OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 19 NOVEMBER 1981 [1]

Mr President,
Members of the Court,

1. Introduction

In the seven joined cases which I deal with today a third attack is mounted by the German wheat milling industry on the common organization of the market in durum wheat and common wheat following the cases of *Werhahn and Others* (Joined Cases 63 to 69/72 [1973] ECR 1229) and *Kampffmeyer and Others* (Joined Cases 56 to 60/74 [1976] ECR 711). Leading the attack this time is Ludwigshafener Walzmühle Erling KG whilst the leaders of the earlier attacks have retired to the rear. New to the group of applicants this time is the large pasta product manufacturer Schwaben-Nudel-Werke B. Birkel Söhne GmbH & Co. As on the previous occasions the applications are mainly based on the second paragraph of Article 215 of the EEC Treaty. Article 178 of the Treaty is also invoked for the purpose of fixing the damages claimed. This time the alleged illegality of the common organization of the market in durum wheat and common wheat concerns aspects different from those in the previous proceedings. The present attack is directed solely against the level of the Community threshold prices for durum wheat. Those threshold prices are considered to be too high, particularly in relation to those for common wheat. It is alleged that in fixing those high threshold prices for durum wheat "superior" rules of law have been infringed in various ways. Compensation is sought for what the applicants claim to be the considerable damage caused by the infringement of superior rules of law.

In this opinion I shall, after a brief summary of the essential facts, first examine the six arguments on the basis of which the Council, the Commission and the Italian Government claim that the action is inadmissible.

In the third *Lütticke* judgment (Case 4/69 [1971] ECR 325, paragraph 10 at p. 337) the Court has already established that by virtue of the second paragraph of Article 215 and the general principles to which that provision refers the non-contractual liability of the Community presupposes the existence of a set of circumstances. Those are (1) the existence of damage, (2) a causal link between the damage claimed and the conduct alleged against the institution and (3) the illegality of such conduct.

It is also established since the judgment in Case 5/71 *Schöppenstedt* [1971] 975 ECR (paragraph 11 at p. 984) that the Community may also be liable for damage resulting from legislative action of the institutions involving measures of economic policy if a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.

1 — Translated from the Dutch.

It will already be apparent to the Court from the written and oral procedure that the question of the alleged illegality of the legislative action at issue, which must be more precisely defined in accordance with the terms of the *Schöppenstedt* judgment cited above, raises the most, and also the most complicated problems. For the sake of procedural efficiency I therefore propose that after considering the question of admissibility, I should first examine the less difficult questions as to the existence of damage and the causal link between the damage claimed and the conduct alleged against the institutions. I shall undertake that examination against the background of some of the fundamental features of the common agricultural policy.

Only in so far as it appears necessary I shall then finally consider the allegation that the level of the threshold prices fixed for durum wheat is illegal.

2. Summary of the essential facts with some incidental remarks

For the sake of brevity I refer to the report for the hearing for a complete summary of the facts emerging from the written procedure. It appears to me that the most important facts for the purpose of my subsequent submissions are these.

For each kind of wheat the price system of the organization of the market in wheat comprises:

(1) A target price applicable throughout the entire Community from which the level of protection of the common market in wheat is derived; the target prices are fixed for Duisburg, the Community area having the greatest deficit; they comprise as the market element the difference which should exist between on the one hand the intervention price for durum wheat and the reference price for common wheat of bread-making quality and on the other hand the foreseeable level of market price for durum wheat and for common wheat of bread-making quality in a normal harvest and under natural conditions of price formation in the area having the greatest surplus. Besides that market element the target prices include the cost of transport from the area having the greatest surplus, Ormes, to the Duisburg area.

(2) An intervention price at which the national intervention agencies must purchase wheat offered to them provided that it fulfils specific qualitative and quantitative conditions; pursuant to Article 3 of Regulation No 2727/75 an intervention price for durum wheat is fixed each year for that purpose.

(3) A reference price for common wheat used for bread-making.

(4) A threshold price which determines the price level up to which the prices of cheaper imported wheat must be brought by variable levies.

As noted above, this dispute is concerned only with the difference between the threshold prices for common wheat and durum wheat. All the different types of prices which I have mentioned must naturally be fixed in relation to one another otherwise undesirable economic effects might occur. The second and third subparagraphs of Article 40 (3) of the Treaty have some relevance here from the legal point of view. The second subparagraph of Article 40 (3) provides that the common organization is to be limited to pursuit of the objectives set

out in Article 39 and is to exclude any discrimination between producers or consumers within the Community. The third subparagraph of Article 40 (3) provides that any common policy is to be based on common criteria and uniform methods of calculation. The applicants attach considerable importance to those two provisions in their allegation that the threshold price fixed for durum wheat is illegal.

Besides the price system Article 10 of the basic regulation, No 2727/75, also makes possible the grant of aid for the production of durum wheat. Since production aid is an alternative way of protecting producers, an increase in such aid may naturally lead to lower intervention and threshold prices. For this reason that alternative is a factor in these proceedings. The applicants are indeed seeking a reduction in the threshold prices for durum wheat. Production aid may be varied from one production area to another and restricted to specific production areas. In each case it is restricted to specific qualities of wheat. A restriction of production aid to specific areas and qualities occurred in Regulation No 1143/76.

So much for the general features of the relevant market organization. As I have pointed out, the allegedly excessive difference in threshold prices for common wheat and durum wheat and in particular the allegedly excessive threshold price for durum wheat, is the main issue in these proceedings.

