In Joined Cases 197 to 200, 243, 245 and 247/80,

LUDWIGSHAFENER WALZMÜHLE ERLING KG, having its registered office at Bremen and operating a durum wheat mill at Ludwigshafen am Rhein (Case 197/80),

PARK-MÜHLEN GMBH, having its registered office at Mannheim, where it operates a durum wheat mill (Case 198/80),

MÜHLE RÜNINGEN AG, having its registered office at Rüningen-Braunschweig, where it operates a durum wheat mill (Case 199/80),

PFÄLZISCHE MÜHLENWERKE GMBH, having its registered office at Mannheim, where it operates a durum wheat mill (Case 200/80),

KURT KAMPFFMEYER MÜHLENVEREINIGUNG KG, having its registered office at Hamburg and branches operating durum wheat mills at Mannheim and Berlin (Case 243/80),

WILHELM WERHAHN KG, having its registered office at Neuss am Rhein, where it operates a durum wheat mill (Case 245/80),

SCHWABEN-NUDEL-WERKE B. BIRKEL SÖHNE GMBH & CO., having its registered office at Endersbach, and several factories producing pasta products, the principal one of which is situated in Weinstadt-Endersbach (Case 247/80),

all represented by Fritz Modest and Jürgen Gündisch, of the Hamburg Bar, with an address for service in Luxembourg at the office of Jeanne Jansen-Housse, huissier de justice, 21 Rue Aldringen,

applicants,

SCHWABEN-NUDEL-WERKE B. BIRKEL SÖHNE GMBH & CO. (Case 247/80) being supported by

ÉTABLISSEMENTS JOSEPH SOUBRY SA having its registered office at Roeselare, where it operates a durum wheat mill,

and

N.V. BLOEMMOLENS ANT. COPPENS, having its registered office at Turnhout, where it operates a durum wheat mill,

both represented by A. F. de Savornin Lohman, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, 14a Rue des Bains,

interveners,

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Bernhard Schloh, an Adviser in its Legal Department, acting as Agent, assisted by Arthur Brautigam, an Administrator in the Legal Department, acting as Joint Agent, with an address for service in Luxembourg at the office of D. J. Fontein, Director of the Legal Department of the European Investment Bank, Kirchberg,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jörn Sack, a member of its Legal Department, acting as Agent, assisted by Albrecht Stockburger, of the Frankfurt am Main Bar, with an address for service at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendants,

supported by

GOVERNMENT OF THE ITALIAN REPUBLIC, represented by Arnaldo Squillante, Head of the Litigation Department for Diplomatic, Treaty and Legislative Matters, acting as Agent, assisted by Guido Fienga, State Advocate, with an address for service in Luxembourg at the Italian Embassy,

COMITÉ FRANÇAIS DE LA SEMOULERIE INDUSTRIELLE, a trade association established in Paris,

SYNDICAT DES INDUSTRIELS FABRICANTS DE PÂTES ALIMENTAIRES DE FRANCE, a trade association established in Paris,

ASSOCIATION GÉNÉRALE DES PRODUCTEURS DE BLÉ ET AUTRES CÉRÉALES, a legal person established in Paris,

all three represented by Lise Funck-Brentano, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Joseph Hansen and Marlyse Neuen-Kauffmann, 21, Rue Philippe II,

interveners,

APPLICATIONS seeking damages pursuant to the second paragraph of Article 215 of the EEC Treaty,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts

Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975, L 281, p. 1) as amended in particular by Council Regulations (EEC) Nos 1143/76 of 17 May 1976 (Official Journal 1976, L 130, p. 1), 1151/77 of 17 May 1977 (Official Journal 1977, L 136, p. 1), and 1254/78 of 12 June 1978 (Official Journal 1978, L 156, p. 1) states that the common organization of the market in cereals includes a single-price system for the Community.

That price system involves, in particular, fixing annually for each basic cereal,

— a target price, valid for the whole Community, on the basis of which the level of protection of the Community market is determined,

— an intervention price, at which the national intervention agencies are obliged to buy in the cereals harvested in the Community which are offered to them, provided that such offers comply with certain qualitative and quantitative conditions,

— and a threshold price, to which the price of imported products must be equated by means of a variable import levy.

According to Article 3 (as amended) of Regulation No 2727/75, the following are to be fixed each year, for the Community, before 1 August, for the marketing year beginning the following year:

— a common single intervention price for *inter alia* common wheat and a single intervention price for *inter alia* durum wheat,

— a reference price for common wheat of bread-making quality,

— a target price for *inter alia* common wheat and durum wheat.

(a) The single intervention prices are to be fixed for the Ormes intervention centre, which is the centre of the Community area having the greatest surplus for all cereals, at the wholesale stage, goods delivered at warehouse, before unloading. They are valid for all Community intervention centres designated for each cereal.

(b) The reference price for common wheat of bread-making quality is to be calculated by adding to the common single intervention price for that product an amount reflecting the difference in return between the production of common wheat of minimum bread-making quality and that of common wheat of non-bread-making quality.

(c) The target prices are to be fixed for Duisburg, which is the centre of the Community area having the greatest deficit for all cereals, at the wholesale stage, goods delivered at warehouse, before unloading.

They are to be calculated by adding, to the reference price for common wheat and to the single intervention price for durum wheat, a market element and an element reflecting the cost of transport between the Ormes area and the Duisburg area.

For durum wheat and common wheat the market element represents, in each case, the difference which necessarily exists between

— the single intervention price for durum wheat and the reference price for common wheat of bread-making quality, on the one hand, and

— the market prices for durum wheat and common wheat of bread-making quality respectively to be expected in a normal harvest and under natural conditions of price formation on the Community market in the area having the greatest surplus, on the other.

The element representing the cost of transport is determined on the basis of the most favourable means of transport or combination of means of transport and on existing tariffs.

For common wheat and durum wheat, in particular, Article 5 (as amended) of Regulation No 2727/75 provides that a threshold price is to be fixed for the Community in such a way that the selling price for the imported products on the Duisburg market is the same as the target price, after differences in quality have been taken into account.

The threshold prices are calculated for Rotterdam, for the same standard quality as the target price, by deducting from the latter price a component representing the cost of transport between Rotterdam and Duisburg and a component representing the trading margin and transhipment charges at Rotterdam.

The threshold prices are fixed by the Commission each year, before 15 March, for the following marketing year, in accordance with the so-called "Management Committee for Cereals" procedure.

The intervention prices, the reference price for common wheat of bread-making quality, the target prices and the threshold prices are the subject of

monthly increases phased over all or part of the marketing year in order to take into account, *inter alia*, warehouse charges and interest for the storage of cereals in the Community and also the need for a flow of stocks consonant with the needs of the market (Article 6 as amended).

Article 10 (as amended) of the regulation provides that aid is to be granted for the production of durum wheat in the Community.

The amount of such aid is to be fixed per hectare of land sown and harvested and is to be equal throughout the marketing year. However, the aid may be differentiated according to the region of production and confined to certain production regions; it is to be granted only for durum wheat having specified qualitative and technical characteristics.

The possibility of granting aid for Community production of durum wheat was justified, in Regulation No 2727/75, by the conclusion that it might prove impossible to give producers of durum wheat sufficient guarantees by fixing a price which takes into account the ratio existing normally on the world market between durum and common wheat prices, but that it was advisable to ensure that that ratio was respected so far as possible in the Community because of the interchangeability of those two products. It was stated in Regulation No 1143/76 that in view of the rise in Community production of durum wheat it was no longer justified to grant uniform aid to all producers but, with a view to encouraging an increase in productivity and an improvement of the quality of that product, it was appropriate to maintain aid for its benefit; that aid could be confined to certain regions and to durum wheat having certain qualitative and technical characteristics making it suitable for the manufacture of pasta products.

The single intervention prices, the reference price for common wheat of bread-making quality and the target prices were fixed by the Council for the 1978/79 marketing year by Regulation No 1255/78 of 12 June 1978 (Official Journal 1978, L 156, p. 2), and for the 1979/80 marketing year by Regulation No 1548/79 of 24 July 1979 (Official Journal, L 188, p. 2).

In particular those prices were fixed for common wheat and durum wheat as follows:

Marketing year 1978/79
(in units of account per tonne)

	Common wheat	Durum wheat
Single intervention price	121.57	203.01
Reference price, minimum bread-making quality	136.96	—
Target price	162.39	224.27

Marketing year 1979/80
(in ECU per tonne)

	Common wheat	Durum wheat
Single intervention price	149.17	249.12
Reference price, minimum bread-making quality	168.06	—
Target price	201.42	277·37

The threshold prices for cereals and for certain classes of flour, groats and meal were fixed for the 1978/79 marketing year by Commission Regulation (EEC) No 1408/78 of 26 June 1978 (Official Journal 1978, L 170, p. 28) and for the 1979/80 marketing year by Commission Regulation (EEC) No 1594/79 of 26 July 1979 (Official Journal 1979, L 189, p. 44).

In particular the threshold prices were fixed at the following rates for common wheat and durum wheat:

	Common wheat	Durum wheat
Marketing year 1978/79 (in units of account per tonne)	159.40	221.30
Marketing year 1979/80 (in ECU per tonne)	197.45	273.40

The German durum wheat millers use mainly durum wheat imported from non-member countries, which they process and sell in the form of durum wheat meal, in particular to pasta-product manufacturers in the Federal Republic of Germany. Those millers, who are the applicants in Cases 197, 198, 199, 200, 243 and 245/80, consider that the threshold price for durum wheat was fixed, by Regulations Nos 1408/78 and 1594/79, at an excessively high level, causing them considerable damage.

Schwaben-Nudel-Werke B. Birkel Söhne GmbH & Co., the applicant in Case 247/80, produces pasta products in various establishments. It is of the opinion that the excessive level of the threshold price for durum wheat has in part been passed on by the millers to their customers, giving rise to excessive prices for durum wheat meal, which the above-mentioned company itself uses for the manufacture of pasta products; being thus compelled to bear the increase in the cost of the raw material it has thereby suffered considerable damage.

II — Written procedure

The applicant companies, on 7 October 1980 (Cases 197/80, 198/80, 199/80 and 200/80), on 30 October 1980 (Case 243/80), on 5 November 1980 (Case 245/80) and on 6 November 1980 (Case 247/80), brought actions for damages, pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, against the EEC, represented by the Council and the Commission.

By order of 3 December 1980, the Court decided to join the seven cases mentioned above for the purposes of the procedure and judgment.

By orders of 21 January 1981, 4 February 1981, 18 February 1981 and 11 March 1981 the Court, having heard the views of the Advocate General, decided, pursuant to Article 37 of the Statute of the Court of Justice of the EEC and to Article 93 of the Rules of Procedure, to allow the Comité Français de la Semoulerie Industrielle, the Government of the Italian Republic, the Syndicat des Industriels Fabricants de Pâtes Alimentaires de France and the Association Générale des Producteurs de Blé et Autres Céréales to intervene in all the joined cases, in support of the submissions of the defendants.

By order of 8 April 1971, the Court, having heard the views of the Advocate General, decided to allow Établissements Joseph Soubry S.A. and N.V. Bloemmolens Ant. Coppens to intervene in Case 247/80, in support of the submissions of the applicant.

