OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 26 April 1988 *

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* Translated from the Italian.

Mr President,
Members of the Court,

1. By order of 31 October 1985, in proceedings brought by the German company 3 Glocken GmbH and by Mrs Gertraud Kritzinger against Provincia autonoma di Bolzano, which had accused them of infringing certain Italian provisions on trade in pasta products, the pretore of Bolzano referred the following questions to the Court under the second paragraph of Article 177 of the EEC Treaty:

(a) Is the prohibition . . . contained in Article 30 of the EEC Treaty to be interpreted as preventing, in regard to the importation of pasta products, application of the provisions of Italian law . . . which prohibit the use of common-wheat flour in the production of pasta products where those products have been lawfully produced and marketed in another Member State . . .

(b) Is the prohibition of arbitrary discrimination or disguised restrictions on trade between the Member States contained in Article 36 . . . to be interpreted as preventing the application of the above-mentioned national provisions?

On 19 March 1986, having been called upon to adjudicate with respect to an identical infringement alleged against Mr Giorgio Zoni, the pretore of Milan, raised a similar question, but expressed it in the opposite way. His question is:

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

(a) Was imposed solely in order to safeguard the superior properties of pasta manufactured using only durum wheat;

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

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

In the course of the procedure before this Court (Cases 407/85 and 90/86) written observations were submitted by: the applicants in the main proceedings (3 Glocken, Kritzinger and Zoni); Provincia autonoma di Bolzano, the defendant in the proceedings before the pretore of Bolzano; the civil parties claiming damages in the criminal proceedings before the pretore of Milan (that is to say nine Italian undertakings producing pasta, four associations representing members of the pasta industry, one of which is international (the Durum Club), together with Fratelli Barilla SpA (hereinafter referred to as 'Unipi and Others')), the Confederazione Nazionali dei Coltivatori Diretti, the Confederazione Italiana Coltivatori and the Confederazione dell'Agricoltura Italiana; the French, Italian and Netherlands Governments; and the

Commission of the European Communities. The Greek Government participated in the hearing, in addition to those mentioned above, whereas Provincia autonoma di Bolzano did not appear.

2. As the questions submitted by the two courts are the same, I shall consider them together. However, before doing so I think it is appropriate to make a number of preliminary observations with a view to ridding the problem brought before the Court of the trivial image which certain observers attach to it and to identify the economic and political realities with which the judgment of the Court should concern itself.

The image to which I refer can be described in few words. By a quirk of fate, the compatibility with Article 30 of the Treaty of the Italian provisions on pasta products fell to be considered in Bolzano at a rather unpropitious time, namely when the media were full of protests from German brewers and consumers reacting against the 'challenge' which the Commission had dared to issue against the superior quality of German beer by attacking before this Court rules on purity dating back to the time of Martin Luther. The Court does not need to be reminded of the outcome of that case. In its judgment of 12 March 1987 in Case 178/84 ([1987] ECR 1227) the Court ruled, following what is now regarded as a classic line of decisions, that 'by prohibiting the marketing of beers lawfully manufactured and marketed in another Member State [but not complying with the Biersteuergesetz on the manufacture and designation of that product]', the Federal Republic of Germany had failed to fulfil its obligations under the Treaty.

The process of de-trivialization to which I have referred is made necessary by those circumstances. As far as the interests involved and the collective imaginations of the two nations are concerned — many thought — beer has the status in Germany that spaghetti has in Italy; so much so that the protests with which the Italians received the order made by the pretore of Bolzano appear to echo those of the Germans. The pasta case is therefore a replica of the beer case and, once transferred from the national jurisdiction to Luxembourg, it can only give rise to the same result. There are, without doubt, similarities between the two cases, but there are also differences, and it does not seem to me that there are more of the former than there are of the latter.

I should point out in the first place that the present proceedings are concerned with a preliminary ruling on the interpretation of a Community provision; in other words — needless to say — the proceedings are different from those in Case 178/84, particularly as regards the matter of evidence and the effects produced in each separate case by the judgment given. However, it is true that, likewise when dealing with a case under Article 177, the Court must know upon what issue it is adjudicating. The manner in which the national court applies the provision interpreted in Luxembourg may have, and indeed often does have, a profound reforming influence not only upon the national system concerned but also, as may be the case here, on those of other Member States and even upon the Community legal order.

In the normal course of events, the background to the legal and non-legal problems in relation to which the Court must appraise the compatibility with Community law of the contested national provision is illustrated by the Commission in fulfilment of a duty which has been defined as that of *amicus curiae*. However, in this case that duty has remained substantially unfulfilled. Indeed, a few weeks ago, the Community executive

made known that it had not 'attaqué l'Italie devant la Cour tout en expliquant à la Cour elle-même, dans une affaire préjudicielle,' that, in its opinion, the Italian prohibition of imports of common wheat pasta constituted 'une restriction incompatible avec l'article 30' of the EEC Treaty (*Agence Europe*, 19 March 1988, No 4747, p. 11). But matters did not proceed in that way. It must be stated with regret that, in addition to remaining silent as to its reasons for declining to take the hallowed path of Article 169, as in the beer case, the Commission has been a poor *amicus curiae*. There are three suitable adjectives to describe its submissions: contradictory, inexact and incomplete.

3. Let us start with the inconsistencies. In Case 407/85, the Commission states that 'total abandonment of the rules' on this matter 'in Italy, France and Greece would result in a degree of *substitution of common wheat for durum wheat* in the manufacture of pasta products in those countries' and, hence, 'an increase in the expenditure to be borne by the Community budget'. The Commission is therefore clearly against 'dispensing entirely with the provisions in question' and does not expect that the States involved would 'consider such a radical measure' (emphasis added). In Case 90/86, on the other hand, the Commission proposes that the Court should rule that 'Article 30 . . . does not permit a Member State to extend to products lawfully manufactured and marketed in another Member State the obligation . . . to use only durum wheat in the manufacture of dry pasta products intended to be marketed within . . . that State'.