As may be seen from the file on the case, the threshold price for the 1978/79 marketing year was fixed somewhat below the target prices for common wheat at 159.40 ECU per tonne and at 221.30 ECU per tonne for durum wheat. For the 1979/80 marketing year those threshold prices were fixed at 179.43 and 273.40 ECU per tonne respectively, again somewhat below the target prices. The differences between the threshold prices for common wheat and durum wheat have thus grown larger than was the case up to 1973/74, even though according to the applicants' calculations the price difference between the 1974/75 and 1979/80 marketing years has dropped again from a ratio of 100 : 152.2 to 100 : 138.5. In the applicants' view however that ratio is far above the price ratios between common wheat and durum wheat on the world market which they consider to be relevant. That has been contested in the written procedure by the French interveners and the Italian Government as regards the wheat qualities on the world market relevant for comparison purposes. In the written procedure the Council and the Commission have mainly confined their observations on this point to stating that the basic regulation contains no obligation requiring account to be taken of price ratios prevailing on the world market in the common organization of the market as well. Seeing that the obligation which I mentioned is laid down in Article 4 of Regulation No 2727/75 to take account of prices to be expected under natural conditions of price formation, I would make one comment on that statement which I believe is strictly correct in itself. It is this. Indirectly price ratios for comparable qualities on the world market thus do certainly appear to have some importance, notably in so far as those price ratios on the world market

have in fact arisen as a result of the normal operation of supply and demand. In that respect the submission of the French interveners and the Italian Government in the written procedure appears to me to be rather more relevant.

Besides relying on price ratios on the world market the applicants also rely on the cost price ratios for durum wheat and common wheat within the Community. One comment which I would make in regard to their observations on this point is that in relying on the *Werhahn* judgment the applicants somewhat over-estimate the Court's influence on the cost-price ratios. Paragraph 19 of the decision in that judgment states that there is a relationship between the cost price of durum wheat and of common wheat, the former being generally approximately 20 % higher than the latter. In their application the applicants do not indicate the results of their own study in respect of the further evolution of production costs. They did not thoroughly examine the evolution of production costs for common wheat and durum wheat in the Community until the oral procedure. One of their most interesting conclusions during the oral procedure was that the ratio of those production costs to one another is widely divergent, with a tendency however to shift in favour of durum wheat the nearer it is produced to the south of the Community. Doubt has since been cast by other parties to the proceedings on the value of the data produced. In their application and also the subsequent procedure the applicants have indeed continued to attach great significance to the price ratios prevailing on the world market in this respect. If prices were left to find their own level production costs would inevitably reflect those price ratios on the world market. I would comment here that I consider that reasoning to be economically correct in principle and also of possible relevance. I believe it is correct in principle because if prices were left to themselves businesses whose production costs are too high are bound to disappear. I believe it is also relevant because, as I pointed out previously, the target prices must take account *inter alia* of a forecast of the price ratios under natural conditions of price formation.

Amongst the other facts I consider the following in particular to be of further relevance.

First, it is not disputed that during the relevant years there was a surplus of common wheat and a deficit of durum wheat on the Community market. During the oral procedure the Commission produced the figures for imports of durum wheat from non-member countries by Italy and France which were considerably higher than those for Germany. In 1979 France imported 242 929 tonnes of durum wheat, Italy 523 835 tonnes and the Federal Republic of Germany only 154 726 tonnes, though some of the Netherland's imports of 143 789 tonnes must be included in that figure. Although those figures do not by themselves indicate the importance in percentage terms of imported wheat for the milling industry, I do nevertheless consider them to be relevant to the factual background of the dispute. For they bear out the Commission's contention that the prices for durum wheat produced in France and Italy tend to adapt themselves to the threshold prices. In a deficit situation extending to the producer countries

themselves it is hardly possible to expect anything else given the laws of supply and demand. To that extent the applicants' contention, which is not supported by concrete evidence, that the industry in the production areas can obtain durum wheat more cheaply, appears much less credible.

In the submission of the French interveners made during the oral procedure, a deficit of durum wheat no longer exists in the Common Market since the accession of Greece. However, that statement does not appear to be of relevance for the purposes of the present dispute as it relates to earlier marketing years.

It appears from the file on the case that it is not disputed that the quantity of durum wheat milled by German mills fell by about 20 % between 1975 and 1979. The applicants plausibly argue that the reason for the fall lies in the fact that the wide differences in price for durum wheat and common wheat made it attractive for the pasta-products industry increasingly to substitute common wheat for durum wheat despite its lesser use-value. Such substitution was made possible because, in contrast to the producer countries, there is no prohibition against the milling of common wheat by the pasta-products industry in the Federal Republic of Germany. According to the applicants, as a result *inter alia* of that possibility of substitution they are able only in part to pass on the high import prices to the pasta-products industry. Since that contention seems plausible as well it will be adopted as a working hypothesis in my subsequent argument.

Besides being determined by the price of the raw material and the possibility of substituting common wheat for durum wheat, the conditions under which the milling industry obtains its raw materials are of course also determined by the costs of transport. Mills or pasta-products factories located within or close to the production areas may thus enjoy a geographical advantage over industries located further away from their suppliers. The existence of such a competitive advantage in the sphere of transport costs is disputed by the French interveners by means of figures, particularly as regards the position between the German and French industries. Since those figures and in particular the relevance of the routes chosen as a basis for them were challenged by the applicants during the oral procedure, some uncertainty does remain in this respect. Some French durum wheat is exported to Germany however. It therefore seems improbable that, in contrast to the fixing of the target prices, the aspect of transport costs should be given much weight. It seems difficult to deny that owing to the distance between them Italian and German mills cannot be in competition with one another. In the case of the Italian pasta-products industry, too, it seems unlikely that it enjoys an advantage in transport costs on the German market. When considering the possible causes of the alleged damage I shall not therefore pay any particular attention to the differences in transport costs for the wheat-milling undertakings competing with one another.