By a further order of 8 April 1981, the Court, having heard the views of the Advocate General, rejected an application from Gewerkschaft Nahrungs-Genuß-Gaststätten (Union of General, Fine Food, and Catering Establishments), affiliated to the Deutscher Gewerkschaftsbund (the German Trades Union Congress) to intervene in all the joined cases in support of the submissions of the applicants.

The written procedure followed its normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, it invited the parties to reply in writing, before commencement of the oral procedure, to a number of questions; the applicants, the Council and the Commission responded to that invitation within the prescribed periods.

By order of 1 July 1981, the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure, decided to assign the joined cases to the Second Chamber.

III — Conclusions of the parties

The *applicants* claim that the Court should:

— Order the Community to pay them by way of damages DM 1 786 047.50 (Case 197/80), DM 1 087 692.80 (Case 198/80), DM 910 850.73 (Case 199/80), DM 1 020 524.00 (Case 200/80), DM 2 204 106.30 (Case 243/80), DM 260 172.78 (Case 245/80) and DM 967 750.00 (Case 247/80),

together with interest in all cases at the rate of 6% from the date of judgment;

— Order the Community to pay the costs in all the cases.

The *Council* claims that the Court should declare the applications to be inadmissible, or alternatively declare them to be unfounded, and in any event order the parties to pay the costs.

The *Commission* claims that the Court should:

— Dismiss the applications;

— Order the applicants to pay the costs.

The *intervening parties,* with the exception of the Government of the Italian Republic, do not submit any formal conclusions.

The *Government of the Italian Republic* claims, in support of the conclusions submitted by the Commission and the Council, that the Court should:

— Declare the applications to be inadmissible;

— In the alternative, dismiss the applications as unfounded;

— Order the applicants to pay the costs.

IV — Submissions and arguments of the parties in the course of the written procedure

A — Admissibility

The *Council* considers that all the applications are inadmissible on several grounds.

(a) The applicants have clearly regarded the Community threshold price system for durum wheat as illegal since the 1974/75 marketing year, their reasoning in respect of the 1979/80 marketing year being applicable to the prices for every year since 1973. According to the case-law of the Court, an action for damages which are foreseeable but not yet quantifiable is admissible as being a way "to prevent even greater damage". The conduct of the applicants is in outright conflict with that case-law; it disregards the principle of legal certainty, by virtue of which commercial transactions which have been definitively concluded and carried out in accordance with the contested system must not be called in question.

(b) The Court has held, in particular in its judgments of 5 December 1979 (Joined Cases 116 and 124/77, *Amylum* [1979] ECR 3497; Case 143/77, *Scholten-Honig* [1979] ECR 3583) that, if an individual takes the view that he is injured by a Community legislative measure which he regards as illegal, he has the opportunity, when implementation of the measure is entrusted to national authorities, to contest the validity of the measure at the time of its implementation, before a national court in an action against the national authority; that court may, or even must, in pursuance of Article 177 of the Treaty, refer to the Court of Justice a question on the validity of the Community measure concerned. The procedure under Article 177 constitutes an effective means of protection for the individual; recourse to Article 215 is therefore not necessarily appropriate, or even available.

In this case, recourse to Article 177 is all the more appropriate, even for the applicants, since review by the Court of Justice is, according to its own case-law, subject to more severe constraints in proceedings pursuant to Article 215 than in those pursuant to Article 177; thus, an action based on Article 215 presupposes a serious breach of a superior rule of law for the protection of the individual.

In this case, Article 177 is the proper means of legal protection.

(c) The actions are artificial in character — the applicants have put together claims for damages for the

purposes of these proceedings whereas in reality they do not seek compensation but a total change in the price policy for the durum wheat sector. They intend securing cancellation of certain prices fixed by regulation and even the fixing of new prices; they call in question the whole price policy applied by the Council and the Commission.

It is self-evident that such an objective may not be pursued by means of an action for damages.

The applicants are in fact asking the Court to stand in the place of the Commission and the Council as the authority with responsibility for matters of agricultural policy.

(d) The regulations mainly objected to by the applicants are those by which the Commission fixed the threshold prices for common wheat and durum wheat. Logically therefore the action for damages should have been brought only against the Commission; at the very least, the applicants should have stated the reasons for which their actions are brought also against the Council.

The threshold prices fixed by the Commission are in fact derived prices, ascertained on the basis of those fixed by the Council. However, the Council regulations fixing prices in the cereals sector are not referred to by the applicants.

(e) The applicants are attemping, by means of Article 215 of the EEC Treaty, to secure a right of action not conferred on them by Article 173. An action for damages instituted in such circumstances is inadmissible.

In the *Commission*'s view, the actions are inadmissible because they do not fulfil the formal requirements applicable to actions for damages.

(a) The true object of the actions is to change the ratio between the threshold prices of common wheat and durum wheat, which is regarded as incorrect. The applicants do not seriously seek to obtain from the Community compensation for any damage; in reality they seek only to bring pressure to bear on the Community to induce it to change the existing provisions. They are thus effectively committing an abuse of legal process.

(b) Although such a course was open to them, the applicants did not attack the decisions on levies adopted by the national authorities on the basis of the threshold price of the durum wheat fixed by the Community, which affected them directly. By availing themselves of the procedure under Article 177 of the EEC Treaty, they could have brought about a review of the compatibility of the threshold price for durum wheat with the superior rules of Community law; they could even, had their argument been upheld, have prevented the occurrence of the damage which they claim to have suffered.

Since the periods for appeals prescribed by German legislation on administrative procedure, with regard to this matter, are very short, the decisions on the levies have become definitive. In such circumstances, certain national systems render the admissibility of an action alleging the liability of the State subject to the requirement that every available means of preventing the occurrence of the damage must have been used.

For reasons of procedural strategy, the applicants have brought a direct action before the Court with a view to securing, as rapidly as possible and without going through the national courts, a judgment on the legality of the fixing of threshold prices for durum wheat; they have therefore deliberately waived the remedies available to them through the national courts which might have enabled them to avoid the occurrence of any damage.

In its judgment of 12 December 1979 (Case 12/79, *Wagner* [1979] ECR 3657), the Court dismissed as inadmissible an action for damages against the Commission on the grounds that a national measure adopted to implement provisions of Community law had not been contested by the applicant. The same reasoning should apply in this case.

(c) According to the case-law of the Court, it is not possible to claim directly from the Community reimbursement of charges which have been collected by national authorities on the basis of Community regulations whose applicability is contested. That, however, is the aim of these actions, since the applicants have submitted their claims merely in the guise of an action for compensation whereas in fact, albeit indirectly, they are prosecuting an action for reimbursement.

The *Government of the Italian Republic* also takes the view that the applicants' actions are appropriate only in form to Article 215 of the EEC; in substance they are seeking to secure from Community institutions a reduction in the threshold price for durum wheat. That fact alone renders the actions inadmissible.

Moreover, the applicants, to avoid coming into conflict with the judgments delivered by the Court in a similar matter on 13 November 1973 (Joined Cases 63 to 69/71, *Werhahn Hansamühle and Others* [1973] ECR 1229) and on 2 June 1976 (Joined Cases 56 to 60/74, *Kampffmeyer Mühlenvereinigung and Others* [1976] ECR 711) are endeavouring, in appearance only and not in substance, to place the same question in a new perspective.

The *applicants* consider that the objections of inadmissibility raised by the defendants and the Italian Government cannot be upheld.

(a) The applications are genuinely intended to secure rectification of an incorrect ratio between the threshold price of common wheat and that of durum wheat in the Community; the applicants are not however to be reproached for hoping that, in addition to compensation, by the award of damages, for loss suffered in the past, the loss should not be repeated in the future. Future rectification of the incorrect price ratio is a logical consequence of a judgment ordering the Community to pay damages.

In that sense, any action for damages which is successful constitutes a "means of exerting pressure" on the Community institutions; however, such means of exerting pressuring is legitimate. By means of the legal protection provided by the Court, that pressure should persuade the Community institutions to adopt a lawful attitude.

The actions do not involve any "abuse of legal process", particularly since the applicants' claims are unequivocally intended to seek payment of damages of a specified amount, so as to compensate them for the loss suffered during a specific period in the past.

(b) The loss for which the applicants seek compensation was not incurred by reason of a decision of national authorities but exclusively by measures adopted by Community institutions, namely the incorrect fixing by the Council of the target price for durum wheat and the threshold price which the Commission based on it. When fixing the

levies, the national authorities could not derogate from those measures.

(c) In its judgment of 4 October 1979 (the so-called quellmehl and maize gritz cases [1979] ECR 2955, 3017, 3045 and 3091) the Court held that the applicants' claims did not constitute claims for the payment of amounts due but claims for compensation for the loss resulting from an unlawful act and that a national court could not have heard an action for payment, in the absence of any provision in Community regulations authorizing national agencies to pay the amounts claimed. The same applies to the present cases.

(d) The applicants did not in fact have an opportunity to contest before their national courts the decisions on the levies based on the Community regulations fixing the threshold price of durum wheat. The applicant milling companies do not themselves import the durum wheat which they process; the applicant in Case 247/80, which uses durum wheat meal for the manufacture of pasta products, likewise does not import durum wheat.

The durum wheat imported from non-member States was delivered to the applicants' mills by several importers. The orders to pay the levy were addressed only to them; only they were in a position to contest those measures before the national courts.

B — Substance

Certain matters of fact

The *applicants* point out that, in view of the proceedings leading to the judgements of 13 November 1973 and 2 June 1976, the Court is familiar with the problems of the Community market in durum wheat, resulting in particular from the fact that production of it falls far short of requirements (about 85% self-sufficiency) and also with the situation in which the German durum wheat mills find themselves. Since that time the situation has continued to deteriorate. Thus, the milling of durum wheat in the Federal Republic of Germany has fallen from 280 005 tonnes in 1973 to 157 060 tonnes in 1979, that is to say a drop of 56%, whereas the production of pasta products has remained about constant.

The Community price system is distinguished by the fact that the prices of durum wheat have not evolved in parallel with those of common wheat. The ratio between the threshold price for common wheat and that for durum wheat, which in 1967/68 was 100 : 118, fell to 100 : 116.8 in 1973/74, subsequently rising to 100 :151.2 in 1974/75; in 1979/80 it was still at 100 : 138.5. Moreover, the ratio between common wheat and durum wheat prices in the Community has displayed a considerable variance since 1974/75 in relation to the price ratio between those two varieties of wheat on the world market.

The German durum wheat mills have been obliged to cause the price of durum wheat meal to reflect, at least in part, the excessive threshold price of durum wheat. In consequence, the German pasta-products industry has been obliged to react by substituting common wheat for durum wheat; the percentage of common wheat in the wheat component of pasta produced in Germany has risen from between 8 and 10% at the end of the sixties to 43.2% in 1978/79.

The applicant in Case 247/80 lays emphasis on the fact that the German pasta-products industry is suffering, by reason of determination of the threshold price for durum wheat at an excessive

level, from a stagnation of sales, a stagnation of prices and an increase in Italian competition. In particular, imports of pasta products from Italy have increased almost without a break since 1973; the increase in the prices of German pasta products is distinctly lower than the increase in prices in the food industry as a whole.

