OPINION OF Mr ADVOCATE-GENERAL ROEMER DELIVERED ON 18 SEPTEMBER 1973 [1]

Mr President,

Members of the Court,

The plaintiffs in the proceedings on which I am expressing my opinion today are mill owners in different localities of the Federal Republic of Germany (on the Rhine, the Main, the Weser, as well as in Berlin) in which *inter alia* — or exclusively, as in the case of the plaintiff in Case 65/72 — they process durum wheat into cereal meal. In the main they obtain the necessary raw material from third countries, and only to a limited extent from France, the only country — apart from Italy — where it is grown within the Community.

This raw material is covered by the common organization of the market for cereals as laid down in Regulation No 120/67 of the Council of 13 June 1967 (OJ No 117, p. 2269). It is necessary to make the following detailed remarks in this connection.

On the basis of the aforementioned regulation of the market for durum wheat a series of prices is fixed annually. Amongst these there must in the first instance be mentioned the target price. It is fixed 'for Duisburg at the wholesale stage, goods delivered to warehouse, not unloaded' (Article 2 of Regulation No 120) and constitutes the amount which it is assumed that the market price in this area will attain. During the marketing year 1971/72, which — as will emerge later — is particularly relevant in relation to the present proceedings it amounted, pursuant to Regulation No 1054/71 of the Council (OJ L 115, p. 8) to 127·50 u.a. Reference must further be made to the threshold price. One might call this the target price calculated as at the frontier (i. e., Rotterdam), for it is ascertained by reference to the target price, deducting costs of transport to Duisburg, the costs of trans-shipment as well as the importer's profit margin. As we know, imports from third countries are brought up to the level of this price by means of levies which correspond to the difference between the cif price and the threshold price. During the marketing year 1971/72 the threshold price based upon Regulation No 1120/71 of the Council (OJ L 118, p. 3) amounted to 125·25 u.a. One further ought to mention the intervention prices, i. e., the prices at which intervention agencies are obliged to purchase cereals. During the marketing year 1971/72 — a different situation applied as from 1 August 1972 — there existed further a basic intervention price which, pursuant to Article 2 of Regulation No 120, was likewise fixed for Duisburg and which, pursuant to Regulation No 1054/71, amounted to 119·85 u.a. For all other trading centres there applied during the marketing year 1971/72 a single derived intervention price (previously there had been several derived intervention prices) and pursuant to Regulation No 1530/71 of the Council (OJ L 162, p. 16) it amounted to 112·44 u.a. Finally one must also mention the 'guaranteed minimum price for durum wheat' mentioned in Article 2 of Regulation No 120. It is of importance in connection with the encouragement of durum wheat cultivation, for it is intended to ensure to producers a minimum income which would render cultivation worthwhile. It is fixed for the trading centre of the area with the largest surplus, and during the marketing year 1971/72 it amounted, pursuant to Regulation No 1054/71, to 147·90 u.a. Since processing undertakings would however have found this level intolerable (it would in fact have resulted in excessively high consumer

1 — Translated from the German.

prices and the danger of a change to the cheaper common wheat) it was provided in this context that procedure should be granted an aid from the resources of the Agricultural Fund. That aid corresponds to the difference between the guaranteed minimum price and the intervention price of the area with the largest surplus. Pursuant to Regulation No 1531/71 of the Council (OJ L 162, p. 18), it amounted during the marketing year 1971/72 to 35·46 u.a.

The applicants, who, as has been stated, import almost exclusively durum wheat from third countries on the basis of the threshold price, claim that as a result of this price regulation they are at a disadvantage. In particular they argue that French millers who process durum wheat into cereal meal enjoy, compared with them, a competitive advantage since they are able to obtain French durum wheat at the considerably lower intervention price which is not available to the applicants, or the acquisition of which would not in their case make sense due to the high cost of freight. Thus there had resulted a considerable increase in imports of cereal meal from France at prices that lay appreciably below the applicants' sale prices. The applicants in this way had lost shares in the market, or in the alternative they had sustained losses by reason of their having adjusted to the French sale prices. For the reasons mentioned they addressed themselves by letters of 12 and 18 May 1972 to the Council and Commission of the European Communities. They requested them to ensure that the competitive disadvantages be removed (e.g., by reducing the aid in such a way that it was brought back to the level of the target price). They also applied for compensation for the damage which they had been caused in the manner stated during the marketing year 1971/72.

The Council and Commission did not however accede to this request. They in fact stated, (as regards the Council by a telex and by letter of 17 July 1972) that the criticized Regulations could indeed be reconciled with the Treaty, alternatively (vide the Commission's letter by its Directorate-General for Agriculture of 13 July 1972) that the aids Regulation for durum wheat did not offend against provisions of superior law and that furthermore one had to bear in mind that the French undertakings that were in competition with the applicants likewise processed considerable quantities of imported durum wheat.

Thereupon the aforementioned German millers applied to the Court. Their application is for an order against the Council and Commission of the Communities jointly to pay compensation in respect of the damage the applicants had been caused. Their method of calculating the same is to multiply the quantities of durum wheat imported by them during the marketing year 1971/72 from third countries by the difference between the threshold price and the intervention price — for the sake of Community preference reduced by an amount of 1·1 u.a. After this is converted at the rates applicable to the levies during the marketing year 1971/72, it results in a total amount of DM 9 487 281·01 claimed by way of damages; (as regards the figures of damage in respect of the individual applicants I refer you to the applications). The applicants further claim interest as from 1 February 1972.

I shall now examine how one should approach this complaint, in relation to which the Council and the Commission have raised different objections.

1. In the first place a preliminary question will have to be clarified.

The claims, as has already been stated, are directed against the Council and the Commission jointly. In the applicants' view these Community institutions are jointly liable for an amount which admittedly only has to be paid once. In this connection the question has been asked whether the claims are made against the *correct parties*. Both the

defendants are of the opinion that this is not the case. They take the view that in such cases it is the *Community* that is liable and that the claim is accordingly to be made against the Community. Beyond this, however, they are not in agreement on the question of the necessary representation of the Community. The Council takes the view that it has the task of representing the Community in cases where actions on the part of the Council are said to have caused damage. The Commission on the other hand believes that in general it is called upon to represent the Community in cases involving claims for compensation and in this connection it relies upon Article 211 of the EEC Treaty.

In connexion with this — in my opinion not very important — problem one must in the first place say this.

In Article 215, second paragraph, of the EEC Treaty, the provision upon which the applicants base their claims, it is stated: 'In the case of non-contractual liability, the Community shall ... make good any damage caused by its institutions or by its servants in the performance of their duties'. Agreeing in this respect with the defendants, one can indeed deduce from this that such claims are to be made against the Community, that accordingly it is the Community with its common budget which is the appropriate party to sue. The Community must however be represented before the Court by an institution, and if the matter is looked at in this way there seems to be no objection to a claim to compensation being directed against the institution which represents the Community (as for instance happened in Case 5/71, Rec. 1971, p. 985). One might in this connexion also refer to the wording of Article 215, second paragraph, in which reference is made to damage *caused* by the *institutions* of the Community.