One of the two options must prevail. Italy, France and Greece bow to a possible ruling of incompatibility by the Court, but, aligning themselves with the views of the Commission, they do not remove the obligation incumbent upon Italian producers to use only durum wheat; and in those circumstances it is obvious that the latter producers would suffer discrimination by comparison with foreign producers or parallel importers and producers of common-wheat pasta products and consequently would be powerless to avoid competition from the latter products. Or, to avoid such an iniquitous result, the same States would release *all* producers from that obligation: and then we would witness that 'degree of [progressive] substitution' of common wheat for durum wheat which the Commission envisages — or, rather, exorcises — in the first of the statements quoted.

Let us now consider the inaccuracies. In its observations in Case 407/85, the Commission states that between June 1969 and February 1970, the Economic and Social Committee and the Parliament rejected a proposal for a directive made by it for the approximation of national laws on pasta products. That is not what actually happened. Although it suggested a number of amendments, and in particular transitional provisions, the Committee approved the draft, *inter alia* — as it emphasized — because 'the varieties of durum wheat known at present enable . . . pasta to be produced whose technical and organoleptic properties are recognized as superior (Opinion of 25 June 1969, Journal Officiel C 100, p. 11, second recital in the preamble). The Parliament, on the other hand, expressed a negative view: but — and this is what counts — that view was limited to the 'present form' of the draft and it 'urgently' requested a better text (Resolution of 2 February 1970, Journal Officiel C 25, p. 14). The responsibility for the absence of a directive, which would have eliminated the problem now before us,

cannot therefore be attributed to other institutions; on the contrary, it must be recognized, as we shall see in due course (in Part 10), that it was the Commission which decided at a certain point to abandon the venture.

That is not all. In a different part of the same observations the Commission states that it is reviewing the 'possibility of submitting a [new] proposal for Community legislation', having regard to the fact that the Community is now self-sufficient in durum wheat as a result of the accession of Spain and Portugal. In reality, it emerges from the Commission's reports on European agriculture that the Community became self-sufficient in durum wheat as early as the 1980/81 marketing year. I would add that in the year 1985/86 (the latest period for which statistics are available), the degree of self-sufficiency in that product amounted to 122%, having reached a peak of 133% in 1984/85 (and therefore prior to the accession of the two Iberian States).

Finally, we come to the lacunae. The Commission has provided the Court with no statistics either on Community production and trade or on exports to non-Member countries of pasta products manufactured using, respectively, durum wheat, common wheat or a mixture of the two; it would have been useful to know whether Community production of common-wheat pasta is increasing or decreasing, which States produce such pasta and whether they use it exclusively for domestic consumption or also export it to other parts of the Community. But there are other omissions. The Commission did not tell us that on 7 August 1987 — three months prior to the hearing before this Court — the Council approved what is known as the United States/European Communities pasta settlement concerning exports of Community pasta products to America and thus brought to an end the trade war declared against us when, in June 1985, the United States put an embargo on such products.

That reticence is particularly serious if it is borne in mind that the agreement related only to pasta manufactured from durum wheat: it having been established that indiscriminate liberalization of intra-Community trade in common wheat would give rise to a 'degree of substitution' of the latter product for durum wheat, the question arises whether that result might jeopardize compliance with international obligations undertaken by the EEC *vis-à-vis* its most important trading partner. That question is particularly important in the context of proceedings concerned with the Italian purity law. Italy in fact — and the Commission likewise did not see fit to refer to this important detail either — supplies 99.9% (1987) of the American demand for European pasta products.

A fourth and no less crucial omission vitiates the Commission's analysis of the most recent Community policy regarding durum wheat. To appreciate its scope, however, it is necessary to take into account a general consideration which, moreover, will also be pertinent at a later stage.

The 1987 report presents a veritably catastrophic picture of Community agriculture. In the last 12 years — it is stated — the expenditure of the European Agricultural Guidance and Guarantee Fund has increased by 122% whereas the increase in agricultural production has been only 22%. At the same time, the pressure exercised upon production prices by the build-up of surpluses has brought about a decline in the

overall net value-added in the industry, thus preventing the positive effect of the budget transfers and ever-increasing productivity from being proportional to the increase thereof over the period in question; far from benefiting farmers, an increasing percentage of the resources allocated to agriculture is passed on to the consumers, to the processors and, in the form of refunds, to non-Member importing countries. The combined effect of these factors — concludes the passage from which I am quoting 'is that public funds spent on agriculture . . . have soared to a level which . . . now practically matches the net income of the sector itself.'

This situation prompted the Community to adopt a 'new approach' regarding agriculture which includes amongst its principle features a 'rigorous policy as regards pricing'. As far as the matter at issue is concerned — says the Commission — that policy is reflected, on the one hand, in its proposal to bring closer together for the 1986/87 season the intervention prices for durum wheat and common wheat by reducing that of the latter by 4%, and, on the other, by the positive way in which that suggestion was received by the Council (1987 Report, pp. 15 and 16). Thus, whilst the price of common wheat remained steady at around ECU 180 per tonne, that of durum wheat was reduced to ECU 299.60 (Regulation No 1584/86 of 23 May 1986, Official Journal 1986, L 139, p. 42) and was then further reduced to ECU 291.59 (Regulation No 1901/87 of 2 July 1987, Official Journal 1987, L 182, p. 42).

But — and it was about this that the Commission was silent — the Council did much more than achieve a better price ratio between the two types of wheat. Having realized that the measures in question would give rise to serious and urgent problems (in particular, a reduction of income) for certain categories of producers or certain regions, the Council decided to make them acceptable by adopting a measure which moved in the opposite direction and was of even greater scope. Durum wheat, as everybody knows, is the subject of Community aid, the purpose of which at present is 'to ensure a fair standard of living for farmers in regions . . . where such production constitutes a traditional and important part of agricultural production' (Regulation No 1586/86 of 23 May 1986, Official Journal 1986, L 139, p. 45); in fact, the Community legislature increased the aid by about 20%, raising it from ECU 101.31 per hectare in 1985 (10-member Community) (Decision 85/329/EEC of 28 June 1985, Official Journal 1985, L 169, p. 94) to ECU 121.80 in 1987 (Regulation No 1904/87 of 2 July 1987, Official Journal 1987, L 182, p. 87).

