In Joined Cases 56 to 60/74

FIRMA KURT KAMPFFMEYER MÜHLENVEREINIGUNG KG, Hamburg,

OFFENE HANDELSGESELLSCHAFT IN FIRMA WILHELM WERHAHN HANSAMÜHLE, Neuss am Rhein,

FIRMA LUDWIGSHAFENER WALZMÜHLE ERLING KG, Ludwigshafen/Rhein,

FIRMA HEINRICH AUER MÜHLENWERKE KGAA, Cologne,

FIRMA PFÄLZISCHE MÜHLENWERKE GMBH, Mannheim

represented by Messrs Modest, Heemann, Gündisch, Rauschning, Landry, Röll, Festge, Horst Heemann, Hamburg, with an address for service in Luxembourg at the Chambers of Félicien Jansen, huissier de justice, 21 rue Aldringen,

applicants,

v

EUROPEAN ECONOMIC COMMUNITY, represented by its institutions

(1) The Council of the European Communities, Brussels, represented by Professor Daniel Vignes, Director in the Legal Department of the Council, acting as Agent, assisted by Bernhard Schloh, Legal Adviser in the Legal Department of the Council, with an address for service in Luxembourg at the Chambers of J. N. van den Houten, Director of the Legal Department of the European Investment Bank, 2 place de Metz,

and

(2) The Commission of the European Communities, Brussels, represented by its Legal Adviser, Peter Gilsdorf, acting as agent, with an address for service in Luxembourg at the Chambers of Mario Cervino, Legal Adviser of the Commission of the European Communities, Bâtiment C. F. L., place de la Gare,

defendant,

Application for damages under the second paragraph of Article 215 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, M. Sørensen and Lord Mackenzie Stuart, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

I — Facts and procedure

(a) The objective of the application

Whereas there is a surplus production of common wheat in the Community, there is generally a shortage of that of durum wheat and moreover it is localized in certain areas of France and Italy.

The organization of the market in cereals comprising both common wheat and durum wheat is based on the following prices system: Regulation No 120/67 of the Council of 13 June 1967 (OJ, English Special Edition 1967, p. 33) provides for the annual fixing of a target price, basic intervention price, derived intervention prices and a threshold price. With regard to durum wheat, the fixing of a minimum guaranteed price is also provided for as well as the possibility of granting production aids in order to encourage production.

Article 10 of the regulation provides that this aid, of a uniform amount for the whole Community, shall be equal throughout the marketing year to the difference between the guaranteed minimum price and the intervention price at the beginning of the marketing year.

Regulation (EEC) No 1528/71 of the Council of 12 July 1971 (OJ, English Special Edition 1971 (II), p. 522) provides for the fixing of a single derived intervention price for durum wheat equal to the lowest price resulting from the application of Regulation No 120/67.

Regulation No 796/72 of the Council of 17 April 1972 (OJ, English Special Edition 1972 (I), p. 306) abolishes the basic intervention price and replaces it by a single intervention price equal to the lowest derived intervention price.

Although there is a very great shortage in the Community production of durum wheat, the French and Italian durum wheat mills by reason of their more or less close proximity to the production

areas can cover 80 % of their needs from the Community market.

This situation had already led the German producers of meal from durum wheat to bring an action for damages under the second paragraph of Article 215 of the EEC Treaty against the Community (Cases 63 to 69/72).

According to the application the damage claimed to have been suffered during the cereal marketing year 1971/72 was caused by the deficient, non-rational and illegal management of the common organization of the market in cereals, especially as regards durum wheat, which resulted in German cereal meal producers being obliged to purchase their basic material — durum wheat imported from third countries — at the threshold price, whereas their French and Italian competitors had been able to obtain home-grown durum wheat at the intervention price or at a price approaching the same by reason of the system of aids paid out of public funds.

This distortion of competition is said to have lost the applicants 20 % of the German market in cereals meal, a market made up of manufacturers of macaroni, spaghetti and similar products, the benefit accruing in the main to French undertakings. In the first place, the applicants based their claim to compensation on a wrongful act on the part of the Community institutions, in the main by reason of their having fixed the intervention price in respect of French and Italian durum wheat at too low a level or the threshold price for durum wheat imported from third countries at too high a level.

In the judgment of 13 November 1973 given in these cases ([1973] ECR 1229) the Court of Justice dismissed the applications on the grond that the rules in question did not involve illegality. However, the Court in this judgment observed that ... 'if the Council omitted to correct the disadvantages to which German meal producers were indirectly subject, by reason of the fact that their French competitors enjoyed an advantage from this system, such an omission is nevertheless not capable of rendering the provisions in question illegal.

In enacting them, the Council was at the period in question and in the light of the relevant circumstances not obliged to ascertain whether circumstances of so special a kind could militate against the application of provisions that normally would have been satisfactory.'

The present applications by the German meal producers, who have already been parties to the aforementioned cases, are for compensation from the European Economic Community for damage which the applicants claim they have suffered during the 1974/75 cereal marketing year as a result of the prices rules and aids in relation to durum wheat in the Community.

These new rules, it is claimed, have once again caused discrimination and damage to the German meal producers by reason of the fact that the Community institutions have pursued their previous policy which was already criticized in the previous cases. Moreover the institutions have again increased the difference between the intervention price and the threshold price or target price, a difference which by reason of the shortage and the special position on the French market, constitutes the decisive cause of the discrimination.

Since the French market is basically closed to the German meal producers and they are as a matter of practice obliged to cover all their needs for durum wheat from third countries on the basis of the threshold price or at the world market price, whereas their French competitors can obtain up to 80 % by purchasing homegrown wheat on the basis of the intervention price or at a little higher level it was possible to foresee with certainty that during the

1974/75 marketing year the applicants would again suffer damage. This damage lies in the fact that the French meal producers attempt to expel their German competitors from the German market in durum wheat meal, possibly more than previously, and compel them by means of dumping practices to sell the German meal at a loss in order not to suffer even greater losses in the portion of the market which they hold.

The applicants draw attention to the fact that both the German meal producers and all the meal producers of the Community sent protests to the Commission even before the Community institutions adopted the rules in question for the 1974/75 marketing year. Moreover the German meal producers at an interview with the Commission set out their position and stressed the impossibility of buying French durum wheat and accordingly asked for the abolition of the difference provided for between the intervention prices and the target price of durum wheat.

(b) The prices of durum wheat in force during the 1974/75 marketing year:

target price: 182·83 u.a./metric ton (Regulation (EEC) No 1126/74 of the Council of 29 April 1974, Official Journal L 128, p. 14);

single intervention price: 166·83 u.a./metric ton (Regulation (EEC) No 1128/74 of the Council of 29 April 1974, Official Journal L 128, p. 17);

threshold price: 180·00 u.a./metric ton (Regulation No 1427/74 of the Council of 4 June 1974, Official Journal L 151, p. 1);

guaranteed minimum price: 196·83 u.a./metric ton (Regulation No 1126/74 of the Council).

Amount of aid granted to producers of durum wheat:

30 u.a./metric ton (difference between the minimum guaranteed price and the single intervention price) (Regulation (EEC) No 1524/74 of the Council of 17 June 1974, Official Journal L 164, p. 6).

Prices of durum wheat applicable as from 7 October 1974:

target price: 191·97 u.a./metric ton;

single intervention price: 175·17 u.a./metric ton;

guaranteed minimum price: 205·17 u.a./metric ton (Regulation (EEC) No 2496/74 of the Council of 2 October 1974, Official Journal L 268, p. 1);

threshold price: 189·10 u.a./metric ton (Regulation (EEC) No 2518/74 of the Commission of 4 October 1974, Official Journal L 270, p. 1.).

(c) Procedure

The applications dated 15 July 1974 were registered at the Court Registry on 25 July 1974.

By order dated 18 September 1974 the Court decided to join the present cases for the purposes of the procedure and judgment.

By written statements made under Article 91 of the Rules of Procedure of the Court and lodged on 1 October 1974 the Council and the Commission applied to the Court for a decision on a preliminary objection of inadmissibility.

The applicants made their observations on the preliminary objection of inadmissibility in a written statement lodged on 6 November 1974.

By order dated 20 November 1974 the Court decided to reserve its decision on the objection made by the defendants for the final judgment.

The parties replied in writing to a certain number of questions raised by the Court.

By order dated 29 October 1975 the Court decided to hear as witnesses:

1. (A) Mr Pegler, manager of the undertaking Kampffmeyer France, Paris;

   (B) Mr Wilhelm Klees, manager of the undertaking A. C. Toepfer, Hamburg;

   (C) Mr Peter Schnitt, director of the undertaking Getreide- und Futtermittel-Handelsgesellschaft mbH, Hamburg;

   (D) Mr Richard Zadow, manager of the undertaking Wilhelm Werhahn Hansamühle, Neuss;

   on the following questions:

   (a) Whether he has made any effort since April 1974 to buy French durum wheat of the 1974 harvest and what has been his experience in this respect.

   (b) Whether he has any evidence to show that the French meal producers have been able to acquire durum wheat at prices lower than those which his firm had to pay.

   (c) Whether there has been any difference between the conditions under which French common wheat of the 1974 harvest has been exported to Germany and the conditions in respect of French durum wheat.

2. (E) Mr Schulten, manager of the undertaking Birkel, Stuttgart-Endersbach;

   (F) Mrs Marianne Riehm, director of the pasta factory '3 Glocken GmbH', Weinheim;

   (G) Mr Hubert Kohlschein, director of the undertaking 'Heinrich Auer Mühlenwerke KGaA';

   (H) Mr Lorenz, manager of the undertaking Ludwigshafener Walzmühle Erling KG;

   on the following questions:

   (a) Has there been a considerable difference between the offers for durum wheat meal made by French meal producers or their agents and those by German meal producers?

   (b) How large have these differences been and what were the quantities of meal involved?

   (c) Have you any evidence capable of explaining these differences?

As regards question 1 (b) in this order the Commission in a written statement lodged on 19 November 1975, submitted evidence in rebuttal by producing documents and proposing that witnesses should be heard.