As regards the further question which institution should represent the Community in particular proceedings involving liability for breach of official duty ('Amtshaftung'), I should in this connexion hesitate to rely upon Article 211 of the Treaty, i.e., the provision reading: 'In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission'. In fact in the context of this provision one feels entitled to assume that it only refers to the legal relationship in civil law between the Community and outsiders and to its representation before national courts. Rather more tempting therefore is the solution proposed by the Council, a solution which in the nature of the matter and in the light of the wording of Article 215, second paragraph, is almost compelling. As regards the appropriate legal representation one therefore has to ask to which institution the responsibility for damage is to be attributed, and in a case where a formal legal act is said to be the cause of the damage, one has to remember that pursuant to Article 4 of the Treaty 'each institution shall act within the limits of the powers conferred upon it by this Treaty'.

If one follows this principle in the present case, then the claims must clearly be made against the Council, because what is criticised are Council Regulations fixing prices and one must therefore in the first place examine their legality. On the other hand it is questionable whether the Commission can also be brought into the proceedings. In my opinion this view cannot be justified on the basis that the Commission *proposed* the said Regulations to the Council, since responsibility for their final acceptance obviously rests with the Council alone. Nor, in order to bring the Commission into the proceedings, can one base oneself upon the argument in the application in which there is a reference

to defective supervision of the market — something that might suggest responsibility on the part of the Commission. If I understand it correctly, this only refers to a review of the market and of its arrangements *before promulgation* of the measures that are under attack, i.e., in connexion with their preparation within the framework of the proposals made by the Commission. It does not on the other hand refer to an independent supervision of the market, say in connexion with the application of the competition rules in the Treaty, i.e., in a field in which the Commission does indeed possess independent capacity to act.

I should therefore think that correctly the claims had to be directed against the Community, or alternatively against the Council as the institution representing the Community. Since beyond this there was no reason for bringing the Commission into the proceedings, the claim will in this respect have to be dismissed as inadmissible.

2. The claims for damages filed are based upon facts in which so-called 'legislative injustice' ('normatives Unrecht') plays a part. That much has already become clear. Arising from this, objections were raised in the proceedings concerning the admissibility of the claims as a whole. I should therefore in the first instance like to examine these further.

In this connexion the defendant Commission in the course of the written procedure took its stand on Judgment No 5/71 (in which the problem was likewise relevant). Nevertheless it felt entitled to express doubts as to admissibility having regard to the fact that the regulative content of the provisions at present before the Court and alleged to have caused damage is much more general than that of the provisions dealt with in Case 5/71. Besides, it is of the opinion that in the proceedings at present before the Court there can be no question of a clear infringement of superior law within the meaning of Judgment No 5/71. The Council in the course of the written procedure expressed reservations, arguing that if an application to set aside is not admissible, then neither can an action for liability be admitted on the basis of the financial consequences of an allegedly unlawful act. Besides, the Council argued, at the most a claim to compensation could in such cases arise if it was a case of direct and special damage involving serious culpability, of which on the applicants' argument there cannot really be any question here. In the oral proceedings the advocate acting for both the defendants went even further. He stressed that it was the object of the proceedings to bring about a revision of the organization of the market in cereals, and argued that this object could indeed be achieved with a finding against the defendants by reason of its *de facto erga omnes* effect. Such a procedure was, however, not reconcilable with the system of legal protection afforded by the Treaty. Furthermore he took the view that Article 215, second paragraph, had to be amplified paying due attention to the legal systems of the new Member States. If one proceeded in this manner then, having regard to the way the present legal problems are dealt with in the legal systems of the new Member States one could hardly argue in favour of upholding the decision in Judgment No 5/71, i.e., the affirmation of legal liability for legislative injustice.

Let us now see what follows from all this in connexion with the consideration of the cases now before the Court.

First of all it is clear that some of the reservations referred to have already been raised in connexion with Case 5/71 and were there dealt with at length. One therefore no longer has to return to these objections, particularly since nothing really new has been submitted in this connexion.

In particular this applies to the arguments derived from the system of legal protection of the Treaty and the

limited capacity of individuals to sue in relation to legislative acts. Furthermore, I believe that there is no cause to fall back on investigations of comparative law on the problems before the Court which have been undertaken in relation to the legal systems of the original six Member States. Dealing with a critical comment made by the lawyer of the two defendants, one might in this connexion point out that he evidently misunderstood the conclusion contained in the Opinion in Case 5/71 in relation to the widespread existence of liability for legislative injustice. In fact all that this meant was that such a principle has been recognized in a number of Member States (the 'widespread existence' had to be understood in a geographical sense only); however it was by no means overlooked in the Opinion and in arriving at the judgment that cases of liability for legislative injustice ('legislatives Unrecht') are rarities and in practice only of minimal importance (a realization by the way which in the long run will also probably apply to Community law).

As regards the principle of liability for legislative injustice, one therefore only has to ask oneself whether the enlargement of the Community and the inclusion of three further legal systems for the purposes of the comparative examination of law under Article 215 is a reason for solving the problem now before the Court in a manner different from that adopted in Case 5/71. In this respect several considerations are in my view called for.

Right at the outset I will admit that it would be difficult to argue that the principles of Judgment 5/71, pronounced on 2 December 1971, i. e., before the accession of the new Member States, belonged to the existing body of Community law that was accepted by the new Member States. On the other hand one can ask oneself whether for the purposes of the interpretation of Article 215, second paragraph, and its application to the present case one needs to have regard at all to the legal systems of the new Member States. At any rate I would not reject out of hand the opinion that the claims now before the Court have to be judged according to the law existing at the time when the liability arose.

If however one does not wish to apply this seemingly justified limitation to the examination, that is if one wishes to include the legal systems of the three new Member States in the examination, then — as has been convincingly shown by the defendants' lawyers — this certainly does not *support* the view that liability also extends to legislative injustice. Perhaps this does not apply to quite the same extent in the case of Danish law, which, I think I am right in saying, does not *a priori* exclude a liability for legislative injustice, but where the courts only show a certain reluctance to test decisions that are within the discretion of the legislator. However, the conclusions indicated may certainly be drawn in the case of the legal practice in Ireland and the United Kingdom, even though, in the case of English law, one ought not to overlook the fact that the arguments against it relate in the main to Acts of Parliament and the sovereignty of Parliament, a field in which an affinity with Community law, and particularly with the present case, is less easily discernible than in the case of secondary legislation enacted by the executive.

All this does not however as yet amount to decisive conclusions militating against the continuation of the previous case law. What is important in ascertaining the law under Article 215, second paragraph, is not the unanimity of the legal systems of all Member States, nor a kind of vote ending in a majority finding; no, it is rather a matter of looking at what eminent legal writers (e.g., Zweigert) have called *evaluative comparative law* ('Wertende Rechtsvergleichung'). In this connexion — as has already been argued in the Opinion in Case 5/71 — what may be highly

relevant is to ascertain which legal system emerges as the most carefully considered (Vide — Zweigert, cited by Heldrich in 'Europarecht' 1969, 346). Looked at in this light however, it may be of some importance to realise that the legal systems of the three new Member States show in the field of State liability a clear *tendency to further development*. There is evidently an enlargement of State liability partly by way of legislation; and particularly in the case of Danish law it has been reported that the courts have lately to an increasing extent turned in this direction. Thus the conclusion might seem justified that in this important field of legal protection one can expect a further narrowing-down of the gap between the three legal systems which, on the point of interest in the present case, are largely negative, and the, if you like, more progressive legal systems of the other Member States. Besides, in the course of examination of questions of comparative law and in absorbing their conclusions into Community law one has to take into account the particular *structure* of this legal system. To this extent it is of particular importance that the legislative process takes place in a manner different from that in existing Member States, especially since Parliament only takes a small part in the matter. This not only entitles us to attribute scant importance to considerations in national law as to the special nature of acts of parliament, for the agreement of which with the constitution special provisions have been made. It also renders it necessary to put special stress on the concept of the strengthening by the Court of legal protection within the Community. I can well imagine that precisely such considerations were decisive for the reasoning in Case 5/71. Notwithstanding the negative results which emerge from the legal systems of the three new Member States in relation to the present problem, there is therefore, if the matter is looked at in this way, no ground for thinking in terms of an alteration of the case law as to liability for legislative injustice.