The intervening companies, *Soubry and Coppens,* confirm that common wheat is increasingly being substituted for durum wheat in the production of pasta products.

The Commission states that although the milling of durum wheat in the Federal Republic of Germany did in fact show a decrease of about 20% from 1975 to 1979, the production of pasta on the other hand slightly increased during the same period; the increase of imports of pasta products coming from within the Community, in particular in Italy, has therefore not been detrimental to the production of pasta products in the Federal Republic of Germany.

A feature of the evolution of the ratio between the threshold prices of durum wheat and common wheat from 1974/75 to 1979/80 has been a very progressive reduction in the variance between the prices of those two varieties.

The partial substitution of common wheat for durum wheat is due only in part to changes in the price of durum wheat; increasing improvements in the cultivation of certain varieties of common wheat have enabled it to be used more extensively in the manufacture of pasta products.

The *Syndicat des Industriels Fabricants de Pâtes Alimentaires de France,* an intervener in these proceedings, denies that there is a clear world-wide variance between the prices of durum wheat and common wheat; on the world market prices are free and fluctuate very considerably according to the different varieties, the abundance of harvests and the extent of demand.

Legal considerations

The *applicants* are seeking an order that the Council and the Commission pay compensation for the damage they have suffered as a result of the fixing, by the Community institutions, of the threshold price for durum wheat imported from non-member countries at an excessive and disproportionate level with respect to that of common wheat. From several points of view, the fixing of the threshold price for durum wheat at that level involves a breach of superior rules of law; such conscious breaches of superior rules of law constitute a wrongful act on the part of the Community institutions; the applicants have thereby suffered undeniable and considerable damage, for which they are entitled to obtain compensation.

Soubry and Coppens, the companies intervening in Case 247/80, consider that the Council and the Commission have no justification for refusing to apply to the prices for durum wheat and common wheat fixed by regulation the correct ratio arrived at on the basis of world prices.

The *Council* considers that its action falls within the scope of the responsibilities vested in it by the Treaty and of its wide powers of discretion which have been consistently recognized, with regard to its decisions on economic policy, by the case-law of the Court. There are no grounds for alleging that it has acted arbitrarily or committed any wrongful act. Moreover, there is no direct causal link between the damage alleged by the applicants and the provisions contested by them.

The *Commission* takes the view that the Community institutions have not acted

unlawfully in this case and that, more particularly, they have not breached superior rules of law intended to protect the applicants. In any event, there is no reason to regard the contested measures as in any way arbitrary and therefore no possible breach of a rule of law for the protection of the individual can be of sufficient gravity, in the light of the case-law of the Court, to give rise to an obligation on the part of the Community to pay compensation. Moreover, the method of calculation adopted by the applicants to assess the damage they claim to have suffered is unacceptable.

The *Government of the Italian Republic*, intervening in these proceedings, states that, in its view, the arguments on which the actions are based and their essential objectives are manifestly without foundation.

The *Comité Français de la Semoulerie Industrielle*, the *Syndicat des Industriels Fabricants de Pâtes Alimentaires de France* and the *Association Générale des Producteurs de Blé et Autres Céréales*, interveners, maintain that the measure giving rise to the damage on which the applicants rely is a measure of economic policy adopted within the framework of the Common Agricultural Policy, and with regard thereto the Community institutions, in enacting legislation, avail themselves of powers of discretion over which the Court exercises only minimum control, confined to cases of manifest error and misuse of power. The provisions at issue do not conflict with the objectives of the Treaty or the basic regulation establishing the common organization of the market in cereals or the principle of non-discrimination or the rule that proportionality must be observed. Moreover there is no causal link between the alleged infringement and the alleged damage.

1. Breach of superior rules of law

The *applicants* consider that the fixing of the threshold price for durum wheat at an excessive level entails infringement of basic Regulation No 2727/75, breach of the prohibition on discrimination, of the principles of the Treaty concerning the fixing of prices and of the principle of proportionality.

(a) The basic Regulation No 2727/75 provides that the ratio existing normally on the world market between durum wheat and common wheat prices should be respected so far as possible in the Community because of the interchangeability of these two products.

The threshold prices fixed by Regulations Nos 1408/78 and 1594/79 for 1978/79 and 1979/80 respectively contravene those principles. They correspond to price ratios of 100 : 138.8 and 100 : 138.5 respectively whereas on the world market the ratio between the prices of common wheat and durum wheat varied over the period from 1977 to 1979 between 100 : 104.8 and 100 :110.6. The threshold prices were therefore fixed at a level more than 25% higher than the correct price ratio, which is 100 : 110.

That ratio is close to the ratio between the cost prices of durum wheat and common wheat, which has been estimated at 100 : 120 by decision of the Court, but has in the meantime been reduced.

To ensure an adequate standard of living for durum wheat producers in the less-favoured regions of the Community, the

additional means of action provided for by Community provisions, that is to say aid, would be much more appropriate than the fixing of prices at a high level.

The Commission's refusal to reduce the price ratio between common wheat and durum wheat is not justifiable on fiscal grounds — the result of fiscal measures is to impose on specified economic sectors and certain groups of consumers a charge which should normally, through the budget, fall on all citizens of the Community; within the common organization of the agricultural markets, they have the effect of distorting competition.

Failure to respect the correct ratio between the price of common wheat and that of durum wheat gives rise to undesirable interference, by reason of the interchangeability of those two products.

(b) The fixing of the threshold price for durum wheat at an excessive level involves a breach of the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the Treaty.

By fixing the threshold price at an excessive level, the Community is treating producers in the various countries of the Community, whether they be millers of durum wheat or manufacturers of pasta products, in a different manner. The Member States of the Community which do not produce durum wheat are obliged to import all the durum wheat they require from non-member countries; for them the threshold price is therefore the decisive price factor, whereas the millers of durum wheat in the producing countries (France and Italy) can buy their raw material at a considerably lower price.

The fixing of the price of durum wheat at an excessively high level in relation to that of common wheat affects producers, millers of durum wheat, manufacturers of pasta products and consumers in the Member States to different degrees.

An excessive threshold price for durum wheat hardly affects Italian millers; they are able to provide for most of their requirements from national production at an advantageous price, closer to the intervention price than to the threshold price. On the other hand, in a non-producing country such as the Federal Republic of Germany, the manufacturers of pasta products have to a considerable extent had recourse to common wheat, which has caused a further loss to the millers of durum wheat because of the drop in their sales.

The competitive position of German manufacturers of pasta products, which are obliged to use more expensive wheat meal, has deteriorated considerably in relation to that of the Italian producers.

The market price of durum wheat, which is lower in Italy, gives the pasta-products industry in that country the benefit of an advantage, due to the price of raw materials, amounting to DM 115 per tonne; a further advantage connected with the price of raw materials, of the order of DM 100 per tonne, derives from the variance, which is lower than that to be found in the Federal Republic of Germany, between the purchase price paid for durum wheat by the millers and the purchase price for durum wheat meal paid by the pasta-products industry. Those price advantages are not offset, except to a very small extent, by the costs of the transporting of Italian exports of pasta products to the Federal Republic of Germany.

(c) The fixing of the threshold price for durum wheat at an excessive level is in breach of the principles laid down with

regard to the fixing of prices in the third subparagraph of Article 40 (3) of the EEC Treaty.

According to that provision, any common price policy is to be based on common criteria and uniform methods of calculation. Moreover, measures adopted to implement the common price policy must be necessary for attainment of the objectives defined in Article 39; and Article 39 (1) (c) indicates that a particular objective of the common agricultural policy is to stabilize markets.

The "common criteria" and the "uniform methods of calculation" imply that the agricultural price policy must be based on rational criteria. The Community institutions are certainly empowered to weigh up the various objectives laid down in Article 39; the exercise of this power must not however result in anything other than a uniform price policy. The prices of products which are inter-related from the point of view both of production and of their possible uses may indeed be fixed at a higher or lower level according to the predominance of one or other of the objectives mentioned in Article 39, but the price ratio between the individual products may not be fixed otherwise than on the basis of uniform methods of calculation and must not be established in a manner which is in any way arbitrary. In particular, agricultural prices must not be fixed on the basis of purely political criteria.

Prices should also have a market function too; the price system should also enable the flow of products to be controlled.

The aim of stabilizing markets and the market function of prices were not respected when the excessive threshold prices were fixed for durum wheat. The reliance on fiscal grounds openly admitted by the Commission, for fixing a price in a manner contrary to the legal principles of the price policy results in the Commission's conduct being vitiated by misuse of power.

(d) The contested fixing of the threshold price for durum wheat also breaches the principle of proportionality recognized by the case-law of the Court.

The fixing of the threshold price for durum wheat at an excessive level, which is detrimental to the applicants, is not necessary to attain any of the objectives of the common agricultural policy.

The fixing of a price which disregards the relationship between the price of durum wheat and that of common wheat on the world market conflicts with the objective of stabilizing markets, laid down in Article 39 (1) (c) of the EEC Treaty. In order to fulfil another principle of the Common Agricultural Policy, provided for in Article 39 (1) (b), namely that of ensuring a fair standard of living for the agricultural community, it is not necessary to apply a high threshold price in the countries of the Community which do not in any case produce durum wheat and whose durum wheat mills receive their raw material exclusively from non-member countries. Regionalization of the threshold prices constitutes a more appropriate means of attaining the desired objective.

In order to realize the objective of ensuring a fair standard of living for the producers of durum wheat, the Community has at its disposal an instrument more appropriate than an excessive threshold price, namely the aid provided for by Article 10 of Regulation No 2727/75. An increase in threshold prices and in intervention prices favours

all durum wheat producers in the Community without distinction, whereas aid could be granted in a selective and controlled manner; aid could be differentiated as between production regions and limited to certain of them.

The increase in aid required by the legal provisions applicable was considered too costly by the Commission. The effect of the refusal to increase aid — an increase which is intrinsically necessary — and of the maintenance of excessive prices fixed by regulation for durum wheat is that the burden, which in fact is the concern of all citizens of the Community, must be borne exclusively by the consumers of products based on durum wheat, namely the manufacturers of pasta products and the millers of durum wheat. Budgetary considerations do not justify the failure to use the most appropriate means, namely aid, or the imposition of a burden on a small group of Community citizens, within which the applicants are included.

Soubry and Coppens, companies intervening, agree that the prices fixed by regulation for the durum wheat must be slightly higher than those of common wheat. On the basis of the cost prices, as represented by the world prices for the two varieties of cereals in a wider perspective, that difference is reflected by a ratio somewhere between a 100 : 110 and 100 : 120. The first regulations on the common organization of the market in cereals accepted that ratio, which was moreover strictly applied from 1967/68 until 1973/74 inclusive. The Council and the Commission then decided to take advantage of the unique and temporary situation created by the profound disturbance of price ratios on the world food market so that they could realize more rapidly, to the detriment of the durum wheat processing industry and consumers in the non-producing countries, certain objectives in the area of market policy, in particular the promotion of durum wheat cultivation in certain regions which were underdeveloped from the socio-economic point of view. It is not however permissible to have recourse for that purpose, with a view to relieving the Community budget, to a method of financing, in this case maintenance of the excessive threshold prices of durum wheat, which is neither designed for nor appropriate to that end.

