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

Lecourt Kutscher O'Keeffe

Donner Mertens de Wilmars Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 2 June 1976.

A. Van Houtte
Registrar

R. Lecourt
President

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

Mr President,
Members of the Court,

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

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

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

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

1 – Translated from the German.

minimum price to growers of durum wheat 196·83 u.a./tonne. The aid for growers of durum wheat, the abolition of which moreover the Commission had proposed, was fixed at 30 u.a./tonne, that is the difference between the intervention price and the guaranteed minimum price.

The applicants say that above all they have to obtain durum wheat for processing from third countries whereas the French mills can grind mainly French durum wheat to which the applicants have only limited access. Since different conditions apply to these sources of supply the rules distort competition with resulting damage to the German mills.

They therefore brought the applications dated 15 July 1974 before the Court and these were lodged on 25 July 1974, that is, before the beginning of the 1974/75 marketing year. The applications were first for a declaration that the Community was obliged to make good to them the damage which they would suffer in the 1974/75 cereal marketing year in respect of loss of production and loss of profit in the processing of durum wheat and the sale of meal from durum wheat as a consequence of the rules on prices and aids for durum wheat in the Community.

The defendants are asking for a preliminary ruling under Article 91 of the Rules of Procedure on the admissibility of the applications and that the applications be rejected as inadmissible since they are for a declaration concerned with compensation for future damage.

The applicants opposed this in a pleading dated 4 November 1974 in which they moreover set out fresh claims since the marketing year had in the meantime begun. According to these claims the defendants should be ordered to pay certain sums which amounted to some 30 u.a./tonne of meal in respect of the plaintiff's sale of meal in August and September 1974 and also in respect of an alleged advantage in competition enjoyed by the French mills. At the same time the claim was maintained for a declaration that the Community was obliged to make good the damage which the applicants had already suffered over and above the said sums in the past and which they would suffer in the further course of the 1974/75 cereal marketing year through production losses and loss of profit.

By order made on 20 November 1974 the Court decided to reserve the decision on the procedural issues for the final judgment; the proceedings continued with the lodging of pleadings by the defendants dealing with the substance.

In the reply the applicants considered they could assess the damages up to February 1975 and accordingly increased the amounts which the Community should be ordered to pay. The claims for a declaration, however, remained in substance unchanged.

During the proceedings, namely with effect from 7 October 1974, there was a change in the Community price rules for durum wheat, whereby the target price became 191·97 u.a./tonne, the intervention price 175·17 u.a./tonne, the guaranteed minimum price 205·17 u.a./tonne and the threshold price 189·10 u.a./tonne.

Before the beginning of the 1974/75 marketing year world market prices for durum wheat were already above the level of the prices fixed by the Community, including the guaranteed minimum price — the increase had, as is known, begun in the autumn of 1973. From November 1974 onwards they sank again and levies again became payable on imports from third countries from 18 January 1975 onwards.

In the oral proceedings which took place after the expiration of the cereal

marketing year and the applicants once again amended their applications having regard not least to the result of the taking of evidence. The claims are now for the Community to be ordered to pay certain sums amounting to 10·43 u.a./tonne of meal on the basis of the applicant's sale of meal in the 1974/75 marketing year by reason of their being at an alleged disadvantage *vis-à-vis* their competitors. In addition the payment of interest at 8 % from 1 August 1975 is sought. Further a declaration is asked for that the Community is obliged to make good the damage or to pay compensation of an appropriate amount for the damage which the applicants have suffered over and above the amounts for which figures are given in the 1974/75 marketing year as a consequence of the rules on prices and aids for durum wheat through losses on production and sales in the processing of durum wheat and the sale of durum wheat meal.

I — The admissibility of the applications

In considering these facts from the legal point of view the admissibility of the applications must first be dealt with, for the defendants have from the beginning cast doubts in this respect and have maintained them in the oral proceedings. There are various aspects to be considered.

1. The defendants say at the outset that the applicants are in fact seeking a declaration that the Community rules on the durum wheat market are unlawful and should be amended. Under the system of the Treaty for the protection of rights — Articles 173 and 175 — they cannot achieve this objective directly for legislative rules are in question. Accordingly evasion of these provisions by relying on the Community's liability for wrongful act or omission must be prevented.

The defendant Council refers in this connexion to page 5 of the application where it is stated:

'Such an application ... gives the institution an opportunity to amend its rules before or immediately after the beginning of the 1974/75 cereal marketing year and thus at least partially remove the discrimination'.

Moreover reference may be made to the fact that to end the discrimination against German mills the applicants say that there should be a reduction in the difference between the threshold price and the intervention price and that measures such as a refund to producers when durum wheat from third countries is used, levies on producers when Community durum wheat is used or duty-free export of common wheat against cheaper import of durum wheat should be considered.

Although to a certain extent this supports the defendants' argument I am nevertheless of the opinion that their objection in fact cannot hold.

In so far as what the Council says is concerned the fact should not be overlooked that it speaks only of an 'opportunity'. If the objective were in fact the repeal or amendment of the Community rules, this term would obviously be out of place; there should rather have been reference to an *obligation* on the defendants to adopt appropriate measures.

With regard to the possibilities mentioned by the applicants for ending the alleged existing discrimination it should be said that the applicants only intended to show thereby that in the context of the organzation of the market there were various ways of preventing the German mills from being put at a disadvantage. This makes sense also in support of a complaint against the defendant Community institutions within the terms of an application for wrongful act or omission.

If previous case-law — and this is more important — is followed according to

which the objective and legal effect of actions for wrongful act or omission differ from those of actions for annulment and actions in respect of obligations (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975) and if the application is looked at as a whole in this light then in view of all that has been said there it can scarcely be disputed that it is a genuine action for damages.