Dealing with the defendants' objections does not however exhaust the test of admissibility. There remains the question whether it is appropriate to draw a distinction dependent upon the content of a criticised provision (i.e., whether a claim for liability for breach of official duty can only be accepted in the case of laws applicable to particular individuals, but not when there is a high degree of general applicability) and one is bound to ask whether liability depends on whether — as the Council thinks — direct and special damage and a grave degree of culpability can conclusively be shown to exist.

As regards the first point — I should like to stress this at the outset — I do not recommend following the defendants' view. It is indeed open to question whether one is right to draw a distinction dependent upon the degree of general applicability of a legal provision. It is also important that in the judgment in Case 5/71 other measures were taken to limit claims to compensation arising from legislative acts to specific and exceptional circumstances. Furthermore I should think that there is no real difference between the legal position in Case 5/71 (in which the subject matter was a Regulation containing measures for equalising differences between sugar prices in two marketing years) and the Regulation now to be examined concerning the fixing of prices for a particular commodity and a particular marketing year. Admittedly — as the defendants' lawyer has argued — many are affected by the last-mentioned Regulation; however one can make out a smaller circle of specially affected parties, viz., the mills processing durum wheat to cereal meal, and it is right to say that the Regulation — touching allegedly the very core of their existence — has begun to assume the appearance of a specific law applied to them.

Finally as regards the significant features which the Council regards necessary, it

really will suffice if I draw attention to the fact that there is no reference to them in Judgment 5/71. Besides, I am also of the opinion that they are not necessary for the purpose of limiting the entitlement to claim. For this purpose it will suffice to find the clear infringement of 'a superior rule of law for the protection of the individual' which can only mean a particularly flagrant infringement of rules of law, i.e., an event which must be sought in the field of illegality rather than in the field of culpability. In Case 5/71 the assertion that there had been an infringement of the prohibition against discrimination was apparently considered sufficient. A similar allegation was also made by the applicants in the present proceedings, apart from that of infringing the principle of proportionality and of private property, and — a fact sufficient to establish admissibility — they have conclusively proved that it is a matter of far-reaching effects threatening their existence.

Thus there is probably no argument left which on the question of admissibility of the applications could give rise to a verdict adverse to the applicants. Whether apart from this it is open to the applicants to assert a claim on the basis of an act equivalent to dispossession, will be a subject for investigation in a subsequent context.

3. In examining the next question, whether claims to liability arising for breach of official duty ('Amtshaftungsansprüche') are wellfounded, one must, in the light of the arguments so far adduced, first investigate whether the provisions criticised by the applicants are contrary to law and whether there can be a question of a *clear* infringement of a protective norm of superior law.

(a) In this connexion we first have to deal with an argument put forward by the applicants which need not detain us for long. It runs as follows: the main cause of German mills processing cereal meal from durum wheat being jeopardized are the measures for encouraging the cultivation of durum wheat i.e., the grant of aid which guarantees a minimum price to the producers and thus creates an incentive to cultivation. In this way it is said that there was an appreciable increase in cultivation and thus a strengthening of the position of those mills that can process durum wheat originating within the Community. Without these measures of encouragement on the other hand things would, according to the applicants, have remained as before; in particular durum wheat would in northern France only have been cultivated to a limited extent and the mills established there would therefore to a large extent have had to process durum wheat of third country origin, just as the German mills had had to, i.e., they would have had the same starting-point as the applicants. If however one looks at the measures of encouragement in the light of the objectives of Article 39 of the EEC Treaty, one has to recognize that those measures are not essential for their attainment. The objectives there set out can really also be attained without cultivating durum wheat, indeed possibly — if one thinks in terms of the denaturing costs and costs of refunds on common wheat — at lower cost. Looking at the matter in this way, one can therefore think in terms of a disregard of Article 39.

As regards this line of argument, it is important — as we have already found in a number of cases — to realize in the first instance that the multiplicity of objectives listed in Article 39 and the consequent necessity of evaluation leaves the Community institutions wide room for discretion. It is therefore in this field *a priori* extraordinarily difficult to arrive at a finding of an abuse of discretion on the part of the Community institutions.

A further point is that the relevant measures of encouragement have the effects envisaged by the objectives of Article 39 (a), (b), (c) and (d), that is

they are covered by Article 39. That much can be said because the cultivation of durum wheat within the Community shows a deficit, because durum wheat can take the place of surplus products (common wheat and wine), because its cultivation permits a diversification of agricultural production and because in the case of the dry climatic zones it alone can be considered; so it must there be considered a necessary social measure. This however in the present context amounts to the really decisive finding. Indeed, for the purpose of Article 39 it must suffice that a measure comes within its ambit, that accordingly it can be regarded as suitable for the realization of the objectives there set out. Nowhere however in this provision or elsewhere in the Treaty is it provided that Article 39 can be used for the purpose of justifying a measure of agricultural policy only if it is *indispensable, urgently necessary* in connection with the attainment of the objectives of that Article.

Even if, therefore, one could say that on account of the Community preference connected with the encouragement of the cultivation of durum wheat (in the light of the case law an important principle) the objective of maintaining trade so as to stabilize markets under Article 39 (c) had receded into the background, (in fact, as has been shown by the defendants, this is not the case), nevertheless all this would not amount to a case of disregard of Article 39. In no way could one speak of a *flagrant* disregard of this provision within the meaning of Case 5/71 (a clear infringement of a provision of superior law) or of an infringement of a provision amounting to a *protective provision* from the applicants' point of view.

Accordingly nothing can be gained from the applicants' arguments which refer to Article 39 of the EEC Treaty to support their claims to compensation.

(b) A further and rather more important argument relates to the infringement of the prohibition against discrimination. In this context the applicants argue that under the Community system for durum wheat the German mills processing durum wheat to cereal meal were in an appreciably worse starting position than their French competitors. The French mills were able to obtain their raw material on the basis of the low intervention price whilst the German mills were dependent upon imports from third countries and in this connexion had to pay the much higher threshold price. This difference was such that the German mills were no longer competitive within their traditional sales territory, let alone able to compete abroad, particularly in France. The difficulties described could however have been avoided by a reduction of the threshold price (possibly limiting this to the German and Benelux mills) or by a reduction of Community aid, i.e., by raising the intervention price.

As against this the defendants as we know object that the applicants had looked at the matter in the wrong way. In their view it is not correct to use the comparison of costs that had been undertaken as a basis since the applicants were not dependent upon the supply of durum wheat from third countries but could perfectly well have obtained durum wheat produced in France on the same conditions as the French mills. If this happened, then the French mills only retained a certain geographical advantage which in their competition with German mills in Germany had only minimal effects and which could be absorbed in their profit margin.

