

confined to pasta made exclusively from durum wheat. The same considerations apply to the need to ensure fair trading.

Similarly, such an obstacle cannot be justified on the grounds of the protection of public health unless there is evidence to show that pasta products made from common wheat contain chemical additives or colorants. In any event, such a general marketing prohibition is contrary to the principle of proportionality.

2. Once the Community has established a common market organization in a particular sector, the Member States must refrain from taking any unilateral measure even if that measure is likely to support the common policy of the Community. Consequently, if problems arise in finding market outlets for a product covered by such a common organization — and this cannot be argued when the statistics show that the product in question benefits from competition based on quality — it is for the Community and not for a Member State to seek a solution in the context of the common agricultural policy.

REPORT FOR THE HEARING delivered in Case 90/86 *

I — Facts and procedure

ascertain whether they had been manufactured in compliance with the prevailing Italian regulations.

A — *Summary of the procedure before the national court*

Giorgio Zoni, an Italian wholesaler, imported from the Federal Republic of Germany pasta products which had been manufactured from a mixture of durum wheat and common wheat. One of the retailers to whom these pasta products were supplied asked the competent authorities to

As a consequence Mr Zoni was prosecuted before the pretura di Milano for contravention of Article 29 of Law No 580 of 4 July 1967 (*Gazzetta Ufficiale* No 189 of 29 July 1967) regulating the manufacture and marketing of pasta products (hereinafter referred to as 'the 1967 law'), and of Article 5 (a) of Law No 283 of 30 April 1962 (*Gazzetta Ufficiale* No 139 of 4 June 1962), amending the health regulations on the production and sale of foodstuffs and

* Language of the Case: Italian.

beverages (hereinafter referred to as 'the 1962 law').

pasta manufactured using only durum wheat;

Article 29 of the 1967 law provides that only durum wheat shall be used for the manufacture of pasta products.

Article 5 (a) of the 1962 law prohibits the use of mixtures containing substances of inferior quality to those laid down by law.

A total of nine Italian undertakings making pasta products (hereinafter referred to as 'Agnesi and Others'), together with their associations (including an international association, hereinafter referred to as 'Unipi and Others') and farmers' associations acting on behalf of the durum wheat growers, ('CNCD and Others') sought damages as civil plaintiffs in the criminal proceedings.

In his defence, Mr Zoni argued that the Italian provisions were incompatible with Article 30 of the EEC Treaty and were therefore inapplicable to the main proceedings. In those circumstances the pretura di Milano, by an order dated 19 March 1986, submitted the following question for a preliminary ruling:

'Must Article 30 and Article 36 of the EEC Treaty be interpreted as meaning that the obligation laid down by the law of a Member State to use exclusively durum wheat in the manufacture of dry pasta intended to be marketed in the territory of that Member State is lawful if it is established and proved that that obligation:

(1) was imposed solely in order to safeguard the superior properties of

(2) does not entail any discrimination to the detriment of products with the same characteristics coming from other Member States, or discrimination against Community traders in those products, in so far as traders of the aforesaid Member State are also subject to the same restrictions;

(3) was not introduced in order to pursue protectionist aims to the advantage of the domestic product and to the detriment of products made elsewhere in the Community and having the same characteristics?'

B — The relevant Italian and Community provisions

1. The law on pasta products: its wording and aims

(a) The wording of the law

Until 4 July 1967 the law in force in Italy was Law No 874 of 22 June 1933. This law contained a single rule regarding product description. It permitted the use of either durum wheat flour or common wheat flour for the manufacture of pasta.

That law was replaced by Law No 580 on pasta products, which originated in a parliamentary initiative known as the 'Bartole draft'.

Law No 580 contains provisions governing both the manufacture and the marketing of pasta. Some of the marketing provisions are concerned with the description of pasta products, whereas others are concerned with the labelling displayed on the packaging.

preparation of fresh (moist) pasta intended for immediate consumption.

Dry pasta must be manufactured exclusively from durum wheat meal. That is clear from the provisions of Article 29, read together with Article 28.

In addition, the first paragraph of Article 36 of the 1967 law provides: 'It is prohibited to sell or to stock for the purpose of sale pasta products whose characteristics differ from those laid down herein'. The second paragraph of Article 50 of the same law provides: 'The importation of...pasta products whose qualities differ from the qualities prescribed herein...is prohibited'.