By order dated 20 November 1975 the Court decided to summon as witnesses:

(A) Mr Hans Joachim Winkler, administrator at the Directorate-General for Competition of the Commission of the European Communities, rue de la Loi 200, Brussels;

(B) Mr André Lacroix, manager, Grands Moulins de Strasbourg, 61 avenue de Jena, Paris 16;

(C) Mr Goldstein, Director, Semoulerie de Normandie, 9 boulevard de Croisset, 76042 Rouen — Cedex

and to hear them on the abovementioned question.

At the request of the applicants the Court further heard as witness Mr Hans Werle junior, Einfuhrhandel, Mannheim.

The evidence of the witnesses was given before the First Chamber of the Court at the hearing on 4 December 1975.

II — Conclusions of the parties

Application

The *applicants* claim that the Court should:

1. Declare that the Community is obliged to compensate the applicants

for the damage which they have suffered or pay to the applicants compensation of an amount related to the damage which they have suffered during the 1974/75 cereal marketing year by reason of the price rules and aids relating to durum wheat in the Community contained in the following regulations:

(a) Regulation (EEC) No 1126/74 of the Council of 29 April 1974, Official Journal L 128, of 10 May 1974, p. 14;

(b) Regulation (EEC) No 1128/74 of the Council of 29 April 1974, Official Journal L 128, of 10 May 1974, p. 17;

(c) Regulation (EEC) No 1427/74 of the Council of 14 June 1974, Official Journal L 151, of 8 June 1974, p. 1;

(d) Regulation (EEC) No 1524/74 of the Council of 17 June 1974, Official Journal L 164, of 20 June 1974, p. 6.

2. Order the defendant to bear the costs.

In their written statement made in relation to the objection of inadmissibility the applicants claim that the Court should:

1. Order the Community to pay

(a) to the applicant in Case 56/74 compensation amounting to DM 817 570·80

(b) to the applicant in Case 57/74 compensation amounting to DM 48 951·00

(c) to the applicant in Case 58/74 compensation amount to DM 351 085·50

(d) to the applicant in Case 59/74 compensation amounting to DM 122 470·92

(e) to the applicant in Case 60/74 compensation amounting to DM 295 219·26;

2. Declare that in addition the Community must make good the damage suffered by the applicants, that is to say pay them reasonable compensation for the damage which they have suffered in the past over and above the amounts set out in paragraph 1 and further compensate for the damage which they will suffer during the 1974/75 marketing year in the form of losses in production and on prices for processing durum wheat and for the sale of durum wheat meal as a result of the Community rules on prices and aids relating to durum wheat provided for in the regulations mentioned in the application under (a) to (d) to which should be added

(e) Regulation (EEC) No 2496/74 of the Council of 2 October 1974, Official Journal L 268, p. 1;

(f) Regulation (EEC) 2518/74 of the Commission of 4 October 1974, Official Journal L 270, p. 1;

3. Order the defendants to bear the costs.

In the reply, paragraph 1 of this last application was amended in the following manner:

The applicants claim that the Community be ordered to pay

(a) to the applicant in Case 56/74 compensation amounting to DM 1 876 601·22

(b) to the applicant in Case 57/74 compensation amounting to DM 164 427·95

(c) to the applicant in Case 58/74 compensation amounting to DM 783 257·67

(d) to the applicant in Case 59/74 compensation amounting to DM 358 735·23

(e) to the applicant in Case 60/74 compensation amounting to DM 625 008·46.

In a written statement submitted at the hearing the applicants amended their previous claims in the following way:

They asked the Court:

1. To order the Community to pay
   (a) to the applicant in Case 56/74 an amount of DM 2 135 611·50
   (b) to the applicant in Case 57/74 an amount of DM 261 747·00
   (c) to the applicant in Case 58/74 an amount of DM 833 621·35
   (d) to the applicant in Case 59/74 an amount of DM 562 625·80
   (e) to the applicant in Case 60/74 an amount of DM 773 934·92

   with interest at 8 % as from 1 August 1975 to all the applicants.
2. To declare further that the Community is liable to compensate the applicants for the damage which they have suffered or to pay the applicants as damages an amount related to the damage which they have suffered during the 1974/75 cereal marketing year in addition to the amount set out in paragraph 1 of the application by reason of the price rules and aids relating to durum wheat in the Community contained in the regulations cited in the previous claims as a result of losses at the production level and in respect of the prices on processing durum wheat and on the sale of durum wheat meal;
3. Order the defendants to bear the costs.

The *Commission* and the *Council* in the written statements made under Article 91 of the Rules of Procedure ask the Court:

1 — to give a preliminary ruling on the admissibility of the applications;

2 — to dismiss the application as inadmissible;

3 — to order the applicants to bear the costs.

In their defences they ask:

In the first place:

— that the amendments of the application made by the applicants in their statement dated 4 November 1974 be dismissed as inadmissible;

— that the original claims of the applicants be dismissed as inadmissible, alternatively as unfounded;

In the second place:

— (in the event of the amendments to the claim being declared admissible)

— that the claims of the applicants as contained in the statement dated 4 November 1974 be dismissed as inadmissible, alternatively as unfounded;

in any event that the applicants be ordered to bear the costs.

III — Submissions and arguments of the parties

Admissibility

In its written statement made under Article 91 of the Rules of Procedure the *Council* raises an objection of inadmissibility. An action for compensation for damages arising from the fixing of prices for a marketing year is not possible before the marketing year begins.

In so far as the applicants see in the action for a declaration (Feststellungsklage) in German law a procedural avenue giving them the possibility of obtaining in advance before the damage occurs the promise of compensation for the damage claimed, it is necessary to see whether it is possible to include this procedural avenue in the proceedings provided for in the EEC Treaty and in particular the action under Article 215.

When the matter is considered it appears that the action provided for in Article 215 of the EEC Treaty rests on an obligation to compensate; the objective, however, of the action for a declaration is only a declaration of a legal relationship without drawing the actual consequences at the moment. Further, whereas Article

215 refers to 'damage caused', the action for a declaration is not concerned with the present results since the damage may be only a possibility.

These differences prevent the action for a declaration being included in the Community legal system.

Finally, it may be doubted whether the applicants' intention is to obtain compensation. They do not hide the fact that their real concern is to encourage the institutions of the Community, by the expedient of the declaration of an obligation to compensate, to amend as quickly as possible the rules in question (cf. p. 5 of the originating application). If this were really the true intention of the applicants it would give rise to another head of inadmissibility, that is to say of a misuse of procedure.

In the *Commission's* view there are such fundamental objections that it appears justified to ask for a preliminary ruling on the admissibility of the application. The applicants, in expressing their claims in the form of actions for a declaration (Feststellungsklagen) have relied on a typically German procedural rule which does not exist in Community law. Article 178 in conjunction with Article 215 of the EEC Treaty authorizes only actions to enforce a payment (Leistungsklage), that is to say actions for compensation for 'damage caused'. Since the action for a declaration is not provided for in Community law, there is no question of ascertaining whether such a means of redress exists in the other Member States. The reference to the 'general principles common to the laws of the Member States' (Article 215) relates to the substantive conditions of liability and not to the procedural rules governing actions. If the Court considers it proper to change the present applications to actions for compensation, they would still be inadmissible. In the case of an action for compensation for future damage the condition giving rise to the right to compensation is that it should be absolutely certain that the damage will occur. In the present case the damage claimed is not only uncertain but its occurrence is even quite unlikely in view of the facts (the price situation on the world market).

Moreover, the applications made on 15 July 1974 refer to compensation for damage which could only occur at the earliest on 1 August 1974 (beginning of the cereal marketing year). The simple 'possibility' that the world prices of durum wheat might fall again below the threshold price does not suffice to give rise to a right to compensation. Further, it is unlikely that this possibility would occur in any event during the 1974/75 marketing year.

Since the occurrence of future damage is not only hypothetical (even according to the applicants' statements) but even unlikely, there does not appear to be any legal ground for bringing an action. Thus, should an application comparable to the action for a declaration in German law in principle be accepted within the framework of Article 215 of the EEC Treaty, the conditions for admissibility are nevertheless not satisfied.

The arguments set out regarding the inadmissibility of the applications based on Article 215 of the EEC Treaty apply also *mutatis mutandis* in so far as they seek a declaration of a right to compensation for an illegal intervention equivalent to expropriation.

In their observations on the objection of inadmissibility the *applicants* say that they cannot exclude the possibility that international prices, at the time above the threshold price and also the minimum guaranteed price, may fall below these prices during the 1974/75 marketing year.

The applicants say that it is a general legal principle that the criterion in ruling on the admissibility of an application is the position in fact and in law existing

on the last day of the oral procedure. Accordingly it does not matter whether the applications were inadmissible when they were brought because the rules in question had not yet entered into force. At the present time it is not possible to cite the date on which the application was brought against the admissibility of the application. *Ex abundanti cautela* it should, however, be pointed out that the rules on prices and aids in respect of durum wheat have effect from the date of their publication which is prior to the date on which the applications were brought.

Community law contains no provision on the admissibility or inadmissibility of an action for a declaration; in the same way the form of procedure in which an application for compensation may or must be brought is not laid down. The application for a declaration as such is in line with the case-law of the Court and should be declared admissible when it enables the case to be more speedily dealt with or simplifies it and when by so doing peace and certainty in the law can be re-established as quickly as possible.

Moreover, practice has shown that frequently the precise assessment of the damage has to be reserved to a later judgment after a finding of liability.

It must suffice to make an application for compensation admissible that the injury which gives rise to the obligation on principle to make good the damage has already taken place and that the damage may occur in the future. In these circumstances the injured party has a legitimate interest in the obligation of the party liable for compensation being determined as soon as possible.

In the present case the injury giving rise to the Community's obligation to compensate exists. It is constituted on the one hand by all the rules on prices and aids relating to durum wheat and on the other by the negligence on the part of the institutions of the Community which have done nothing to offset the distortion in competition.

In the same way it is certain that the applicants will suffer damage until the end of the cereal marketing year: if the world market price for durum wheat is maintained above the guaranteed minimum price, the discrimination created by the grant of the aid will have its full effect during the whole of the marketing year. If the world market price falls below the threshold price, the excessive difference between the intervention price and the target and threshold prices will cause harm to the German meal producers.