What can be said of all this? It seems to me that a first result has been achieved. The pasta case is much more complex than it has been made to appear by virtue of facile comparisons, glaring inaccuracies and enigmatic omissions. I shall go further: it is different from any other previous case concerning the free movement of goods because the contested national legislation is the foundation upon which the Community has, over a period of 20 years, based an important part of its agricultural policy and it plays a major role with respect to its external trade. Factors of this kind, of course, are not sufficient to make those provisions compatible with Article 30 of the Treaty; but it is also certain that a ruling of incompatibility cannot be arrived at without careful account having first been taken of all the internal (in the dual sense of national and intra-Community) and international consequences which such a ruling would entail.

4. These general considerations having been discussed; it is time to examine the

provisions in question, but without analysing — this is done excellently in the report for the hearing — the many and intricate details thereof. Let me say straight away that Law No 580 of 4 July 1967 is not — as it was described at the hearing by the Commission — a mere 'recipe-law' but is rather a wide-ranging and systematic measure containing all the rules concerning the 'manufacture and marketing of cereals, flour, bread and pasta products'. In particular, pasta products are governed by rules contained in Articles 28 to 36, in Title IV, and by a number of transitional provisions: including Article 50 (1), which contains the prohibition with which the questions submitted by the pretori of Bolzano and Milan are concerned.

Pursuant to Article 28, the designation 'pasta di semola . . . di grano duro' applies to products obtained from the 'drawing, rolling and subsequent drying of mixtures prepared . . . exclusively . . . from durum-wheat flour and water'. The foodstuffs whose composition and compulsory designation are thus determined are the 'dry' pastas which I shall refer to as standard; therefore, they do not account for the full range of pasta which can be lawfully produced. In particular, it is permitted to manufacture: (a) 'special pastas containing various ingredients' (Article 30); (b) 'pastas in which eggs are used' (Article 31); (c) 'dietetic pastas' (Article 32); and (d) 'fresh pasta products' (Article 33).

Of those products, the first two are also dry: at least as far as domestic production is concerned, they must be prepared using only durum wheat flour and must be marketed under the designation 'pasta di semola di grano duro' (durum-wheat flour pasta), followed by a list of the ingredients added (for example, spinach or artichokes: Article 30 (2)), and 'egg pasta' Article 31 (2). In the preparation of other types, on the other hand, it is lawful to use common-wheat flour (Article 33 (3)); and the Italian Government has explained in various ways the reasons for this particular exception. The most valid, in my opinion, is that based on the fact that fresh pasta is prepared in a very large number of places and as a result it is difficult to ascertain whether it contains common wheat. When Law No 580 was adopted, the dry-pasta industry and the distribution networks for it were still small. Within the family, in country trattorias and even in city restaurants, pasta — to be eaten the same day — was predominantly 'home made'; and for household and small-scale production of this kind use was made of the flour available on the market which, particularly in the north, was not always made from durum wheat.

Pasta, types of pasta, pasta products: those who do not know Italy and its language well will say that they are all words describing the same thing. But that is not the case. According to the Treccani encyclopaedic dictionary, 'pasta' means not only 'a mixture of flour, properly stirred until it becomes firm and compact' but also a mixture of 'wheat flour or meal, unfermented, which, having been processed in various ways and dried, constitutes the various types of pasta product'. *Pasta* in the singular — the dictionary continues — in general has a collective sense, whilst in the plural *(paste)* it is employed, in commercial usage, almost exclusively to indicate a

collection of various types or forms of pasta'.

Armed with these explanations, let us re-read the text of the provisions cited earlier. It will become apparent that 'pasta' in Article 28 is a *generic* designation, whereas the 'products' mentioned in the same provision, which must be prepared using only 'durum-wheat flour' and the 'paste' mentioned in Articles 30 to 33 are designations of *types* of pasta, that is to say the material or materials from which pasta is prepared. I would add that the first must appear on every packet of the products in question and is always followed by the second. Pursuant to Article 35, 'the packages or wrappings must bear, in the Italian language . . . the designation and type of pasta . . . in indelible and clearly legible characters'. Those designations must, in turn, be those provided for in Articles 28 to 33, must be indicated consecutively and may not be accompanied by other qualifying terms or representations liable to deceive the purchaser.

At this point it is appropriate to establish, as regards in particular dry-pasta products, what technical meaning may be attached to words not referred to in the law such as 'spaghetti', 'vermicelli', 'bucatini', 'maccheroni', 'rigatoni', 'fusilli', 'penne', 'linguine', 'orecchiette', 'malloreddus' and so on. In my opinion, these are some of the innumerable *specific* names of the forms which pasta may take; and the law disregards them precisely because — at least in Italy (but not in other countries, as we shall see in due course) — their number is unlimited or is limited only by the bounds of the imagination of the pasta makers. To impose upon the latter the obligation to specify, for each type of pasta, the materials from which it is made was simply impossible or, having regard to the confusion which such rules would provoke amongst consumers, even hazardous. It was therefore better, in the view of the legislature, to provide purchasers with general information as to the nature of each product, requiring manufacturers to use only the standardized designation common to all types of dry pasta: the term used in Article 28, namely 'pasta di semola di grano duro'.

A few further words are called for regarding the objectives pursued by the law. The first, regarding which no party has raised any doubts, is to guarantee the quality of the pasta and, thereby, the interests of consumers. It is well known that only pasta made with durum wheat does not become sticky during cooking and arrives on the plate as the Italians like it to be: 'al dente' (and therefore, as André Gide put it in his *Journal*, on 22 June 1942, 'glissant des deux côtés de la fourchette'). The second purpose is of a social nature. The legislature of 1967 wished to encourage the growing of durum wheat, which in certain parts of the Mezzogiorno is the only possible crop. In other words, by compelling pasta makers to use only that type of wheat an endeavour was made to ensure that anyone who grew it had a steady commercial outlet for it and, accordingly, a secure income. In that connection it should be borne in mind that durum wheat cannot be used for animal feedingstuffs and, apart from a very small amount used for couscous, it is used only for the pasta industry.