Article 28 provides: "Pasta di semola di grano duro" (pasta made from durum wheat meal) and "pasta di semolato di grano duro" (pasta made from fine durum wheat meal) shall mean the products obtained by extruding, rolling and drying pasta which is prepared, exclusively, either (a) with durum wheat meal and water, or (b) with fine durum wheat meal and water'.

Rules on the manufacture of pasta

The 1967 law draws a distinction between the industrial manufacture of dry pasta, intended for storage, and the small-scale

Article 29 provides: 'The production of pasta intended for marketing is permitted only for those types of pasta having the following characteristics:

Type and description	Maximum moisture content %	As a percentage of dry matter					Maximum acidity (in degrees) ¹
		Ash		Fibre		Nitrogenous substances (nitrogen × 5.7 min.)	
		Min.	Max.	Min.	Max.		
Pasta made from durum wheat meal	12.50	0.70	0.85	0.20	0.45	10.50	4
Pasta made from fine durum wheat meal	12.50	0.90	1.20	—	0.85	11.50	5

¹ The degree of acidity is expressed by the number of cubic centimetres of normal alkaline solution required to neutralize 100 g of dry matter.

Pasta will not reach the minimum percentage ash-content laid down by Article 29 unless it is made exclusively from durum wheat, because the latter has a higher ash-content than common wheat.

The rule concerning the exclusive use of durum wheat in the manufacture of pasta is subject to two exceptions.

Under Article 33, 'the preparation of fresh pasta products is permitted' and 'the use of common wheat flour is permitted' in their preparation.

Under the first paragraph of Article 50, 'the manufacture of . . . pasta products whose qualities differ from those laid down by the provisions of this law is permitted provided that the products concerned are intended for exportation and are not harmful to human health, following authorization in accordance with the detailed rules to be laid down by regulation'.

Rules on the description of pasta products

Article 28 of the 1967 law, mentioned above, has the effect of confining the description 'pasta made from durum wheat meal' to pasta manufactured exclusively from durum wheat meal and water. It follows from the aforesaid Article 29 that such pasta is required to carry that description.

Rules on the labelling of pasta products

In accordance with Article 35 of the 1967 law, the packaging must show, in Italian, the manufacturer's name or company name, his registered office, the location of the factory, the description and type of the pasta and the net weight.

(b) The aims of the 1967 law

The account of the parliamentary debate discloses that two kinds of considerations prompted the Italian legislature to adopt the 1967 law.

First, the legislature sought to guarantee the quality of pasta; pasta which contains only durum wheat cooks much better.

Secondly, the legislature sought to encourage the growing of durum wheat. The market in pasta products is the only outlet in the Community for farmers growing durum wheat, and those growers have no real option of changing over to other crops in the southerly regions of the Community in which they are established. In those circumstances the aim of the legislature was to guarantee their one and only outlet by compelling pasta manufacturers to use exclusively durum wheat.

2. *The 1962 law*

Under Article 5 (a) of the 1962 law, Law No 283 on foodstuffs in general, 'it is

prohibited in the preparation of food to use... foodstuffs... which are mixed with inferior foodstuffs or treated in such a way as to alter their natural composition...'. .

The relationship between the 1967 law and the 1962 law is as follows.

On the one hand, whilst prohibiting the treatment of pasta with chemical agents or other additives, Article 34 of the 1967 law defers to the powers vested in the Minister for Health by the 1962 law, namely to permit the use of chemical colourants or additives in certain conditions (Article 5 (f) and (g)).

On the other hand, the first paragraph of Article 8 of the Ministerial Decree implementing the 1967 law provides that the ingredients used in the preparation of special dry pasta and fresh pasta products must meet the standards of hygiene and purity laid down by the provisions in force, and in particular by Article 5 of the 1962 law.

3. Council Directive 79/112/EEC

On 18 December 1978 the Council adopted a directive on the approximation of the laws of the Member States relating to the labelling and presentation of foodstuffs (Official Journal 1979, L 33, p. 1). Under Article 6 (5) (a) of the directive, 'The list of ingredients shall include all the ingredients of the foodstuff, in descending order of weight, as recorded at the time of their use in the manufacture of the foodstuff'.