Not only the unlawfulness of the Community rules but also the liability, in the view of the applicants, of the Community institutions is involved. In addition the applicants deal at length with the damage caused to them. They say in the past they have suffered serious loss — a reduction of their share of the market and price reductions in line with the lower French meal prices — and since the discrimination has increased a further trend of this nature is to be reckoned with. In the application even a preliminary attempt at quantifying the damage on the basis of 10 u.a. above the threshold price is made. Moreover, a definite assessment of damage is set out for the end of the marketing year and indeed during the course of the proceedings there were continuous adjustments of the assessment of the damage to take account of the latest available data.

It must therefore be recognized that the object of the proceedings is above all financial compensation for the damage caused to the applicants in the 1974/75 marketing year. On the other hand the actual objective of the application could scarcely be the repeal or amendment of the rules in question for the 1974/75 marketing year. In the context of the present proceedings — this is all that is in question — a finding that the rules are unlawful, especially as it would be only after the marketing year had ended does not show conclusively that the competent institutions would have had *retroactively* to undertake an amendment affecting all concerned in the market. If, however, the defendants in the future seek to draw conclusions from possibly critical observations of the Court in the present proceedings for wrongful act or omission then it should be clear that this would be outside the object of these proceedings and moreover in view of the discretion which doubtless exists it is not possible to say what such conclusions might be.

I do not consider therefore that the first objection to the admissibility of the application is valid.

2. A second objection relates to the fact that in the application only a declaration relating to the obligation of the Community to make good the damage which the applicants anticipated in the 1974/75 cereal marketing year is sought. The defendants are of the opinion that Community law does not recognize applications for a declaration in this sphere. Neither can there be said to be a general legal principle of the Member States since applications for a declaration are alien to certain legal systems.

In considering this objection the relevant provisions of Community law must first be dealt with. The second paragraph of Article 215 of the EEC Treaty provides that in the case of non-contractual liability, the Comunity shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. In my view this is obviously a provision of *substantive law* which merely prescribes the conditions under which a claim for compensation arises. On the other hand it says nothing about *the procedural manner in which it is to be implemented.* The same applies to Article 178 of the EEC Treaty under which the Court of Justice has *jurisdiction* in disputes relating to compensation for damage provided for in the second paragraph of Article 215.

From this the conclusion may be drawn that in Community law the manner of implementing a claim before the courts based on wrongful act or omission is left as a matter of practice. In developing it, as always when gaps in Community law become apparent, guidance is to be derived from national law. This does not mean, however, that one is strictly tied to those general principles common to the laws of the Member States which are the criterion giving rise to liability under the second paragraph of Article 215.

The defendants have shown in the proceedings that in a number of the legal systems of Member States applications for a declaration are admissible. This applies to German law (Paragraph 256 of the Zivilprozeßordnung) and to a large extent also to Danish law (Tvisternal; Horwitz-Gomard, 1971, p. 131 *et seq.*). Netherlands law (Article 612 of the Wetboek van burgerlijke rechtsvervordering) recognizes, at least as an alternative, the possibility of declaratory judgments in damage claims and Italian and English law allow applications for a declaration at least in special cases (Carnelutti, Sistema del diritto processuale civile 1936, Vol. 1, p. 149; Halsbury's Laws of England, 3rd Edition, Vol. 22, p. 746). On the other hand actions for declarations are alien only to French, Belgian and Luxembourg law.

In these circumstances I can see no reasonable cause to exclude the adoption of the action for a declaration of liability for a wrongful act or omission in Community law, especially since this instrument is in principle known to Community law as Articles 169 and 175 show. Actions for declarations may be regarded as particularly appropriate in claims concerned with liablility for wrongful act or omission that is in disputes with authorities, for here it is often sufficient to determine that liability arises since compensation may be left to the parties. In this connexion I would like to refer to Joined Cases 29, 31, 36, 39 to 47, 50 and 51/63, *Société Anonyme des Laminoirs, Hauts-Fourneaux, Forges, Fonderies et Usines de la Providence and Others* v *High Authority of the ECSC* [1965] ECR 911 at p. 941, in which the Court by way of preliminary judgment found liability on the part of the High Authority for a wrongful act or omission and initially left it to the parties to reach agreement on the amount of damages. The same was done in Case 74/74, *Comptoir National Technique Agricole* v *Commission* [1975] ECR 533.

In my opinion, therefore, it may be assumed that claims under Community law for wrongful act or omission do not need to be associated with monetary claims to be valid. Independent applications for a declaration are in no way excluded. Thus the second objection made by the defendants against the admissibility of the application in not valid.

3. A further objection relates to the fact that the applications which are directed to the declaration of an obligation to make compensation for damage anticipated in the 1974/75 marketing year were brought on 25 July 1975 before the marketing year began. It must therefore be considered whether such an action relating to damage arising in the future may be regarded as admissible.

Let me say at once that there is nothing decisive on this in the Treaty or in previous case-law.

So far as the second paragraph of Article 215 is concerned it is true that it speaks of damage *caused* which seems to indicate that the damage must already have occurred. It should not, however, be forgotten that this relates to a provision of substantive law on a claim for payment and it is therefore no evidence whether an application for a declaration of a future obligation to make compensation may be brought before the claim arises.

The defendants have referred to two notorious cases from the case-law relating

to scrap equalization in which a claim based on a wrongful act or omission was dismissed as being premature. They are Joined Cases 55 to 59/63 and 61 to 63/63, *Acciaierie Fonderie Ferriere di Modena and seven other applicants* v *High Authority of the ECSC* [1964] ECR 211 at p. 229, and Joined Cases 9 and 25/64, *Acciaieria Ferriera di Roma and six other applicants* v *High Authority of the ECSC* [1965] ECR 311 at pp. 320 and 321. On closer examination it is apparent that the facts are not comparable with the present. Both of those cases depended on the fact that it could not be said with certainty whether there was any damage at all since in the one case it was expressly provided that in reaching the relevent decisions the High Authority should have the opportunity of checking and correcting the provisional calculations and in the other case the winding up of the equalization scheme and attempts to recover sums wrongly paid out had not been completed.