Under the rules in force since 1 August 1974 it is already established that the applicants have suffered actual damage resulting from the fact that the fixed amount of 30 u.a./metric ton as aid has been granted.

With regard to the durum wheat meal sold during August and September 1974 the amount of the damage may be calculated on the basis of an abstract method of assessment. Accordingly the applicants are amending their claims to this effect.

In its defence the *Council* objects to this alteration of the claim. This alteration is not covered by Article 42 (2) of the Rules of Procedure and must therefore be declared inadmissible. On this point the *Commission,* in its defence, has identical conclusions. The applicants have completely amended their argument in law. The new claims are based on a new means of redress which does not arise from new facts which have appeared. Further the Commission maintains its objections of inadmissibility which it has already set out. It adds that even if Community law recognizes in principle the action for a declaration with regard to compensation for future damage, it may be asked whether this can be the case when the damage is attributed to an unlawful legislative measure. Having

regard to the restrictions existing in the legal systems of Member States, Community liability arising out of legislative acts can be taken into account only within narrow limits and subject to more restrictive conditions than liability arising out of executive measures.

If nevertheless such an action were accepted in Community law it would be necessary to attach special importance to the necessity of substantially proving the future damage.

Otherwise the action for compensation would risk being misused to evade the conditions provided for in Articles 173 and 175 of the EEC Treaty.

Since the price of durum wheat on the world market in the meantime fell below the threshold price, the *applicants,* in the reply, refer to their arguments set out previously in relation to the admissibility of the original action. This action for a declaration has, moreover, had from the outset the character of an action for enforcement.

The arguments set out in the statement of 4 November 1974 and the new claims made following on it do not constitute an amendment of the application and in any event not an inadmissible amendment. It appears from the wording of the application that the original applications were already expressly directed against the amount of the aid. In view of the fact that at the time of the last statement the prices on the world market had already passed the level of the minimum guaranteed price, the rules on aid had been specially challenged for, since August 1974, that is after the action was brought, they had had a discriminatory effect in respect of the whole amount. The Rules of Procedure do not state whether and subject to what conditions an amendment of the application is admissible. To save time it is proper to accept an amendment of the application if this is shown to be useful. If the applications of November 1974 constitute such an amendment it is proper to accept it because this condition is satisfied.

In the rejoinder the *defendants* maintain their objections relating to the admissibility of the applications in their original form, their amended form and in their present form.

They refer in particular to the strict conditions in Article 42 (2) of the Rules of Procedure relating to the raising of fresh issues. The principle of clarity and of the certainty of the procedure requires that the opposite party should not without good reason have repeatedly to face new issues.

What is prohibited in the rules of procedure in relation to a fresh issue must *a fortiori* be prohibited in relation to a new claim. The application must state 'the subject matter of the dispute and the grounds on which the application is based' (Article 38 (1) (c) of the Rules of Procedure). An amendment of the application by way of the substitution of an action for enforcement of a payment for an application for a declaration involves moreover the amendment of the claims which should likewise be contained in the application originating the proceedings the amendment of which is not provided for anywhere.

Finally, although it may be possible to amend the application in German law this device cannot be incorporated into Community law: German law recognizes an application for a declaration within the framework of an action for damages whereas Community law does not provide for it. The principles of 'saving time' and 'opportuneness' relied on by the applicants can be taken into account only if it is possible to proceed to another means of redress. They cannot, therefore, be accepted in the present case.

Substance

A — The applications

Facts

After consideration of the regulations applicable and an analysis of the market situation of durum wheat the applicants observe first of all that the rules on prices and aids for the 1974/75 marketing year are characterized in particular by the fact that the prices of common wheat have increased by 4 to 6 % and that with regard to durum wheat the minimum price has increased by 26·7 %, the intervention price by 41·3 %, the target price and the threshold price by 36·5 % whereas the aids have been reduced by 19·42 %. The prices of durum wheat will henceforth exceed the prices of common wheat by more than 50 %.

As regards the movement since 1967/68, differences being between the intervention price on the one hand and the target and threshold prices on the other, it must be observed that for common wheat this difference has increased from 7·50 u.a./metric ton to 11·81 u.a./metric ton (basic intervention price — target price) and from 5·63 u.a./metric ton to 8·97 u.a./metric ton (basic intervention price — threshold price).

For durum wheat the difference between the intervention price and the target price has increased on average from 10 u.a./metric ton to 16 u.a./metric ton and that between the intervention price and the threshold price from 8·87 u.a./metric ton (1967/68 - 1970/71) to 13·17 u.a./metric ton (1947/75).

As for the durum wheat production in France and Italy the applicants observe that the cultivated areas, especially in France, and likewise the yields per hectare have increased greatly during recent years (Annexes 3 to 5). The position regarding the needs of the French and Italian meal producers and the possibility of supplying them has not notably changed and it must be anticipated that this position will continue during the 1974/75 marketing year for although the cultivated areas have increased by 15 000 hectares (10 %) there is still a shortage of durum wheat on the French and Italian markets.

Further, the meal producers of these countries have such opportunities of covering their needs from the national production (up to 80 % and more on a regional basis) that this supply has considerable positive effect on the calculations of these meal producers and accordingly a negative effect on the German meal producers which have to obtain supplies by imports from third countries at higher prices.

As for the position of the German meal producers it must be observed that the need and consumption of meal have not changed whereas since 1968 the milling of durum wheat by the German meal producers has continually declined to an abnormal extent (Annex 6a).

This decline in milling and the decrease in the share of the market held by the German meal producers are undoubtedly due to the growth of imports of meal from Italy and France (cf. application originating the proceedings, p. 20). The German meal producers whose export of meal has also increased have covered their needs of durum wheat almost exclusively from third countries up to 1973, apart from reduced imports from France (p. 22).

The price movement of common wheat on the world market, after an unusual increase up to February 1974, inclines to a level below the threshold price. The international market in durum wheat has followed the same pattern: after having exceeded the threshold price the international prices (since August 1973) have declined constantly and it has to be anticipated that during the 1974/75 marketing year they will fall below the threshold price. The international price

increase in durum wheat has had repercussions on the prices on the Italian and French exchanges after the beginning of the 1973/74 marketing year, but this fact gives no indication on the subject of prices actually paid by the French and Italian meal producers for the 1973 harvest. Only reduced quantities of the national production reached the exchanges and the markets. It may accordingly be assumed that the French meal producers and in particular those situated in the Paris basin have been able to cover their needs as in previous years before the beginning of the cereal marketing year, that is to say the spring of 1973, at prices around the intervention price when the increase on the world market had not yet had any effect on the Community market.

As regards the access to the French market in durum wheat, the prices actually paid by the French meal producers and the German exports of durum wheat meal to France, the applicants make the following observations:

The negative results of the efforts of the German meal producers and the importers to buy large quantities of French durum wheat is reflected in the figures on imports (p. 22). The negotiations conducted by the German undertakings and importers in France (pp. 30 to 36) shows how attempts to purchase were increased. It is not the sale or price conditions which led to the failure of these negotiations but the lack of offers from the French side.

This negative result is in accordance with the economic situation on the durum wheat market in France. This is in the first place a deficit market; further the large French durum wheat mills, in particular those of the Paris basin, are situated directly in or around the production areas and there are traditionally natural and close ties between the producers, depots and meal producers from which people outside the circle are excluded. Only surpluses which cannot be bought by these meal producers can come onto the exchanges and open markets. As a result the prices on the exchange and on the market do not reveal the prices at which the French and Italian meal producers buy durum wheat from the national production.

The fact that especially the mills of the Paris basin (during the 1971/72 and 1972/73 marketing years) obtained supplies on the basis of the intervention price or slightly higher price may be indirectly inferred from the fact that they proposed dumping prices for meal to the German manufacturers of pasta. This dumping involved a reduction of DM 250 per metric ton on the offers of the German meal producers.

Further, the three meal producers of the Paris basin did not increase the prices of meal on sale in France after the beginning of the 1973/74 marketing year in spite of the increase on the world market. The opportunity for these meal producers to obtain supplies at prices close to the intervention price is due to the particular relations between the producers, depots and mills. In the first place there are standing relationships between the customers and sellers which, moreover, in the Paris basin, are not limited to the supply and purchase of durum wheat but likewise cover business relating to other kinds of products (common wheat, fertilizer) and services. In addition the returns per hectare in the Paris basin in 1972 and 1973 attained 75 % and even 100 % more than the average rates on which the rules for prices and aids of the Community are based (cf. pp. 14 and 15 of the application originating the proceedings).

It cannot be overlooked that durum wheat growers of the Paris basin achieve exceptionally high returns in relation to the growers of other areas even if they receive only the minimum guaranteed price which, after deducting the aid, is equal to the intervention price.

The fact that the German meal producers are also increasing the export of durum wheat meal to French pasta manufacturers does not undermine the argument that these meal producers are discriminated against in that they are not in a position to compete with the French meal producers. Only the German meal producers situated relatively near the frontier are involved in these exports. They sell the meal at a loss to pasta manufacturers likewise situated relatively near the frontier, on the one hand to withstand the discriminatory competition from the French meal producers and on the other to reduce the losses arising from not working at full capacity.

Finally the applicants observe that both the German meal producers and all the meal producers of the Community set out their position to the Commission before the rules in question were adopted.

In November 1973 the Union of Associations of Meal Producers of the EEC informed the Commission that in the unanimous opinion of all the member associations the rules would lead to distortion of competition and harm to the meal producers of the countries of northern Europe and in particular the Federal Republic of Germany and the Benelux countries.

After the publication of the Commission's proposals for the 1974/75 marketing year there was a meeting between the representatives of the German meal producers and a representative of the Commission during which the meal producers pointed out that it was not possible for them to buy French durum wheat. They also asked for the abolition of the difference between the intervention price and the target price of durum wheat, which difference was not justified, in any event not to such an extent, by the deficit market.