The application of Article 6 (5) (a) to mixed pasta products containing, for example (as in the present case), 60% common wheat and 40% durum wheat, requires the common wheat to be mentioned first, but without any specification of their proportions.

Council Directive 79/112/EEC was implemented in Italian law by Decree No 322 of the President of the Republic dated 18 May 1982.

4. *The common organization of the market in cereals*

Inasmuch as the law on pasta products is designed to encourage the growing of durum wheat, it pursues an objective which the Community has upheld since 1967 as part of the common organization of the market in cereals.

Community action is twofold: first, an intervention price is established for durum wheat at an appreciably higher level than that of common wheat and, secondly, direct aid is granted for the production of durum wheat; see Article 10 of Council Regulation No 120/67/EEC of 13 June 1967 (Official Journal, English Special Edition 1967, p. 33) and Article 10 of Council Regulation No 2727/75 of 29 October 1975 (Official Journal 1975, L 281, p. 1).

Since 1967 the production of durum wheat has been steadily increasing in Italy, as it has in France and Greece, and has even extended northwards, in particular into

Germany, Denmark and the United Kingdom. Production in Italy accounts for some three-quarters of the Community total.

In view of those developments the Community, from 1976 onwards, restricted the conditions for granting the aid. The first step was to fix the amount of the aid by reference to the area under cultivation and not, as previously, to the quantities produced. Secondly, it became possible to limit the aid to certain regions. Lastly, the aid was confined to durum wheat having qualitative and technical characteristics to be determined; see Article 5 of Council Regulation (EEC) No 1143/76 (Official Journal 1976, L 130, p. 1).

The standards regarding 'qualitative and technical characteristics' mean *inter alia* that the durum wheat flour must be suitable for use by the durum meal industry and for the manufacture of pasta products; see Article 3 of the Council Regulation (EEC) No 3103/76 of 16 December 1976 (Official Journal 1976, L 351, p. 1). In an implementing regulation the Commission stipulated that the durum wheat must 'have qualitative and technical characteristics establishing that pasta made therefrom is not sticky when cooked'; see Article 2 of Commission Regulation (EEC) No 2835/77 of 19 December 1977 (Official Journal 1977, L 327, p. 9).

As regards the regions qualifying for the aid, the basic legislation now provides that aid is granted only in areas of the Community in which the production of durum wheat constitutes a traditional and important part of agricultural production; see Article 1 of Commission Regulation (EEC) No 1451/82 of 18 May 1982 (Official Journal 1982, L 164, p. 1).

Community production of durum wheat none the less continued to expand. Today, part of that production no longer finds outlets even on the Community market. In view of that situation, the Community envisages a further modification to its policy in that sector. In particular, it proposes to lower the intervention price for durum wheat and thus bring it closer to the intervention price for common wheat.

In any case, the buying-in by Community intervention agencies of large quantities of durum wheat is accounted for not only by the expansion in Community production but also by the importation of durum wheat from North America.

II — Written observations submitted to the Court

Written observations were submitted by Mr Zoni, by Agnesi and Others, Unipi and Others, and CNCD and Others, the civil plaintiffs in the main proceedings, and also by the Italian, French and Netherlands Governments and the Commission. CNCD and Others refer for the most part to the observations submitted by Unipi and Others, limiting their comments to the 'agricultural' aspects of the issue.

A — *The existence of a restriction on imports within the meaning of Article 30 of the EEC Treaty*

Mr Zoni asserts that the Italian 1967 law entails discrimination, inasmuch as it prohibits the importation of pasta made from common wheat whilst allowing Italian exporters to use common wheat in the manufacture of pasta intended for exportation.

Furthermore, the 1967 law seeks to protect Italian production of durum wheat.

Agnesi and Others observe that Article 30 of the EEC Treaty should be viewed in conjunction with Article 36. Restrictions justified on one of the grounds set out in Article 36 are not unlawful unless they conceal interests which are incompatible with the freedoms established by the Treaty (see the second sentence of Article 36).

That is not the case in this instance. The Italian 1967 law creates no discrimination against foreign products in favour of Italian ones. Moreover, it pursues no protectionist goal contrary to the fundamental principles of the EEC Treaty.

