that in principle the Community is bound to make good the damage resulting from the discovery of the applicant's identity by means of the documents handed over to Roche by the Commission. It must however be recognized that the extent of the Commission's liability is diminished by reason of the applicant's own negligence. The applicant failed to inform the Commission that it was possible to infer his identity as the informant from the documents themselves, although he was in the best position to appreciate and to avert that risk. Nor did he ask the Commission to keep him informed of the progress of the investigation of Roche, and in particular of any use that might be made of the documents for that purpose. Lastly, he went back to Switzerland without attempting to make any inquiries in that respect, although he must have been aware of the risks to which his conduct towards his former employer had exposed him with regard to Swiss legislation.

54 Consequently, the applicant himself contributed significantly to the damage which he suffered. In assessing the conduct of the Commission on the one hand and that of the applicant on the other, the Court considers it equitable to apportion responsibility for that damage equally between the two parties.

55 It follows from all the foregoing considerations that the Commission must be ordered to compensate the applicant to the extent of one half of the damage suffered by him as a result of the fact that he was identified as the source of information regarding Roche's anti-competitive practices. For the rest, however, the application must be dismissed. The amount of the damages is to be determined by agreement between the parties or, failing such agreement, by the Court.

On those grounds,

THE COURT,

as an interlocutory decision,

hereby:

(1) Orders the Commission to compensate the applicant to the extent of one half of the damage suffered by him as a result of the fact that he was identified as the source of information which led the Commission to impose a fine on his former employer, the Swiss company Hoffmann-La Roche, for certain anti-competitive practices;

(2) For the rest, dismisses the application;

(3) Orders the parties to inform the Court within nine months from the delivery of this judgment of the amount of damages arrived at by agreement;

(4) Orders that, in the absence of agreement, the parties shall transmit to the Court within the same period a statement of their views with supporting figures;

(5) Reserves the costs.

Mackenzie Stuart		Everling	Bahlmann	Joliet
Bosco	Koopmans	Due	Galmot	O'Higgins

Delivered in open court in Luxembourg on 7 November 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President