I therefore consider it right to seek an answer to the question raised by looking into the position in comparative law. Further, account must be taken of the peculiarities of the system for the protection of legal rights contained in the Treaty.

In so far as anything is to be derived from the legal systems of the Member States I have the impression that although actions for compensation for future damage are not ruled out, they are subject nevertheless to strict conditions. Even if the wording used differs the basic position is on the whole fairly uniform. It seems to me that the most liberal approach is to be found in the case-law of the Bundesgerichtshof which allows actions for a declaration of an obligation to make compensation for damage anticipated to arise (Entscheidungen des Bundesgerichtshofes in Zivilsachen, Vol. 28, p. 234). All other legal systems are, in so far as I can see, much stricter. Thus Italian law requires a definite likelihood, a well-founded and reasonable anticipation of damage occuring (Torrente, Pescatore, Ruperto: Codice Civile, 6th Edition, Note 2 to Article 1223). Belgian law requires the likelihood of damage to appear certain (Servais et Mechelynck: Codes Belges, 3rd Edition, Note to Article 1382). English law in this connexion speaks of the natural or probable consequence (Halsbury's Laws of England, 3rd Edition, Vol. 11, p. 217). Netherlands case-law is concerned with considerations which make the occurrence and amount of damage foreseeable and the fact that the damage must be assessable (Hooge Raad, 17 May 1940, NJ 1940). Similarly French law requires serious likelihood that damage will occur or that the amount of the damage should be assessable (De Laubadère, Traité élémentaire de Droit administratif, 5th Edition, p. 654; Mazeaud & Tunc, Traité de la Responsibilité civile, 6th Edition, Vol. 1, p. 270).

On the other hand in so far as Community law is concerned it is apparent from the organization of its system for the protection of legal rights that there is a strict attitude with regard to the question of actions in relation to damage arising in the future. This can be seen with regard to the limitation of the right of action of private persons in relation to legislative measures. It must not be overlooked also that an action to prevent a wrongful legislative measure can be an obstacle to the legislative function. Moreover the danger is particularly great here that the remedies available under Article 215 may be used to get round the conditions for bringing actions laid down in Articles 173 and 175.

Therefore, in my opinion, the actual existence of damage when proceedings are brough should be disregarded and a situation comparable to existing damage recognized at most only in cases in which the cause of damage already exists when the action is brought and in all probability the consequential damage is to be expected shortly.

If this criterion is applied to the present proceedings the following assessment emerges:

There is no doubt that the Community rules out of which the distortion of competition to the detriment of the German mills is claimed to have arisen, had already been adopted at the time the proceedings were brought, that is, the alleged cause of damage already existed. It is very doubtful on the other hand whether according to the statement of claim and grounds to be found in the pleadings it could be said that damage was very likely to occur.

In the application the applicants say that German mills had to obtain supplies of durum wheat from third countries on the basis of the threshold price whereas French mills could obtain French durum wheat on the basis of the intervention price. The decisive cause of the alleged discrimination lay, according to them, in this difference. They therefore took the view that the Community institutions should narrow the difference and they presented the first assessment of damage which assumed that the thereshold price was fixed 10 u.a. too high. On the other hand world market prices at that time, as they have been since the autumn of 1973, were above the level under the Community price rules and affected the common market. In this situation the price difference mentioned above could not have any significance. This could be assumed only in the event of the world market prices sinking below the level of the threshold price. To this extent the applicants faced only a future possibility when they brought the application. In fact they stated in the application simply that it was *possible* that world market prices, in the course of the 1974/75 marketing year, would sink below the thershold price. It is not said at all and no evidence has been produced for the assumption that such a price trend may be anticipated in the near future; this did not happen until January 1975.

According to the grounds of the claim chosen in the application — the rules on aids are mentioned only incidentally and in no way as an independent cause of damage taking effect in every price situation — a legal interest in bringing the proceedings *immediately* cannot be recognized because there is a high probability that no damage will arise. The application is accordingly inadmissible as being *premature.*

4. This does not conclude the examination of the questions of admissibility. As you know, in their reply to the application made by the defendants under Article 91 of the Rules of Procedure the applicants have altered the grounds of their application and have given for the first time in this pleading amounts of damage. They say that the Community rules on durum wheat have caused them damage during the period as well in which the world market prices were very high and the threshold and intervention prices had practically no effect. In this situation the effect of the rules on aid was that the domestic growers of durum wheat were content with the world market price or with a price slightly below it; it was as though the aid was transferred to those processing the durum wheat. The defendants were reproached for not having stopped or reduced the aid, this being the actual cause of the discrimination against the German mills. Looked at from this point of view the applicants assess the disadvantage in compeition suffered by the German mills at 30 u.a. per metric ton of meal and on this basis and having regard to the durum wheat processed by the German mills in August and September 1974 they calculated the amount of damages owed for this period.

The defendants have objected that the amendment of the grounds of the claim means nothing other than an amendment of the application. Since, however, Article 42 of the Rules of Procedure on principal prohibits the

raising of fresh issues which could have been raised when the proceedings were initiated an amendment of the application in the form chosen by the applicants is not possible.

In so far as this objection is concerned there is in my view no occasion to deal with the problem of amendment of the claim in terms of our Rules of Procedure, although naturally it is a different problem with regard to actions for annulment which are subject to time-limits or actions against Member States which presuppose preliminary proceedings, from the case of actions for damages for which as a rule there are no time-limits. I would like, however, to observe that a trend in the caselaw is discernible according to which there is no strict application of the principle of Article 42 of the Rules of Procedure in relation to actions for damages and amendments of the claim may be admissible if they appear expedient. I refer in this connexion only to the judgment in Joined Cases 19, 20, 25 and 30/69, *Denise Richez-Parise and Others* v *Commission of the European Communities* [1970] ECR 325 at p. 338).