According to Unipi and Others, the Cassis de Dijon judgment of 20 February 1979 (Case 120/78 *REWE-Zentral* [1979] ECR 649) must be interpreted as meaning that a measure which applies universally must be appraised not only according to a strict interpretation of the criteria in Article 36 of the EEC Treaty but also in accordance with broader criteria, such as 'mandatory requirements' and 'grounds of public interest'.

In this case the Italian law does indeed apply equally to domestic and imported products. If the law had compelled only Italian traders to manufacture and sell in Italy pasta made exclusively from durum wheat, those traders would immediately have objected to the law as being unconstitutional for breach of the principle of non-discrimination set out in Article 3 of the Italian Constitution. The fact that the law permits common wheat to be used in the manufacture of pasta intended for exportation does not make it discriminatory.

If indeed there was discrimination, it arose from a divergence between the legislative systems of the various Member States. The Italian 1967 law itself is not discriminatory. For the purposes of applying Article 30, the question whether treatment is discriminatory in nature must be determined solely on the basis of the legislation of the State where the product is marketed, as the Court expressly acknowledged in its judgment of 20 April 1983 (Case 59/82 *Schutzverband* [1983] ECR 1217).

The legislature had not sought to protect Italian pasta manufacturers from their foreign competitors, because the latter were not exporting pasta to Italy in 1967. In practice, the law had mainly affected those Italian pasta manufacturers who were using common wheat at the time.

Nor had the legislature sought to protect Italian durum wheat growers against foreign common wheat growers. If it did favour the former category at all, it did so principally at the expense of their domestic competitors who grew common wheat. Growers of common wheat had, incidentally, been in the majority at that time.

On the same grounds the Italian Government claims that the 1967 law did not seek to protect either Italian pasta manufacturers or Italian growers of durum wheat.

It further claims that the 1967 law is not discriminatory in its effects. The Italian Government explains that the authorization to use common wheat in the manufacture of pasta products intended for exportation is designed merely to extend to Italian manufacturers an option available to all manufacturers established in countries in which the exclusive use of durum wheat is not compulsory. The 1967 law thereby seeks to

avoid any discrimination against Italian manufacturers in favour of foreign manufacturers.

The French Government takes the view that the Italian law applies equally to domestic and imported products and that the *Cassis de Dijon* judgment, confirmed by the judgment in the *Souvenirs of Ireland* case of 17 June 1981 (Case 113/80 *Commission v Ireland* [1981] ECR 1625, at p. 1637), is therefore applicable to this case.

According to the Netherlands Government the fact that the 1967 law is of general application does not afford a conclusive argument for regarding it as compatible with Community law. The *Cassis de Dijon* case shows that only imperative requirements in the public interest can justify an exemption from the prohibition under Article 30 of the EEC Treaty.

Turning to the point made by the pretura di Milano concerning the absence of any protectionist aim, the Netherlands Government contends that the determinant factor is not the intention of the legislature at the time of the adoption of the law but above all the effects of the legislation, in particular whether obstacles to intra-Community trade arise when it is implemented.

The Commission observes that the issue as to whether the Italian law is compatible with Community law should be viewed within the terms of the *Cassis de Dijon* judgment. It is apparent from that judgment that even if a measure is not discriminatory by nature, it may be incompatible with Article 30 of the EEC Treaty if it produces effects which restrict trade between Member States and which are not necessary to satisfy any imperative requirement.

As for the point made by the pretura di Milano regarding the absence of any protectionist aim, it is irrelevant that the legislature did not intend to protect the domestic product from the products of other Member States having the same characteristics. The relevant issue is whether the law has the effect of protecting 'the typical national product' within the meaning of the *Prantl* judgment of 13 March 1984 (Case 16/83 [1984] ECR 1299) against competing products from other Member States. In this case, the effect of the 1967 law is indeed to protect such products. It promotes on the one hand the marketing of pasta of typical Italian manufacture, in that it contains only durum wheat, and on the other hand the use of durum wheat which is typically a product of Italian agriculture. It thus puts at a disadvantage both foreign-manufactured pasta normally containing common wheat and foreign-produced common wheat.