On the other hand, these arguments are emphatically criticised by the applicants. They argue that the German mills, even if they obtained French durum wheat, were, as compared with their French competitors, under a competitive disadvantage due to the increased transportation costs which could not be bridged by means of the profit margins of the mills. Therefore even looking at matters in the way which the defendants

considered right, there had been a case of appreciable discrimination against the applicants by means of a provision that expects them to process French durum wheat. However, even more important is the fact that the German mills in fact do not to any appreciable extent succeed in purchasing durum wheat on the French market. They claim that in the relevant area of origin the production does not suffice to satisfy even French requirements and that the entry of millers from other territories into this market is fought off, particularly by means of the collection system that is practised there and the traditional connections between the producers of durum wheat and the regional mills.

Let us now see how these complex arguments which lead to the central issue in this case, are to be judged in detail.

(aa) In this connexion let us first undertake a comparison of the competitive conditions as they appear when the German mills obtain French durum wheat and let us go into the question whether it can indeed be accepted as a fact that German mills do not succeed in obtaining access to the French market in durum wheat to any appreciable extent.

(i) As regards the first-mentioned point, I must point out immediately that in this connexion there are a number of points which have not been fully resolved. The defendants calculated the costs of French mills in disposing of their cereal meal within the Federal Republic and the costs incurred by German mills in acquiring French durum wheat. Taking into account the differing costs of freight (freight for cereal meal is said to be higher than freight for durum wheat, the latter being reduced by State grants) as well as the fact that by reason of the rate of extraction larger quantities of raw material have to be transported (the proportions being approximately 2 : 3), they concluded that the French mills' competitive advantage within the Federal Republic amounted to, at the most, about 3 u.a. They take the view that this is an amount that can be absorbed in the course of competition, for it amounts to 15 % of the processing costs and is less than 2 % of the resale price. The applicants on the other hand consider this an erroneous way of putting matters. With corresponding calculations they arrive at a competitive advantage on the part of the French mills of nearly 6 u.a., since in their view it is necessary to put the prior freights of French mills at a figure lower than that assumed by the defendants, to take into account freight to the main customer in Stuttgart, and to include in the calculation the fact that it is not only a mill in Rouen, but also the mills in Paris, with even lower prior freights, that must be considered competitors. They argue that it is quite out of the question to bridge such a competitive advantage within the framework of a profit margin. In fact there can be no question of this even where one is dealing with an advantage of approximately 3 u.a., since German mills processing cereal meal from durum wheat operate on an average profit margin of just over 3 u.a. before tax and interest on capital; (in this connection they refer to a standard calculation sanctioned by the Federal German Minister for Economic Affairs which plays a part in a price agreement approved in a cartel case relating to common wheat mills and which if anything is on the low side for durum wheat mills).

If, therefore, this argument were the crucial point for deciding the case one could not avoid the need for supplementary data, though even at this stage one feels entitled to criticize the applicants for not taking into account the fact that the French mills, in the event of substantial purchases by the German mills on the French market, would be forced increasingly to fall back on durum wheat from third countries at higher prices, which would certainly reduce their competitive advantage.

However, I do not believe that this argument necessitates further data, (particularly for ascertaining freight costs and profit margins). For in reality there are other considerations that ought to be decisive.

(ii) These are connected with the applicants' objection that German mills had not been able to obtain French durum wheat to any appreciable degree. In this connection you will recall that, first in their pleadings and again in reply to a question of the Court, the applicants stated what little success they had had, despite attempts made ever since 1968. (It is a fact that the durum wheat imports from France up to the 1971/72 marketing year only rose to around 13 000 metric tons, that is, a minimal percentage in relation to the total processing undertaken by the applicants). In particular one can refer to what the applicants — producing proof in this respect — have stated in relation to their cooperation with importing firms (with some of whom they were legally associated) and with regard to the continuous contact which these firms maintained with French agents or with their own branch offices in Paris. Whilst such contracts have existed since the fifties and have led to largescale deliveries of common wheat, yet in the case of durum wheat it is said that they only resulted in limited imports of poor quality material after the harvest had taken place and coupled with instructions to observe silence about the matter. By way of example, even after the insertion of an advertisement in a French trade paper in the spring of 1972, as well as after making contact with Synprodur (a French trade association of producers, traders and unions for the durum wheat sector) in the spring of 1962 and strengthening such contacts in the autumn of that year, evincing interest in an outline agreement for over 50 000 metric tons, this did not result in imports worth mentioning. Furthermore the applicants referred to the traditional French collection system and the close relationship existing between producers, collecting agencies and mills in conjunction with Synprodur and forming part of that organization. In this way (as is shown by an announcement in the trade publication 'Le Petit Meunier' of 6 November 1969) there had been contracts for cultivation with the collecting agencies and contracts for delivery with the mills for considerable quantities and for that reason only minimal quantities had reached the market upon which foreign buyers are after all in the first instance dependent (this is proved by *inter alia* drawing attention to the trade publication 'Le Petit Meunier' which during the 1971/72 marketing year contained only two announcements offering durum wheat). Finally the applicants also drew attention to the fact that the total harvest in the relevant French production area around Chartres (during the 1971/72 marketing year it amounted to around 250 000 metric tons) corresponded approximately to the requirements of the French regional mills there established, so that there was in fact no surplus. If the matter is seen in this light, the French processing plants did indeed have an interest in securing this production for themselves, so as not to be dependent upon costly imports.

However, the French growers of durum wheat also had a substantial interest in the maintenance of good relations with the French processers, who provide them with a guarantee of stability, since they have to proceed from the fact that foreign customers are not able in any case to bid in excess of the prices offered by the French processors, owing to the high costs of transport.

We now have to ask ourselves what is to be thought of all these arguments. Now, in the first instance one will probably have to concede that in this context also some points of dispute will remain at the end of the proceedings and that some supplementary data on one or other aspect might be of assistance. Taken all in all I do however believe

that the data supplied by the applicants, combined with familiar experience and one's knowledge of the market arrangements are sufficient for a proper decision to be reached. This decision can in my view only be the following:

We are dealing with a market that has developed over a comparatively short time (the French production of durum wheat in the area of interest in this case has evidently risen from 10 000 metric tons in 1964 to 167 000 metric tons in 1969, finally reaching around 250 000 tons in the year 1972). We are now faced with a production total which in the defendants' opinion cannot be significantly increased and which, we know, just about covers the French processors' requirements. In these circumstances, however, it seems entirely out of the question that parties from outside the national territory might within a short period of time (including in this term a number of years) succeed in appreciably increasing their purchases in this territory contrary to the vital interests of the French processors and against the interests of the producers in maintaining traditional sales channels There can certainly be no question at all of saying that there had been a real prospect of arriving at approximately the same proportion of national and third country wheat for both German and French mills by increasing the extent of German purchases. (For this would mean that French mills would be left with only half the French production). In further examining the matter one has to start from this fact, a fact which can be gathered from the market arrangements, (one need not think in terms of factors disturbing competition, e.g., abuse of a dominant position on the part of the French mills, which is now being examined by the Commission). But in reality all this amounts to no more than recognition of the fact that German mills are to a predominant extent dependent upon the supply of wheat from third countries based upon the higher threshold price and this forces one to examine whether, taken in conjunction with the fact that French mills are able to a predominant extent to process locally grown wheat enjoying a special price system, this can be said to result in a clear case of discrimination against German mills.