The view, however, may be taken that an amendment of the claim can be admissible only if the claim in respect of which it is sought is itself admissible. On the other hand it would be unsatisfactory to conclude the proceedings now with a finding that the claim is inadmissible. Since the marketing year in question has in the meantime expired the result would certainly be that the same matter which has already been thoroughly discussed would immediately be brought before the Court again. To save unnecessary litigation I therefore think it worth considering allowing the applicants' second pleading to be interpreted as a new claim. A decision to this effect may be the more easily taken since it was only after this that the defendants dealt with the substance of the action and thus there can be no question of any restriction on their rights of defence. Moreover, we are not concerned with a completely new ground of claim but rather with a shift of accent in the basis since the application originating the action contains references to the influence of the aids on the price structure in the regions with a high production.

If I am right in this there can be no objection from the points of view so far dealt with — application for a declaration, application for compensation for damage arising in the future — against the admissibility of the application from the time the second pleading of the applicants was lodged. The marketing year had in the meantime actually begun, damage according to what the applicants say, had already occurred and therefore claims for compensation could already be formulated.

5. In so far as admissibility is concerned it remains only to inquire whether Article 38 of our Rules of Procedure has been observed, that is, whether substantive grounds have been given; further it must be considered whether the claims with their new grounds could be directed against the Commission.

With regard to Article 38 of the Rules of Procedure the defendants say that the application is not sufficiently substantiated in respect of the occurrence of the damage, the causal connexion between the rules on aid and the damage to the applicants is not conclusively shown and there is no attempt at least to estimate the damage. In this respect I think there can be no question of an infringement of the Rules of Procedure which prescribe only that summary grounds be given of the application. Sufficient grounds were in any event given during the course of the proceedings to enable the defendants to defend and the judgment on the substance to be given. This should suffice, as in the judgment in Case 74/74 which I have already cited.

With regard to the admissibility of the application in so far as it is directed against the Commission the objection must be recognized as valid that the new ground of claim in relation to the rules on aid does not permit any complaint to be made against the Commission. This follows on the one hand from the judgment in Joined Cases 63 to 69/72, *Wilhelm Werhahn Hansamühle and Others* v *Council and Commission of the European Communities* [1973] ECR 1229 at pp. 1247 and 1248, according to which there can be question of the liability of the Commission for rules which it has not itself laid down only if the Commission has made an appropriate proposal. A further decisive factor is that the Commission, as I have already mentioned, proposed that no aid to growers of durum wheat should be given for the 1974/75 marketing year.

6. At the conclusion of this first part of the investigation it can be said, to summarize, that there are reservations against the admissibility of the applications only in so far as according to the first pleading and its grounds there was no great probability that damage would occur and in the second pleading complaint was made against the Commission that the rules on aid had been maintained. Since no other objections are discernible — the repeated change in the amounts of the damage cannot be objected to — and since it also appears defensible to interpret the second pleading of the applicants as a new application, there are no obstacles to a consideration of the substance.

II — Substance

There are various factors making your investigation more difficult. The market conditions have substantially changed during the course of the 1974/75 marketing year. At the beginning world market prices for durum wheat were above the level under the Community rules; in the second half they fell with the result that from 18 January 1975 onwards levies had to be imposed again because prices were below the threshold prices.

Further, the grounds of the claim have not remained the same which is in part connected with the change in the economic situation. First, the difference between the threshold price and the intervention price for durum wheat was relied upon. In the second pleading of the applicants the claim was based on the fact that in spite of high world market prices which had an effect upon the common market the rules on aid for the benefit of growers of durum wheat were retained and this had an effect on the French market prices. Finally, in the oral procedure there was criticism of the relationship of the prices of common wheat to those of durum wheat which is alleged to have led to durum wheat not being used in meal production.

Finally, after more than one and a half years during which the action has been going on, we are now confronted with a mass of figures which at first sight has a frightening effect and somewhat obscures the substance of the case.

1. Let me begin the investigation with the criticism which was made for the first time in the oral procedure relating to the relationship between the price of common wheat and durum wheat. This difference in price is alleged to have resulted in meal from common wheat being increasingly used in pasta production with the result that durum wheat mills suffered loss of sales. Although possibly out of sequence I shall deal with this argument first since it gives rise to only relatively small difficulties.

I shall not consider the question whether there are objections to its admissibility on the ground that it was brought up so late in the action. I shall also leave open the question whether the claim, namely the alleged displacement of meal from durum wheat by meal from common

wheat, can be regarded as sufficiently substantiated.

If the difference in prices of two products is criticized this logically means above all that either the price of the one product is fixed too low or the price of the other is fixed too high. Even the applicants themselves do not allege that the price of common wheat was too low. This would also have been difficult to accept and defend having regard to the objective, set out in Article 39 of the EEC Treaty, of the maintenance of reasonable consumer prices if regard is had to the fact that there is in any case a surplus production of common wheat in the Community and further the difficulties of the sale of surplus cereals from the Community on the world market.

Thus the main thing is whether the prices of durum wheat were fixed too high. With regard to this in my view the situation of the world market at the beginning of the 1974/75 marketing year and the fact that there was a shortage of durum wheat on the Community market are crucial. I have already said that the level of the world market prices was above that under the Community rules for a long time before the beginning of the 1974/75 marketing year. In view of this situation and the fact that world market prices affected the Community market owing to the shortage on the latter, the view can certainly not be taken that the Community institutions fixed the prices of durum wheat excessively high at that time. In any event it cannot be said that then in the first half of the 1974/75 marketing year world market prices were above the Community level the price rules of the Community institutions were the cause of the alleged disappearance of durum wheat from meal production. Again, since, owing to the sharp increase of the prices of durum wheat from autumn 1973 — the figures provided by the applicant in Annex 7 to the pleading show this — there was an unusually large difference between the prices of common wheat and durum wheat on the world market also, it is not understandable why price rules in the Community which take this into account should be described as defective.