The German representatives had likewise drawn attention to the fact that the difference provided for could lead to a danger of substituting common wheat for durum wheat in the manufacture of pasta.

The Union of Associations of Meal Producers of the EEC had likewise personally submitted complaints to the Commission through the intermediary of its representatives and advanced, in substance, the same arguments as the German meal producers.

These complaints had had only a limited success. Although the Council of Ministers did not follow all the proposals of the Commission, it nevertheless increased the difference between the intervention price and the target price in relation to the previous year. Further, under the new rules the difference in the price between common wheat and durum wheat had considerably increased: the relationship for the intervention prices being henceforth 100 : 151·6 and 100 : 151·6 for the target prices.

Law

Infringement of superior rules of law

According to the applicants the legislative measures of the institutions of the Community adopted to regulate prices and aids in relation to durum wheat for the 1974/75 cereal marketing year constitute an aggravated violation of the superior rules of law protecting individuals (discrimination, infringement of the principle of proportionality).

The rules on prices and aids for the 1974/75 marketing year infringe the objective of stabilizing markets provided for in Article 39 (1) (c) of the EEC Treaty, that of assuring the availability of supplies (Article 39 (1) (d)) and ensuring that supplies reach consumers at reasonable prices (Article 39 (1) (e)). Nor is it in accordance with the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole (Art. 39 (2) (c)). The rules have

regard only to the particular interests of the grower without taking account sufficiently of the needs of the rest of the economy and the consumers and in doing this are out of proportion.

The increase in the threshold price injures consumers without being of benefit to durum wheat growers in the Community.

Because of the great difference between the intervention price on the one hand and the target and threshold prices on the other the rules cause discrimination against meal producers of the Federal Republic of Germany, the Benelux countries and the new Member States in relation to the French and Italian meal producers.

According to the applicants all these disadvantages could be removed:

(a) by increasing the intervention price and bringing it up to the level of the threshold price, or

(b) lowering the threshold price and adjusting it to the intervention price;

(c) by fixing different threshold prices on the import of durum wheat into France and Italy on the one hand and on the import into the other Member States on the other.

To this may be added a fourth possibility:

(d) the refund to producers, for meal producers at a disadvantage, in proportion to the durum wheat imported from third countries.

The discretion of institutions of the Community in executing the Common Agricultural Policy is limited on the one hand by Article 40 (3) of the Treaty which permits only the measures required to attain the objectives set out in Article 39.

Such limits arise likewise from recognized principles of political economy including the recognition of the fact that from the economic point of view the best place to process or consume goods is where they are produced. In a free economy natural chains thus develop, ensuring that a product always goes to the nearest user at the least cost and that it does not reach the most distant places except in so far as the nearest buyers cannot buy it.

Finally, if the market in a product is limited to a particular source and what is more the product is in short supply, it is economically necessary to allow imports of the product to prevent harmful deflections of trade and unreasonable price increases to the detriment of the ultimate consumer.

In the present case the durum wheat produced in Italy and France naturally finds its way to the closest meal producers of these Member States without, however, covering the needs of these mills. In view of the fact that the meal producers of the other Member States can be sufficiently supplied by imports from third countries, the institutions of the Community are acting contrary to the Community interest and the law by upsetting the normal pattern of trade with controls and by causing artificial deflections in trade patterns. In performing their duties within the framework of the Common Agricultural Policy the Community institutions should take account of the fact that the German meal producers would be acting economically in an artificial and harmful manner if they tried to cover their requirement of durum wheat from France and Italy. Having regard to the fact that these mills are obliged to obtain supplies from third countries, the Community institutions must undertake to give them the opportunity of obtaining supplies at the same prices as the French and Italian meal producers. This obligation has not been respected in the price rules in question.

Since the institutions of the Community still justify the large difference between

the intervention price and the target price by their concern to maintain flexibility in the domestic wheat market, it is necessary to stress the fundamental difference between the market in common wheat and the market in durum wheat. There is justification in this surplus market in common wheat for ensuring sufficient flexibility by price rules so that the wheat produced in the distant surplus areas may likewise be sold in the main areas of consumption. In addition to the fact that there is a shortage of durum wheat, there is the fact that the French and Italian meal producers are close to the areas where the wheat is grown. In view of these two facts it is not necessary and even ill-advised to ensure flexibility in the sales of durum wheat so that home-grown durum wheat may be sold everywhere in all the countries of the Community.

Finally the argument with regard to the necessity of flexibility in the market contradicts the arguments in favour of laying down a single derived intervention price.

It is sufficient to fix a difference between the intervention and threshold prices in order to ensure priority for domestic production *vis-à-vis* imports. In this respect a difference of a few units of account would suffice even in France and Italy. This difference should of necessity logically be much less than that which is required in respect of the surplus market in common wheat. It follows that the price rules are contrary to the objectives of Article 39 of the EEC Treaty and likewise to the principle of proportionality.

As regards in particular the level of the threshold price the applicants refer to the criteria laid down in Regulation No 1968/73 of the Council of 19 July 1973 (OJ L 201, p. 10). They consider that the threshold price for durum wheat at present in force is fixed some 10 u.a./metric ton too high.

If, nevertheless, it is desired to maintain the difference between the intervention price and the target and threshold prices, it would still be possible to fix the threshold price so that it is differentiated.

If these proposals are not accepted the proper means to compensate for the different opportunities for purchase is the grant of a refund to producers. This compensation should take the form of a payment of a refund to the meal producers of the Federal Republic of Germany, the Benelux countries and the new Member States for the amount of durum wheat processed into meal and sold to the pasta industry.

Further the applicants contest the claim that the damage to them has not been caused by the Community price rules but is due to the high prices on the world market for which the Community institutions are not responsible. In this respect the applicants refer to Article 19 of Regulation No 120/67 which authorizes the necessary measures to be taken when the cif price is appreciably higher than the threshold price thereby disturbing the Community market. The Council of Ministers, in making use of this authorization in Regulation No 1968/73 of 19 July 1973 restricted itself, however, to introducing an export levy. In the same way the system of import refund could have been introduced.

Among the possibilities coming within the framework of Article 39 of the Treaty and Article 19 of Regulation No 120/67 the applicants (p. 102) propose rules allowing meal producers at a disadvantage to import a certain quantity of durum wheat from third countries against the export of a certain quantity of common wheat duty free.

The applicants add that these last points are not of decisive importance in the present case because it is possible that the international price of durum wheat may again fall below the threshold price during the 1974/75 marketing year.

Damage

The damage which the applicants have suffered and could suffer is proved by the fact that at least since 1971/72 the French meal producers have succeeded in penetrating the durum wheat meal market in Germany to the extent of some 20 %. Nor must the damage caused by the German meal producers having had to align their prices with French competitors in order not to lose an even larger share of the market be overlooked. Since the Community institutions adhere to the system of price rules in question it must be anticipated that the applicants will suffer losses during the 1974/75 marketing year at least as great as those of the previous years.

The applicants are of the opinion that at least in part damages should be assessed by the abstract method, that is to say in so far as German meal producers buy durum wheat from third countries on the basis of the threshold price or at a higher price. It follows that the damage amounts to at least 10 u.a. per metric ton, a figure at which the threshold price would be too high (particulars on pages 92 and 93).

Whilst accepting the abstract method of assessment, the applicants claim that the concrete method of assessment should be applied in respect of the damage which they will suffer by reason of the loss of part of the market. The latter cannot be assessed until the end of the 1974/75 cereal marketing year.

Wrongful act or omission

As regards the wrongful act or omission it should be observed that the Community institutions cannot claim in the present case that they did not know the special conditions appertaining to the French durum wheat market nor the discriminatory effects and the distortion of competition caused by their rules. They cannot claim either that the German meal producers have not drawn attention to the damage which threatened them during the course of the 1974/75 cereal marketing year. The complaint with regard to the wrongful act or omission also involves negligence of the Community institutions which, in spite of knowing the facts, did nothing to alleviate the difficulties.

In the second place the applicants rely on the principle of the right to compensation for an unlawful intervention — even if it were not negligent — of the Community institutions equivalent to expropriation. This principle comes within the scope of the second paragraph of Article 215 of the EEC Treaty which does not make the Community's liability depend on the existence of negligence or a direct connexion and should be applied in the present case: the legal measures fixing the aids and prices of durum wheat each year have caused serious and permanent damage to the private property of the German meal producers. These measures are illegal because they are not necessary to attain the objectives of Article 39 of the EEC Treaty and the wellbeing of the Community and because there are other means of fixing prices and promoting the cultivation of durum wheat in the Community allowing the objectives of the organization of the market to be attained without distorting competition between the meal producers.

B — Defence of the Council

Facts

The Council first of all refers to the fact that the Community system has succeeded in considerably increasing the production of durum wheat in the Community. The percentage in relation to the needs of the Community production has increased in seven or eight years to 70 %. In the first place it is the system of aid which has led to this positive result but it was necessary, moreover, to establish Community

preference, that is to say to fix the threshold price at such a level that Community production is not stifled by imports. This preference has, however, never gone too far. The preference margin cannot be expressed in fixed figures, as the applicants are doing, but can only be a percentage. On examining the movement of the threshold and intervention prices it must therefore be observed that for the 1971/72 marketing year preference represented 10·22 % of the threshold price whereas in 1974/75 it was reduced to 7·31 %.

At the same time aid to growers decreased during this period not only in absolute terms but also on a percentage basis: 28·31 % of the threshold price (1971/72) to 16·66 and even 15·86 % subsequently in 1974/75 (cf. Annex).

As regards the position on the durum wheat market the Council observes that a slow but clear penetration of the market has been taking place for the past five years in various directions: mainly a fourfold increase of exports of meal from France to Germany and on the other hand a tenfold increase of German meal exports to France; also a tenfold increase of French durum wheat exports to Germany; finally an appreciable increase of imports of French and Italian pasta into Germany, this latter movement being perhaps due to reasons of consumer taste rather than economic reasons.

Having regard to this movement it is difficult to claim that the Community market is completely rigid and that it is subject to serious and permanent distortions.

Law

In the opinion of the Council the three conditions for an action based on liability — wrongful act or omission, damage and causal link are not satisfied in the present case.