For the further facts I refer as I said to the report for the hearing which also contains a useful summary of the arguments submitted by the parties in

support of their case. I shall so far as necessary examine those arguments in turn in the relevant part of my subsequent argument.

3. The question of admissibility

As I said I shall now first examine the six arguments put forward against the admissibility of the claims.

The Council considers the applications to be inadmissible because they relate to the threshold prices for all marketing years from 1974/75 to 1979/80. That is in blatant contradiction to the case-law of the Court and disregards the principle of legal certainty. That principle precludes argument over commercial transactions which have been definitively settled. This defence argument does not seem to me to be tenable. In fact it contains a *conclusio a contrario* based on the judgment in *Kampffmeyer and Others* (Joined Cases 56 to 60/74). In the first subparagraph of paragraph 6 of the decision in that judgment the Court held that "Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty . . .". It may certainly not be inferred from that dictum of the Court that Article 215 would preclude an application being made to the Court on account of damage which has already occurred. The wording of Article 215, which is clear in this respect, shows on the contrary that the article is intended precisely to cover primarily damage which *has already* been caused. It was necessary for the Court to refer to the legal systems of the Member States in [the last subparagraph of] the paragraph cited simply as an additional argument for justifying the ambit of Article 215 being extended to damage in the future but foreseeable with sufficient certainly. This first argument of the Council has indeed already been expressly rejected by the Court in Joined Cases 3 and 4/64 *Chambre Syndicale de la Sidérurgie Française* [1965] ECR 441 and in Joined Cases 19, 20, 25 and 30/69 *Denise Richez-Parise and Others* [1970] ECR 325.

Secondly, both the Council and the Commission argue that the applicants should have first exhausted the national legal remedies. As to that point, the Court has however already held shortly before these proceedings began in paragraph 10 of the decision in the *Wagner* judgment (Case 12/79 [1979] ECR 3657) in answer to a similar defence argument on the part of the Commission that "the action for damages provided for in Articles 178 and 215 of the Treaty was included as an independent form of action, with a particular purpose to fulfil within the system of legal remedies, and subject to conditions on its use arising out of its specific nature. Its purpose is not to enable the Court to examine the validity of decisions taken by national agencies responsible for the implementation of certain measures within the framework of the common agricultural policy or to assess the financial consequences resulting from any invalidity of such decisions." In my opinion the sole inference to be drawn from the subsequent paragraphs 12 and 13 is that only national courts may decide the legality of national regulations implementing the common agricultural policy, with recourse to Article 177 of the EEC Treaty where necessary; not, on the other hand, that the national implementing regulations must be

challenged before a claim for damages may be brought under Article 215 for unlawful action on the part of the Community itself. Indeed, in the *Merkur* judgment (Case 43/72 [1973] ECR 1055) the Court has already stated as much in paragraph 6 [at page 1069]: "It would not be in keeping with the proper administration of justice and the requirements of procedural efficiency to compel the applicant to have recourse to national remedies and thus to wait for a considerable length of time before a final decision on his claim is made". Nor is it possible to infer from paragraph 14 of the decision in *Amylum* (Joined Cases 116 and 124/77 [1979] ECR 3560) and from the virtually identical paragraphs 6 of the decisions in a series of other judgments delivered in 1979 ([1979] ECR 2955, 3017, 3045 and 3091) that in this case an action must be brought before the national court to challenge or seek the repayment of levies imposed before an action for damages is brought under Article 215. The distinctive nature and independent character of the action for damages under Articles 178 and 215 of the Treaty is on the contrary expressly confirmed in all the paragraphs cited. In view of those previous decisions I think that on balance it is unnecessary to look more closely into the question whether national remedies were available to the applicants in these cases, which they themselves deny but which the Commission has attempted to show when answering questions put by the Court.

Thirdly both the Council and the Commission and also the Italian Government maintain that the action is inadmissible because its purpose is not in fact to obtain damages but to obtain a review of the Council's and Commission's policy on threshold prices. It is therefore a case of an abuse of process. As far as that objection is concerned, it is sufficient for me to point out that in Case 5/71 *Schöppenstedt* [1971] ECR 975), Case 153/73 *Holtz and Willemsen* [1974] ECR 675) and other cases the Court has repeatedly rejected similar objections of inadmissibility whilst referring to the independent nature and particular function and purpose of the action for damages provided for in the second paragraph of Article 215. Nor is it possible to say that the object of the claim for damages is not defined or that the grounds for the claims are not set out. To that extent an objection of inadmissibility raised against an application for the award of compensation for damage not defined in detail, which was upheld by the Court in paragraph 9 of the decision in the *Schöppenstedt* judgment, may not be relied upon here either. That plea can be dismissed first by reference to paragraphs 6 and 7 of the decision in Case 90/78 *Granaria* [1979] ECR 1081, at pp. 1090 and 1091. Moreover, the damages claimed are thoroughly defined in this case just as are the grounds of the claim. Indeed the parties differ so much in their views on the question whether the existence of damage and a causal link with the alleged unlawful price-fixing decisions have in fact been demonstrated that, apart from considerations of procedural efficiency, the aforesaid paragraph of the decision in the *Schöppenstedt* judgment is an additional reason for giving priority to those questions when the substance of the case is examined. An abuse of the

second paragraph of Article 215, as alleged by the Council and Commission in this third objection, can be successfully pleaded only if it is demonstrated that, even if there is a question of unlawful conduct, it has still not been proved that positive damage has been caused as a result. However, for the reasons given, that can be done in this case only when the substance of the case is examined.