B — The existence of 'mandatory requirements' within the meaning of the Cassis de Dijon judgment

1. Consumer protection

Mr Zoni observes that the protection of the Italian consumer can be ensured by an appropriate system of labelling whereby the precise nature of the raw material used in the manufacture of the pasta is specified.

Unipi and Others admit that the argument that adequate labelling would rule out any risk of confusion on the part of the consumer is at first sight reasonably convincing, but claim that it does not stand up to close scrutiny. They set out a number of objections to the argument, concluding that, in short, the only way in which consumer interests can be protected is by laying down the mandatory requirement

that only durum wheat shall be used in the manufacture of pasta.

First, if the law on durum wheat were to be repealed, restaurants would be tempted to prepare pasta from common wheat, since it is cheaper, and offer it to customers at the same price as pasta made from durum wheat, which is superior in quality. Such a practice would confuse the customer and might destroy the image of Italian pasta as traditionally containing only durum wheat. On the other hand, even proper labelling would not eliminate the confusion in the minds of all those who eat pasta in Italian restaurants in which the menu states, at most, that the pasta is 'home made' so as to distinguish it from dried, factory-made pasta.

Secondly, Italian consumers have never been confronted with labels which expressly differentiate between the two possible raw materials for making pasta, namely common wheat and durum wheat. In those circumstances, a label describing pasta by reference to the raw material used would have virtually no effect. In any case, Italian consumers are so accustomed to pasta containing only durum wheat that they would automatically associate the designations 'pasta' and 'spaghetti' with a product made exclusively from durum wheat, without ever looking at the labelling.

Lastly, even if they noticed the appropriate labelling, consumers might be misled as to the 'right' price to be charged. In the first place it is impossible, with the present methods of analysis, to determine the exact quantity of common wheat in mixed pasta products. In the second place, common

wheat costs considerably less than durum wheat. It would therefore be easy to deceive the consumer by charging him a higher price than would be justified by the actual durum-wheat content of the pasta. The 1967 law affords the only means of ensuring that consumers pay the right price.

Unipi and Others further state that the last-named objection is, in their opinion, conclusive evidence that it is impossible to eliminate confusion from the pasta market by using even a proper system of labelling.

Having rejected the argument regarding labelling, they go on to claim that, even if the new drying techniques will shortly have the effect of giving pasta containing common wheat the same firmness when cooked, they will at the same time ruin its taste. All such pasta products have a poor, 'prefabricated' taste. Only by using exclusively durum wheat can pasta be made which remains naturally firm when cooked, without necessitating heat treatments which irreversibly spoil its character.

Moreover, since those drying techniques were developed only recently, imported pasta containing common wheat and treated in that way can no longer be regarded as having been 'traditionally' produced in the Member State of origin within the meaning of the judgment of 26 November 1985 in the '*Gin*' case (Case 182/84 *Miro* [1985] ECR 3731).

Agnesi and Others agree with Unipi and Others that proper labelling cannot

eliminate all risk of confusion in the mind of the consumer. In this context they also refer to the attitude of the Italian consumer and to the deception of the consumer as to the right price for pasta.

They further maintain that, should the pasta be manufactured from a mixture of durum and common wheat, even modern methods of analysis could not establish whether the ingredients were listed on the labelling in descending order of weight, as is required by Article 6 of Council Directive 79/112/EEC.

Authorization for the marketing of imported pasta containing common wheat might also induce some Italian manufacturers to produce such pasta abroad for the purpose of importing it into Italy, which would harm the image of Italian pasta products.

The Italian Government confines itself to the argument concerning the deception of the consumer as to the 'right' price for pasta: the 1967 law is the only means of ensuring that the consumer pays the exact price warranted by the quality of the product which he buys.

The French Government also relies on that argument, together with the argument regarding the attitude of the Italian consumer: the presentation of pasta made from common wheat under the description 'pasta' is bound to create confusion in the mind of the consumer, who associates that term with the exclusive use of durum wheat.

The French Government also argues that, if pasta were to be manufactured from a mixture of durum and common wheat, even modern methods of analysis could not establish whether the ingredients were listed on the labelling in descending order of weight, as is required by Article 6 of Council Directive 79/112/EEC.