5. Having thus highlighted the main aspects and purposes of the Italian legislation, I think that it is appropriate to consider its impact on the European market and, in more general terms, the developments in recent years in the production

and marketing within the Community of durum wheat pasta products. For that purpose, I shall rely upon the documents submitted by the Unipi (Annexes Nos 5, 10 and 17) and the volumes published annually by the Italian Central Statistical Office (Istat).

Three types of data appear to me to be of particular interest. The first relate only to 1985. In that year: (a) Community production of pasta (in general) totalled 2 316 000 tonnes, of which 71% (1 650 000 tonnes) was manufactured in Italy; (b) among the Member States where there are no purity laws similar to the Italian law, Germany produced 209 000 tonnes, the Netherlands 32 000 tonnes, and Belgium and Luxembourg 22 000 tonnes; (c) the same four countries imported from Italy respectively 278 692, 377 441 and 75 758 quintals of durum-wheat pasta. The second set of data relates to the period from 1967 to 1987: whilst in the first half of that period, up to 1976, annual exports of the type of pasta at issue here from Italy to the rest of the common market increased from 102 182 to 684 808 quintals, in the second half of the period they achieved 1 680 686 quintals. In other words, during the first 20 years under Law No 580, the quantity of wheat pasta exported by Italy within the EEC grew by 1 645%.

Finally, let us consider the exports of pasta from Italy to the four Member States to which I have just referred in the years 1981 and 1987:

(in quintals)

		Pasta containing eggs	Pasta containing no common-wheat flour or meal	Other
Common Customs Tariff		(1902/19.00)	(1902/19.10)	(1902/19.90)
Belgium and Luxembourg	1981	7 650.66	78 308.61	4 361.80
	1987	12 411.85	109 021.63	11 849.29
Netherlands	1981	984.70	26 368.28	7 194.52
	1987	9 361.28	43 440.32	40 110.54
Federal Republic of Germany	1981	210 408.60	236 001.89	28 833.09
	1987	179 435.28	372 712.28	30 623.37
Total	1981	219 043.96	340 678.78	40 389.41
	1987	201 208.41	525 174.23	82 583.20

As will be seen, whilst the exports of pasta containing egg (regarding which it is impossible to determine whether common wheat has also been used) show a decrease, attributable in particular to Germany, those of durum wheat pasta are increasing everywhere to a considerable extent. What is the reason for this phenomenon? Amongst the parties to these proceedings, the associations of Italian pasta makers account for it by reference to the superior quality of the product in question; the Netherlands Government states that, at least within certain limits, quality is a 'subjective concept about which there may exist, and do exist, differing views' in each Member State. For example, there is a conspicuous preference among consumers in the 'Nordic' countries for pasta made from common wheat.

Based as it is on experience stretching over a thousand years — *de gustibus non est disputandum* — the remark made by the Netherlands is on target. The figures which I have reproduced, however, show that tastes (even among consumers as a whole and, in particular, consumers as a whole in the Netherlands) may change. In short, it is undeniable that durum-wheat pasta is becoming the norm throughout Europe; and the Community legislature has taken notice of this by adopting rules which highlight if not actually the superior quality then certainly the *considerable diversity* of pasta products of that kind as compared with those made from common wheat. I refer to the criteria established by the Commission for the payment of aid in respect of durum wheat and for determination of the intervention price with regard to the other type of wheat.

More specifically, it is provided, on the one hand that, in order to be eligible for Community aid durum wheat must 'have qualitative and technical characteristics establishing that pasta made therefrom is *not sticky when cooked*' (Regulation (EEC) No 2835/77 of 19 December 1977, Official Journal 1977, L 327, p. 9); and, on the other, that intervention will be available only if 'the dough from [the] wheat *does not stick during the mechanical kneading process*' (Regulation (EEC) No 1580/86 of 23 May 1986, Official Journal 1986, L 139, p. 34).

These, it seems to me, are very significant provisions. As far as durum wheat is concerned, the grant of aid is conditional upon a 'gastronomic' requirement, which relates directly to the choice made by the consumer: an extremely close relationship is thus established between the raw material and the character of the finished product, which enables durum-wheat pasta products to be distinguished not only from those made with common wheat but also from those made with a mixture or — why not? — those which, despite being made with durum wheat, become sticky when cooked (I have in mind durum wheat grown in areas, such as Central Europe, which, for climatic reasons, do not favour its development). On the contrary, in the case of common wheat, the requirement of non-stickiness relates to an industrial production stage and is therefore entirely unconnected with human consumption.

6. The references which I have just made to aid and to the intervention price for durum wheat and common wheat bring me to the matter of Community policy and the rules on the common organization of the markets in cereals. To summarize, and having regard to the details given on the subject in the Report for the Hearing, the present situation in the Community with respect to durum wheat may be described as follows:

(a) There has been self-sufficiency of supply for several years and about 75% of production is concentrated in central southern Italy;

(b) The quantities sold to intervention agencies are high and continue to increase (from 588 000 tonnes in 1985/86 to 688 000 tonnes in 1986/87; but for the sake of completeness I would point out that the corresponding tonnage of common wheat was 1 690 000);

(c) Although durum wheat is in surplus, the cereal is imported, and increasingly so, from non-Member countries including, principally, the United States. According to the Commission, responsibility for this phenomenon is borne both by the Member States of central and northern Europe and by the Italian pasta manufacturers. The former, which, it is well known, do not produce durum wheat or else produce only a little, prefer to obtain their supplies from markets outside Europe; the latter buy it not because of a shortage of raw material but *solely* for reasons of quality. It appears that, when mixed with European durum wheat, the American product gives the pasta 'certain visible characteristics (in particular the aspect of colour) which are demanded by consumers . . . [and cannot be obtained] by the use of additives or colorants prohibited by law' (reply by the Commission to a question put by the Court, p. 2.)