As the *fourth* objection of inadmissibility the Council contends that the regulations at issue were enacted by the Commission and therefore the applications should have been made against the Commission alone. That objection must be rejected as well because the content of the Commission regulations were determined almost entirely by the aforesaid Council on prices.

Since the applicants clearly seek compensation for damage arising from regulations of the Council and Commission and by no means the repayment of charges fixed by the national authorities, the *fifth* objection of the Commission, which is based on the opposite view, must likewise fail.

Finally the Italian Government as intervener submits yet a *sixth* ground of inadmissibility, namely that these proceedings only appear to have raised a new question. In actual fact the issue is the same as in *Werhahn* (Joined Cases 63 to 69/72 [1973] ECR 1229) and *Kampffmeyer and Others* (Joined Cases 56 to 60/74 [1976] ECR 711), namely the legality of the common organization of the market in wheat. In my opinion this objection must also be rejected because the illegality alleged in this case concerns an aspect of the organization of the market in wheat different from that at issue in the previous cases, the substance of the actual claim is different and only some of the applicants are the same as those in the previous proceedings.

4. The requirements of proven damage and of a proven causal link between the damage alleged and the alleged illegality of the relevant regulations of the Council and Commission

4.1 *Some of the relevant fundamental principles of the common agricultural policy*

In order to put the requirements of the existence of damage and a causal link between the damage alleged and the conduct alleged against the institutions in the correct prospective, I think that it is useful first to call to mind some of the basic features of the common agricultural policy. In the case of each of those features I shall indicate its significance with regard to the requirements which any action for damages based on the second paragraph of Article 215 must satisfy.

First, it should be remembered that under Article 38 (2) of the EEC Treaty the rules laid down for the establishment of the Common Market are (also) to apply to agricultural products save as otherwise provided in Articles 39 to 46. Furthermore Article 40 (2) shows that the common organization of the agricultural markets which is made possible may entail more or less extensive interference with the market mechanism. The significance of those two points as regards the issue before us lies generally

speaking in the fact that the common agricultural policy never wholly eliminates the mechanism of the Common Market. According to the Court's decisions on the principle of proportionality, which are still to be dealt with, and the important judgment in Joined Cases 80 and 81/77 *Commissionnaires Réunis and Ramel* [1978] ECR 927, the common agricultural policy *may* not completely eliminate the operation of the market mechanism itself. Some of the consequences of that fact are these. In so far as the market mechanism itself, for example owing to the geographical advantages of the French and Italian wheat-milling industries, causes disadvantages to industrial undertakings situated further away from the production centres for durum wheat, compensation for that damage may not be sought. Furthermore compensation may not be sought either, on the grounds of an allegedly illegal common organization of the market, for any distortion of the conditions of competition resulting from disparities between national legislation, national schemes to provide aid or from business practices which distort competition, when the common organization of the market contains no independent rules upon them. In accordance with Article 38 (2), such distortion must in principle rather be challenged on the basis of the rules of the Treaty on the establishment of the Common Market.

No less significant in the present case is the effect of the normal operation of supply and demand on the level of prices which is to be expected when such considerable quantities of durum wheat are imported from non-member countries into the producer countries, as also occurred in the relevant period according to the figures provided by the Commission. The operation of the market mechanism will then almost inevitably lead to the price level of durum wheat produced in France and Italy themselves, adapting itself to the level of import prices. The producer of durum wheat can then in fact sell his produce at any time in France and Italy themselves somewhat below the threshold price level. According to the Commission's figures such a likely adaptation of prices did actually occur. Finally, it is alleged that too high a threshold price for durum wheat has to be paid by commercial buyers not only in the northern Member States but also in France and Italy. Certainly, in so far as the price level of domestic durum wheat also adapts itself to that allegedly excessive threshold price owing to the operation of the market mechanism, the competitive position of the German, French and Italian milling industries in relation to one another is not therefore changed by that allegedly excessive price level. Therefore no loss to the German wheat milling industry is to be expected on that ground either.

A *second* basic feature of the common agricultural policy lies in the fact that the various objectives set out in Article 39 of the EEC Treaty have no fixed priority. This has been repeatedly confirmed by the Court, for example in its judgments in *Werhahn* (Joined Cases 63 to 69/72 [1973] ECR 1229) and *Kampffmeyer* (Joined Cases 56 to 60/74 [1976] ECR 711). In other words the institutions of the Community may temporarily give priority to some of the objectives described in Article 39 over other objectives of the same article. This ability