Citing the judgments of 7 February 1984 (Case 237/82 *Jongeneel Kaas* [1984] ECR 483, at paragraph 20) and 17 March 1983 (Case 94/82 *De Kikvorsch* [1983] ECR 947, at paragraph 8), the Netherlands Government points out that Article 30 does not prevent the adoption of national rules with the object of improving the quality of domestic products, provided that they do not obstruct the free movement of goods, and that they enable the consumer to buy products made according to a different tradition.

The Netherlands Government observes in relation to the argument concerning the attitude of the Italian consumer that, in any case, the names 'pasta' and 'spaghetti' have become generic terms in the course of time, and that the Court has consistently held that it is incompatible with Article 30 of the EEC Treaty to confine a generic term to a national variety and thus to withhold it from different varieties produced in other Member States.

None the less, the Netherlands Government expresses one reservation. It maintains that situations may arise in which the products involved can no longer be described as 'pasta products' because, for example, the cereal content is too low. There must be a limit below which a product can no longer be considered to match a given name.

The Commission also cites the *Jongeneel Kaas* judgment and points out that in the absence of Community rules Member States are entitled to pursue a policy of quality controls over their national production on condition that it does not obstruct the free movement of imported products.

In connexion with the argument concerning the attitude of the Italian consumer, the Commission cites the judgment in the *Wine Vinegar* case of 9 December 1981 (Case 193/80 *Commission v Italy* [1981] ECR 3019, at paragraph 23), according to which the interests of the consumer who, being accustomed to the commercial use of a particular term, mistakenly associates it with a particular product, may be safeguarded by the compulsory inclusion of proper labelling to show the nature of the product sold. The Commission also points out that the Italian consumer is already given an indication of the composition of the pasta offered to him for sale by the name, without even needing to study the list of ingredients.

2. Fair trading

As stated above, the supporters of the 1967 law all maintain that the compulsory use of durum wheat alone is the only means whereby consumers may be sure of paying a price exactly matching the quality of the product.

Without expressing an opinion on this point, the Commission relies on the abovementioned judgment in the *Gin* case in concluding that, on the contrary, the obligation to use only durum wheat cannot be justified by an imperative requirement relating to fair trading.

It points out that pasta made from durum wheat is required to bear a distinctive trade name and is thus already distinguished from pasta containing common wheat. From that point of view the judgment in the *Gin* case, delivered in a case in which Netherlands gin and Belgian gin were not distinguished from one another by their name, is *a fortiori* applicable.

3. Public health

Mr Zoni maintains that it is well known that common wheat is just as natural a raw material as durum wheat and that no one has yet claimed common wheat to be harmful to health.

Unipi and Others argue that the compulsory use of durum wheat alone allows additives and colourants to be omitted from the manufacture of pasta. They would be indispensable for giving pasta containing common wheat the amber appearance characteristic of pasta made solely from durum wheat. One of those colorants would be tartrazine which, if absorbed in regular doses, might prove dangerous to health, especially given the per capita level of pasta consumption in Italy.

The Italian Government endorses that line of argument and also concludes that additives and colourants, if absorbed in large quantities, can have deleterious effects on human health.

Furthermore, it would not be possible to ensure proper consumer information, because the additives in question do not belong to the ingredients which must be shown on the packaging pursuant to Directive 79/112/EEC.

According to the French Government, the specialists are unanimous that durum wheat is the only raw material which yields pasta products of good quality, in terms of taste, colour and firmness when cooked. Thus, pasta made from durum wheat, as opposed to common wheat, does not necessitate any food additives such as colourants, gelling agents, stabilizers or emulsifiers.

The Commission points out, however, that it was established by the pretura di Milano that, in this instance, the imported pasta products were in no way harmful to health.

4. The protection of an agricultural sector in accordance with the common organization of the market

According to CNCD and Others, in the cereals sector the Community itself has been guided from the outset by a logic regarding the 'purity' of durum-wheat pasta which is analogous to that underlying Italian legislation. Consequently, such legislation does not constitute an infringement of Articles 30 and 36 of the EEC Treaty. To call the Italian legislation in question is, indeed, wholly inconsistent with Article 39 (2) (a) of the EEC Treaty and with every Community measure which, pursuant to that article, takes account of 'the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions'.