(bb) As regards the calculations to be undertaken in this connection, the defendant Commission arrived at the conclusion that the French mills in disposing of cereal meal in Germany enjoyed a price advantage of at the most 8 ua per metric ton. Since this might be further reduced by a variety of factors it amounts on average to at the most DM 15-20 per metric ton, that is an amount which can still be absorbed in competition and which in the Council's opinion could even, under certain conditions. (e.g., intervention prices being substantially exceeded in France), almost completely disappear. The applicants oppose this with very different calculations. In their view the competitive advantage enjoyed by the French mills in the Federal Republic is considerably greater. In fact it amounts to more than 13 ua per metric ton and must therefore be regarded as grossly discriminatory. Besides, even of the average competitive advantage as calculated by the Commission, one may well argue that it is oppressive for the German mills.

When we now go on to examine more closely this important issue in the case, we ought to do so in such a way that we examine first the method of calculation of French cost prices and then those of the German competitors, together with the different factors that are relevant in this connexion.

(i) As we have seen, it is an important question in relation to the French cost prices whether the French mills were indeed able to buy on the basis of the intervention prices or at any rate close thereto (this is the applicants' view), or whether the Council is correct in stating that French mills had been obliged to purchase durum wheat at prices that exceeded the intervention prices by some

7 to 8 u.a. In this respect — and I should like to say this immediately — I did at the end of the day get the impression that the applicants rather than the Council presented the truer picture. I shall give you my reasons. As I see it, the Council in taking its view bases itself mainly upon the announcement in the September 1972 issue of 'Le Petit Meunier' However, there we are dealing with data which do not apply to the marketing year of interest in these proceedings (this also applies to the data mentioned in a letter of Synprodur of 28 September 1972 according to which a price exceeding the intervention price by some 5 u.a. per metric ton was anticipated). The Council further overlooks the fact that we are dealing here with *stock exchange* quotations, i.e., wholesalers' sale prices that probably apply to Paris, whilst according to the convincing explanations on the part of the applicants, the French mills acquired their raw material directly from the collecting agencies, i.e., at the wholesalers' purchase prices. Besides, further arguments in opposition to the Council's views can be found not only in the observations of the Commission which on the one hand acknowledges that figures are admittedly lacking in France in relation to market prices (due to the fact that the bulk of the durum wheat does not openly appear on the market) but which nevertheless proceeds from the basis that during the 1971/72 marketing year the level of intervention prices was in part not exceeded at all and was in part not exceeded to any substantial degree (a point of view for which the Commission produced plausible explanations, such as the fact that the French farmers had in any event achieved improvements in their income as a result of the transfer to the price system of the common market in agriculture, the fact that such improvements were also caused by the currency situation prevailing during that period and the fact that they lack an adequate organization for effectively defending their interests). Supporting the Commission's line of arguments are, further, the data in the issue of 'Le Petit Meunier' of October and November 1971, according to which the sale prices for durum wheat were close to the intervention prices. Pointers in the same direction are also provided by the Commission's replies to a parliamentary question (according to which the producer prices for French durum wheat during the 1968/69 marketing year amounded to 113·51 u.a. and during the 1969/70 year to 102·43 u.a.; i.e., taking into account a devaluation rate of 11·11 %, they were only insignificantly above the intervention price level). Last but not least one can also, in supporting the correctness of this assumption, point to the fact that there is no effective entry onto the French market (a market very much tied by traditions) by outsiders, a fact that otherwise could produce a rise in prices. One may therefore, without any more ado and without assuming that factors disturbing competition had played a part on the French market, proceed from the fact that the calculation of French cost prices in the main took place on the basis of the intervention prices. At any rate, if this level was exceeded to a certain extent, this does not entitle one to correct to any appreciable extent the aforementioned calculations which relate to the competitive advantage of French mills.

As regards other factors concerning the calculation of French cost prices which were also discussed in the proceedings, e.g., prior freight of the French mills, profit margin of the collecting agencies, costs of unloading, the rate of extraction of the French mills and their alleged marginal calculation, I can be quite short because I am convinced that in the present context they are of no great importance. Thus in relation to *prior freight,* one can say that a correction in the sense suggested by the applicants does not affect the matter vey much. Furthermore we are here dealing with a problem of the individual centre which, in generally judging the appropriateness of a price system, hardly deserves

attention. *Profit margins* of the collecting agencies and *unloading costs* can be disregarded when comparing costs since they equally apply in the case of imports from third countries. As regards the *rate of extraction,* we have heard that in connection with these calculations one assumes a standard rate of extraction; besides, it seems to be established that in this respect there is no longer any great difference between German and French mills. Finally, as regards the question of the so-called *marginal calculation,* i.e., the possibility on the part of French mills in a situation of expanding production, thus reducing costs, to exempt goods destined for export from the element of fixed costs, and likewise to transfer the increased price payable on the necessary purchase of additional wheat from third countries to the goods destined for the home market, we are here — as the defendants have rightly said — dealing only with a supposition on the part of the applicants, rather than with facts. If however such a marginal calculation did indeed have an effect, then it ought to be disregarded because it does not originate in a Community provision but was in any case facilitated by offences against the competition rules, the responsibility for which is not at present a matter for discussion.

On the question of the calculation of French cost prices, therefore, the only real objection remaining is that, as has already been indicated, the French mills did not process only French durum wheat, but partly (to the extent of approximately 20 %) they also processed wheat from third countries, to which higher prices applied. One has to concede that this certainly affected the total calculation. However I consider it doubtful whether an appreciable effect could have resulted from this circumstance and it is doubtful in particular whether we are dealing here with an effect that could appreciably reduce the competitive margin which has been shown to exist.

(ii) On the other hand as regards the calculations of the German mills, basically one only has to follow up two aspects to which the defendants have referred — leaving aside remarks concerning freight rates for Rhine cargo for the same reasons as the remarks concerning the French prior freights. There is on the one hand the fact that at the time in question the currency compensatory charges, already sufficiently known from other cases, were not raised on durum wheat imports from third countries; accordingly these imports were rendered correspondingly cheaper; there is the further fact that upon importation there was an opportunity of advance fixing, resulting in the threshold price level not being reached.

As regards the first point however, one realises that currency compensatory charges were not levied on French cereal meal imports either. Even if the precise advantage resulting therefrom as compared with that arising on importation of third country durum wheat — consequent upon the failure to levy currency compensatory charges — is not precisely known (a relevant factor in this respect is the price level for durum wheat on the world market and for French cereal meal, as well as the different movements of the DM exchange rates in relation to the dollar and the French franc) one might yet, after hearing the arguments in the case, get the impression that the absence of the currency compensatory charges probably had no effect; at any rate that it does not oblige one significantly to revise one's comparison of costs (this after all is the reason why the Commission ignored this rather temporary state of affairs). On the question of advance fixing of levies upon the import of third countries wheat, which at that period was possible for a period of thirty days, there was admittedly no dispute that this could result in a reduction of import prices, amounting to possibly 2 to 3 u.a., or exceptionally even up to 6 u.a. However, for one thing it is not certain whether

this advantage was effectively passed on by the importers to the mills or whether it was in part retained as compensation for the fact that in other cases advance fixing resulted in disadvantages. Besides, here too one is only dealing with average orders of magnitude which probably were not to any substantial degree capable of reducing the competitive difference indicated.