Causal link

Even if there were damage, which is denied by the Council, there is no direct link between this damage and the Community rules in question in view of the fact that the international prices of durum wheat have consistently been much higher than the intervention price (first claim of the applicants). In the second claim (statement of 4 November 1974) it is not possible to find in the allegations of the applicants any factor showing that the Community system, and in particular the grant of aid is the 'cause' of a difference of 30 u.a./metric ton in the cost price of the French and German meal producers.

Damage

With regard to the action for a preliminary finding, the Council considers that the conditions of the second paragraph of Article 215 of the EEC Treaty are not satisfied (cf. the arguments set out above on the objection to the admissibility). This preliminary claim cannot be treated as a provisional claim. Since the claim was made before the beginning of the cereal marketing year, the existence of damage cannot be shown.

Furthermore, in so far as the claim is for a finding of the unlawfulness of the rules, it cannot be considered in the abstract but only in terms of actual damage resulting from this unlawfulness.

As for the action for enforcement of a payment it must be stressed that the tables given in the application originating the proceedings (Annex 6a) do not show that the applicants' production is declining and that there is damage.

The Council refers further to the trend in German meal exports to France and that of imports of French durum wheat into Germany.

Finally, the applicants' calculation, the method of which is contested by the Council, does not show why the amount of aid, even supposing it is unlawful, is to the advantage of the French meal producers. The direct beneficiary of the aid is the grower and there is no reason in a deficit market why the grower should give up the aid for the benefit of the meal producers. The applicants have not furnished any of the factors required for a calculation of damage since there is none.

The wrongful action or omission on the part of the Community institutions

The original reasoning of the applicants is based in the Council's view on numerous falsehoods, in particular that the French meal producers obtained supplies at the intervention prices. In the light of the considerable increase in prices since 1973 this argument is completely wrong.

As for the alleged difficulties of penetrating the French market the Council stresses that the applicants import 10 % of their supplies of durum wheat from France.

Since the wrongful act or omission of the Community institutions, according to the applicants, lies in the increase of the difference between the intervention price and the threshold price, it must be remembered that this growth in units of account becomes a decrease in percentage.

As regards the alternative argument in the statement of 4 November 1974, the Council maintains that the applicants have not shown that the French growers give a free refund of 30 u.a./metric ton to their customers.

Finally, it is necessary to point out that abolition of the aid would have led to an increased shortage of Community durum wheat. The Council could not have changed its policy too sharply without endangering the positive results already achieved which are in the general interests of the Community: owing to the system of aid Community production of durum wheat has tripled in 10 years and this is also to the advantage of the applicants.

Since the exports of French meal to Germany have also increased, the Community preference machinery has been adapted to re-establish equilibrium. Community preference reflects a proper equilibrium between regard for the general interest of the Community and the special interest of the applicants.

The criterion of 'sufficiently flagrant infringement of a superior rule of law protecting the individual' does not apply in the present case. Since a particularly complex and delicate 'choice of economic policy' is involved, the responsible authority must be accorded sufficient discretion in so far as its choices are guided by regard for the general interest, which is not contested in the present case.

C — Defence of the Commission

Facts

After pointing out that the world market prices of durum wheat, like the prices of the French market, were at the time higher than the intervention price, target price and minimum guaranteed price, the Commission makes two preliminary observations:

first, imports of durum wheat from third countries are not subject to levies;

secondly, the situation on the world market is fully reflected in the prices of the French market.

According to the forecasts of experts no significant change in prices on the world market may be expected before the 1975/76 harvest.

Further the Commission observes that French exports of durum wheat to the other Member States have developed continuously and to a not insignificant extent (Annex 2).

Law

Damage

Since, according to the statement of the applicants of 4 November 1974, evidence of the damage is based on an alternative, the Commission considers two cases:

(a) If the world market price again falls below the threshold price, the difference between the intervention price and the threshold/target price would operate to the detriment of the applicants.

(b) If the world market price remains above the minimum guaranteed price, the discrimination caused by the grant of aid would operate to the full to the detriment of the applicants throughout the year.

The first case

The Commission considers that it is improbable that this case will arise during the 1974/75 marketing year and this fact deprives the claims of any legal basis.

The second case

The Commission maintains that the applicants have not succeeded in establishing a causal link between the aid and the damage claimed. In the first place the argument of the applicants neglects the fact that the aid granted to growers is of no effect on the market. The prices paid to the growers are a result of the laws of supply and demand and depend upon competition. The aid is paid to every grower of durum wheat independently of what he may obtain as a market price. Even if the aid leads to the grower's obtaining a price higher than the world market price for his product this is no benefit to the French meal producers.

The Commission contests the applicants' claim that French meal producers obtain supplies of durum wheat from third countries apart from what they are able to obtain from French growers at significantly lower prices.

Even assuming that the French mills prefer the national product only if it is cheaper it is not necessary that it should be 'significantly cheaper'. To be competitive with regard to the production from third countries it is sufficient for French growers to offer their goods at prices slightly lower than those on the world market.

Aid granted from public funds could at most exercise an influence of a psychological nature on the negotiation of prices between growers and meal producers. Being assured of receiving aid the grower could perhaps be tempted not to exploit fully the latitude in negotiation which the position in the market allows him.

An indirect disadvantage for German meal producers from the point of view of competition which might perhaps arise from this limited influence and which is in no way quantifiable in the formation of purchase prices cannot possibly be treated as damage within the meaning of Article 215 of the EEC Treaty.

Further, the particulars given by the French authorities regarding the prices actually paid on the durum wheat market in France (Annex 1) showed that the applicants' assumptions do not accord with fact.

Even assuming that these figures do not reflect the prices fixed in the annual contracts, it must be recognized that these long-term contracts as a rule have a price revision clause.

In the Commission's view the alleged price cutting by the French meal

producers on the German market is not a sound basis for determining whether and to what extent the grant of aid during the 1974/75 marketing year influenced the purchase prices of the French meal producers. First they related to the previous marketing year (1973/74). It is possible that the French mills acquired the 1973 harvest (contracts of spring 1973) at particularly favourable prices before the increase of prices on the world market. But if the German meal producers were in consequence at a disadvantage, the Commission cannot be made liable for it.

The calculation of the damage

The Commission considers the abstract method used by the applicants for calculating the damage is unsatisfactory, quite apart from the question whether in international commercial law this method is freely accepted.

To calculate the damage correctly it is necessary to show that the difference between the prices (Case 1) or the aid (Case 2) involved a loss of profit or losses and/or a loss of sales.

Infringement of superior rules of law

(a) Article 39 (1) (c) of the EEC Treaty

First the Commission challenges the interpretation given by the applicants to the concept of stabilization of the market. This concept in the context of the Treaty certainly does not mean the maintenance of existing trade patterns and positions on the market. Nor is it possible to support the claim that in a deficit market goods must be consumed or processed where they are produced. Because of the build-up of competition in Germany it might appear quite desirable to sell French meal just as in order to stimulate competition in France it might appear sensible for foreign buyers to buy at least part of the French durum wheat. This last practice might result in the rigid structures of the French market becoming more flexible.

Further, in any case the Community policy is not aimed at deflecting French durum wheat from the production areas; it is simply conceived in such a way as not to exclude trade patterns of this kind. To require from the Community measures which would directly lead to isolating national markets certainly does not come within the criterion of stabilizing the market.

The aid is not sufficient to contribute of itself to the development of meal exports to Germany; it is at most conceivable that this could happen indirectly through the cultivation of durum wheat being stimulated. In any event, the promotion of the cultivation of durum wheat in the Community does not conflict with the objectives of stabilizing the market.

Finally, considered in the long term, the policy of aid could lead to creating a new equilibrium in the market: if, owing to the Community measures of promotion, French production attains and even exceeds French requirements this development will definitely profit the German meal producers.

From the point of view of the global economic interest the policy of aid appears quite legitimate.

(b) Article 39 (1) (d) and (e) of the EEC Treaty

This last consideration relates also to the objectives of assuring the availability of supplies and ensuring that supplies reach consumers at reasonable prices.

Having regard to the shortage of certain raw materials on the world market and the increase in prices of these products a policy aimed at a certain level of self-provision by the Community would certainly serve the objectives provided for in Article 39 (d) (e). The compensatory measures, however, envisaged by the applicants would in the end have the effect of slowing down Community cultivation of durum wheat.

(c) The second subparagraph of Article 40 (3) of the EEC Treaty and the principle of proportionality

With regard to the question of amendment to the system of prices and aids the Commission observes first of all that the comparison of the intervention prices with the threshold and target prices in the application is not correct.

In respect of the 1970/71 marketing year the applicants refer to the highest derived intervention price whereas reference ought to have been made to the lowest intervention price. (Calculation of the Commission, p. 26).

Compared with the figures for 1971/72 the difference in question has only slightly increased until the 1974/75 marketing year. Having regard to the fact that the increase in the target price and the threshold price plays a much more important part than that of the intervention price, it must be observed that the values have declined relatively (Annex 3).

Even if this difference were entirely to the detriment of the German meal producers, which is contested by the Commission the alleged undercutting by the French mills could not be attributed to the effects of the system of Community prices.

The statement by the applicants on alterations in the price relationships between durum wheat and common wheat is not contested by the Commission. As regards these fresh relationships, the Commission maintains that they were virtually imposed by price developments on the world market. This course of events does not therefore justify the conclusion that the Community institutions no longer admit that there is a risk that soft wheat will take the place of durum wheat.

A general raising of the intervention price of durum wheat appeared inopportune not only because of the risk of substitution but for other reasons: a large reduction in the difference between the threshold price and the intervention price could, in certain areas of the Community, lead to products from third countries replacing local products.

Finally, the level of protection of durum wheat has been reduced in relation to that of common wheat (cf. the table on p. 29).

As for the possibility of penetrating the French market in durum wheat the Commission observes that the French exports of durum wheat to the other Member States has continually increased (Annex 2) which shows that the French market is not completely closed to foreign meal producers. The export of 26 500 metric tons to Germany (according to the Commission's table) represents roughly 10 % of the whole of durum wheat processed each year by German meal producers. While recognizing the difficult conditions it should be observed that a slow and constant penetration by foreign competitors of the French market is possible and that this trend should alter the competitive position in France and lead to an increase in prices to growers.