It can therefore be said that the arguments of the applicants relating to the difference between the prices of common wheat and durum wheat are no support for the claim of liability for wrongful act or omission.

2. It thus come in my investigation to the complaint of the applicants relating to the rules on aids for durum wheat. They say that in a situation in which world market prices were above the level under the Community rules an additional aid for growers of durum wheat is not justified. It had as consequence that the aids at least in part went to those processing durum wheat, that is, the mills. At times in which the world market price was below the Community level the fact that the aids were based on the intervention price and not the target price meant that the market price was in the region of the intervention price; this is especially true in areas with a high yield per acre, as in France, where growers do not depend on the full amount of the aid. However, it was mainly French mills which were in the neighbourhood of the production areas which enjoyed such favourable price trends; German mills had only very limited access to such cereal. On these grounds it could thus be said that the rules on aids had discriminatory effects.

(a) In this connexion let us first deal with the basic criticism of the system of aids applying to growers of durum wheat. If it appears that objections are valid in this respect then we must inquire further whether it can be shown that the competitive position of the applicants was affected. Here I need say nothing on the purpose of the rules on aids. It is the well-known intention that in this way the growing of durum wheat of which there is a shortage in the Community is

to be encouraged and a change in the agricultural structure is to be attempted. Having regard to the less abundant crop and higher costs in comparison with common wheat and, since the financing by means of the price at the expense of the consumer is not considered appropriate, recourse was had to public funds for the financing.

At the beginning of the 1974/75 marketing year world market prices for durum wheat rose markedly and since of necessity world market prices affected the Community market in which there was a shortage, Community prices for durum wheat increased sharply. A few figures may show this. While the minimum price per tonne of durum wheat, which was to be attained by means of aids, amounted in 1970/71 to 145 u.a., in 1971/72 to 147·90 u.a., in 1972/73 to 153·80 u.a. and in 1973/74 to 155·33 u.a., it was fixed for the 1974/75 marketing year at 196·83 u.a. Market prices in the Community under the influence of the world market were, however, at the time considerably higher as appears from the tables of the Commission and the figures given by the applicants. It may accordingly be said that it was possible for the growers without difficulty to obtain a fair income on the market; the conclusion is compelling that in this economic situation aid from public funds was quite superfluous.

The two matters for consideration which the defendants mention in this connexion to justify the system of aid do not undermine this conclusion. They stress that it was not possible to stop the aids because it was undesirable to give the impression that there was a basic change in agricultural policy and that the policy of encouraging the growing of durum wheat which was still in short supply but structurally desirable had been abandoned. Further the defendants refer to the fact that the Italian growers consumed a large quantity of the durum wheat themselves (some 600 000 tonnes or one third of the total harvest) and that to this extent there was no improvement in income on the market and the desired objective could be obtained only by means of aids.

It may be said with regard to this that a false impression in relation to the policy of encouraging the growing of durum wheat would have been avoided if, although basically retaining the system of aids, the grant of aid had been temporarily suspended at the beginning of the marketing year owing to the state of the market. In so far as the Italian growers' own consumption is concerned it seemed doubtful whether in the situation described it was necessary to take this into account. It would have been also conceivable to arrange the organization of the market so that the Italian growers would have been encouraged to bring the expensive durum wheat onto the market and satisfy their own needs with cheaper kinds of cereals. Moreover, and this is more important since it does not concern the problem of the Italians' own consumption, a suitable solution was obvious in the form of a differentiation of the aid rules as is now mentioned by the Commission in regard to the very different yields per hectare (1973/74 France 294 per 100 kg against 17·6 per 100 kg in Italy). Thus in the 1974/75 marketing year the French areas of cultivation at least could have done without the aid.

If the criticism of the system of aids is valid in so far as the first half of the 1974/75 marketing year with its high level of world market prices is concerned, then, let me say at once, position can scarcely be different with regard to the 'normal situation' as described by the applicants, that is the times in which, as happened in the second half of the 1974/75 marketing year, the world market price for durum wheat was below the level of the Community prices.

I certainly do not endorse the argument of the applicants that it is generally

sufficient to assess aid in such a way that based on the minimum price, it is related back to the target price as the price which in a deficit market is assumed to be the one normally to be aimed at. It should be borne in mind that the basic amount of the target for the system of aids is the *minimum* price and the intervention price is based on this. Further, it may be said that in normal price situations the position of the Italian growers with their high personal consumption may properly be considered and that on this assumption the amount of aid previously granted is necessary to give sufficient encouragement for the cultivation of durum wheat.

In this connecion, too, the great differences in the yields per acre, already mentioned in relation to France and Italy, should be remembered and also the all-important possibility of differentiating aids. I accordingly consider it not mistaken even in a normal price situation such as is now in question to assume that the French growers of durum wheat could have done without aid or at least have done with a substantially lesser amount of aid, from which it follows that the unchanged retention of aid in the second half of the 1974/75 marketing year is open to criticism.

(b) Then following on there must be a further examination of the question whether a connexion can be shown between the granting of aid to the French farmers and the market prices for French durum wheat to which the applicants — I shall return to this — supposedly did not have the same access as the French mills. To deal with this certainly somewhat delicate question as accurate a picture as possible of the French market situation must be obtained and placed in relation to the trend of the world market during the period here in question. The numerous particulars which the parties provided during the course of the proceedings have certainly not made it easier to carry out this task.

In my opinion we can take the French market prices which the Commission has provided from the particulars of prices given by the French intervention agency ONIC. The evidence of the representative of the Grands Moulins de Strasbourg, one of the large French competitors of the applicants, comes clearly within these terms.