of the institutions to set temporary priorities has already been recognized in Case 5/67 *W. Beus GmbH & Co.* [1968] ECR 83. So the production of durum wheat in particular, in which the Community is deficient, may be promoted by relatively high prices or through aid. I would add that an adjustment from the over-production in common wheat to the under-production of durum wheat promoted in this way also appears to be in accordance with the aim of the rational development of agricultural production and the optimum utilization of the factors of production mentioned in Article 39 (a) and with the aim of assuring the availability of supplies mentioned in Article 39 (d). The temporary nature of the priority thus given to a high degree of self-sufficiency means of course that other objectives must receive priority once a sufficient degree of self-sufficiency is achieved. The need to set temporary priorities was also expressly recognized by the Court in paragraph 24 of the decision in Case 5/73 *Balkan-Import-Export* [1973] ECR 1091. In view of the task set out in Article 2 of promoting throughout the whole Community a harmonious development of economic activities, a task which also applies to the common agricultural policy, considerations of regional policy may and indeed must be taken into account in the organization of the market in wheat. With regard to the aim mentioned in Article 39 (c) of stabilizing markets the Court has already observed in paragraph 12 of the decision in the *Werhahn* judgment cited above and also in paragraph 13 of the decision in the *Kampffmeyer* judgment that the concept of stabilization of the markets cannot cover the maintenance at all costs of positions already established under previous market conditions. Besides protecting producers and buyers against price fluctuations on the world market and against the effects on prices of large variations in harvests, the aims of stabilizing markets in my view also includes the elimination of both structural surpluses and structural deficits in production. It certainly does not include the compulsory elimination of a natural competitive advantage of producers or milling industries in certain areas of the Community as well. Besides the *Werhahn* judgment, a comparison may also be made with the judgment of 17 December 1970 in Case 34/70 *Synacomex* [1970] ECR 1233 on this point.

Thirdly, it seems useful to recall that the Council has considerable discretion not only with regard to the order of priorities of the objectives of Article 39 but also with regard to the choice of form and methods for the attainment of those objectives. In this connection Article 40 (2) mentions three forms of market organization from which the Council may choose depending on the product concerned. The first subparagraph of Article 40 (3) then provides that the common organization established in accordance with paragraph (2) may include all measures required to attain the objectives set out in Article 39. The particular examples listed are regulation of prices, production and marketing aids, storage and carry-over arrangements and common machinery for stabilizing imports or exports. As the practice of the common agricultural policy shows, that list is moreover not an exhaustive one. For example, income subsidies and quality standards are also possible and

furthermore it is generally known that regulation of prices may assume a large number of different forms. Besides being determined by the objectives of Article 39, general legal principles and the kind and market situation of the particular products concerned, the choice between the methods to be used in a specific case is determined primarily by considerations of economic and social policy. Anyone has the right to express a preference for the use of specific instruments on the basis of his interests or his view of economic or social policy, including considerations of regional policy, on the basis of budgetary considerations, legislative policy or yet other considerations. In my previous capacity as an academic I repeatedly did that myself. However, the important point in legal proceedings is first the fact that, even after a political decision has been taken in favour of specific priorities within the objectives of Article 39, the order of objectives chosen usually — and indeed on the market in wheat as well — still leaves considerable discretion as to the choice of the methods to be employed. By virtue of the provisions in the Treaty that discretion of the Council has to be respected by the Court. It must then be said that, according to the Court's decisions (*inter alia* paragraph 13 of the decision in the *Kampffmeyer* judgment (Joined Cases 56 to 60/74 [1976] ECR 711, at p. 743), which I have already cited several times), in actions arising from non-contractual liability against the Community concerning legislative acts involving choices of economic policy that discretion may be regarded as having been exceeded only in the case of a sufficiently flagrant infringement of a "superior" rule of law protecting the individual. What these "superior" rules of law may comprise has already been clarified in part in the Court's decisions. Further decisions will provide further definition of them. As appears from the aforesaid formula of the Court, reliance may certainly not be placed in this case on the principle to be inferred from the first subparagraph of Article 40 (3) and the common legal principles of the Member States that the methods used must be proportionate to the objectives which they seek to attain, in so far as none of the applicants' individual interests are damaged by any disproportion found in the methods used. I have already pointed out in this connection that in a deficit situation excessively high prices which apply to all competing purchasers do not necessarily change their competitiveness as between themselves. Where the provisions of the relevant basic regulation are alleged to have been infringed it must first be ascertained whether those provisions belong to the "superior" rules of law referred to in the Court's formula. In addition it will be also be necessary to ascertain whether the relevant provisions are intended to protect the individual interests which an applicant claims to have. For the reason already indicated in connection with the principle of proportionality that does not appear to be automatically the case with regard to policy decisions concerning the level of Community preference for home-grown durum wheat. In view of the generally accepted fact that there is little elasticity in price where demand for

agricultural produce and food is concerned, it is improbable on present showing that where there is a deficit, as in the case of durum wheat, a high threshold price applicable to all buyers will as such lead to a change in their relative competitiveness and thus to some buyers' being put at a disadvantage.