That information — I must add — is accompanied by an observation and an omission which cause further puzzlement as to the way in which our *amicus curiae* interprets its role. The Commission appears to fear that the imports by Italian pasta makers are endangering the interests of cereal growers, whereas it is obvious that, in so far as they respond to a 'solely' aesthetic requirement, there is no likelihood of their competing with Community production. By contrast, the Commission says not a word about the motives which induce the northern countries to import durum wheat from outside Europe nor does it tell us why the Community does not adopt measures to limit those patterns of trade, or at least to bring them under control.

(d) The decisions progressively to reduce the spread between the intervention prices for the two types of wheat and to tighten the criteria for granting aid in respect of durum wheat (non-stickiness when cooked) appear above all designed to avoid 'an increase of the areas planted [with durum wheat towards] the north [of the Community] . . . to the detriment of common wheat' (Commission's observations in Case 407/85). We know, however, that the Council has also increased the aid; and it is obvious that, applying to a market situation where there is an abundant supply of the product in question, that measure was adopted solely for social reasons. In other words the aid, which was introduced to encourage the growing of a product which was in chronic deficit, today satisfies a requirement which is *heterogeneous* and also *takes priority* over all the imperatives governing Community action in the industry: to ensure that the farmers of southern Europe enjoy an adequate standard of living. That implies, however, that, despite the formidable growth in trade recorded over the last 20 years, the pasta-products industry does not yet provide a sufficiently stable and remunerative economic outlet for those farmers.

In the light of those facts, let us examine the repercussions on the relationship between durum wheat and pasta and on the Community budget which might, according to the Commission, stem from an amendment of the national purity laws. The Commission concedes in the first place that the prohibition of the marketing of pasta containing common wheat is of some significance as regards both the disposal of the durum wheat produced (and therefore for the producers) and, above all, the expenditure borne by the common organization of the market in cereals. Indeed — the Commission states — 'if the decrease in consumption of durum wheat does not come about by way of a reduction of imports, the unused portion of Community production will have to be exported to non-member countries, either after passing through intervention storage or directly from the market. But it must be borne in mind that the possibilities of disposal on the world market are very limited. In the event of sales on that market, the budgetary costs relating thereto, calculated on the basis of the intervention and export costs adopted for the 1985 budget, may be estimated at about ECU 39 million, if pasta were allowed to contain 10% common wheat, and about ECU 195 million if a 50% common-wheat content were allowed' (Commission observations in the same case).

These, it seems to me, are figures which would even alarm the Chancellor of the Exchequer of the land of milk and honey. Forgetting the reorganization proposals contained in the 1987 report (*supra*, Section 3), the Commission hastens to observe that the producers of durum wheat have nothing to fear from removal of the prohibition because they will in any event be provided for by aid from the common organization of the market and because it is studying legislative proposals and new structural measures. Admittedly — the Commission nevertheless adds — such measures will not see the light of day in the near future; hence it will be appropriate, pending their adoption, for the States involved to continue to require pasta manufacturers within their territory to comply with the purity rules.

I have already drawn attention to the contradiction inherent in that reasoning. I would now add that it reveals a disconcerting naivety: although fully aware of the troubles which it risks bringing upon itself, the Commission seeks to rely upon Article 30 and then hopes that some divine intervention — an early consensus within the Council and benevolence on the part of the Member States — will save its bacon. But that is not how the world works. What counts in cases like this is not good intentions but rather the laws of the marketplace and of competition, particularly where the product intended to be liberalized is widely consumed every day and is of a composition such that a purchaser may be easily deceived as to its real nature.

Let us try therefore not to bury our heads in the sand. If Community trade in pasta were liberalized, we should experience, on the one hand, glaring examples of surpluses and as a result much greater disbursements of Community funds, and on the other, in the southern regions which produce most European durum wheat, disappearance of the only commercial outlet upon which the growers of that cereal can rely. The latter effect would be decisive: the Community policy regarding durum wheat, conceived and developed by the Council on the basis of the intimate economic interdependence existing between durum wheat and pasta, would be shattered if it had been hit by a sudden and devastating earthquake.

I do not deny that such a far-reaching decision — which, I repeat, is liable utterly to disrupt the common organization of an agricultural and commercial sector, in an industry which, moreover, during the years of coexistence of the national purity laws and the Community provisions, has seen the EEC change from a net importer to a net exporter of durum wheat — is justifiable by virtue of higher values. But I must say that it cannot, as the Commission would prefer, merely be 'followed' or 'accompanied' by adjustment or support provisions. A decision of that kind must be *preceded by* or *form part of* a comprehensive legislative reform which reconciles all the interests involved in the wheat market. We shall consider in due course the measures that should be adopted and the scope that should be attributed to them.

7. The recent agreement concluded between the EEC and the United States on Community exports of pasta to that country also forms part of the Community policy and provisions concerning durum wheat. The events date back to 1985. For reasons which it would be superfluous to go into here, the Americans decided, in disregard of their GATT commitments, to levy additional duties on imports of European pasta; and, considering that 'these measures caused significant injury to the Community producers concerned' (that is to say the growers of durum wheat and pasta makers), the Council reacted by increasing the duty on American exports of citrus fruit and nuts (Regulation (EEC) No 3068/85 of 27 June 1985, Official Journal 1985, L 292, p. 1). The negotiations lasted for over a year and were very difficult. Finally, with a view to putting an end to a dispute which was damaging to all parties and in order to 'avoid a new conflict . . . at a particularly critical moment for the world trading system', the parties entered into the settlement of 15 September 1987 (Official Journal 1987, L 275, p. 38).

In short, the agreement provides that the Community is to export 50% of the pasta to the United States under what are known as 'inward processing relief arrangements' (Regulation (EEC) No 1999/85 of 16 July 1985, Official Journal 1985, L 188, p. 1) and without paying refunds; in return, a proportional quantity of durum wheat is to be allowed into Europe free of duty. The remaining 50% is to be exported to America with a refund reduced by a percentage (27.5) which the parties undertake to review on the basis of the results obtained under the inward processing relief arrangements (paragraphs 1 to 5). Finally, 'should either party take any action which will undermine the effects or operation of [the] settlement or fail to take appropriate action to implement [it], the other party will have the right to terminate the settlement' (paragraph 11).