If these prices are compared with the cif prices given by the Commission, that is the world market prices for durum wheat, the following picture appears:

In August and September 1974 some French market prices were considerably below these world market prices: of the order between FF 25 and 200 per tonne or in September between FF 50 and 140 per tonne. If, however, the particulars of prices given by the applicants with regard to their purchases on the world market are taken as a basis the differences are in some cases considerably reduced. A clear reduction of the difference may be observed also in respect of the world market prices given by the Commission for the following months of 1974. In so far as the French prices were at all below the level of the world market the order is between FF 40 and at most FF 180 per tonne. In some cases the French market prices were already above the cif prices in these months. The situation changed completely at the beginning of 1975, that is at a time in which the world market prices sank below the level of the threshold prices. Thus the French market prices in January and February 1975 were clearly above the threshold price; this was also true in some respects in March 1975. In the following months of 1975 there was again a fall in the French prices. During this period they were below the threshold price and nearer to the intervention price than the threshold price. This is, however, obviously, if I may say so at once, due to the fact that at that time large quantities of durum wheat which had been held back from the 1974/75 harvest — the witness Pegler

spoke of 100 000 to 150 000 tonnes – were thrown onto the market and did not meet with appropriate demand.

In view of this fact I very much doubt whether it can be taken as proved that the aids poured out to the growers of durum wheat were responsible for the fact that the French prices did not more closely approach world market prices for some months of the marketing year. It may thus be observed that the price trend in so far as the relationship to the world market prices is concerned was not at all uniform. I cannot see how this could be explained on the basis of the crucial influence of the rules on aid. Doubts increase if the method of paying the aids is borne in mind. According to what we have heard from the Commission care was taken that the aids benefited the growers; they were paid out shortly after delivery to the places of collection and were obviously separately calculated from the sale prices. Further, it is easily conceivable that the lower French price level is due to the traditional relationships between the French mills and the French durum wheat growers, including the market agencies acting on their behalf. This view has already been expressed in the judgment in Joined Cases 63 to 69/72 [1973] ECR 1229 at p. 1250 and there is doubtless even more to be said for it since in the first half of the 1974/75 marketing year there were quite unusual price situations which must not have been altogether ideal for relationships with old customers. The prohibition on the export of durum wheat which was introduced by the decision of 4 August 1973 and retained until the beginning of April 1975 may have had some effect. Not least, the trend in the monetary situation may have played some part.

In these circumstances I cannot give an assessment differing from the judgment in Joined Cases 63 to 69/72 by accepting the argument of the applicants on the causal connexion between the aids for durum wheat and the French market prices.

Let me, however, make the two following observations: if a causal connexion were assumed it would certainly be necessary to ask whether there was a sufficient causal connexion between the act of the Community and the damage to the German mills and whether such a connexion is sufficient to give rise to liability for wrongful act or omission. Doubts arise here to, and certainly not least having regard to legal systems according to which it is necessary that there should be *direct* damage such as in English and French law. In addition to give rise to liability it would be important whether the resulting prices which in a deficit market could certainly be called unusual were at all foreseeable by the Community institutions. This can likewise be doubted on good grounds and thus at least it can be taken that there is no reproach to be made and no culpability.

For all these reasons, and quite apart from whether possible criticism of the rules on aids in fact justifies speaking of a *flagrant* infringement of a rule of law within the meaning of previous case-law I am inclined to regard the grounds of the claim in so far as the rules on aids are concerned as insufficient. I will, however, return to this point in a later connexion as an alternative because I cannot rule out the possibility of a different view being taken.

3. In considering the case I shall turn now first to the further question whether the Community institutions can be reproached for having neglected to provide within the framework of the rules on durum wheat opportunities of purchase for the German mills, which depended primarily on the more expensive durum wheat from third countries for processing, equal to those of the French mills which could obtain supplies mainly on the more favourable terms of the French market. In this connexion the applicants have in mind measures of the following nature: making possible cheaper imports from third

countries by a threshold price fixed at a lower level for German mills, the processing having to take place under customs supervision; the granting of a refund to producers on the use of durum wheat from whird countries or the consent to the export of common wheat free from levy against a corresponding cheaper import of durum wheat. They also mentioned production levies which could be put on the poducts of those procession durum wheat grown in the Community.

Consideration of this point necessitates, as a preliminary, the settlement of the question of what access the German mills had to the French market and what opportunities for purchase they had on this market.

On this it has been shown in the proceedings on the one hand — the figures are quite clear — that exports of durum wheat from France to the Federal Republic of Germany have increased since 1969/70. Whereas in that marketing year they amounted to some 4 000 tonnes they were some 25 000 tonnes in the 1974/75 marketing year. According to the evidence of the witnesses which the Court has heard there is no doubt on the other hand that German purchasers have only difficult access to the French durum wheat. In spite of intensive efforts they obviously do not succeed as a rule in obtaining large quantities. They do not get delivery immediately after the start of the harvest as do their Franch competitors who are clearly favoured. In my opinion, however, there are obvious reasons for this. In a deficit market the vital interest of French purchasers is naturally directed to intense efforts to obtain French cereals. In this their closer proximity to the areas of cultivation and the opportunity open to them to take smaller quantities immediately in lorries stand them in good stead. Purchasers outside those areas, on the other hand, have the disadvantage that larger quantities must be collected together for export and that there are additional problems in connexion with currency and transport. This does not need to be gone into in detail now.

In so far as the purchase prices are concerned it has become apparent from the witnesses and the documents produced that in this respect too German purchasers are at a certain disadvantage. In so far as the price advantage of the French mills is concerned there was some mention of amounts of up to FF 20 per metric ton; it was also said that the prices of the French purchasers were only slightly below those of the German purchasers. The figures produced by the applicants in respect of their purchase prices in France fit into this picture if the necessary corrections are made to them arising from the trade margins of the importers and loading and transport costs. However, even with regard to this discrepancy in price there are quite obvious explanations: one has only to consider the necessity of using other trade channels, collecting together larger quantities for export or using other clauses in foreign trade (cif mill instead of central deport). Possibly certain natural advantages from personal aquaintance of the parties are not to be altogether ruled out.