With regard to the ratio between the prices for durum wheat and common wheat as reflected in particular by the world prices, it should be noted that, in the longer term, the ratio to which the applicants refer recurs periodically and regard should be had to the established fact, based on experience, that durum wheat is supplanted by common wheat on the Community market when that price ratio is departed from otherwise than on an exceptional and temporary basis. Moreover, it is not possible to calculate the price ratio on the world cereals market on the basis of cereal varieties designated as standard qualities by European agencies, within the framework of an administrative régime; the applicants base the price ratio of 100 : 110 on the price of the varieties of cereals most frequently dealt in on the Community market or the world market.

The Commission itself has admitted that the new ratio between the prices fixed by regulation for durum wheat and common wheat has, by reason of the excessive variance, led, in the non-producing Member States without a Law on purity requirements, to an increasing substitution of common wheat for durum wheat and has affected the wheat processing industry, in particular in the

Federal Republic of Germany; even in the opinion of the Commission, it is appropriate to lay down provisions intended to promote the restoration of a balanced price ratio, an improvement which can only be brought about by a drop in the prices of durum wheat in relation to those of common wheat.

The *Council* is of the opinion that none of the applicants' complaints has any foundation.

(a) The applicants' decision to attack the threshold prices for durum wheat and common wheat on the basis of the price levels for the 1978/79 and 1979/80 marketing years is totally arbitrary; the variance to which the applicants object was much greater during the 1974/75 marketing year and the difference between the two prices has gradually diminished.

The ratio to which the applicants refer, 100 : 110, is not laid down by any article in the basic Regulation No 2727/75. It is merely stated in the recitals in the preamble thereto that it is appropriate to respect the ratio existing normally on the world market between durum wheat and common wheat prices; moreover, that statement is subject to a very clear reservation ("so far as possible"). It is a question of ensuring that respect for that ratio is not rendered impossible by the economic context in which it is intended to operate; the regulation does not therefore restrict the considerable discretionary power vested in the Council with regard to the Common Agricultural Policy.

It would be inappropriate, even impossible, to adhere closely to the price ratio as it normally evolves on the world market. There is a fundamental difference between the world market and the Community market; the latter is a protected market subject to constraints which do not affect the world market.

The production level of the two varieties of wheat is very different; a surplus of common wheat is produced and there is a shortfall of durum wheat. It is therefore inappropriate, or even impossible, and in any event very burdensome for the Community strictly to respect the price ratio ascertained on the world market. That alignment, in the existing situation, would in no way guarantee that the same price ratio would be reflected in the sale prices, which are decisive factors as far as the substitution of common wheat for durum wheat is concerned.

Application of the ratio advocated by the applicants would lead to indefensible results and would totally upset the policy followed by the competent institutions with regard to the Common Agricultural Policy; an alignment upwards of prices would totally destroy the system of "fluidity" for common wheat and would considerably increase the guarantees given to producers for production which is already in surplus; an alignment downwards would destroy the protection vis-à-vis non-member countries with regard to durum wheat and would unjustifiably diminish the minimum guarantees given to producers.

The applicants also fail to mention the substantial change made to the system by Regulation No 1143/76, the object of which was precisely to remedy certain distortions. In order to improve fluidity of the cereals market, the Council increased the difference between the

target price, on the basis of which the level of protection is determined, and the intervention price; the reason for that increase was essentially to enhance protection of the Common Market and not to reduce considerably guarantees given to producers.

The 100 : 120 ratio, derived from a comparison of the costs prices, is no more convincing; it depends in particular on the varieties of wheat used, the yield obtained, the level of wage costs and other factors. In any case, the higher cost prices for the production of durum wheat constitute only one of the many factors which the Council must take into consideration pursuant to Article 39 (1) of the Treaty.

(b) Any discrimination against the applicants in relation to the French or Italian durum wheat processing industry is not in any case attributable to the common organization of the market in the cereals sector, at least since the substantial change made to that organization in 1976, or to the rules relating to prices or aid for durum wheat for implementation thereof. The common organization of the market in cereals is based on two essential factors: the free movement of cereals and Community preference. The simultaneous application of those two principles must guarantee free access to all Community traders, on the same terms, both to durum wheat produced in the Community and to durum wheat imported from non-member countries. If the millers in the north of the Community did not in fact have access to the cereals market of the south, that situation could only have arisen in consequence of the conduct of the producers of durum wheat, and not as a result of the common organization of the market; such conduct is contrary to the Community system and moreover constitutes infringement of the rules of the Treaty on competition.

The assumption made by the applicants that Italian and French millers are able to obtain supplies of durum wheat produced in their own countries and, to a large extent, at the intervention price, which is considerably lower than the threshold price at which the German millers are obliged to purchase all their durum wheat from non-member countries, is incorrect in several respects. There is also a shortfall in the production of durum wheat in Italy and France and imports into those countries are also made at the threshold prices. Durum wheat produced in a Member State does not always remain in the producing country; Italian purchase prices were in fact, during the four marketing years from 1973/74 to 1977/78, distinctly higher than the intervention prices and were at target-price level.

Such economic advantage as may accrue to the millers in the south of the Community as a result of the difference between the threshold price and the intervention price is reduced to nothing or even outweighed by the transport costs.

(c) The Council's refusal to increase aid for durum wheat is justified by the case-law of the Court, according to which the use of Community aids is unlawful when it is not necessary for the attainment of the objectives laid down in Article 39 of the Treaty; this applies in the case of aid granted to all producers and for all qualities and quantities of products. The applicants do not demonstrate the economic justification for a reduction in the level of protection,

entailing increased competition from durum wheat from non-member countries, for the introduction of generalized aid or for a substantial reduction of the intervention price.

Substitution of common wheat for durum wheat to a certain extent does not appear detrimental to the proper functioning of the common market in cereals, since a surplus of common wheat is produced in the Community and substantial quantities of durum wheat require to be imported.

Regionalization of the threshold prices is contrary to the concept of unity of the market and adversely affects the free movement of cereals.

The *Commission* denies that in this case there has been any breach of a superior rule of law for the protection of the applicants.

(a) Regulation No 2727/75 does not impose upon the Community institutions specific substantive criteria on the basis of which the various regulated prices must be fixed; in particular, it does not lay down any rule limiting the discretion of the legislature, by virtue of which the ratio between the threshold price of durum wheat and that of common wheat must correspond to the ratio between those two varieties of wheat on the world market.

From the purely formal point of view, a recital in the preamble to a regulation cannot constitute a superior rule of law; in view of the nature of the decisions regarding prices, which are intended to attain objectives of economic policy which are likely to change, the Council and the Commission are precluded, on substantive grounds, from committing themselves in the long term by virtue of any particular regulation.

In any case, Regulation No 2727/75 does not contain superior rules of law for protection of the applicants; the fixing of specific threshold prices is intended to afford protection to Community producers of durum wheat, not to protect undertakings engaged in processing at later stages.

Furthermore, the threshold prices fixed for wheat are constantly maintained within what appear to be reasonable and appropriate limits in relation to the reasons on which Regulation No 2727/75 is based.

It may be seen from the wording thereof that the Council did not intend to confine itself to reflecting directly the relationship existing between the prices on the world market in the ratio between the threshold prices for the two products. The effect of such a practice would have been to reduce excessively the discretionary power vested in the legislature for the adoption of economic policy decisions regarding the fixing of the threshold price and would have prevented it from taking into account the fact that the cost of durum wheat production is, within the Community, considerably greater than that of common wheat. In its judgment of 13 November 1973, the Court approved a difference of 20 % between the cost prices of durum wheat and common wheat; the Council had to take that ratio into account when fixing the threshold prices for durum wheat and common wheat, as well as the fact that the threshold price for durum wheat must, in relation to the world price, reflect a preference for the benefit of Community production.

In general, the only valid ratio between the threshold prices of durum wheat and common wheat is one which reflects to an appropriate extent considerable variances, exceeding 20 %, between the

cost prices of durum wheat produced in the Community and those of common wheat, differences of quality, which are often considerable, between durum wheat originating in a non-member country and durum wheat produced in the Community, and the principle of Community preference. The ratio between the threshold prices of 100 : 138.8 for 1979 takes those factors sufficiently into account whereas the ratio regarded as correct by the applicants certainly does not.

Where measures to regulate the market must be taken, fiscal requirements deserve the same attention as the other objectives of economic policy laid down in the Treaty. The Council and the Commission are rightly requested to exercise care in the allocation of the limited financial resources of the Community, in particular in the payment of direct aid to certain categories of undertakings.

Substitution of common wheat for durum wheat on a small scale is not necessarily detrimental to the interests of the Community; it provides an extra outlet for the surplus production of common wheat.

The substitution of common wheat for durum wheat carried out by German manufacturers of pasta products is not motivated only by price considerations; it is to a considerable extent the result of consumer habits and specific attitudes of German consumers.

(b) The ratio between the prices of durum wheat and common wheat is not a source of discrimination. It is the same in all Member States, including France and Italy; in view of the extensive import requirements of these two producer countries too, the effects of the price difference between durum wheat and common wheat are not fundamentally different from those found in the other Member States.

The German manufacturers of durum wheat meal can also obtain supplies of durum wheat in France and Italy. The fact that German imports of durum wheat meal coming from other Community countries, particularly France, have undergone a considerable reduction since 1975 reflects an improvement in the competitive position of German manufacturers of durum wheat meal.

The transparency of national markets has, in general, become greater in recent years. Thus, a not insignificant part of German production of durum wheat meal has not been used by the national pasta-products industry but has been exported.

The growth in German imports of Italian pasta-products is essentially the result of Italian immigration into that country. There is no support for the applicants' affirmation that the durum wheat millers in the producing countries have the opportunity to purchase the bulk of their raw material at the intervention price, which is significantly lower; on the contrary, the amended system has made producers in the countries where durum wheat is grown more aware of their sales opportunities, having regard to the fact that there is a shortage of supply in France and Italy as well.

(c) The progressive reduction, since the 1975/76 cereal marketing year, in the variance between the price of durum wheat and that of common wheat was reasonable and rational, as also was the decision, in view of the differences between the cost prices of durum wheat and common wheat in the Community,

not automatically to adopt the price ratio existing between those two varieties of wheat on the world market.

The principle whereby the common price policy must be based on uniform methods and adopt common principles does not mean that, within the framework of their price policy, the Community institutions have no power to establish and to change, according to the prevalence of one or other of the objectives laid down in Article 39 of the Treaty, price ratios between the various products which fall within the common organization. Rather than mere implementation of laws, the policy provides for the development of ideas and changes in the decision-making process on the part of those who shape the policy; in the case of price formation in the cereals sector, whenever the objectives of the economic policy are changed, the criteria for fixing the prices of the various varieties of cereals in relation to each other are also subject to change.