The measures of compensation envisaged by the applicants are criticized by the Commission. In particular as regards the regional differentiation of the intervention price the Commission says that in the case of a deficit market affected by more expensive products from third countries the intervention price cannot have a significant effect in establishing prices.

The fact, unchallenged by the Commission, that the French prices were formerly partly and temporarily at the level of the intervention price or slightly above it, must be explained by other circumstances for which only assumptions can be made.

Nevertheless there are in the present case two factors of causality — the factual situation in France and the Community rules — which cannot give rise to consequences to the disadvantage of the applicants unless they tend in the same direction.

Where economic measures prejudice the interests of dealers only when they are added to a factual trend in the economic situation it is always necessary to inquire whether the legislative measure constitutes the 'decisive' cause of the damage claimed. The Commission refers on this point to the judgment of 14 May 1974 in Case 4/73 *Nold* v *Commission* [1974] ECR 491.

In the present case the causal factor determined by the Community is not the 'sufficient cause' of the consequences which have occurred or, in French legal terminology, this factor has not caused direct damage to the applicants.

At most it would be possible to get a different result if the Community rules contributed to establishing more firmly the factual situation in France which is precisely not the case here: the Community rules are aimed at loosening these structures of the market and giving them more 'flexibility'.

If Community institutions were required when adopting price rules to have regard to a particular situation so as to offset the applicants' difficulties, this could only be in special circumstances: for this it would be necessary that the factual situation should be a permanent situation which, contrary to what might normally be expected and contrary to the normal laws of the market, is seen to be rigid and unchangeable. This condition has not been shown by the applicants. A process of loosening the inflexible market structures has been going on for quite a long period and this trend did not stop when the prices were fixed. Accordingly it cannot be expected of the Community that it should at the time have combated the situation on the French market by means of price correction measures.

Moreover, the reintroduction of intervention prices differentiated according to areas would be contrary to the present general tendency to abolish such differentiations.

Again, there are also facts which could justify maintaining the system in force, *inter alia,* the increase in French exports of durum wheat, the increase in prices on the French market and the situation on the world market.

The applicants' argument in favour of lowering the threshold price is not relevant. In particular it is not possible to deduce the converse from the Community rules adopted in the event of the threshold price being exceeded: these special measures for limiting exports, intended to prevent a shortage, ought not to follow the same criteria as permanent rules relating to import charges.

The introduction of differentiated rules for the threshold price would lead to an increase in obstacles existing on the common agricultural market.

All the measures proposed by the applicants are such as completely to undermine the action for damages.

If the applicants had intended to claim a right to the grant of a refund to producers they should do so within the context of proceedings under Article 175 of the EEC Treaty.

As regards the effects on the aid of the increase in international prices the Commission admits that the grant of aid does not appear absolutely necessary in such circumstances. Accordingly it proposed to the Council to abolish it at least temporarily, but fiscal considerations were also involved.

However, even if aid is not absolutely necessary, this does not mean that it has

no *raison d'être* at all and even less that it is vitiated on the grounds that it is unlawful. It may be imagined that several considerations determined the Council's decision only to reduce the aid and not to abolish it (cf. pp. 40 and 41).

In any event, as regards the question whether a subsidy should be granted, a wide margin of discretion should be left to the legislature and it cannot be shown in the present case that this margin has been overstepped.

Finally, aid can be described as unlawful only if it is such as to give rise to damage to third persons concerned in the market. This is not so in the present case (cf. the arguments set out above).

Even if all the defence pleas were rejected as irrelevant; there would remain the question whether the infringement of the superior rule of law constitutes a flagrant infringement within the meaning of the case-law of the Court.

Having regard to all the circumstances considered there can be no question of the particular rules being the result of seriously arbitrary conduct or of their seriously infringing the rule of proportionality. Even if the criterion of 'flagrant infringement' is interpreted as revealing 'Sonderopfer' of 'special and serious damage' these criteria are not satisfied.

In the present case it is at most damage which does not exceed the normal proportions of results of decisions taken by the legislature in the sphere of economic policy.

The question of a wrongful act or omission

The Commission does not consider it necessary to go into the question of a wrongful act or omission in view of what has been said above. It observes, however, that in the context of an action under Article 215 of the EEC Treaty some wrongful act or omission must be shown. Moreover, it is not contended, as in the aforementioned Joined Cases 63 to 69/72, that the applicants are partly responsible for the damage which occurred.

It is not necessary either to give an opinion in detail on the possible existence of an 'intervention equivalent to expropriation' in view of the fact that there is no unlawful measure on the part of the institutions of the Community in the present case.

D – Reply

Facts

The applicants observe first of all that since the middle of January 1975 the prices on the world market in durum wheat and common wheat are lower than the threshold price. As a result import levies are again being charged in the Community.

Whatever the trend in prices until the end of the marketing year the present position makes the arguments of the defendants relating to the level of world market prices devoid of purpose.

After having completed the figures relating to the trend in exports and imports of durum wheat and durum wheat meal between Germany and France (pp. 4/5) the applicants observe that these figures give only an imperfect picture of the question. The heart of the problem lies in the undercutting by the French meal producers, at the time by DM 100 to 125/metric ton of durum wheat meal, which probably increased after the fall in world market prices.

As regards the prices on the French market the applicants contest in the first place the correctness of the table given by the Commission. Moreover, it has not been shown that the French meal producers have bought from the collecting centres and have paid the prices listed in this table without taking

into account the aid of 30 u.a./metric ton. It may rather be assumed that the prices given relate to such purchases by German importers or other foreign undertakings.

The applicants contest the Commission's argument on the neutral character of the aid. For the durum wheat grower the only decisive factor is what he receives in total for his product. It is moreover noteworthy that the institutions have never shown the precise method of payment of the aid used in France and Italy. If the aid is paid through accredited collectors or even through the meal producers, which is the most simple method, it becomes largely a factor in calculation.

Finally, in calculating the amount of the aid so that the minimum guaranteed price is brought up to the level of the intervention price the Community institutions have understood that aid may influence the market price. It may therefore be assumed that the latter will come into line with the amount of the intervention price.

The applicants state that during the 1974/75 cereal marketing year they must, as previously, cover at least 90 % of their requirements of durum wheat from third countries at the threshold price or at the higher world market price. For the 10 % of their requirements satisfied in France they had to pay the prices on the French exchanges roughly corresponding to the world market prices when the latter were above the threshold price or in any event well above the intervention price. This 10 % represents an insignificant amount and the prices paid for this amount are well above the prices paid by the French meal producers.

Law

Unlawfulness

In the present case the crucial question is not whether and to what extent the French meal producers have been able to make use of the opportunity provided by the Community rules on prices and aids to obtain supplies and whether they have done so. From the legal point of view the criterion is whether the Community institutions have in any event provided and allowed in all conscience and with knowledge of the circumstances a more favourable opportunity to purchase than that which the German meal producers have.

The argument in defence of the large disparity between the intervention price and the threshold price and the method of calculating the aids shows the fear of the Community institutions that the French meal producers buy French durum wheat only when it is appreciably cheaper than the durum wheat from third countries. As a result the Community institutions should likewise accept that French meal producers buy and have bought French wheat only when they could buy it on the basis of the intervention price (the world market price being lower than the threshold price) and when French wheat was appreciably cheaper than durum wheat from third countries (up to 30 u.a./metric ton at the time when the world market prices were higher than the minimum guaranteed price).

The defendants' argument on this point is, however, irreconcileable with the Commission's argument (defence p. 16) that all that the French growers have to do to be competitive with production from third countries is to offer their goods at prices slightly less than world market prices.

If gentler measures sufficed to avoid jeopardizing sales outlets for Community wheat both as regards the difference between the intervention price and the threshold price and also as regards the amount of aid it was not therefore necessary to adopt a measure which by creating different opportunities of purchase discriminated against the German meal producers.

When the world market price exceeded the minimum price the payment was no longer necessary and should have been abolished. Wrongful and unlawful discrimination to the detriment of the German meal producers is established.

If, however, it were a question of necessary discrimination, the institutions could and ought to have adopted measures to prevent unfavourable consequences.

There are such possibilities within the framework of the Treaty and the common organization of the market.

The causal link between the injury and the damage

If, when the world market prices were below the threshold price the difference between the intervention price and the target price had been restricted to a minimum or if the amount of aid had been calculated so that the minimum guaranteed price had been brought up to the target price or a little below it the opportunities for purchase by the French and German meal producers would have been almost indentical. By reason of the fact that a minimum price was guaranteed to growers the French meal producers ought in this event to have paid a price which in any case would have been slightly less than the target price and this would have been roughly the equivalent of the threshold price. It follows that the rules on prices and aids were at the origin of the different opportunities for purchase working to the detriment of the applicants.

Since the world market price was above the minimum guaranteed price the aid should have been abolished or limited to the difference between the minimum price and the world market price to give the same opportunities of purchase. During this period the rules on aid and its amount were thus at the origin of the advantage which the French meal producers enjoyed. The causal link speaks for itself: it is obvious that the different opportunities of purchase for competing undertakings on the same market necessarily involve damage to the undertakings having the less favourable opportunities. The causal link between negligence attributed to Community institutions and damage to the detriment of the applicants arises from the fact that the possible compensation measures did not bring out the damage suffered by the applicants.

Wrongful act or ommission

The wrongful act or omission of the Community institutions is obvious because they have adopted the rules in question with knowledge of all the circumstances and without adopting measures to provide compensation.

Damage

The applicants say that they have suffered damage:

— by reason of the diminution of their share in the durum wheat meal market in the Federal Republic of Germany;

— by reason of the undercutting by French meal producers and the simple fact that they have had to buy their wheat at a higher price than that at which the French meal producers could buy theirs owing to the Community rules.

With regard to the method of quantifying the damage the applicants adhere to the opinion which they set out in the application originating the proceedings.