In my view the question whether the Community institutions in laying down the marketing rules for durum wheat have to take account of the different purchase prices on the French market can scarcely be answered in the affirmative. The relevant scales of operation do not suffice for this. Moreover, the question is solely one of advantages due to location which, as such, cannot give rise to special compensatory measures.

With regard to the basically difficult access of the German purchasers to the French market — this could be spoken of at least at the beginning of the 1974/75 marketing year — the following further points arise on the special

compensatory measures suggested by the applicants in argument:

In so far as the applicants speak of laying down specially reduced threshold prices which should apply to imports into the Federal Republic of Germany, it is sufficient to observe that this possibility was already rejected in the previous judgment which stressed the necessity of a uniform threshold price. Moreover, it may be said that such a measure in the first half of the 1974/75 marketing year — I shall return to the special features of the second half of this marketing year later — would have been ineffective since world market prices were much higher than the threshold price.

With regard to the introduction of production levies on the processing of Community durum wheat thus making this raw material more expensive it should be said that assessing it in the continually changing price situation of the 1974/75 marketing year which was in question would have been highly problematical. In addition I have reservations in this connexion with regard to the objective of maintaining reasonable consumer prices, the jeopardizing of Community preference to which I shall return once again later and also the danger of replacing durum wheat by common wheat in meal production and pasta manufacture.

There are equally important objections — let me say this at once — against the possibilities mentioned by the applicants of making imports of durum wheat from third countries cheaper by means of refunds to producers or by means of linked transactions (export of common wheat free from levy against the import of durum wheat on favourable terms). It is important to observe that these are in no way usual measures. Where they have previously been applied was in quite exceptional situations: processing of maize for which the competition of substitute products makes difficulties in the starch sector; making possible a certain export trade in the beef market with its enormous surpluses. The position of the German mills is scarcely comparable to this if it is borne in mind that they are increasingly penetrating the French durum wheat market and are having a corresponding influence on the price position there so that there is a trend towards less price underbidding by the French mills and the meal exports from France in recent years have not increased dramatically. Further, the Commission said that the measures mentioned related to exceptionally difficult rules for which, since they had not proved a success, a change would be considered. Finally, it must also be borne in mind that the facilitating of imports demanded would have undesirable effects on the Community markets by solidifying its structures: it would doubtless be accompanied by a slowing down in efforts of German mills to penetrate the French market and this again would influence the trend of Community prices for durum wheat in a particular manner which would not be in harmony with the quite justified objective of encouraging the cultivation of durum wheat in the Community.

Even if it had to be recognized that the two possibilities last mentioned, limited to particular import quantities, could be an appropriate means for ending or reducing certain disadvantages in competition on the part of the German mills, I could not therefore draw the conclusion that to neglect such measures is a serious mistake in law within the meaning of the law on wrongful act or omission. In consequence these possibilities cannot be considered as supporting a claim for compensation for damage.

4. I must then turn in a further section still to the question which was stressed in the drawing up of the application whether the difference between the intervention price and the threshold price for durum wheat was too large and the domestic product was given excessive protection.

This question has obviously only subordinate significance for the marketing year in question here. World market prices were above the level under the Community rules in the first half, which is obviously when most purchases take place, and, as we have seen, they have affected the common market. The threshold prices were thus not the criterion in this period for imports from third countries, nor were the intervention prices the criterion for purchases of Community durum wheat. The said difference in prices could, accordingly, not have adversely affected German mills at that time. The same applies to the first months of 1975 in which the French market prices were above both the intervention price and the threshold price. A reduction of the difference in question would therefore have had no effect on the purchasing opportunities of the French mills.

The question raised therefore relates only to the remaining months of the 1974/75 marketing year in which the French market prices were in fact nearer the intervention prices than the threshold prices. For this reason alone, although there are others which will immediately become apparent, it does not seem to me necessary to devote long comment to the problem of the difference between the intervention price and the threshold price.

As you know the applicants take the view — I do not need to go into all the details of what they say — that a difference of some 3·5 u.a. between the intervention price and the threshold price would have been sufficient. In this they rely on Regulation No 1968/73 (OJ 1973, L 201 of 21. 7. 1973) with its provisions for avoiding disturbances on the Community market, on previous rules on preference relating to trade within the Community and on the organization of the market in common wheat. Against this it must be said that such an extensive general reduction of the difference between the intervention price and the threshold price, disregard of which could alone justify the complaint of a flagrant infringement of the law, could not come into consideration having regard to the necessary Community preference. I refer in this respect to the observations of the Commission that making durum wheat grown in the Community correspondingly more expensive, if the conditions on the Italian market and the distance of the southern Italian areas of cultivation from the processing centres of central and northern Italy are taken into account, would have meant that Community durum wheat could no longer have competed with durum wheat from third countries. I would like to refer also to the finding in the judgment in Joined Cases 63 to 69/72 that for the protection of Community-grown durum wheat a difference of 12·81 u.a. between the intervention price and threshold price was quite appropriate.

What, however, could have been considered is a differentiating of the intervention price so that there would have been a smaller difference between the threshold price for the French areas of cultivation which concern us here than for other areas of the Community. This is an observation which is also contained in the opinion in Joined Cases 63 to 69/72. It must be admitted that it cannot be rejected out of hand if the scales are considered which applied earlier when there were still various derived intervention prices and which are still of importance in the market in common wheat. On the other hand the market conditions which obtained at the beginning of the 1974/75 marketing year must not be forgotten. They certainly justify the question whether in such circumstances differentiating the intervention prices should have been thougt of and whether failure to do so represents a serious mistake in law. The impression may be obtained from the judgment in Joined Cases 63 to 69/72 that the idea of differentiating the intervention prices was rejected just as much as was that of differentiating the threshold prices.