Now, what about my conclusions? I consider that despite the points in dispute to which reference has been made and without submitting them to the examination of experts — a course that would certainly be useful — one must conclude that German mills did indeed suffer a detriment within their sales territory as compared to competing French undertakings (obviously there was no question at all of attempting any competition worthy of that name in France). Furthermore, one can also take it for granted that the detriment has assumed an extremely worrying extent, especially if compared with the profit margins shown by the applicants as typical in the case of the German milling sector. It follows that the existence of a serious, gross discrimination cannot be denied, i.e., a clear infringement of the obligation of equal treatment within the meaning of Judgment 5/71.

(cc) Admittedly, before drawing further conclusions one must still go on to ask whether such a result could have been avoided under the total system of the organization of the market and whether accordingly it ought to have been avoided without causing prejudice to the system

On this point, several possibilities could, as we saw, have been considered. One could have considered an alteration of the threshold price for durum wheat, i.e., a reduction to the level of the intervention price, or — for the sake of Community preference — 1·1 u.a. above that. One could have considered reducing the threshold price for Rotterdam only, and to have taken care that the reduction benefited only German and Benelux mills. Finally there would have been a possibility of increasing the intervention price by an appropriate amount, at any rate for the French production area relevant in this case.

i) As for these possibilities, the defendants expressed serious misgivings above all in relation to the first one. One can immediately concede that these are not unfounded, that a general reduction of the threshold price for durum wheat would doubtless constitute a danger from several points of view for the pursuit of the legitimate objects of encouraging Community durum wheat production. Thus we have seen that one has to keep to a price differentiation as against common wheat (according to the world market factors a ratio of 100/118 applies). If it is not observed then this will result in an undesirable situation: the forcing out of common wheat by durum wheat. Since however at that time the threshold price for common wheat amounted to 107·25 u.a. there could really be no question of reducing the durum wheat threshold price to a level of 112·4 u.a. Just as important is the fact that a reduction of the threshold price also involves jeopardising domestic durum wheat production by imported durum wheat. With a reduction in the threshold price as advocated by the applicants there could no longer be said to be an adequate protected domestic production. Particularly in the areas in proximity to harbours, such as Genoa, where produce of third country origin is competing with durum wheat from southern Italy, there is reason to fear an increasing changeover to imported durum wheat. At any rate one must expect a possibility of national durum wheat prices stagnating, i.e., the possibility of their remaining at the intervention price level which might considerably reduce the incentive to cultivation. The Commission has rightly called attention in this context to the significant fact that the previous Italian threshold price was higher than the

common threshold price. Particularly having regard to the interests of the main cultivation area for durum wheat (i.e., southern Italy) a further reduction of the threshold price was inconceivable, and this also applies to a reduction which for the sake of Community preference would have been 1·1 u.a. above the intervention price level.

ii) The second possibility, i.e., the differentiated reduction of the threshold price by limiting it to Rotterdam (i.e., having regard to the imports effected by the Benelux mills and German mills) is also open to several objections and this is so even when, taking into account the fact that French mills also to some extent process wheat from third countries, a margin of 1·1 u.a. from the intervention price level is observed. One of the most weighty objections is that the uniformity of the market and of prices would thus be destroyed. Now it is admittedly correct that in other cases too deviations from this principle have been accepted (e.g., in the case of Italian cereal fodder imports where there was a reduction in the levy). One must not forget however that these were exceptional provisions of temporary applicability, not suitable for more universal application and from which in the absence of a factual connexion legal rights cannot be derived, particularly not by the applicants in this case. As regards the possibility which we are now considering, it must be added that if the advantage is to be limited to the Benelux mills and to the German mills, this would require a procedure to secure customs duties, i e., a device that must be regarded as a foreign body within the Common Market. Furthermore it seems clear that even in this case one cannot wholly exclude an element of indirect prejudice to the national durum wheat market, if only because cereal meal processed from imported wheat and produced by mills in proximity to the borders could displace cereal meal produced from home-grown wheat, or because in such a situation and in the absence of foreign demand one must at least expect a stagnation of French prices. Finally it is not without relevance in this context that this would result in an unequal treatment of mills in other Member States that likewise in part process material from third countries. However, to avoid such unequal treatment would also require a differentiated system for other areas of the Community. This, however, could necessitate a considerable degree of administrative effort and would mean the risk of similar demands for exceptional treatment being made in respect of other agricultural products, quite apart from the fact that the realization of the objects aimed at by encouraging durum wheat production would thus be prejudiced.

iii) Accordingly this only leaves the third possibility to be seriously considered, that is raising the intervention price, at any rate for the region northern France at present under discussion. Under this heading it seems remarkable that it should have been argued in the proceedings that with durum wheat the gap between the threshold price and the intervention price is greater than with other kinds of cereals (e.g., in the case of rye, barley and maize, but also greater than in the case of common wheat, for which the threshold price in 1971 was around 107·25 u.a. whilst the average intervention price for the most important localities was around 98 u.a.). I was given further food for thought by the fact that earlier on (round about the 1968/69 marketing year) there was a higher intervention price for Rouen — around 117·50 u.a. — so that at that time they kept to a narrower margin from the threshold price (123·13 u.a.). This price ratio moreover applied at a time — and it must not be forgotten — when domestic cultivation was not yet very developed and when therefore a stronger demand for domestic durum wheat must have existed, encouraging prices to rise. The smaller margin to

which I have referred, as between the threshold and the intervention price was evidently nevertheless regarded as sufficient for the protection of domestic production. In the light of this finding one cannot in my view avoid the question why later on — *inter alia* in the 1971/72 marketing year — and subsequent to an increase in domestic production a greater margin between threshold price and intervention price should have become necessary for its protection. We have heard no plausible explanation for this in the course of the proceedings. However, we ought now to draw the necessary conclusions from this.

This means: without improperly interfering with the legislator's discretion it must be placed on record that in the 1971/72 marketing year there was a possibility of fixing the intervention price for durum wheat in Northern France at a higher level without jeopardizing the aims of the organization of the market for cereals. Such a measure being appropriate at the same time to reduce the distortion of competition existing as between German and French mills processing cereal meal from durum wheat and to bring this distortion back to an acceptable level, it is also clear that the applicants rightly refer to a system that discriminates to a substantial degree.

4. Under the rules on liability for breach of official duty ('Amtshaftung') (as they have so far been interpreted) there must, following upon my conclusion of illegality, be an investigation whether an allegation of culpability is well-founded. We shall now turn to this question.

In this connexion one must immediately concede that such an examination is particularly delicate when one is dealing with legislative measures intended to apply for a lengthy period and in respect of a large number of affected parties, where therefore one is dealing with complex analyses and difficult forecasts.

As regards the present case, the defendants base their defence first on the argument that it was permissible to proceed from the fact that for German mills too the acquisition of French durum wheat involving only minimal competitive disadvantages can be considered a possibility. Secondly, it was argued that it could not have been foreseen that prices on the French market, affected by a production deficit, would move differently from those on the Italian market, i.e., that they would not appreciably exceed the level of intervention prices, and would thus result in an appreciable competitive advantage for the French mills.

If on the basis of what I have said one turns to an examination of the allegation of culpability then one is bound to recognize that there can be no question of *intentional* infringement of the law. The only real question is whether negligence can be assumed to have existed, i.e., whether it can be said that the Council, by taking the appropriate care, could have recognised and avoided the effects that have been ennumerated.