In any event, neither the criteria laid down in the third subparagraph of Article 40 (3) of the Treaty nor the criteria for price formation in the cereals sector imply specific legal protection for certain specific undertakings.

Any distortions of competition and the substitution of common wheat for durum wheat in Germany are essentially attributable not to the fixing of prices but to the disparity between national laws; in certain countries the substitution would to a considerable extent be prevented by the "purity requirement" (the requirement to use exclusively durum wheat), whereas in Germany the only limits on substitution are those of a technical nature.

(d) The principle of proportionality, as a criterion for assessing legislative measures, does not preclude a power of discretion on the part of the legislature regarding the evaluation of objectives and the choice of means and procedures. In this case, the course of action followed by the Community institutions in fixing threshold prices for durum wheat, combined with a revised aid system, has been correct. Regionalization of the threshold price would have compromised the achievement of a single market, called in question the principle of free movement and involve a degree of partitioning of the national wheat markets. An increase in direct aid to producers would have involved an extra and disturbing burden upon the Community budget and have endangered the stability of the Community market in durum wheat; aids cannot, or can only with great difficulty, compensate for the disappearance or reduction of the protective function of the threshold price for durum wheat. The unfavourable effects of the aid system on the flexibility of the market have been known to the Court since the earlier cases brought before it.

The *Government of the Italian Republic*, an intervener in these proceedings, does not regard the applicants' arguments as relevant, either in fact or in law.

(a) The production costs of durum wheat are undeniably 20 % higher than those of common wheat; on that basis alone, the determination of the world-market ratio as 110 : 100 is without any foundation.

That ratio was moreover calculated arbitrarily by the applicants; it was determined by reference to a temporary situation lacking in significance (confined to the year 1979) and to data in respect of non-comparable items (varieties of common wheats which are very close, as regards quality and price, to durum wheat and which are not extensively represented on the Community market; failure to apply corrective factors to account for quality).

In fact, during the 1975/76 to 1979/80 marketing years the world price of durum wheat imported into the Community varied, in relation to common wheat, between a minimum ratio of 123.74 : 100 and a maximum ratio of 141.17 : 100; the c.i.f. average for the five years is 134.10. That ratio is very close to the ratio of 138 : 100 which is contested by the applicants, but far removed from the ratio of 110 : 100 advocated by them.

(b) The very wording of the preamble to Regulation No 2727/75 clearly shows that respect for the ratio between the prices of durum wheat and common wheat on the world market is only a desirable condition and not an obligation on the competent Community institutions. Regulation No 2727/75 does not impose upon the Community legislature any rigid criteria or, still less, absolute rules of superior law, which must be respected when the various cereals prices are fixed; the Council is certainly under no obligation to bring the ratio between the Community threshold prices for durum wheat and common wheat, fixed by various supplementary Community regulations for each marketing year, totally into line with the fluctuating ratio, which is susceptible of manipulation, between the prices of those products on the world market or, alternatively, to ensure that Community durum wheat production is maintained by means of the grant of aids to producers. On the contrary, the Community legislature is invested with discretionary powers for the fixing of threshold and intervention prices.

In fact the logical function of the recital in the preamble to Regulation No 2727/75 relied upon by the applicants is to furnish justification for the creation of the aid mechanism for durum wheat production and not to impose a specific price ratio between common wheat and durum wheat in the Community.

(c) The aim of increasing Community production of durum wheat having been achieved, the Commission considered that it was appropriate to amend its policy by changing from generalized production aid for all Community growers to specialized aid for specified areas, within the framework of a true regional policy, and therefore to introduce territorially limited and selected aids constituting productivity aids. The considerable variance in the Community ratio between the prices of durum wheat and common wheat and that ratio on the world market is a consequence of the acute drop in prices recorded on the world market during the years 1973/74. Considerations of a financial nature precluded a reduction of the ratio of prices between common wheat and durum wheat achieved by reducing the price of durum wheat and still less one achieved by increasing production aid.

The applicants' argument regarding the substitution of common wheat for durum

wheat and the difficulty of competing felt by certain concerns in countries not producing durum wheat seeks to override the rule of Community preference; the Community institutions may not be compelled to adopt a policy which would eliminate the natural geographical advantages of the French millers or of the Italian pasta-products industry.

The action taken by the Community institutions is in no way discriminatory; differences of treatment based on objective criteria, such as those deriving from regional specialization, are lawful.

Regionalization of import threshold prices would jeopardize the unity of the market; a multiplicity of threshold prices would compromise the freedom of trade between Member States.

(d) In any event, it should be noted that Regulation No 2727/75 is manifestly devoid of any rules, and *a fortiori* of any superior rules of law, which protect durum wheat millers and manufacturers of pasta products as such; the fixing of threshold prices for durum wheat is designed, in the interests of the Common Market, to afford a minimum level of protection for producers.

The *Comité Français de la Semoulerie Industrielle,* the *Syndicat des Industriels Fabricants de Pâtes Alimentaires de France* and the *Association Générale des Producteurs de Blé et Autres Céréales,* intervening parties, take the view that the applicants have not demonstrated either the unlawful character of the measure allegedly causing them damage or, still less, a sufficiently serious breach of a superior rule of law for the protection of their interests.

(a) The applicants' arguments are, in their entirety, based on a false premise: the ratio between the prices of durum wheat and common wheat on the world market is not 110 : 100.

There is certainly no single normal ratio between a single price for durum wheat and a single price for common wheat on the world market, but rather a very large number of price ratios, according to the types of wheat, and the places and times of reference; moreover, external short-term economic factors, such as international tension and developments in the money markets, exercise a considerable influence on the prices of most varieties of wheat.

In particular, the applicants disregard the matter of quality and overlook a fundamental factor, namely differences of price determined by the quality of the wheat; they calculate the variance between the prices of durum wheat and common wheat on the world market on the basis of a variety of common wheat of exceptional quality, which is accordingly particularly expensive, on the one hand, and of a durum wheat close to standard quality, without application of the coefficient of equivalence, on the other hand.

There is no "world variance", but as many variances as there are varieties. It is not acceptable to compare the ratio of 100 : 138 between the threshold prices of wheats of European quality with the ratio of 100 : 110 which existed at a particular time on the world market, between durum wheat and common wheat of qualities differing considerably from the European qualities.

Moreover, the applicants made their calculation on the basis of the world prices for products delivered in Europe, incorporating transport costs from the United States of America, which further

reduces the relative difference between the prices; as regards the period used as a reference by the applicants, there was during that chosen a very small variance between the prices of durum wheat and common wheat, whereas at other times the situation was totally different.

In 1979, the reference year in these cases, the ratio between the world prices of durum wheat and common wheat, far from being 110 : 100, was at a level between 126 : 100 and 133 : 100 for products in respect of which the quality and other factors were comparable. Over a long period, that ratio is extremely variable; it may fall to a very low level but may also exceed 140 : 100.

(b) The disputed provisions concerning the price of wheat do not infringe Article 40 of the Treaty; in particular they do not disregard the objective of stabilizing the markets. Such stabilization is inseparable from orientation of production. In that respect, it should be noted that Community policy with regard to durum wheat is intended to ensure the Community's self-sufficiency, that the production costs for durum wheat are considerably higher than those for common wheat and that it is therefore necessary to set a higher price for durum wheat in order to expand and maintain its production and that the prices on the world market fluctuate to a very great degree. The aim of the Common Agricultural Policy is to protect the Community market from such fluctuations; agricultural prices should not therefore reflect them.

(c) The difference between threshold prices and intervention prices is not intended solely to protect Community production but also to ensure free circulation of the products. That difference moreover does not in any way discriminate against the applicants.

Not all the durum wheat grown in the producing countries is used by the national industries in those countries; more than 50% of the durum wheat used by the French milling industry is imported; imports of French durum wheat into the Federal Republic of Germany are not insignificant and were indeed very large, for qualitative reasons, in 1976 and 1977 (almost 45% of total imports); German millers are able to secure access to the French market on the same terms as their French competitors; the costs of transporting imported durum wheat from non-member countries to the mills is lower in Germany than in France.

(d) Differential threshold prices detract from the principle of free movement of products within the Community and from the principle of Community preference.

To reduce the variance between the prices of durum wheat and common wheat would encroach upon the Community guarantee of fair prices for producers and lead to an abandonment of durum-wheat growing in a large number of regions of the Community, giving rise to an increase in the volume of imports; moreover, that course of action would place an excessive burden on the Community budget.

2. Liability of the Community

The *applicants* consider that the breach of superior rules of law by the Council and the Commission constitutes, in itself, a wrongful act. Moreover, the Community institutions are sufficiently aware of the particularly damaging

consequences of their price policy regarding durum wheat. It is a question in the present case therefore of a conscious breach of superior rules of law.

Furthermore, the Council and the Commission have, in this case, manifestly and seriously exceeded the limits to which the exercise of their discretionary powers is subject.

The degree of discretion vested in them does not extend to the actual determination of economic data, in particular the price ratio on the world market between common wheat and durum wheat, the ratio between the cost prices of those two varieties of wheat and the substitution of common wheat for durum wheat in the production of pasta products; for the most part, those data are not contested. As it is a question of the nature and the scope of the provisions to be adopted on the basis of such data, the limits of the discretionary powers have been exceeded in this case. No legally defensible consideration can justify the Council's refusal, since the price rise which took place in 1974/75 no longer applies, to re-establish the price ratio between common wheat and durum wheat which had existed for a long time; by allowing a considerable and disproportionate variance to develop between the price of common wheat, which should be the reference price, and the price of durum wheat, the Council has contravened the essential principle of equality.

The Community's liability has therefore been incurred.

The *Council* considers that the Community's liability has not been incurred in this case, in the absence of any breach of a superior rule of law.

The *Commission* is of the opinion that the actions do not meet the requirements necessary, having regard to the case-law of the Court, to establish any obligation on the part of the Community to pay compensation.

The *trade associations* which have intervened in support of the submissions of the defendants point out that if it were assumed, by way of hypothesis, that the damage claimed by the applicants was a result of the regulation of durum wheat prices, the provisions involved would be measures of economic policy, adopted in an area in which the Community institutions enjoy discretionary powers in the exercise of their legislative activity. The applicants have not however, in that regard, established either a manifest error or any misuse of power, which are the only grounds on which the Community's liability can be incurred.

3. Damage

The *applicants* seek compensation, together with interest, for the damage caused them by the fixing of the threshold price for durum wheat at an excessive level.

(a) The applicants in Cases 197, 198, 199, 200, 243 and 245/80 consider that the damage they suffered in 1979 is a result of the difference between the correct threshold price and the excessively high threshold price fixed by the Community institutions; from that difference should be deducted the sums which the applicants were able to pass on to their purchasers by increasing the price of durum wheat meal produced by them.

The average monthly threshold price for common wheat was, in 1979, DM 572.29; the correct ratio being 100 : 110, the correct threshold price for durum wheat should therefore have

amounted in 1979 to DM 629.52 per tonne. The actual threshold price for durum wheat amounted on average in 1979 to DM 785.07 per tonne; the difference is therefore DM 155.55. That difference between the correct threshold price and the threshold price actually paid in 1979 for durum wheat was reflected in the levy paid by the importers and in turn in the price of the raw materials; it represents the notional damage which the applicants have suffered, as millers of durum wheat, for each tonne of durum wheat processed. No account is taken, in this respect, of the loss caused to the applicants by the drop in the volume of durum wheat milled by them and in their sales of durum wheat meal.