The Italian Government maintains that the 1967 law is designed to promote the

production of durum wheat, and thereby contributes to the attainment of a basic goal which the Community itself adopted when organizing the market in cereals. The policy takes account of the structural and natural disparities between the various agricultural regions of the Community in accordance with Article 39 (2) (a) of the EEC Treaty, and therefore meets an imperative requirement.

The 1967 law is, furthermore, a means proportionate to the goal which it pursues. That point is demonstrated by the very fact that it meets a general imperative requirement which the Community legal system has adopted and endorsed. Nor should the fact be overlooked that, in the areas where it is traditionally grown, durum wheat could not really be replaced by other forms of agriculture because of the climate and soil. Finally, account must be taken of the fact that pasta producers in other Member States do not in practice incur any loss on account of the 1967 law, since virtually no pasta was imported into Italy either before or after its adoption.

According to the French Government, the repeal of the 1967 law would call in question the common agricultural policy in so far as durum wheat is concerned. The Community has encouraged the production of durum wheat so as to ensure a fair standard of living for its producers (see Article 39 (1) (b)) and to guarantee adequate supplies for the pasta-making industry (see Article 39 (1) (d)). Competition from common wheat would threaten the one and only outlet for durum wheat and hence the development of durum wheat production which was encouraged by the Community.

According to the Netherlands Government it is not possible for a national protective measure to supplement a measure adopted in pursuance of the common agricultural policy. With reference to the case at issue, the Netherlands Government observes that Community aid for durum wheat is justified by its lower yield per hectare than that of common-wheat varieties. Once that Community aid has compensated for the disadvantage in terms of output, a national measure designed to encourage the use of durum wheat at the selling stage is no longer warranted.

In any case, the Italian provision is contrary to Article 18 (2) of Regulation No 2727/75, which prohibits the application of any quantitative restriction or measure having equivalent effect.

According to the Commission, the protection of a given sector of the economy, including agriculture, cannot constitute an imperative requirement justifying an exception to the basic principle of the free movement of goods, because that would be tantamount to accepting the very principle of protectionism. The Commission also maintains that national protective measures are, in any case, no longer warranted if the common agricultural policy already affords protection for a given sector.

Finally, it observes that it is for the Community alone to adopt appropriate measures should the repeal of the 1967 law endanger the only outlet for durum wheat and necessitate the buying-in of even larger durum wheat surpluses through the intervention machinery.

III — Replies to the questions put by the Court

In reply to a question from the Court, the Italian Government explained that the rule requiring the exclusive use of durum wheat does not apply to the preparation of fresh (moist) pasta essentially for three reasons:

the very marginal importance of such products;

deference to local customs and traditions, according to which special pasta is prepared by mixing fresh pasta with other ingredients such as meat and vegetables;

the multiplicity of premises used in the small-scale preparation of fresh pasta, which makes it impossible to carry out health checks to detect the presence of common wheat in the pasta.

Asked whether pasta made from common wheat contains additives the use of which is prohibited by Article 5 (a) of the 1962 law on foodstuffs in general, the Italian Government explains that, although in its written observations it pointed out the problem of additives used in the manufacture of such pasta in order to give it the organoleptic characteristics of pasta made from durum wheat, it did not mean to suggest that all common wheat pasta contains such additives or colourants. It admits that it has no evidence to support such a suggestion.

Turning to the aims of the 1967 law, and in particular the aim of promoting the growing

of durum wheat, the Italian Government explained that Italian durum-wheat production would have been jeopardized if that law had not required pasta manufacturers to use only durum wheat. It points out that it would not have been difficult to envisage a veritable invasion of common wheat for the manufacture of pasta, since it is appreciably cheaper.

Questioned as to why Italian pasta manufacturers import durum wheat from North America in spite of the surpluses of that product on the Community market, the Commission qualified its observations that such imports are essentially attributable to the superior quality of American durum

wheat. It explained that this superior quality does not relate to the non-sticky characteristics of durum wheat pasta when cooked but rather to its colour. Italian pasta manufacturers mix domestic durum wheat with durum wheat imported from North America solely in order to obtain pasta displaying certain characteristics (especially as regards colour) which are expected by the Italian consumer and cannot be achieved by the use of additives and colourants, since these are prohibited by law.

R. Joliet
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL MANCINI

(see Case 407/85, p. 4246)