Moreover — and this makes clear the relative unimportance of the observations made so far — in relation to the special circumstances of the marketing year in question here the following must also be said: according to what we have heard in the proceedings it was notable there was a considerable amount of durum wheat available on the French market in the spring of 1975. Obviously it was the amount which had been held back from the previous harvest and which has already been mentioned. In this respect I can refer to the documents produced by the applicants which show the purchases of the German mills at this time. The statements of the witnesses such as Zadow, Werle and Schnitt were clear for, according to them, in the spring of 1975 (in the months of March and April) there were large quantities of French durum wheat at competitive prices, namely at prices in the neighbourhood of the intervention price. It may accordingly be said that at least at that time essential factors were wanting in support of the case first made out by the applicants, namely the more difficult access of the German mills to the French market, a factor which alone justifies the question whether it ought not to have appeared proper to reduce the advantages existing for French mills on the French market by Community measures.

For this reason no less than for the other reasons which have been given I take the view that the Community rules cannot be described as grossly wrong for maintaining the well-known difference between the intervention price and the threshold price for durum wheat.

5. Although the examination so far has shown that the claim of the applicants based on wrongful act or omission cannot be held to be well founded, there is still, before I deal with the question of liability for acts equivalent to expropriation, the alternative consideration which I have already mentioned. This applies to the case where, contrary to my view, there is assumed to be a causal connexion between the rules on aids and the level of the French prices and also liability on the part of the Council for this. It applies too in the event of the Court's adopting a different view on the question concerning possible compensatory measures — refunds to producers and such like — from that which I consider to be the correct one. The question then arises as to what extent there may be said to be damage to the applicants and how a claim for compensation is to be assessed.

On the first point, in view of the evidence it can be taken as proved that the applicants — we can limit ourselves to this — had to suffer from the competition of various French mills. I refer to the evidence of witnesses on the price cutting by French competitors which resulted in German mills having to accept a loss of profit or loss of the share of the market.

An assessment of the extent of the damage on the other hand is certainly not possible at present. All that can be said on the present evidence is:

It is certainly not right simply to take as a basis the decline in sale of meal by the applicants because the meal imports from France have increased only to a small extent. In fact it cannot be ruled out that the decline in milling may be due to other causes which are not connected with the present proceedings such as increased imports of pasta from Italy which in turn is possibly due to the well-known action by the AIMA for reducing the price of durum wheat or the substitution of common wheat for durum wheat in meal production.

If it is assumed that the Community institutions ought to have adopted compensatory measures (such as refunds to producers) in the interests of German mills, the damage to be compensated would have to be determined in this

light, taking into account the durum wheat from third countries actually processed, if it is not necessary — in the interests of Community preference — to assume a certain limitation on the amount of importants in question.

Moreover — and this applies in the event of the rules on aids being regarded as unlawful — the crucial question would be how the applicants would have fared if, as a result of the abolition or reduction of aids granted to durum wheat growers, the cost prices to the French mills, and so the opportunities for purchase, had been correspondingly altered. On this assumption an inquiry would have to be undertaken as to what the selling conditions on the German and French markets would have been — the French mills too process some durum wheat from third countries — that is to say, it would be necessary to ascertain how far the competition by the French mills would have been reduced and therefore how far reduction in prices and loss of sales would have been avoided by the German mills.

Nothing more need be said on this part of the investigation now. In any event it is clear that at most a judgment on the principle could come into question, while the assessment of the amount of damages would have to be entrusted to an expert if the parties could not reach agreement on this.

6. A final word must be said on the question of liability for acts equivalent to expropriation, that is for inlawful conduct of the Community institutions without proof of fault. This can also be made brief not least of all because I take the view that unlawful conduct on the part of the Community institutions has not been shown.

The question of liability for acts equivalent to expropriation has not arisen for the first time in the present proceedings; it was already introduced into the discussion in the previous case, that is in Joined Cases 63 to 69/72. The Court did not consider it further in its judgment. My predecessor, Mr Advocate-General Roemer, however, discussed this question in some detail.

In assessing the various arguments Mr Advocate-General Roemer came to the conclusion that there could scarcely be said to be a general legal principle whereby in situations such as the present liability should arise simply for inlawful conduct. One criterion for this is that only a few of the legal systems of the Member States recognize such a legal institution; in addition in systems which do recognize it the forms it takes differ widely. Further, the system and structure of the common market and the provisions for its progressive development do not favour the acceptance of liability arising solely from unlawful conduct. Even if such a claim were recognized in prinicple in Community law it could not be said that conditions for it were fulfilled in circumstances such as those then at issue. It is necessary that there should be an encroachment on the substance of a commercial or industrial undertaking. This cannot be said to occur when there is a simple change in the conditions of supply for basically no-one has a claim to the maintenance of a particular governmental system regulating the purchasing position. Finally, the requirement, at least in German law, that the encroachment shall be directly causal is lacking, since factors other than those contained in the Community rules contributed to the adverse effect on the applicants.

I would like to endorse this view. Since. the facts to be judged in the present case are on the whole the same and since no important new arguments have been added in the present case it can accordingly be said that there is also no possibility of declaring the claim for compensation valid on the basis of the principles of liability for intervention equivalent to expropriation.

III – In view of all that I have said I propose that the applications lodged by the German durum wheat mills should be decided as follows:

The applications on the basis of their original grounds must be regarded as brought prematurely and therefore inadmissible. Further the applications are inadmissible in so far as they are directed against the Commission and in so far as they rely on the alleged inlawfulness of the regulations for aid applying to the durum wheat growers. For the rest the applications are to be rejected as unsubstantiated and the costs of the proceedings must be borne by the applicants.