The yield of durum wheat meal from a specific unit quantity of durum wheat amounts, according to generally accepted average values, to 63.29%. Conversion of the loss per tonne of durum wheat, on the basis of that yield rate, into loss suffered per tonne of durum wheat meal produced gives a figure of DM 245.77.

Because of the conditions of competition, the applicants were unable to pass on the full amount of the excessive increase in the threshold prices to their purchasers, the manufacturers of pasta products.

The actual loss suffered by the applicants may be determined by means of a calculation which takes into account, for each tonne of durum wheat, the average cost price in 1979, the "milling wage" (wage costs, energy consumption, capital depreciation and reduced rate of normal profit), the proceeds of sale of by-products, the yield of durum wheat meal, the average expenditure per tonne of durum wheat meal and the average costs of transport from the mill to the purchasers' premises, on the basis of which it is possible to establish the amount which the applicants should have been able to obtain per tonne of durum wheat meal, account being taken of the actual cost price to be paid for the durum wheat by reason of the excessive threshold price and levy, less the average actual proceeds from the sale of one tonne of durum wheat meal.

On the basis of the quantities supplied by the applicants to the German pasta-products industry for the year 1979, the losses suffered by the applicants during 1979, for which they should be able to obtain compensation, are respectively DM 1 786 047.50 (Case 197/80), DM 1 087 692.80 (Case 198/80), DM 910 850.73 (Case 199/80), DM 1 020 524 (Case 200/80), DM 2 204 106.30 (Case 243/80) and DM 260 172.78 (Case 245/80).

(b) The applicant in Case 247/80 is of the opinion that the loss for which it should be compensated consists of the difference between, on the one hand, the correct price for durum wheat meal, which may be deducted from the correct threshold price for durum wheat, account being taken of the yield rate and of the processing costs, and, on the other hand, the actual prices of durum wheat meal which the applicant had to pay to the German durum wheat mills.

If account is taken of the average yield of durum wheat meal from a specific unit quantity of durum wheat, the generally accepted figure being 63.29%, and if this conversion coefficient is applied to the ratio between the correct threshold price for durum wheat and the correct price for durum wheat meal, the correct price for durum wheat meal so ascertained is DM 994.64 per tonne.

The German manufacturers of pasta products have been unable, because of the conditions of competition in the Common Market, to pass on the

excessive prices of durum wheat meal, due to the excessive price of durum wheat itself, to the consumers; moreover, partial replacement of durum wheat meal by the second flour of common wheat has made possible only a partial mitigation of the loss. The average price of the durum wheat meal purchased in 1979 by the applicant was DM 109.61 per 100 kg. Having regard to the actual price of wheat flour, its correct price and the quantity purchased and processed by the applicant, the latter's real loss is DM 967 750.00.

(c) All the applicants state that, according to the judgments of the Court of 4 October 1979 (Joined Cases 241, 242, 245 to 250/78 *DGV and Others* [1979] ECR 3017), a claim for interest in connection with non-contractual liability of the Community must be considered in the light of the principles common to the legal systems of the Member States; accordingly, a claim for interest is in general admissible. The obligation to pay interest arises on the date of the Court's judgment; the rate of interest which it is proper to apply is 6%.

The *Commission* considers the applicants' abstract calculation of their loss to be unacceptable; the starting point, a "correct" threshold price, arrived at by an arithmetical operation from the 100 : 110 price ratio for durum wheat, is untenable. The discretionary powers of the Community institutions may not be reduced to such arithmetical constraints; alternative solutions would have been possible, such as raising the price level of common wheat. There is no strictly binding rule that the ratio 100 : 110 must be applied.

The whole calculation of the loss made by the applicants is nothing but a "mathematical exercise".

The method of calculation adopted by the applicants moreover involves an attempt to reverse the burden of proof; it is for the applicants to estabish not only the unlawfulness of the measure but also the fact that such measure has caused them damage; they have failed to do so in this case.

The German processing industry has certainly not sold its products at a loss or covered the difference in its prime costs by drawing upon its "substance", that is to say its assets. The way that the profit margins of any particular undertaking are affected is essentially the result of a difference in the impact of the production costs and of commercial strategy.

An alleged loss of profit on the part of the German pasta-products industry, and therefore a fluctuation of its profits, is a normal phenomenon, both on the internal market and on the Community market. The Community institutions are unable to guarantee constant margins at each stage of the processing of agricultural products or to align the prices fixed by them correspondingly.

The *Syndicat des Industriels Fabricants de Pâtes Alimentaires de France*, an intervener, points out that in particular the applicant in Case 247/80 provides no evidence of a drop in its sales or of a fall in its profits.

4. Causal relationship

The *applicants* take the view that the damage for which they seek compensation is the result of the fixing of the threshold price for imported durum wheat at an excessive level.

The fixing of the price at that level affects principally, and perhaps exclusively, millers and pasta-products industries which, as a result of their geographical location, are constrained to use imported wheat. In so far as the competitive disadvantage of the German undertakings may also be due to other factors, such as the system of monetary compensatory amounts, the responsibility therefor also falls upon the Community institutions.

As regards the substitution of common wheat for durum wheat, the different legal position with respect to the exclusive use of durum wheat in the manufacture of pasta products in the Federal Republic of Germany on the one hand and in France and Italy on the other has certain unfavourable results for the applicants. The German rules do not however constitute the legally decisive cause of the damage; after the establishment of a common organization of the market in cereals, a Member State is no longer entitled, for the purpose of ensuring that there is a market for durum wheat, to lay down a national obligation to use durum wheat in the manufacture of pasta products. In the absence of a harmonizing directive, the Federal Republic of Germany has not been compelled to bring its laws into line with those of France and Italy; it is the Council which bears the responsibility for failure to adopt a harmonizing directive and for the differences in the legal situation resulting therefrom in the Member States.

By their actions the applicants seek only to claim the part of the loss which they have been unable to pass on to their customers.

The *Council* considers that there is no direct relationship of cause and effect between the damage alleged by the applicants and the provisions contested by them.

An excessive threshold price for durum wheat cannot have adverse consequences for millers or pasta-products undertakings varying according to their location; access both to Community products and to imported products is ensured by the rules on the same terms for all undertakings in the Community.

The shrinkage of the relative market share of the German millers and the German pasta-products industry is attributable to causes wholly unconnected with the threshold price, in particular to the system of monetary compensatory amounts.

In any case, it is for the applicants to prove that they have not avoided their loss by passing it on in its entirety to a later stage in the commercial process and, ultimately, to the consumer.

The *Commission* denies that there is any relationship of cause and effect between the fixing by the Community of the threshold price for wheat and the damage claimed by the applicants.

The cause, in the legal sense, of the damage allegedly suffered by the applicants by reason of the fact that the German processing industry has substituted common wheat for durum wheat is in fact to be found in the legal situation in the Federal Republic of Germany. German law relating to foodstuffs does not require the exclusive use of durum wheat for the manufacture of pasta products; the greater the variance between the price of durum wheat and that of common wheat, the greater will be the natural tendency towards substitution.

In the case of the applicant in Case 247/80, whose loss is the result of price

increases applied by the German durum wheat millers, the applicants in the other cases, there is only one alternative — either it should have (and could have) turned to other sources of supply offering better financial terms or else such possibilities did not exist, in which case it is impossible to see how the measures adopted by the Community could have caused it any loss.

In so far as the strong competition from Italian manufacturers of pasta products prevented it from incorporating the higher cost of the raw material in its sales prices, it is appropriate to record the fact that the competitiveness of the Italian pasta-products manufacturers is essentially due to their traditional reputation; Community measures cannot have favoured the competitive capacity of that industry and, moreover, the Italian manufacturers have to bear the costs of transport for their sales in Germany.

The *trade associations,* interveners in these proceedings, state that the drop in production suffered by the applicant milling companies, which is due to the fact that the German pasta-products industry, for reasons of price, substitutes common wheat for durum wheat in increasing proportions, is not the direct consequence of the Community price policy; it derives essentially from the legislation of the Federal Republic of Germany which does not include any 'Law on purity requirements' requiring the use of durum wheat meal, to the exclusion of any mixture, for the manufacture of pasta products.

As regards the position of the German pasta-products industry, it is due on the one hand to the absence of any 'Law on purity requirements', which has induced the German manufacturers to manufacture products at increasingly lower prices, at the expense of quality, involving a downgrading of the product in the eyes of the consumers, and on the other hand to the fact that the German industry has not carried out the necessary restructuring operations in a very competitive market.

V — Oral procedure

At the sitting on 1 October 1981 oral argument was presented and answers to questions put by the Court were given by the applicant companies, represented by Dr Modest and Dr Gündisch, by the intervening companies Soubry and Coppens, represented by Mr de Savornin Lohmann, the Commission, represented by Mr Sack and Mr Stockburger, the Council, represented by Mr Schloh, the Government of the Italian Republic, represented by Mr Fienga, and the intervening trade associations represented by Mrs Funck-Brentano.

During the hearing, following an intervention from the Commission, the Court decided that a document annexed to the statement lodged by the intervening companies Soubry and Coppens was to be withdrawn from the file on the case and that the extracts from that document reproduced in the statement were to be regarded as non-existent.

The Advocate General delivered his opinion at the sitting on 19 November 1981.

Decision

1 By applications received at the Court Registry on 7 October 1980, 30 October 1980, 5 November 1980 and 6 November 1980 respectively, the companies Ludwigshafener Walzmühle Erling KG, Park-Mühlen GmbH, Mühle Rüningen AG, Pfälzische Mühlenwerke GmbH, Kurt Kampffmeyer Mühlenvereinigung KG and Wilhelm Werhahn KG, durum wheat millers, and also the company Schwaben-Nudel-Werke B. Birkel Söhne GmbH & Co., a manufacturer of pasta products in the Federal Republic of Germany, brought actions pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty seeking the award of the sums hereinafter specified as compensation for the damage caused them by the Council and the Commission as a result of the fixing of the threshold price for durum wheat imported from non-member countries during 1979 by comparison with the price fixed for common wheat.

2 It appears from the file on the case that the measures which, according to the applicants, have given rise to the alleged damage are four regulations fixing the price of cereals for the 1978/79 and 1979/80 marketing years, namely:

— Council Regulation (EEC) No 1255/78 of 12 June 1978 (Official Journal 1978, L 156, p. 2),

— Commission Regulation (EEC) No 1408/78 of 26 June 1978 (Official Journal 1978, L 170, p. 28),

— Council Regulation (EEC) No 1548/79 of 24 July 1979 (Official Journal 1979, L 188, p. 2),

— Commission Regulation (EEC) No 1594/79 of 26 July 1979 (Official Journal 1979, L 189, p. 44).