Discussion of the method of calculation seems unnecessary in the present case since whether the damages are assessed by the abstract or by the concrete method will make no great difference.

The German meal producers should be put in the position in which they would

have been if they had had the same opportunities of purchase as the French meal producers.

Even in assessing by the abstract method the damages caused by the existence of different opportunities of purchase, the calculation would be centred on the objective value of the different opportunities, that is to say the extent to which the opportunities of the French meal producers were better than those of the German competitors. This damage assessed as general or as special amounts to at least 30 u.a./metric ton of durum wheat meal sold to the German pasta industry as long as the world market price was above the minimum guaranteed price (up to 1 November 1974).

For the subsequent period the damage in respect of the quantities sold is at least the amount for which aid was fixed at too high a level. On the basis of the argument that it sufficed to fix the aid at a level such that the mills could have bought 'slightly' below the target price this 'slightly' lower amount could be assessed at 11 u.a./metric ton, an amount provided for by the basic Regulation No 19/62 to ensure that Community wheat should be purchased in preference to wheat from third countries.

Assuming that it would have sufficed to fix the threshold price at 2 % above the single intervention price (cf. application p. 92), the threshold price actually in force is at least 10·43 u.a./metric ton too much. The damage suffered since 1 November 1974 in respect of the quantities sold is at least 1043 u.a./metric ton of durum wheat meal.

In the assessment for the two periods considered the applicants take into account a conversion rate between durum wheat and meal of 3 : 2 by reason of the fact that the advantage of the French meal producers extends to only 80 % of their requirements of durum wheat and to allow an additional safety margin.

E — Rejoinder of the defendants

Facts

The Commission observes that the levies charged since January 1975 have been relatively low and would have led to only a moderate increase in the price of the product from third countries in relation to the Community product.

As for trade in durum wheat meal there has been a 24·6 % decline in French exports to Germany and an increase in German exports to France.

Moreover, the Commission contests the alleged undercutting by DM 100 to 125/metric ton and all the other allegations of the applicants on the cost and sale prices of the applicants and their French competitors.

Law

The irregular nature of the Community rules

(a) Price rules:

The alleged irregular nature could have caused damage to the applicants only from the date at which the threshold price effectively began to fulfil its function, that is, from 18 January 1975.

There is no obligation on the Community institutions to preserve trade patterns and they are not bound to shape their policy so that the natural geographical advantages of the French meal producers are nullified.

As for the French market price of durum wheat the table given in the defence shows that in any event the intervention price in no way serves as a guide price as the applicants claim that it does.

Even if the French meal producers as a result of long term agreements and large supply contracts enjoy a favourable price, it is not possible to imagine that the

prices actually paid differ so much from the market prices.

In any event the alleged undercutting, by DM 100 to 125/metric ton, assuming that it actually exists, cannot be evidence of French prices. First, the underbidding is explicable on other grounds and the amount alleged by the applicants is much higher than the difference of 10·43 u.a./metric ton described as discriminatory.

As for the alleged disregard of equality of opportunity the Commission refers to the arguments relied on to dismiss the complaint of discrimination. The infringement of such a principle by a legislative act involving its unlawfulness presupposes clearly arbitrary conduct of the Community institutions, deliberately discriminatory and not capable of being justified on grounds of the higher interest (of the Community). The Commission considers that it has supplied arguments sufficiently proving that there is no such arbitrary conduct. (cf. defence pp. 32 to 37).

Even if the difference in question between the threshold and intervention prices is not absolutely necessary, the difference proposed by the applicants (reply p. 40) could in no way guarantee Community preference.

As for the 'irreconcileable contradiction' complained of in the reply (p. 29) the Commission observes that it maintains the claim that the French meal producers give preference to the national product when this can be obtained at a price lower than that of the product from third countries. This reasoning which has regard to a situation characterized by a threshold price lower than the world market price loses all value as a basic if the question of the difference generally necessary between the intervention price and the threshold price is contemplated. On the one hand the objective of the Community rules is not to maintain the market prices at the level of the intervention price. On the other hand the difference between the threshold price and the intervention price should be fixed so that even Community wheat harvested in less favoured areas has a chance of competing with the product of third countries.

Finally, within the context of considering whether there is 'arbitrariness' it is not a question of whether this or that adjustment of the organization of the market would have been preferable, it is simply whether the rules adopted were obviously unreasonable in comparison with other possible provisions. It thus appears that since the rules as a whole are based on objectively reasonable considerations they cannot be described as arbitrary.

(b) The system of aid

The assumptions set out in the reply (p. 10) on the subject of the conditions of the payment of aid are purely hypothetical. In France the aid is paid by the Office nationale interprofessionelle des céréales after the harvest has been gathered. The use of accreditied collectors between the administration and the individual grower for payment and checking serves only practical purposes. In any event the individual grower receives his own statement of account which is quite independent of the sale price. The accredited collectors are subject to strict official control.

The neutrality of the aid cannot be questioned either by arguments based on the 'readjustment' of the minimum price to the level of the intervention price. Although this concept is basically correct it does not in any way indicate that according to the Community institutions the market prices should normally be at the level of the intervention price.

The Commission says that the price level desired for the grower is not the minimum guaranteed price but the target price plus the aid.

The Council of Ministers had in any event valid grounds for maintaining the system of aid for the 1974/75 marketing year and the new fall in world market prices has subsequently shown that it was right.

The suggestion of the applicants that a variable aid should be instituted adapted to the world market prices would have been extremely difficult to implement at an administrative level.

Even assuming that the amount of aid was temporarily excessive, in order to speak of discrimination the applicants ought to have shown that the grant of excessive aid must necessarily favour the French meal producers to a corresponding extent.

Damage

In quantifying the damage claimed, the method of which is contested by the defendants, the applicants treat the diminution of their opportunities of purchase, inferred from a comparison with extreme and hypothetical factors, to actual damage suffered on sale (loss of profit). The alleged undercutting in no way supports the hypothetical assessment.

As regards the alleged loss of sales there is no precise information at all. With regard to the figures for the period from 1 November 1974 it should be stressed that an import levy was not introduced until 18 January 1975.

After this date the damage could not have exceeded the amount of the levy and according to the concept of the applicants the rules in question could have been responsible for the alleged undercutting only to the extent of the levy on each import. But it does not seem very likely that the prices paid by the French meal producers for the goods competing with the goods subject to a levy were exactly at the level of the intervention price. Since this wheat was purchased previously the prices actually paid at the time would enter into account.

As for the assessment for the period up to 1 November 1974, it appears incomprehensible that the aid should suddenly become completely lawful when the threshold of the minimum price is reached.

According to the assessment of the Commission (cf. table p. 18) this threshold is irrelevant in this respect and moreover in a number of situations the highest amount of possible damage must in any event be less than the 10.43 u.a./metric ton claimed by the applicants.

Since the defectiveness of the method of calculation used by the applicants is obvious the Commission asks the Court, in the event of its recognizing that the Community is liable, to make only an interlocutory order on liability and to order the applicants to furnish evidence of the amount of the damage suffered by showing exactly what effect the Community rules had on their losses on prices and, where appropriate, on the fall in their sales.

IV — Oral procedure

The parties made oral submissions on 4 February 1976.

The applicants lodged a document on the assessment of the damage which they allege they suffered during the 1974/75 cereal marketing year by reason of the unfavourable opportunities of purchase. The amount of the damage which they allege that they suffered by reason of the diminution of their sales and the loss of part of the market should be determined and assessed by experts.

The Advocate-General delivered his opinion on 17 March 1976.

Law

1 By applications brought in July 1974 the applicants sought a declaration that the Community was bound to make good the damage which they suffered during the 1974/75 cereal marketing year by reason of the rules on prices and aids relating to durum wheat contained in Regulations Nos 1126/74, 1128/74, 1427/74 and 1524/74 of the Council of 29 April, 4 and 17 June 1974 (OJ, L 128, pp. 14 and 17, L 151, p. 1 and L 164, p. 6).

2 In statements lodged on 1 October 1974 the defendants, the Council and the Commission, raised an objection in accordance with Article 91 of the Rules of Procedure to the admissibiilty of the said applications.

They claim in particular that the applications brought before the beginning of the 1974/75 cereal marketing year constitute an action for a declaration or an application for a declaratory judgment (Feststellungsklage) intended to establish the Community's liability for damage which they may suffer.

Community law, it is alleged, recognizes only an action to establish liability to make good damage which has actually occurred so that actions for damages are premature if their only purpose is a declaration that Community rules are unlawful.

3 In their observations on the objection of inadmissibility the applicants developed their original claims and in addition to the declaration sought asked that the Community be ordered to pay specific sums representing the damage suffered by each of them from the beginning of the 1974/75 marketing year, a point which meantime had been reached.

4 The Council and the Commission objected that this amendment of the claims constituted an amendment of the application which is prohibited by Article 42 of the Rules of Procedure.

Further in so far as the claims are for specific amounts as damages insufficient grounds are given.

Admissibility

5 Since by order dated 20 November 1974 the Court decided to reserve its decision on the objection to admissibility for the final judgment, it is necessary to consider first the admissibility of the application.

6 Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeeable with sufficient certainty even if the damage cannot yet be precisely assessed.

To prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain.

This finding is confirmed by the rules in force in the legal systems of the Member States, the majority, if not all, of which recognize an action for declaration of liability based on future damage which is sufficiently certain.

7 With regard to the defendant's claim that the prejudicial effect on the applicants of the rules adopted for the 1974/75 cereal marketing year was not clear solely because the level of prices in the common market has been very much exceeded by the world level of prices, the applicants could rely on the one hand on the judgment of 13 November 1973 given between the same parties in Joined Cases 63 to 69/72 [1973] ECR 1229 from which it appears that the Community rules for the 1971/72 cereal marketing year, which are basically the same as those for the 1974/75 year, were such as to cause them injury without however making the Community liable and on the other hand on their forecast, which indeed came true at the beginning of 1975, that world prices for durum wheat would fall before the end of the marketing year below the level of Community prices.