Within the ambit of this limited investigation, one is however immediately faced with doubts whether as regards the first point (access of German processors to the French market) the Council can successfully defend itself with the argument that its attention had not been sufficiently drawn to the peculiarities of the French market. In this respect it is crucial that the Community institutions either knew or at any rate ought to have known the French collection system (one need only think of the announcement in 1969 in 'Le Petit Meunier' which has already been referred to). They were also acquainted with the development of the market in northern France in which in a relatively short time a considerable increase in cultivation did admittedly take place, which however still has a tendency to show deficits. In this situation, which of course in the case of a regulated market ought to have been anticipated, one must regard as wholly

unrealistic an assumption that German mills ought in a comparatively short time to have succeeded in obtaining access to French durum wheat on a level with French mills. I am therefore of the opinion that we are here dealing with a grave misjudgment which is indeed capable of forming the basis for an allegation of culpability.

On the other hand as regards the development of the French prices — which did not, as might have been expected under the system and as evidently happened in Italy, to any great extent deviate from the intervention prices and come close to the target prices — one rather in this respect feels entitled to think in terms of an excusable 'forecasting error' on the part of the Council. Yet this too is subject to several reservations. In 1964 already, in a minute of the Council of Ministers, it was placed on record that the Commission is obliged to pay attention to distortions of competition on the market in durum wheat. The attention of the Community institutions was thus specifically drawn to the peculiarities of this market. Furthermore one cannot avoid noting that a parliamentary question of November 1970 (the Kriedemann question) drew attention to the matter. From the reply given it can clearly be deduced that the Commission knew how little French prices have risen above the level of the intervention prices. This movement was therefore not wholly unexpected nor was it beyond the understanding of the Community institutions, as is shown by the attempt at explanation adduced in these proceedings and already referred to (references to the development of French producer prices). Added to this there is not only the fact that the French representative in the Council of Ministers and his experts must have been acquainted with the French circumstances. It is also important that the parties affected supplied relevant hints in good time. If in this context one is not prepared to accept as sufficient the mere sending to the Commission of a business report dating back to 1969 by the applicants in Case 65/72, one can nevertheless now treat as wholly irrelevant the applicants' interventions with the German Ministry of Agriculture during 1968 and 1969 (whether on the other hand there were also verbal representations on the part of the president of the German Association of Durum Wheat Millers to the Commission is not clear and remains to be examined if necessary).

On the whole, then, precisely because measures appreciably changing the structure were involved, which required special attention on the part of the Community institutions, we can in this context hardly avoid treating the allegation of culpability as justified, and thus likewise treating this condition necessary to establish a claim of breach of official duty — serious culpability is not required — as fulfilled.

5. As regards the further question whether in fact damage connected with the system in issue was caused to the applicants, I can be quite short.

As we know the applicants argue in this connexion that they are to a considerable extent exposed to the competition of French end products produced under more favourable conditions. They argue that this led to a loss of shares in the market and to a reduction in profits by reason of the fact that they had been forced to adjust to French cereal meal prices.

In fact there are probably some factors in favour of these arguments. Furthermore it has been shown that on the one hand cereal meal imports from France since 1969 (around 7 000 metric tons) had increased to a substantial degree and lately reached 33 000 tons. On the other hand since 1968 there has undoubtedly been a recession in the sales of all the applicants (as indeed there has been in the case of all German mills). Their processing of durum wheat is receding all round to a substantial degree. For the details I can in this

respect refer you to the applicants' detailed statistical particulars which are before the Court.

For the purposes of the current investigation this finding will at this stage be sufficient. The question of the precise extent of the damage caused might be left to a later examination.

6. I shall also deal quite shortly with the problem of causality and the question of a possible share in culpability on the part of the applicants.

As regards the causal link the defendants argue in essence that it is not by reason of the organization of the market that the applicants were unable to establish themselves in the French durum wheat market and that only the intervention price or a price fractionally above that level was in general paid for French durum wheat.

Basically this is so: however, I am of the opinion that this argument misses the point. The crucial fact is that at the time of setting up the organization of the market there existed a certain situation on the market — a settled predisposition of the French market in favour of French purchasers — which was incapable of being removed quickly. One could also observe a structure of price formation that could not reasonably have been caused by factors inducing distortion of competition. Such elements have to be taken into account by the legislator. If due care had been exercized, it ought to have been clear to him that for German mills it was essentially the threshold price for durum wheat that was relevant, but that on the other hand they were unable to obtain the benefit of the lower French price structure. When in the light of the existing division of the market, he fixed the prices in the way it in fact happened, then one must blame him for the distortion of competition and for the prejudice to the German mills; in other words his conduct amounts to a clear causation of the damage that supervened.

As regards the alleged contributory culpability on the part of the applicants, the defendants take the view that several arguments are relevant here; i.e., the lower rate of extraction of the German mills, the fact that they raised no objection against the assessments to levy as well as the fact that they did not in good time make effective representations to the Community institutions.

On this one can in my view say the following. As regards the rate of extraction — this has already been mentioned — we have in the course of the proceedings heard that during the relevant marketing year (1971/72) there was hardly any difference worth mentioning between the German and the French mills. Besides, this factor would only to a small degree explain the prejudice to competition which has been shown. As regards the failure formally to object against the assessments to levy, it has been shown convincingly that the applicants did not themselves effect the imports and therefore did not have the possibility of questioning in national proceedings the validity of the price fixing. Finally, the fact that you cannot construct a contributory fault from an omission to ask parliamentary questions or to raise official complaints with the Community organizations is sufficiently shown by the lack of results achieved by complaints made at a later date. Besides, one must remember that the applicants did at any rate complain to their own national Minister and that the Council of Ministers can fairly be fixed with knowledge of this fact.

Nothing emerges, therefore, in the course of an examination of causality or contributory culpability that would lead to an exclusion of Community liability.

7. This means that nothing now stands in the way of an order against the Community for compensation for the damage. All that remains to be asked is whether the damage can be quantified in the judgment or whether — and this is in particular the view of the Commission — the Court ought at the present time

to limit itself to an interim judgment on the basis of the claim.

In this context it must be said that we can certainly not proceed in the way that the applicants would like us to; there can be no question of an order for the amounts resulting from multiplying the quantities of third country durum wheat imported by the applicants during the 1971/72 marketing year by the difference between threshold price and intervention price, reduced by 1·1 u.a. Indeed, what militates against this is not only the fact that such an abstract manner of calculating damage is unknown in international law and that therefore it cannot be recognized as a general principle of law within the ambit of Article 215. It is particularly relevant that one cannot accuse the Council of having wrongly omitted to reduce the threshold price in favour of the German mills.

Proceeding from the discrimination that has been found to exist and from the fact that it could have been reduced if the intervention price for northern France had, as in previous years, been fixed at a point closer to the threshold price, the decisive question really is what would have been the applicants' position had there been no such discrimination. In this context one must have regard to how in the light of such a system the situation in France would have developed. One therefore will have to examine what amounts the French mills would have had to spend — starting from the margin of excess over the intervention price that has been found to exist — whether and to what extent their exports to Germany would have decreased so that the applicants would not have been obliged to accept the loss of shares in the market, or alternatively to accept reductions in their profits, by reason of their having to adjust to French cereal meal prices. However, it is at the present stage clearly not possible to reply to all these questions. Reliable answers can only be given by experts, and in this connexion the situation in every one of the undertakings would have to be individually examined, the extent of the damage being afterwards calculated.