It is impossible for me to predict whether indiscriminate liberalization of Community trade in pasta from our American trading partners would be a measure liable to 'undermine the effects or operation' of the settlement. Common sense, however, prompts me to take the view that, if forced to face competition in their respective countries from pasta products containing common wheat which were in circulation subject only to the conditions laid down by the directive on labelling, the European durum-wheat pasta producers would not remain passive; nor does it seem to be unreasonable to suppose that their first reaction would be to reduce the production costs by eliminating or reducing the use of American durum wheat, an ingredient whose only purpose is to give the pasta a particular colour. Furthermore, they would

certainly not stop exporting to the United States; and at this stage, a change having been brought about that would affect the reciprocal obligation which is at the centre of the agreement, the Community would probably be accused of failing to fulfil its international commitments.

A final observation is called for and, as I said in part 3 of this Opinion, it concerns a matter which cannot be disregarded. In 1986 and 1987 Community exports of pasta to the United States amounted to 534 680 and 602 770 quintals respectively; of those quantities, 526 992 and 600 021 were made in Italy.

8. I referred a few moments ago to Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling of foodstuffs for sale to the ultimate consumer (Official Journal 1979, L 33, p. 1), and I now propose to consider certain aspects of it. Let me say straight away that it is a matter of great importance. The rules by means of which the directive ensures that purchasers can determine the nature and composition of the products in question have proved decisive in two respects: on the one hand, it is on the basis of those rules that the Court has resolved *all* the recent cases concerning the compatibility of national laws with Community provisions on the designation of foodstuffs which prevented the free movement of similar products legally marketed in other Member States; on the other hand, those rules have enabled the Commission to say that, since consumers are adequately protected thereby, harmonization of internal provisions regarding the composition and manufacture of foodstuffs is no longer necessary, except for reasons of protection of health. In particular, it would be superfluous to adopt new rules concerning pasta products if in fact the directive in question already requires that the consumer be made aware of the nature of the raw materials used in the manufacture of the products by means of a list thereof on the label (Communication to the Council of 19 March 1979, COM(79) 128 final).

I do not find that view convincing. It should be borne in mind that, according to the intention of the legislature, the measure in question is designed only to enact 'Community rules of a general nature applicable horizontally to all foodstuffs put on the market'; by contrast, 'rules of a specific nature which apply vertically . . . to particular foodstuffs should be laid down in provisions dealing with those products' (recitals Nos 3 and 4). In relation to that objective, the general common rule is that 'the labelling and methods used must not . . . be such as could mislead the purchaser . . . particularly as to the characteristics of the foodstuff and, in particular, as to its nature, *identity*, properties, composition . . . [and] method of manufacture' (Article 2). The same limits also apply to 'the presentation of foodstuffs, in particular their *shape*, *appearance* or packaging, the packaging materials used, the *way* in which they are arranged and the setting in which they are displayed' (emphasis added).

The indications which the label *must* contain include above all the *name under which the product is sold* and *the list of ingredients* (Article 3). The name of a foodstuff is 'the name laid down by whatever laws, regulations or administrative provisions apply to [it] . . . or a description of the foodstuff . . . that is sufficiently precise to inform the purchaser of its true nature and

to enable it to be distinguished from products with which it could be confused' (Article 5 (1)). For their part, the ingredients must be listed one by one 'in descending order of weight, as recorded at the time of their use' (Article 6 (5) (a)). That obligation — pursuant to Article 6 (2) (c) — does not exist where the product consists 'of a single ingredient'.

That is a first detail which undermines the view put forward by the Commission in its Communication of 1979. Article 6 (2) applies to every kind of spaghetti, whether prepared using durum wheat, common wheat or soya; and in those circumstances, at least as far as certain types of pasta are concerned, the directive falls far short of protecting the consumer. Quite the contrary, it is liable to leave him uncertain or even expose him to deception as to the nature and identity of the product. Take for example Mr Van Dijk who, as the Netherlands Government explained to us, prefers pasta made with common wheat: an Italian pasta preparation made using only durum wheat and bearing on the front of the packet the sale description 'spaghetti' or 'vermicelli', without further information, would conform with the Community rules, but unless Mr Van Dijk were an expert it would frustrate his expectations.

Perhaps that is the reason for which Article 6 (6) provides that 'Community provisions or, where there are none, national provisions *may* lay down that the name under which a specific foodstuff is sold is to be accompanied by mention of a particular ingredient or ingredients' (emphasis added).

The fact remains, however, that a power ('may') is not an obligation; on the other hand, obligations — and therefore specific and strict Community rules on designations — are what the industry needs if it is desired that products which are similar yet different, such as pasta products made with durum wheat and common wheat, are to move freely within the common market without damaging the interests of consumers or infringing other imperative requirements of a domestic or international nature. Moreover, in various sectors and in response to similar problems, rules of that kind have already been issued. I am thinking, in particular, of a European product which is as well known as Italian spaghetti: French champagne.

9. In the case of champagne there is a Community measure — Council Regulation (EEC) No 3309/85 (Official Journal 1985, L 320, p. 9) — which helps consumers not to confuse champagne with sparkling wines produced by the same method but in areas of the Community other than the French Champagne district. The experts understood that, in designating such beverages, a distinction should be made between 'mandatory information needed to identify a sparkling . . . wine and optional information designed mainly . . . to distinguish it sufficiently from other products in the same category which compete with it on the market' (recital No 3); and for that purpose it was decided to prohibit producers who do not operate in the Champagne district from referring directly or indirectly to the method of preparation known as 'méthode champenoise', although that wording has been used for a considerable time and is even subject to specific rules in some Member States (Italy and the Federal Republic of Germany). I would add that, precisely for that reason, the prohibition was made operative as from 1994, that is to

say on the expiry of a period corresponding to 'eight wine-growing years' (third subparagraph of Article 6 (5)).