8 In these circumstances as soon as the Community rules in question were published and before they were put into effect the applicants were justified in bringing before the Court the question whether and to what extent these rules were such as to put them at a disadvantage in relation to their French competitors and if so whether these rules were for this reason contrary to the principle of equal treatment.

Since the damage which could result from the factual situation and the rules was imminent, the applicants could reserve the right to specify the amount of the damage which the Community would have eventually to make good and

restrict themselves for the time being to asking for a finding of the Community's liability.

It follows that the subsequent claims of the applicants that the Community be ordered to pay the specific amounts which were successively amended cannot be regarded as constituting an amendment of the application or as fresh issues.

The question whether sufficient grounds are given for claiming the said amounts concerns the assessment of the damage and thus relates not to admissibility but to the substance of the case.

9 The objection to the admissibility must therefore be rejected.

Substance

10 Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals provides for the fixing of a guaranteed minimum price for durum wheat in order to encourage the cultivation in the common market of this wheat, which, as opposed to that of common wheat, is clearly below requirements.

Article 10 of this regulation provides that 'Where the intervention price for durum wheat ... is lower than the guaranteed minimum price, aid shall be granted for the production of this cereal', this aid being equal to the difference between the two prices.

11 As a result of this aid the cultivation of durum wheat has very much increased in certain areas where its cultivation is possible, especially in Beauce, the south of France and southern Italy so that the needs of the French and Italian mills are to a large extent satisfied.

On the other hand the German and Benelux meal producers have in practive had to continue to obtain supplies of durum wheat from the traditional source, that is to say by import from third countries.

It is established that during the marketing years prior to that of 1974/75 this situation has worked to the disadvantage of the German meal producers such as the applicants since their French competitors are clearly able to obtain supplies of durum wheat locally at prices close to the intervention price

adopted for the cereal year whereas they themselves had to buy the product at prices determined by the threshold price and could obtain Community durum wheat only in small quantities.

12 The applicants consider that the Council and the Commission are liable for the damage which the situation described has caused them in view of the manner in which these institutions have applied Regulation No 120/67.

In the knowledge that the provisions adopted to implement this regulation could at the very least aggravate the disadvantages of this situation, these institutions should either have reduced the aids provided for and thus eliminated the influence which they would have exercised on the level of prices for durum wheat harvested in France or else compensated the effect of this influence by lowering the threshold price so that it was closer to the intervention price.

In the event of neither of these measures being considered possible these institutions should have sought other means of reducing the disadvantage of the German and Benelux meal producers.

As a result of their total failure to act the institutions infringed not only Article 39 (1) (c) according to which the objectives of the common agricultural policy are *inter alia* to stabilize markets, but also the fundamental principle of equality of treatment of partners of the common market expressed in Article 40 (3) of the Treaty.

13 Since the matter deals with a legislative act involving choices of economic policy, there is no liability on the part of the Community for damage which individuals may have suffered by reason of this act, bearing in mind the provisions of Article 215, second paragraph, of the Treaty, unless there is a sufficiently flagrant infringement of a superior rule of law protecting the individual.

In creating a system of aids intended to favour the production of durum wheat in the Community the institutions sought to attain several of the objectives in Article 39, in particular ensuring the availability of supplies in the common market and the stability of the market by encouraging the cultivation of durum wheat which is showing an unfavourable balance as compared with that of common wheat.

The concept of stabilization of the markets cannot cover the maintenance at all costs of positions already established under previous market conditions.

By temporarily giving priority to some of the objectives of Article 39, as compared with the maintenance of established positions, the institutions did not infringe the provisions of the Treaty cited but have exercised their powers in the context of a common agricultural policy in a successful way for the policy has contributed to a considerable local increase in the production of durum wheat.

14 It is necessary however, to inquire whether in the planning of this policy of aid the regulation of the Council has not, as the applicants claim, wrongfully put the German meal producers at a disadvantage *vis-à-vis* their French competitors.

15 During the marketing years prior to 1974/75 durum wheat harvested in France has been marketed at prices consistently near the intervention price without ever approaching that of imported durum wheat.

This factor justifies saying that the rules in question have profited the purchasers of durum wheat, that is to say mainly the French meal producers, rather than the growers themselves.

This situation which was found and recognized by the defendant institutions during the course of the proceedings in Joined Cases 63 to 69/72 and during the present proceedings should have led them to reconsider, if not the system of aids, at least their level.

The fact that the Council did not remedy this situation could have given rise to the question whether the situation was compatible with Articles 39 and 40 of the Treaty if the conditions of the market had remained unchanged.

16 However since the autumn of 1973 world prices of durum wheat increased above the level of the Community target and threshold prices and this increase after a certain time was reflected in the prices of Community durum wheat.

As a result of this price trend the Council, on a proposal from the Commission, increased the intervention, target, threshold and minimum guarantee prices for 1974/75 by about 40 u.a. in relation to those of the previous year.

Although the reason why the minimum guaranteed price, the fixing of which is prompted by very different objectives, was increased as much as the intervention, target and threshold prices is not clear, it is conceivable that in the uncertain conditions of the world market the Council considered it wiser temporarily to maintain the whole system in force.

In any event in view of the circumstances mentioned it is not possible to describe the postponement of amendment of the system to a subsequent date and the decision to maintain for 1974/75 the previous structures of the system as a sufficiently flagrant infringement of Articles 39 and 40 of the Treaty.

This conclusion is confirmed by the fact that as from the 1976/77 cereal year the system of aids has been amended so as to remedy the abovementioned discrimination.

17 Further in the exceptional conditions which governed the trend in prices of durum wheat harvested in France during 1974/75 it was not clear that the existence of the system of aids and their maintenance at the previous level could have any effect on this trend comparable to that observed in respect of the previous period.

18 The applicants, as they had already done in Joined Cases 63 to 69/72, complained further that the Community institutions did not reduce the margin between the intervention price fixed for durum wheat and the threshold price.

Where the product is in short supply on the market as in the present case there is no reason for a large margin between these two prices for it makes competition more difficult for those meal producers obliged to obtain supplies mainly on the world market in relation to those located in areas where Community durum wheat is cultivated.

The reasons why it has been possible to consider the difference between these two prices necessary, that is prevention of undesirable interference between the sale of durum wheat on the one hand and that of common wheat on the other no longer existed for the year 1974/75 during which the difference in prices fixed for the two products, which in previous years was some 20 %, was increased considerably.

19 For 1974/75 the difference between the intervention and threshold prices was, in relation to that of 1973/74, reduced in terms of percentage and, at least until 7 October 1974, even in absolute terms.

This difference was necessary to maintain Community preference in those countries where durum wheat is produced since a reduction in the threshold price in relation to the intervention price would endanger the flow of the Community product from southern Italy to northern Italy and from the south of France to the Atlantic coast.

Fixing different threshold prices for Member States not growing durum wheat and other Member States as suggested by the applicants would be an extremely delicate measure requiring an assessment of uncertain factors which would have assumed safer and more extensive information than the statistics supplied.

20 Moreover in the perspectives of 1974/75 as they appeared to the Council when the relevant regulation was adopted the reduction of the threshold price in relation to the intervention price could appear only of academic interest since the level of world prices considerably exceeded that provided for by the Community rules.

In these circumstances it is not possible to complain that the institutions did not reduce the difference between the two prices save to the extent ultimately adopted.

Although it is true that as from the beginning of 1975 the world level of prices decreased and fell below the threshold prices fixed by the Community rules, the level of the threshold price cannot have seriously harmed the German meal producers, who, in so far as they needed still to obtain supplies, could at the time profit from a fall in the purchase prices of durum wheat harvested in France which were once again approaching the intervention price.

21 For reasons similar to those mentioned above it is not possible either to complain that the Community institutions did not take into account possible remedies suggested by the applicants such as a refund to the German meal producers of the import levy on durum wheat coming to the German mills from third countries.

It is understandable that these institutions consider that in respect of such an exceptional year as 1974/75 it would not have been wise to experiment with measures so difficult to implement.

Accordingly it is not possible either to find in this respect a sufficiently flagrant infringement of the rules and principles of the Treaty which have been cited.

22 The applicants cited again the existence of a principle that calls for compensation by reason of an illegal intervention on the part of a public authority, comparable to an expropriation.

23 Without its being necessary to decide the question whether Article 215 covers such a liability, it suffices to state that since the the criticized interventions involve no illegality, the submission relating thereto must be rejected.

Costs

24 Since the applicants have failed in all their submissions they should be ordered to bear the costs of the proceedings in accordance with Article 69 (2) of the Rules of Procedure.

However in view of what has been said they could reasonably consider themselves injured by the prolongation without amendment of the rules adopted in implementation of Regulation No 120/67.

It is proper therefore to order each party to bear its own costs and that the costs of preparatory inquiries be borne as to half by the applicants and as to the other half by the defendants.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**
2. **Orders each party to bear its own costs;**

3. Orders the costs of the hearing of witnesses to be borne as to half by the applicants and as to the other half by the defendants.

Lecourt Kutscher O'Keeffe

Donner Mertens de Wilmars Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 2 June 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 17 MARCH 1976 [1]

Mr President,
Members of the Court,

The case on which I am giving my opinion today is concerned with claims for damages brought by five German mills against the Council and Commission of the European Communities.

These mills are situated in various parts of the Federal Republic of Germany, namely on the Rhine, in Frankfurt, Hamelin and Berlin, and they grind durum wheat into meal which is used in the production of pasta. In their view the Community rules on the durum wheat market are so drafted that the German mills are at a disadavantage in particular in relation to their French competitors.

This is not the first time that the Court has been concerned with the problems which arise here. Similar proceedings were brought by the same applicants in 1972 (Joined Cases 63 to 69/72). I therefore do not need to go into all the factual details which have been put before us in the lengthy proceedings. It suffices to say the following briefly:

The Council fixed the durum wheat prices for the 1974/75 marketing year, which is now in question, and the aids for the growers of durum wheat in various regulations of 29 April, 4 June and 17 June 1974. These provided that from 1 August 1974 the target price was 182·83 u.a./tonne, the threshold price 180 u.a./tonne, the intervention price 166·83 u.a./tonne and the guaranteed

1 – Translated from the German.