On the other hand it may be inferred from the second subparagraph of Article 40 (3) and from the Court's decisions that the prohibition of discrimination set forth in that provision definitely constitutes a "superior" rule of law for the protection of both producers and consumers. That was expressly recognized in the judgment in Case 64/76 *Dumortier* [1979] ECR 3091. For an excellent summary of the extensive case-law on the prohibition of discrimination up to 1978 I refer to the publication by G. Druesne *La Politique Agricole Commune devant la Cour de Justice des Communautés Européennes* 1958-1978 (Paris, Éditions Techniques et Économiques), pages 81 to 112. To claim that an excessive but uniform fixing of the threshold prices as such leads to such prohibited discrimination *vis-à-vis* German consumers, as the applicants contend, is on present showing unacceptable for the reasons indicated previously. What is more the applicants claim in support of their case that French and Italian mills have a natural competitive advantage because they can obtain their raw materials more cheaply. Apart from the fact that the correctness of this claim could be challenged it must be pointed out in this connection that in paragraph 17 of the decision in the *Werhahn* judgment cited above the Court has stated that this fact "does not in itself constitute a prohibited kind of discrimination but rather the consequence — that is not contrary to the rules of the Treaty — of a more advantageous location of French undertakings". Furthermore from the judgments in Cases 9 and 11/71 *Compagnie d'Approvisionnement* [1972] ECR 391, 43/72 *Merkur* [1973] ECR 1055 and 7/76 *IRCA* [1976] ECR 1213 Druesne in my opinion correctly derives the general rule that differences in competitive position which result from national measures which are not otherwise prohibited by Community law cannot constitute prohibited discrimination within the meaning of Article 40. Since this point appears to have particular significance for the present cases in connection with the prohibition existing in some Member States — but not in the Federal Republic of Germany — against the milling of common wheat for pasta products, I would however make the following observations on that general principle. Differences in competitive position of market traders in different Member States, which arise from differences in national policy, do not on the whole constitute discrimination under the scheme of the Treaty. The concept of discrimination presupposes that the decision-making body treats comparable situations in different ways unless there are objective reasons for such different treament (on this see *inter alia* the judgment of 19 October 1977 in Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753), or it treats dissimilar cases in the same way (see here the *Italian Refrigerator* judgment, Case 13/63 [1963] ECR 165). Where on the other hand competitors from different Member States experience different consequences as a result of divergent legislation or administrative rules of the Member States concerned

there is no question of discrimination but at the most distortion within the meaning of Article 101 of the Treaty. Where it occurs action must be taken against it on the basis of that article. If the conditions for the application of that provision are not fulfilled application of Article 100 is also conceivable. In so far as one of the national legislative or administrative provisions concerned is contrary to the provisions on the free movement of goods, in particular Articles 30 to 34, it will also be possible to take action on the basis of those articles. Although in some circumstances discrimination may also occur this is not discrimination within the meaning of the second subparagraph of Article 40 (3) of the Treaty. For by its clear wording the prohibition of discrimination laid down in that article solely concerns discrimination in the context of the common organization of the agricultural market.

Finally, as regards the superior rules of law, the applicants rely on the final subparagraph of Article 40 (3). At this juncture suffice it to say with regard to that argument that the common criteria and uniform methods of calculation referred to in that provision definitely form a superior rule of law for the protection of the individual only in so far as its non-observance

— constitutes *either* discrimination within the meaning of the foregoing subparagraph,

— *or*, a breach of the principle of proportionality, which in its *Werhahn* judgment *inter alia* the Court appears also to have recognized as a superior rule of law for the protection of the individual,

— *or* a breach of some other generally recognized legal principle lying outside Article 40, such as misuse of power or manifestly incorrect findings of fact material to the taking of a decision.

Over and above that it will be necessary to demonstrate in proceedings concerning legislative action in which one of those superior rules of law is alleged to have been infringed with a "sufficiently flagrant infringement" of such superior rules of law has occurred.

4.2 *The requirement of damage*

Against the background of the aforesaid general features of the Common Agricultural Policy I shall now first examine the requirement of damage mentioned in Article 215.

The applicants in Cases 197, 198, 199, 200, 243 and 245/80 consider the damage which they have suffered to be the difference between a correct threshold price and the excessively high threshold price fixed for durum wheat from which must then be deducted the amounts which the applicants can pass on to their buyers by increasing their prices for meal.

The applicant in Case 247/80 considers the damage which it has suffered to be the difference between on the one hand the correct price for durum-wheat meal, as can be calculated from a correct threshold price for durum wheat, the yield of durum wheat and the cost of milling durum wheat into durum-wheat meal, and on the other the prices actually paid to the German mills for that meal.

Therefore the allegedly excessive threshold price for durum wheat is a

decisive factor in all the applications in the calculation of damage. In this connection there is no need to examine the ancillary claim for interest derived from and dependent on the main claim for damages.

According to the judgment in the *Richard Poole* case (Case 49/79 [1980] ECR 569), two different elements may be distinguished in the requirement that actual damage should exist for an action based on the second paragraph of Article 215 to succeed. In the first place the existence of actual damage must be demonstrated. I refer here to paragraph 10 of the judgment cited.

In the second place it appears from paragraph 11 of the same judgment that the alleged damage must be sufficiently defined.

In the Commission's view the existence of damage has not been demonstrated in this case since the German milling industry has by no means operated at a loss or met the alleged difference in cost price *vis-à-vis* its French and Italian competitors from its capital. Although a proven reduction of profits and not only a proven loss may in my opinion also indicate that damage has actually been suffered, for reasons different from those of the Commission I too take the view that the actual existence of the individual damage alleged to have been suffered has not been demonstrated. As I have already explained in detail in my general observations on the features of the common agricultural policy, even if it is accepted that the threshold prices for durum wheat has been fixed too high for the Community as a whole, the fact is that it by no means follows that the German undertakings concerned have incurred a disadvantage owing to those excessively high prices. Rather, in the case of a deficit, it will have to be assumed that the competitive position of buyers as between themselves of durum wheat in the various Member States is not altered by such uniform excessive threshold prices.

Therefore it cannot be expected *a priori* that damage can be incurred by any of the undertakings concerned as a result of those excessive threshold prices. Faced with the statistics and arguments put forward by the Commission and the French interveners the applicants have not in the least managed to demonstrate that this basic assumption is wrong in this case. That they have rather implicitly admitted the opposite will be shown later on when the required causal link between the alleged disadvantages and the alleged unlawful conduct is examined.