Admissibility

3 The Council and the Commission, supported by the Italian Government, contest the admissibility of the actions on various grounds. In substance, they accuse the applicants of a misuse of procedure by reason of the fact that, on the one hand, they seek to evade, by means of actions for damages, the restrictive conditions applicable to actions by the individual in connection with the review, imposed by the second paragraph of Article 173 of the

Treaty, of the legality of regulations and that, on the other hand, by bringing the matter before the Court by direct action they have failed to avail themselves of the rights of recourse open to them before their national courts.

Objection as to the misuse of the procedure under the second paragraph of Article 73

4 As to this objection, it is sufficient to note that, in a consistent line of decisions, the Court has held that the action for damages under Article 178 and the second paragraph of Article 215 of the Treaty was established as an autonomous form of action with a particular purpose to fulfil within the system of actions and the exercise of it is subject to conditions imposed in view of the specific objective thereof. That form of action is different from an action for annulment in that it does not seek the cancellation of a specified measure but compensation for damage caused by the institutions in the exercise of their functions; the conditions for actions for damages are laid down with that objective in mind and accordingly are different form those for an action for annulment (see judgment of 2 July 1974 in Case 153/73 *Holtz & Willemsen* [1974] ECR 675, paragraphs 2 to 5 of the decision).

5 It follows from the foregoing that, in order to be successful, any party who chooses to pursue an action for damages is obliged to establish fulfilment of all the conditions which must be fulfilled, pursuant to the second paragraph of Article 215 of the Treaty, if the liability of the Community is to be incurred. The fact that some of those conditions may coincide with those applicable to an action for annulment is not therefore a sufficient reason to describe an action by a party in reliance upon Article 178 and the second paragraph of Article 215 as a misuse of procedure.

6 That objection must therefore be dismissed.

Objection as to failure to exercise rights of action before the national courts

7 The defendant institutions draw attention, in the second place, to the fact that the applicants could have defended themselves against the alleged damage by bringing an action before the competent national courts in connection with the levies charged on durum wheat imported by them into the Community. It was in fact the collection of those levies, on the basis of the threshold price fixed by the Community, which gave rise to the financial

burden in respect of which the applicants claim damages. Such an action, brought before the national courts, could have led to a preliminary question under Article 177, thus enabling the Court of Justice to examine the validity of the regulations contested by the applicants.

8 It appears from the preliminary examination of the case that such a form of action was not open to the applicants before their national courts. It seems, in fact, from the statements of the applicants, which are not contested, that none of them actually imported the durum wheat themselves; the applicant companies operating durum wheat mills made use of importers who paid the levies; as regards *Birkel*, it is not contested that, as a manufacturer of pasta products, it obtained its raw material from the mills.

9 In the circumstances, the applicants were not in a position to bring an action before the national courts regarding the levies collected on the imports of durum wheat intended for them. Accordingly no objection of inadmissibility may be based on their failure to avail themselves of a form of action in the national courts which was not in fact open to them.

10 The second objection of inadmissibility must therefore also be dismissed.

11 The Council also alleges inadmissibility on the ground that the applicants have claimed damages only for 1979, stating that the amounts claimed constitute only a fraction of the damage actually suffered by them. Having regard to the possibility that the applicants were thus preparing to extend their claims at a later stage, particularly to periods before 1979, the Council takes the view that the applications are inadmissible in so far as they relate only to possible damages.

12 It does not seem necessary to examine this argument of the Council regarding the admissibility of the actions. The Council's objections in fact concern one of the substantive pre-conditions for liability on the part of the Community, namely the existence of damage. They will therefore be considered when the substance of the case is examined.

Objection regarding a document submitted by the intervening parties Soubry and Coppens

13 At the hearing, the Commission objected to production by the intervening parties Soubry and Coppens, as an annex to their statement as intervening parties, of a document entitled "Report to the Council on durum wheat". According to the Commission, it is an internal document which was improperly obtained and should therefore be removed from the file on the case; in fact, that document is merely a draft report prepared by the officers of the Commission at that time and, ultimately, the Commission did not approve it; moreover it was never transmitted to the Council.

14 According to the intervening parties, the document was distributed at a meeting of the "Advisory Committee on Cereals" set up within the Commission, which includes the representatives of the various industrial and trade sectors involved. It came into the possession of the interveners through one of the participants at that meeting.

15 That explanation was contested by the Commission which stated that, at the meeting in question, the participants were given an oral report on the subject; the contested document had not at that time even been submitted to the Commission for examination and was not therefore distributed. The Commission further noted that the copy placed before the Court had no outer cover, which normally indicates the origin of the document and the date and type thereof. When questioned by the Court, the representative of the intervening parties was unable to specify the person by whom the document had been made available or to explain why it was incomplete.

16 The Court finds that there exists thus a doubt both as to the actual nature of the contested document and as to whether the interveners obtained it by proper means. In the circumstances, the document must be removed from the file, together with the quotations from it included in the intervening parties' statement.

Substance

17 Before examining the applicants' arguments, it is appropriate to indicate the principles which, according to the case-law of the Court, govern the non-contractual liability of the Community.

18 In its judgment of 28 April 1971 (Case 4/69 *Lütticke* [1971] ECR 325), which has since been confirmed on numerous occasions (see in particular the judgment of 2 July 1974, *Holtz & Willemsen,* cited above, paragraph 7 of the decision), the Court made clear that under the second paragraph of Article 215 and the general principles to which that provision refers, Community liability depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the institutions, the fact of damage and the existence of a direct link in the chain of causality between the wrongful act and the damage complained of.

19 The measures which, according to the applicants, gave rise to the alleged damage are legislative measures. With regard to such measures, according to a similarly consistent series of decisions of the Court, the Community does not incur liability unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (judgment of 2 December 1971, Case 5/71 *Zuckerfabrik Schöppenstedt* [1971] ECR 975).

20 Regard must be had to these requirements when the actions are examined. Accordingly, it is appropriate to examine separately, on the one hand, the question whether the fixing, by measures adopted by the Council and the Commission, of the threshold price for durum wheat for the period in question is vitiated by illegality in the light of the criteria indicated above, and on the other hand, whether the applicants are able to prove damage causally related to the contested measures.

Objections regarding the fixing of the threshold price for durum wheat for the year 1979

21 The applicants put forward with regard to this subject a number of economic and legal considerations intended to demonstrate that the Council and the Commission breached the rules of Community law in various ways by fixing the threshold price for durum wheat at the time in question on the basis of a comparison with the price of common wheat.

22 They state that, in the past, the import price for durum wheat was close to the price of common wheat until, in 1974, a considerable price rise on the world market led the Council to raise the threshold price for durum wheat considerably, the ratio between the price of common wheat and that of durum wheat being at that time 100 : 151.2. Despite the fact that the prices have since drawn closer on the world market, the ratio between them not exceeding approximately 100 : 110, the Council has reduced only very slowly the gap between the two prices which, at the time in question, was 100 : 138.5 in the Community. This disparity of prices gave rise, in the manufacture of pasta products, to a tendency to substitute common wheat for durum wheat, leading in consequence to a considerable reduction in the volume of production of durum wheat mills and a deterioration in the quality of pasta products, resulting in a weakening of the competitive position of the German manufacturers in the market. This tendency was accentuated by the fact that the German manufacturers encountered increasingly strong competition in their market from pasta manufacturers of other Member States, and in particular Italian manufacturers, whose production centres, being near to the growing areas of durum wheat in the Community were able to obtain the supplies at prices close to the intervention price, whereas the German manufacturers obtained supplies of durum wheat meal of exclusively American origin, imported at the threshold price.

23 From the legal point of view, the applicants rely upon four grounds, namely disregard of the price policy embodied in the basic Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975, L 281, p. 1), breach of the principle of non-discrimination embodied in the second subparagraph of Article 40 (3) of the Treaty, breach of the principles for the fixing of agricultural prices as laid down in the third subparagraph of Article 40 (3) and, finally, breach of the principle of proportionality.

24 In the first place, the applicants draw attention to the fact that, in the basic Regulation No 2727/75 the Council recognized, in the eighth recital in the preamble thereto, that it was necessary to respect so far as possible within the Community the ratio existing normally on the world market between durum wheat and common wheat prices, because of the interchangeability of those two products. That policy was indeed followed for a long period and it was

only after the 1974 price rise caused by short-term economic factors, which in the meantime was reabsorbed on the world market, that the Council followed a new policy, consisting in maintaining an abnormal variance between the two prices in question, thus provoking a substitutional effect regarded as abnormal in the terms of the regulation. The applicants are of the view that the Council was obliged to make every effort to eliminate that abnormal variance.

25 According to the applicants, the Court recognized the justification of that reasoning in its judgment of 13 November 1973 (Joined Cases 63 to 69/72, *Werhahn and Others* [1973] ECR 1229), in which it stated:

"There is a relationship between the cost price of durum and of common wheat, the former being generally approximately 20 % higher than the latter.

At the risk of seeing an undesirable kind of interference making its appearance on the market in these cereals, this relationship must be taken into account in fixing their respective threshold prices".

26 What is required in this case, in accordance with the above statements of the Court, is to define the "fair" price ratio between durum wheat and common wheat; according to the principles recognized in the recitals in the preamble to the basic Regulation No 2727/75, that ratio should, as far as possible, be set at the level of the ratio ascertained on the world market.

27 In the second place, the applicants state that the fixing of the threshold price for durum wheat at an excessive level involves an infringement of the second subparagraph of Article 40 (3) of the Treaty, in the terms of which the common organization of the market "shall exclude any discrimination between producers or consumers within the Community". By fixing the threshold price for durum wheat at an excessively high level, the Council has created such discrimination against millers and against manufacturers of pasta-products in the Member States which do not produce durum wheat; those producers have had to import all their durum wheat requirements from non-member countries, whereas the millers of durum wheat and the manufacturers of pasta-products in the countries which grow that wheat, France and Italy, are able to obtain their raw material locally, at a considerably lower price.

28 In the third place, the applicants state that the fixing of the threshold price for durum wheat at an excessively high level breaches the principles governing the fixing of prices, as laid down in the third subparagraph of Article 40 (3) of the Treaty, in the terms of which in the common price policy "shall be based on common criteria and uniform methods of calculation". They also refer, in that context, to Article 39 (1) (c), which states that the object of the common agricultural policy is, *inter alia*, "to stabilize markets". Those provisions place an obligation on the Council to fix the prices in accordance with "rational views" and not to determine them in an arbitrary fashion on the basis of purely political considerations with the aim of favouring certain groups of producers within the Community at the expense of other groups, such as that which includes the applicants.

29 Finally, the applicants consider that the Council has breached the principle of proportionality, in so far as it had the opportunity, instead of fixing an artificially high threshold price, to attain its objective by other means which were less disadvantageous to the applicants, such as for example regionalization of threshold prices or indeed an extension of aid to producers in the Community, so as to diminish the effect on them of a reduction in the threshold price.

30 The Council and the Commission, supported by the Italian Government, emphasize in general the wide discretionary powers vested in the Community institutions in the matter of agricultural policy and adaptation of that policy to the circumstances, in the light of all the guidelines laid down in Article 39 of the Treaty.