About one month after the regulation was adopted, the provision to which I have just referred was challenged as 'discriminatory' by a German manufacturer of sparkling wine (Case 26/86 *Deutz* v *Council*, judgment of 24 February 1987 [1987] ECR 941); and the Commission, which intervened in support of the Council, sought to uphold the provision by saying that 'il aurait été difficile de s'accorder pour laisser un grand nombre de producteurs de vin mousseux de la Communauté utiliser [la mention] "méthode champenoise" ... Ainsi, même si ... l'utilisation de [cette] expression ... n'avait juridiquement pas présenté d'inconvénients jusqu'à présent, des *raisons d'intérêt général* suffisantes militent en faveur de l'entrée en vigueur de l'interdiction à partir de 1994' (intervention submissions, p. 9, emphasis added).

The expressions used are ambiguous in so far as they do not make it clear whether the term 'reasons of public interest' is used in order to justify the prohibition of reference to the 'méthode champenoise' or to explain the deferment of its entry into force until the expiry of a long transitional period. I shall therefore say that that postponement answered the twofold requirement of allowing the sparkling wine already bearing labels with that wording to be sold and to accustom purchasers to the new designations. The reasons which prompted the imposition of the prohibition were threefold: to prevent, as I have said, consumers from being deceived, to protect the wine-growers of the Champagne district and — see the ninth recital — to ensure compliance with the 'international obligations of the Community and the Member States regarding protection of registered designations of origin or geographical descriptions of wines'.

Unfortunately, in Case 26/86 the Council and the Commission did not give precise details of those 'obligations' and I have been unable to find any trace of them in current legislation. But for the purposes of this case, such details are irrelevant; what is relevant is that the Community invoked its international commitments in order to go beyond the scope of the general rules of a 'horizontal' directive, of which the measure of 18 December 1979 is an example, and to issue rules based on a specific and rigorous prohibition. We are aware that similar obligations exist in the cereals industry as well; and although it may be true that they do not affect — at least directly — the designation of pasta products, it is no less true that their existence and the reasons for which they were adopted should prompt the Community legislature to take, *mutatis mutandis*, a similar qualitative leap.

The reason for this is clear. I have already stated that, since it might significantly change the present competitive relationship between durum- wheat and common-wheat pasta products, any repeal of the purity laws could have adverse affects on Community trade (in particular Italian trade) with the United States, in both directions; with the further consequence of bringing to an end — or at least, as Mr Foster Dulles would have said, of exposing to an 'agonizing reappraisal' — an agreement which the EEC imposed upon the Americans in order to defend its producers of durum wheat and of pasta. But, how could such a misfortune be avoided except by regulating the entire pasta industry, from

the raw material to the finished product, by means of rules reconciling the protection of the traders involved and of consumers with the free movement of goods?

The objection will be raised that an analogy between pasta products and sparkling wines or between the related problems concerning designation is not tenable. 'Méthode champenoise', maintained the Commission in Case 26/86, is a geographical designation, whilst 'spaghetti' is not. Moreover, 'spaghetti', stated the Commission in its observations in the *Zoni* case, is a word in current use in the German language and does not therefore evoke the idea of a product of Italian origin. It may easily be said in reply: (a) that, pursuant to Regulation No 3309/85, 'méthode champenoise' is not a designation of origin, but a term 'relating to a method' of producing sparkling wines; (b) that 'spaghetti', an eminently Italian word, has been taken into the German lexicon and into that of every Community language simply because, like 'champagne', it describes something untranslatable. Moreover, I am convinced that, when reading that word on any packet of pasta, Mr Schmidt and Mr Van Dijk do not associate it with the image of a Bierstube or a windmill but rather with the hubbub of a Roman trattoria or the sound of a guitar with Vesuvius in the background.

I do not however intend to dwell upon a question which is open to discussion and is of little importance. Before leaving it, however, I must draw attention to two facts: (a) with respect to the designation of sparkling wines, the Council acted in the stead of the Member States by deciding, *inter alia* having regard to the international obligations entered into by the Community, definitively to close the common market to sparkling wines produced by the 'méthode champenoise' and therefore to prohibit the use of that term by the numerous Community producers who traditionally employ it; (b) in taking that decision, the Council considered that it was necessary to grant the national legislatures a long period of time to amend the relevant provisions.

In the present case, the Commission proposes to achieve the opposite result *immediately*. More specifically, it wishes to liberalize two economic activities (the production and marketing of pasta) which are governed by national purity rules which the Community has accepted for 20 years and, what is more important, it seeks to do so without adopting the counter-measures necessary (a) to protect consumers, durum-wheat growers and pasta undertakings which use only that type of cereal; (b) to avoid the dissipation of the Community's financial resources as a result of the repercussions of the change; (c) to guarantee the fulfilment of the commitments entered *vis-à-vis* the United States. Whatever its reasons for so doing, it is difficult to imagine a course of action more remote from the policy followed in the case of sparkling wines.

10. Before I again take up the thread of the reasoning which I have developed so far, another matter remains to be considered which is closely connected with the one that I have just examined: the content and the fate of the proposal for a directive on pasta products presented by the Commission on 7 November 1968 (Journal Officiel C 136, p. 16).

That initiative, I would remind the Court, was prompted by a single and very specific circumstance: the differences between

national laws governing the composition, designation, labelling and packaging of pasta products which — stated the Commission in the second recital — 'hinder the free movement of those products, [since] they create unequal conditions of competition [on the market]'. It was therefore necessary to harmonize them; and for that purpose two criteria were adopted — 'the nature and quality of the meal' used and the 'choice of different designations according to the composition of the pasta products' — on the basis of which the Commission proposed ensuring the free movement only of pasta products made using durum wheat, and reserving five descriptions for them ('superior quality pasta products', 'pasta products', and so forth). Other pasta products, on the other hand, could be produced and marketed, but only within the Member States concerned.