As regards the second element of the requirement that damage should actually have been suffered, the conclusion must be that the applicants have not sufficiently defined the damage suffered either. Their calculation of this damage is on the contrary largely abstract. They should have at least attempted to define the extent to which their competitive position vis-à-vis their French and Italian competitors has deteriorated owing to the allegedly excessive threshold prices. However, there is no attempt to do so in the applicants' submissions. Their abstract calculation is in point of fact based on the view, which as I said is highly improbable given the market

conditions, that they, but not their French and Italian competitors, have suffered a disadvantage owing to those allegedly excessive threshold prices. I shall return to this point when I consider the causality requirement below.

4.3 *The causal link required*

As regards the requirement of a proven causal link between the alleged unlawful conduct and the damage claimed, I refer first to what I have already said about the general features of the common agricultural policy. The possible causes of any damage are then, besides the common organization of the market in wheat, first of all geographical advantages of the French and Italian industry as well as possible higher efficiency or lower profit margins. Another possible cause of damage which must be mentioned here in particular is the difference in national legislation on quality standards for the pasta-products industry which featured so prominently in the proceedings. As I observed previously, it follows from the decisions of the Court that differences in competitive position which result from those two causes cannot constitute a breach of the prohibition of discrimination contained in Article 40 or an infringement of any other superior rule of law relied upon. Both causes may also have an effect on the competitive position which has nothing at all to do with the allegedly excessive threshold prices.

In the remainder of my opinion I shall confine my submissions to those two other possible causes of the damage which has been alleged although, as I have said, not demonstrated. As regards the first other possible cause, the natural conditions of competitions, the applicants explicitly indicate at various places in their own submissions that those conditions are also regarded as a cause of the damage suffered. In the oral procedure this view of theirs was again expressly affirmed in answer to a question on this matter on my part. They claim that the geographical advantage of the Italian industry has made it impossible for the applicants in particular to pass on the excessive threshold prices to their buyers. In this part of my opinion it is sufficient for me to state and I do not need to return to my previous conclusion that the more likely inference from the deficit situation, which judging by the Commission's figures, exists in France and Italy as well, is that the market mechanism excludes any competitive disadvantage of northern industries as regards the prices of raw materials, even if the threshold prices are fixed at an excessively high level. In the oral procedure the applicants have expressly admitted as much in answer to a question on this matter on my part. But then they went on to state that this only holds good, and I now quote verbatim from the tape recording, "if the legal situation and with it the state of competition in all the countries of the Community were the same. The crucial difference however lies in the partial application of a purity requirement. Our primary damage resides in the replacement of durum wheat by common wheat. That is caused by the disproportionate price gap. This different economic situation, on the one hand in the Federal Republic of Germany in which it is similar to that in Belgium, the Netherlands and Great Britain, and on the other hand in Italy and France, is

due to the fact that the economic effects of the excessive price gap of the economically unjustified, unbalanced price (to use the phrase of my senior partner, Mr Modest) are cushioned in the other countries by the purity requirement".

It then becomes apparent from the rest of the answer that the applicants discern prohibited discrimination in that difference in legislation. Such a conclusion was moreover already to be inferred from the applicants' answer to the Court's written questions before the oral procedure. As regards the actual significance of the difference in legislation, which was also cited in the oral procedure as a cause of damage, it is insignificant whether or not the Federal Republic of Germany, France and Italy are justified in introducing or maintaining a requirement as to purity on the basis of other provisions of the Treaty.

For the purposes of these proceedings it is unimportant whether the French and Italian prohibition against the milling of common wheat might be contrary to Articles 30 to 34 of the EEC Treaty, as the applicants claimed in passing during the course of the oral procedure.

In answer to a further question from the Judge-Rapporteur the applicants once again confirmed that in their view the prohibition in Italy against the milling of common wheat makes it impossible for the German industry to pass on the excessive threshold prices for durum wheat, whereas the Italian industry certainly may mill common wheat when exporting pasta products to Germany.

From those replies no other conclusion can be drawn than that the applicants do not perceive the main cause of the damage alleged, albeit unproven as I have said, to be in the excessive threshold prices but in the divergent legislation on quality standards. For they have expressly admitted with regard to the threshold prices alleged to be excessively high that they have not as such led to competitive disadvantages for the German industry. As far as the alleged unequal conditions of competition are concerned, to which the difference in legislation is supposed to lead, they are wrong in claiming that this difference constitutes discrimination. I have already observed in the first part of this section of my opinion that according to the text of Article 40 (3) and the case-law of the Court, which is clear on this point, differences in national legislation, such as those in question here, cannot constitute discrimination prohibited by Article 40 (3). Since it is that difference in legislation which in the final analysis is conceived to be the main cause of the alleged disadvantage, all the applicants' claims for damages must be rejected.

5. The alleged illegality of the threshold prices for durum wheat

The conclusion which I draw from my argument so far is that the alleged damage has not been demonstrated or sufficiently defined and that the applicants themselves have made it clear in their answers to the written questions put by the Court and during the oral procedure that the main cause of their alleged damage is not to be seen in the threshold prices as such but in the differences in legislation laying down quality standards for pasta products. Therefore it is unnecessary in my view to

look more closely at the third requirement for an action arising from non-contractual liability to succeed, namely the illegality of the threshold prices fixed for durum wheat.

To round off my argument, and in case the Court does not share the conclusions which I have drawn, I shall however so far as necessary briefly summarize my conclusions on this third requirement as well. For this purpose I can also go back to my previous observations on some of the basic features of the common agricultural policy.