31 In response to the first submission made by the applicants, the defendant institutions emphasize that there is a fundamental difference between the world market and the Community market, in so far as the world market is governed by the unrestricted interaction of supply and demand, whereas the Community market has a common organization which is intended to maintain price levels in conformity with the policy objectives laid down by the Community institutions within the framework of the Treaty. In this case, it is appropriate to have regard to the fact that the Community market has chronic over-production of common wheat and that there is a shortfall of durum wheat. The policy followed by the institutions consists therefore in

favouring development of durum wheat production, by an appropriate price policy, whilst maintaining the production of common wheat to a reasonable extent.

32 As regards the complaints of discrimination and infringement of the rules relating to the fixing of agricultural prices, laid down in the second and third subparagraphs of Article 40 (3), the defendant institutions draw attention to the fact that the fixing of cereal prices takes place within the context of free circulation both of raw materials and of secondary products and that therefore, from the Community point of view, there is nothing to prevent German producers from obtaining supplies in other Member States of the Community. They draw attention to the fact that neither the French market nor the Italian market is self-sufficient and that producers in those States must also, to a considerable extent, use durum wheat imported from non-member countries, a circumstance which has given rise to a tendency in the producing States for the prices of the indigenous product to move towards the threshold price and not, as asserted by the applicants, towards the interventions price.

33 As regards the alleged breach of the principle of proportionality, the institutions draw attention to the fact that the options proposed by the applicants are impracticable; regionalization of threshold prices would be in direct conflict with unity of the Common Market, whereas extension of the aids system would impose new and intolerable burdens upon the Community budget.

34 Finally, the defendant institutions emphasize that the legal rules relied upon by the applicants are not in any case classifiable as "superior rules of law for the protection of the individual", a condition imposed by the case-law of the Court in cases of actions for damages in respect of legislative measures adopted by the Community.

35 The French associations, intervening in support of the Council and the Commission, lay particular stress on the fact that the statements made by the applicants regarding price ratios on the world market are not based on correct information; the development of the world market is in fact influenced by a multiplicity of diverse factors, of a structural and conjunctural nature. In particular, they criticize applicants for choosing representative prices for common wheat and durum wheat arbitrarily with a view to arriving at the price ratio of 100 : 110 which they describe as "justified".

36 The Court is of the opinion that the arguments expounded by the applicants are not of such a nature as to raise any doubt as to the lawfulness of the measures adopted by the Council and the Commission in respect of which the actions have been brought.

37 It should be remembered that, in determining their policy in this area, the competent Community institutions enjoy wide discretionary powers regarding not only establishment of the factual basis of their action but also definition of the objectives to be pursued, within the framework of the provisions of the Treaty, and the choice of the appropriate means of action.

38 As regards the applicants' first submission, it should be noted that the developments in the state of the world market and of the Community market provide no grounds for inferring that there is a manifest error in the assessment made by the Commission and the Council of, on the one hand, the relevant world-market data and, on the other, the production conditions peculiar to the Community market. In particular, there are no grounds for regarding as a constant factor the Court's finding in its judgment of 13 November 1973, regarding the comparative production costs of common wheat and durum wheat for the period under consideration.

39 As regards the economic objective pursued by the Council in fixing the variance between the threshold price for durum wheat and the price for common wheat, there is likewise nothing to indicate that the institutions have overstepped the limits of their discretionary powers in determining that variance, if it is borne in mind that there is chronic over-production of common wheat and a need to stimulate Community production of durum wheat. This choice having been made by the Council, in the legitimate exercise of its powers of discretion, its repercussions must be accepted by the manufacturers of secondary products, as they must by the various groups of producers concerned.

40 The fact that before the changes in the world-market conditions occurred in 1974 the Council applied a different policy for a long period does not confer upon the producers and processing undertakings involved any entitlement to preservation of such advantages as the established policy may have allowed them; nor does that fact impose any limitation on the freedom of the

Commission and the Council to adjust their policy in step with data reflecting the evolution of the market and with the objectives pursued. In this connection it is sufficient to refer to the judgments of 13 November 1973 (cited above, paragraph 12 of the decision) and 2 June 1976 (Joined Cases 56 to 60/74 *Kampffmeyer and Others* [1976] ECR 711, paragraph 13 of the decision). In particular, the intention evinced in the eighth recital in the preamble to Regulation No 2727/75 is not to be regarded as the expression of a rule of law of which observance is therefore mandatory for the institutions.

41 With regard to the argument based on Article 39 (1) (c) of the Treaty, it should be pointed out in the first place that according to a consistent line of decisions of the Court, the institutions must reconcile the various objectives laid down by Article 39, a fact which precludes the isolation of any one of those objectives, such as the stabilization of certain situations which have become established, in such a way as to render impossible the realization of other objectives such as, in this case, the rational development of agricultural production and security of supplies, where, as in the case of durum wheat, there is a shortfall of the product concerned.

42 As regards the second and third submissions, relating to the principle of non-discrimination and to rules for the formation of agricultural prices laid down in Article 40 (3), the arguments are unacceptable in the context of a common organization of the market based on freedom of trade within the framework of a common production-price system. That organization enables all users of durum wheat to obtain supplies on equal terms, in the case both of the raw material and of secondary products such as meal, subject to the Community preference which is reflected in the variance between the intervention price and the threshold price. It should be noted that the latter question is not contested in these proceedings.

43 The applicants' fourth submission, alleging disregard of the so-called principle of "proportionality", is based on the fact that, in determining the means of regulating the market, the Council has chosen a method — the fixing of the price of durum wheat at the level stated — which has put them at an undue disadvantage.

44 It should be pointed out in this connection that, in itself, recourse to differentiation of the various prices administered by the Community seems to be a method particularly well-suited to the general machinery of the market organization and to the objective pursued in this case, namely development of durum wheat growing with a view to improving the structure of Community production as a whole. The defendant institutions have stated correctly that the courses of action advocated by the applicants are unacceptable, since one — namely differentiation of the threshold price as between the south and the north of the Community — is incompatible with unity of the market and the other — namely extension of aid for durum wheat growing — is contradictory in a market-economy system and, moreover, excessively onerous for everybody.

45 It is therefore appropriate to conclude that, far from having proved a "serious breach of a superior rule of law for the protection of the individual", the applicants have not succeeded in demonstrating any unlawful act whatsoever on the part of the Council or the Commission.

Damage and causal relationship

46 The applicants claim the following sums from the Community by way of damages:

DM 1 786 047.50 (Case 197/80), DM 1 087 692.80 (Case 198/80), DM 910 850.73 (Case 199/80), DM 1 020 524 (Case 200/80), DM 2 204 106.30 (Case 243/80), DM 260 172.78 (Case 245/80) and DM 967 750 (Case 247/80).

47 They calculate the damages claimed by multiplying the tonnages of meal sold to the manufacturers of pasta products by the difference between what they regard as the "fair price" for drum wheat and the import price resulting from application of the Community regulations, after deduction of the margin which they acknowledge having passed on to their purchasers. They emphasize that this calculation takes no account either of their loss of profit or of the decrease in their business.

48 The applicant Birkel makes a similar calculation, drawing attention also to the fact that it has not been in a position to pass on to the purchasers of its products that part of the price which exceeds the "fair price".

49 The defendant institutions regard this method of calculation as unacceptable because it is based on a factor — the "fair price" of durum wheat — which is chosen arbitrarily by the applicants. Moreover, and this point has been developed in greater detail by the associations which intervened in their support, they deny the existence of any causal relation between the alleged damage and the fixing of the prices by the Council and the Commission. They state that the true cause of any losses suffered by the applicants is to be found in the fact that unlike other Member States, in particular France and Italy, whose legislation prohibits the use of common wheat for the manufacture of pastas (the so-called Law "on purity requirements"), such prohibition is unknown in the Federal Republic of Germany, so that the German manufacturers are free to substitute at will common wheat for durum wheat in the manufacture of pasta products. Since this substitution has the effect of lowering the quality of pasta products, as is recognized in a study produced by the applicants themselves, the effect of the absence of such legislation in the Federal Republic of Germany is to reduce the German industry's capability for competing with pasta products originating in countries where a Law on purity requirements exists.

50 The Court is of the opinion that the applicants have indeed failed to provide any convincing evidence as to the actual occurrence of the damage which they claim to have suffered. It is sufficient to state that the method of calculation adopted by them is based on one factor — the "fair price" of durum wheat — at which they have arrived on the basis of purely subjective economic considerations, glossing over the fact that they operate within an economic framework determined by a common organization of the market and not in the context of the world market. The calculations they have made on the basis of that initial factor moreover incorporate magnitudes which are dependent, for each of them, upon the individual conduct of their business, and as such cannot be verified.

51 As far as causality is concerned, the applicants have not succeeded in establishing the existence of a relationship between, on the one hand, the measures adopted by the Council and the Commission which, they allege, gave rise to the losses they have recorded and, on the other hand, the damage they claim to have suffered. Two observations are appropriate on this matter.

52 In the first place, the data furnished by the applicants themselves with a view to establishing that they effectively suffered damage show that the financial

result they have obtained from their business is conditional upon a series of factors which depend on the way they conduct their industrial and commercial activity and which, apart from not being verifiable, as has just been stated, are not attributable, as such, to the Community.

53 Furthermore, it has become clear from the explanations given in response to questions put by the Court that the real cause of the difficulties suffered by the applicants is in the first place the absence of legislation in the Federal Republic of Germany requiring the use of only durum wheat in the manufacture of pasta products. It should be recalled that a directive to that effect was proposed to the Council by the Commission as early as 1968 but that the proposal was not acted upon (see Journal Officiel 1968, C 136, p. 16).

54 The adoption of a common rule of that kind by all the Member States would no doubt have ensured that all producers of durum wheat meal had a more steady outlet for their goods. In the Federal Republic of Germany and in other Member States where there is no such provision, substitution of a proportion of common wheat for durum wheat in the manufacture of pasta products, with the consequential reduction in the activity of durum wheat millers, is an unavoidable result of the legislative position in those States. The Community has no obligation, in determining its cereals price policy, to fix the comparative level of durum wheat and common wheat prices so as to prevent such substitution in those places where it is legally permitted. Only by harmonization of national legislation would it be possible to remedy the difficulty referred to by the applicants.

55 The foregoing considerations are sufficient to show that the applicants have not established a relationship of cause and effect between the policy pursued by the Community institutions in fixing wheat prices, as embodied in the contested regulations, and the deterioration of their position on the durum-wheat or pasta-products markets.

56 It is evident from the foregoing analysis that the applicants have not substantiated any of the conditions set out above upon fulfilment of which the liability of the Community depends. The applications must therefore be dismissed.

Costs

57 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

58 The applicants and the interveners Soubry and Coppens, which supported the applicant Schwaben-Nudel-Werke B. Birkel Söhne GmbH & Co. are therefore jointly and severally ordered to pay the costs of the proceedings.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the applications.**

2. **Orders the applicants and the intervening parties who supported the applicant in Case 247/80 jointly and severally to pay the costs, including the costs of the intervening parties who supported the defendants.**

Due Pescatore Grévisse

Delivered in open court in Luxembourg on 17 December 1981.

A. Van Houtte
Registrar

O. Due
President