Accordingly I am of the opinion that at the present time only a judgment on the basic issues can be given and that further clarification of the case is a matter for the experts. Similar considerations also apply to the claim to interest, which at the most can be awarded in principle, the exact computation however taking place at a later date.

8. This still leaves us with the supplementary head of claim which the applicants introduced in their reply, namely, the question whether there can be a claim to compensation without culpability arising by reason of an illegal intervention, similar to expropriation of property, a category to which an industrial plant belongs under German law. In itself and in the light of the results so far, it appears unnecessary again to go into this aspect, all the more so since it is not likely to result in greater compensation. As a subsidiary point and in outline I will nevertheless comment on this problem.

(a) There is first a question of admissibility, since this head of claim was first put forward in the reply. The defendants argue against this having regard to Article 42 (2) of the Rules of Procedure, that is to say the provision reading 'No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure'.

At first sight these objections may indeed appear well-founded, since this head of claim certainly does not constitute the development of an argument already contained in the application (in relation to which, as is known, Article 42 (2) does not apply). No, we are here dealing with an independent head of claim and one also cannot say that this was introduced as the result of an action on

the part of the opponent. On the other hand I have the impression that the Court, which in connexion with the amendment of an application (in the present case one might well think in terms of a completion of the application) has fallen back on Article 42, does not always adopt this strict point of view in its case law. Particularly in cases in which the observation of a time-limit is of no consequence (e.g., in the case of supplementary claims for damages) the Court has already repeatedly accepted enlargements of claims and disregarded Article 42 (possibly in this connexion relying upon a principle in German jurisprudence, under which in such cases the 'Sachdienlichkeit' (relevancy) is the decisive factor).

Accordingly in the present case also, one might regard it as a reasonable approach to disregard Article 42 of the Rules of Procedure and, notwithstanding some doubts, to undertake an examination of the claim raised in the reply.

(b) If one adopts this view, however, there immediately arises a second question, that is whether such a claim for compensation is known at all in Community law (i.e., whether there exists a general principle of law of this nature) or whether we are dealing with a peculiarity under German law which developed from the principle of protection of basic rights ('Grundrechtsschutz') which does not in all Member States have an equivalent (Cf. Jaenicke in 'Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht', Volume 44, p. 69).

In the course of this examination the objections that can be raised against the applicants' thesis do indeed seem to carry considerable weight. For a survey from the point of view of comparative law shows that no other Member State has a similar provision in its legal system. One might think of French law in this context, more precisely the concept known to it of liability on the part of the State for laws relating to equality of the individual faced with public burdens, a liability which even in the absence of culpability will arise in cases of excessive demands upon individuals and particular or special damage (Conseil d'État, Rec. 47, 436; 48, 3.2). Likewise, Belgian law, in certain cases where exceptional damage is caused by laws or regulations, recognizes liability in the absence of culpability (cf. Cambier, *Responsabilité de la puissance publique,* 1947, p. 300 *et seq.*). Now admittedly, as has already been said in connexion with the examination of liability for legislative injustice, one can think in terms of common principles of law within the meaning of the second paragraph of Article 215 without necessarily finding that the legal systems of *all* Member States contain such provisions (Cf. e.g., Wengler, quoted by Heldrich in 'Europarecht' 1967, 346). And yet for the purposes of the second paragraph of Article 215 a basis such as that outlined in the present case — i.e., the proof of a legal model in only two or three legal systems, which also show appreciable differences — might be too narrow to be of value. Added to this there is the fact that one also cannot work here on the basis that the system and the structural peculiarities of the Common Market militate in favour of the existence of such liability. Rather can it be said — as indeed the Council did — that one can easily take the opposite view. In fact the Council's thesis, which is partially based upon the events preceding the EEC Treaty (the Spaak Report) has something to be said in favour of it, i.e., the thesis that the authors of the Treaty intentionally excluded compensation in respect of losses resulting from the creation of the Common Market. One feels entitled to take this view since it is frequently difficult to find a relevant causal link and also because otherwise we would arrive at a point of immobility in economic policy and the necessary

structural changes would only with difficulty be attainable. It is also possible to deduce from the Treaty system as a whole — quite apart from the fact that the principle of step-by-step adjustment ensures a certain compensation for hardship — that this only relates to compensatory measures of a special kind (e.g., such as fall within the framework of Article 92 — i.e., aids granted by States — credits for conversion of businesses from the European Investment Bank or retraining grants to employed persons granted by the Social Fund).

Without going into the matter any further, it can therefore be said that the defendants' arguments are to be preferred in the present context and that one therefore ought to hesitate before recognizing a claim based on interference in the nature of dispossession as forming part of Community law.

(c) Finally one might still add, however, that even the recognition in principle of such a claim as existing in Community law will not gain anything for the applicants. There hardly existed the necessary conditions precedent — at any rate under German law.

In this context it is above all necessary that the interference by a governmental agency should be equivalent to a *dispossession,* that — in the case of an industrial undertaking — it affects its very substance (Cf. e.g., Bundesgerichtshof in NJW 1967, 1857), (French law too in such cases requires *serious* interference). There can hardly be any question of this as regards the 1971/72 marketing year, the period that is relevant in these proceedings. The applicants themselves refer in this respect only to the loss of shares in the market and loss of profitability, i.e., of prejudice which under the case law of the German Federal Constitutional Court (e.g., Volume XIII, 229; Volume XVI, 187) clearly does not suffice for establishing a claim. As regards the argument, however, that one has to envisage the possibility of the applicants' livelihood being destroyed, this only relates to the future and up to now lacks sufficient substantiation (to provide that basis would necessitate *inter alia* information as to whether in France there is not yet a development of prices appreciably above the level of intervention prices and whether the applicants by increasing their efforts and after enlarging the cultivation of durum wheat might not after all succeed in securing for themselves an important share in the French durum wheat market).

As an argument against the applicants' claim one might further urge that on the basis of the case law (e.g., the Federal German Court — Volume 45, 87) conditions of supply are not part of an industrial undertaking and that no undertaking has a claim to the maintenance of a particular governmental protection (e.g., protective customs tariffs). It is interesting that French law in this respect states that the courts are not in general prepared to attribute liability to the state in the case of regulations and laws *controlling the economy.*

Finally one must also point to the requirement in German law (Cf. BGH, NJW 1971, p. 607) according to which there must be a *direct* interference (a factor which, if claims are to be kept within necessary limits, can scarcely be dispensed with). This too can hardly be said to exist where — as is the case here — it is only the combination of several factors (the encouragement of durum wheat cultivation, differentiated fixing of prices without having due regard to the conditions affecting the French market) that leads to harmful effects.

(d) Even in the case of an affirmative answer as to the admissibility of the basis of claim pleaded in the reply, a summary examination of it thus shows that the applicants could not succeed on this ground.

9. After this relatively extensive examination of a case replete with problems on a variety of points, allow me to summarize my opinion once more.

I am of the opinion that the claims can be considered admissible only to the extent that they are directed against the Community, represented by the Council of Ministers. To the extent that the Commission is sued, the claims must be rejected as inadmissible.

The present state of the proceedings will allow the Court to hold that the claims are well-founded, i.e., to hold by way of an interim judgment that the Community is obliged to compensate the applicants for the damage caused. As regards the extent of the damage and how that obligation is to be performed, however, these ought to be decided only after an expert's report.

Furthermore, there is therefore no need at the present time to decide on the question of costs.