The applicants' argument that the threshold prices for durum wheat do not take sufficient account of the normal price conditions on the world market has in the first place no distinct factual basis in view of the statistics on world market prices which were adduced in the written procedure by *inter alios* the French interveners and the Italian Government and which were not convincingly challenged. Secondly it has not been demonstrated that, even if there were a question of the threshold prices being contrary to either the eighth recital in the preamble to basic Regulation No 2727/75 cited in support of that argument, or Article 4 thereof — in so far as it might be perceived to reflect the same idea — those provisions may also be treated as superior rules of law protecting the individual from which the applicants in this case may derive rights.

In expressing their preference in these proceedings for the political instrument of providing production aids the applicants ignore the discretion conferred upon the Council as to the choice of instruments to be used.

I have already stated in my previous submissions that it is not the case that the threshold prices for durum wheat which are alleged to have been fixed excessively high constitute discrimination within the meaning of the second subparagrph of Article 40 (3) of the EEC Treaty which is detrimental to industrial mills in the north. I come to that conclusion on the basis of the arguments of the applicants themselves, the previous decisions of the Court and the general scheme of the Treaty.

Irrespective of the question whether the applicants are correct in deriving a requirement from the third subparagraph of Article 40 (3) that economically rational criteria should be applied when the prices are fixed, it has not been demonstrated that such a requirement must be treated as a superior rule of law for the protection of the industry concerned which the applicants may invoke in proceedings pursuant to the second paragraph of Article 215.

The contention that the Council acted contrary to the objectives of Article 39 and in particular to the objective of stabilizing the market when it fixed the prices must be rejected on legal grounds similar to those adopted by the Court in its judgments in the two previous sets of proceedings brought by some of the applicants. Reference may be made here to paragraphs 12 and 13 of the decision in the *Werhahn* judgment (Joined Cases 62 to 69/72 [1972] ECR 1229) and paragraph 13 of the decision in the *Kampffmeyer* judgment (Joined Cases 56 to 60/74 [1976] ECR 711).

The fact that in determining the level of the threshold prices the Council also took into account budgetary considerations may certainly not be regarded as a misuse of its powers. Indeed, according to the explanations of

the Commission and the Council, the aim of that was not to obtain higher income for the Community but to weigh up both the costs and the effectiveness of the alternative instruments of fixing the threshold price and providing production aid.

As I observed before, the submission that the threshold prices have been fixed contrary to the principle of proportionality owing to the failure to have regard to price conditions on the world market has in the first place no proven factual basis. During the oral procedure the applicants did adduce some interesting statistics on production costs for durum wheat and common wheat within the Community which are more relevant in the case of the organization of the market in wheat. However, the widely diverging cost-ratios which emerged in the case of different production areas tends rather to underline the fact that the Council must be given some degree of discretion in this respect too. The applicants' argument furthermore fails to recognize that a claim purported to be based on the principle of proportionality must at least be supported by sound evidence that the level of the threshold prices cannot be justified by the principle of Community preference, which has been recognized more than once by the Court, or by reliance on Article 39 (a) and (b) either. Such evidence has not been provided by the applicants.

Since in my view the applications must be rejected for not fulfilling the other requirements for an action for damages, I believe that those few comments on the alleged illegality of the threshold prices fixed may suffice.

6. Reasons for setting aside a confidential Commission document

As an appendix to its written submissions the Belgian intervener produced an internal document of the Commission which during the oral procedure has been shown to be confidential and irrelevant as far as the formation of the Commission's and Council's definitive opinion is concerned. It was also demonstrated by the Commission that the document produced did not have its cover page which states that the document is confidential and provisional and at the hearing the intervener was unable to disprove the Commission's denial that the document could have been handed over to one or more members of the Advisory Committee on Cereals. It has not been claimed or demonstrated either that the content of the document was communicated verbally at the Advisory Committee's meeting. In those circumstances the reasons for the Court's decision announced at the hearing to remove the document from the file and treat the quotations from it in the written submissions as non-existent can be stated to be the incomplete and therefore confusing nature of the document produced, its confidential and internal nature, and the Commission's opinion, which was not rebutted by the Belgian intervener, that members of the Advisory Committee could not have legitimately taken cognizance of it. In adopting those grounds for the decision sufficient account is taken of the fact that as a matter of experience Commission

documents designated confidential and internal are nevertheless sometimes passed to third parties of whom it cannot be expected that they will not communicate their content to others and moreover not make any external use of them.

To argue that individuals may never make use of Commission documents designated confidential and internal would for that reason go too far in my view. The extent to which internal documents are circulated is the responsibility of the Commission itself. Seeing that the Commission's internal documents or at least their tenor are frequently leaked or even published I feel that it is an exaggeration and a disregard of practice to claim that such use makes any internal recording of provisional ideas or any internal discussion impossible. Consequently in my view the institution concerned should rather be required to demonstrate in each case that use of such documents is inadmissible and the Court will then have to decide each case as it occurs.

7. Conclusion

On the basis of my submissions set forth above it is my opinion that:

(1) The claims for damages before the Court must be rejected because damage has not been demonstrated to exist, the alleged disadvantage has not been sufficiently defined and a causal link between the disadvantage allegedly suffered and the fixing by the institution of the threshold prices complained of has not been proved or even demonstrated;

(2) The applicants should be ordered to pay the costs except those of the interveners;

(3) The decision on Commission document 81.1209 DK can be based on the reasons which I have indicated.