As I have emphasized in part 3 of this Opinion, the proposal was approved by the Economic and Social Committee — which suggested to the Commission, however, that transitional conditions should apply comprising 'rules on designations and labelling to ensure that the consumer is provided with accurate information' — and was rejected by the Parliament. The Parliament justified its decision by saying that the draft took account neither of an essential aspect, namely the protection of purchasers, nor of the tastes of those people who consume pasta products made exclusively from common wheat; and its Legal Affairs Committee aggravated the criticism by stating that the text submitted to it did not clearly show whether, in addition to the five designations just mentioned, protection was provided for 'the designations in ordinary commercial usage such as spaghetti, macaroni, pasta di minestra, and so on'. A recommendation was therefore made to the Commission that that point should be clarified and 'the wording [thereof] should possibly be amended'.

That rejection and the subsequent rejection by the Council (November 1970) were followed by nine years of silence; the Commission broke the silence (in March 1979) by withdrawing the proposal, stating 'that it was unlikely that a solution could be arrived at, particularly regarding the choice of raw materials' (observations in Case 407/85, p. 6). In its Communication, the Commission also stated that 'the pasta industry . . . is [in any event] governed by new rules governing the labelling of foodstuffs in general. On the basis of those rules, pasta products . . . intended for the final consumer must . . . bear a list of the ingredients informing the purchaser of the type of raw materials used'. We are familiar with that argument and I have already demonstrated its fragility. Here, however, it should be added that, in putting it forward, the Commission overlooked not only Article 6 (2) of Directive 79/112/EEC (by virtue of which, it will be recalled, details of the ingredients are not compulsory in the case of products 'consisting of a single ingredient'), but also the criticism made of it by the Parliament Legal Affairs Committee regarding the 'designations for pasta products in current use', and even the text of its old draft.

Let me read Article 5 of the latter. The Member States — says Article 5 (1) — 'shall take all appropriate measures to ensure that the products listed in the annex can be marketed only if the packaging thereof contains the following information, in a clearly visible, legible and indelible form: (a) the designation reserved for the products in question [for example "superior quality pasta products", made of course exclusively from durum wheat], with or without an indication of the form [for example spaghetti or vermicelli], to the exclusion of any other, using characters of at least the

same size as those used for the other particulars'. The same States — continues Article 5 (2) — '*may prohibit trade* in the products listed in the annex where the *mandatory particulars* provided for in paragraph 1 (a) .. do not appear in the appropriate national languages on *one of the main sides* of the package' (emphasis added).

As will be seen, the Commission of 1968 understood, at least *in nuce*, that intra-Community trade in pasta products involves a requirement which cannot be waived: on the packages the generic designation 'superior quality pasta' (which indicates the raw material, durum wheat) and the specific designation 'spaghetti' or 'vermicelli' (which refers to the form of the pasta) must appear *together*. And that is not all. It maintained that those mandatory details should appear on the most clearly visible side of the package, so as to enable the national authorities to prevent the entry of products which, although complying with Community requirements regarding composition, did not fulfil the prescribed requirements regarding presentation. By contrast, the Commission of 1987 either failed to understand all this or else forgot it. However — as will become apparent shortly — it is a matter of crucial importance and one which, more than any other, must be the linchpin of this Court's reply to the two national courts.

11. A preliminary observation is called for before I consider the substance of the case. The questions submitted for a preliminary ruling derive from the fact that in Bolzano and Milan the supervisory authorities found in Mrs Kritzinger's shop and on Mr Zoni's premises pasta products imported from the Federal Republic of Germany, but made from a mixture of common wheat and durum wheat, which therefore could not be marketed in Italy by virtue of Law No 580. From the documents before the Court in the two cases it appears that the pasta from 3 Glocken (Case 407/85) is packed in bags made of a transparent colourless material. On the front side the following details appear in two languages: 'Nudelmeister's Nudeln aus Weichweizen + Hartweizen/ Pasta di grano tenero + grano duro'; also indicated are the net weight, the cooking time, and the name and address of the producer. On the back there is a list of ingredients. According to the plaintiffs in the main proceedings, that presentation satisfies the requirements of Directive 79/112/EEC.

The label examined by the pretore of Milan (Case 90/86) is only in German and bears the words 'Attraktiv und Preiswert. Frischei-Teigwaren. Spaghetti mit hohem Eigehalt' (Appealing and convenient. Pasta made with fresh eggs. Spaghetti with a high egg content). The Commission considers that that presentation is not in conformity with 79/112/EEC: the language in which the label is written is not 'easily understood by purchasers in Milan' and 'the list of ingredients, which specifies only "flour and fresh eggs", cannot be regarded as sufficient to inform the consumer as to the nature of the product in a country in which dry pasta is manufactured exclusively from durum wheat'. We are not told, however, whether the term 'pasta with fresh eggs' — and I emphasize the word 'fresh' — complies with the German rules on the designation of pasta products.

12. We now come to the substance of the case. Gertraud Kritzinger, 3 Glocken, Giorgio Zoni, the Netherlands Government and the Commission propose that the Court should give the following answer to the questions submitted by the two national courts: Article 30 of the EEC Treaty does not allow a Member State to impose the

obligation that only durum wheat may be used in the preparation of dry pasta products intended to be marketed in the territory of that State, even if that obligation was imposed solely in order to safeguard the superior properties of pasta manufactured using only durum wheat, does not entail any discrimination and was not introduced in order to pursue protectionist aims. The opposite view is expressed by the Provincia autonoma di Bolzano, the civil parties in the proceedings before the pretore of Milan, and the French, Italian and Greek Governments. In their opinion, by virtue of the requirements of consumer protection and fair trading that obligation cannot be incompatible with Article 30.

I believe that both those views come up against insuperable obstacles. The first is based on the conviction that the requirement of consumer protection is already satisfied by Directive 79/112/EEC: it provides the Italian purchaser with all the details he needs, without hindering — as does, by contrast, Law No 580 — the movement of pasta products lawfully manufactured in other Member States using recipes different from those prescribed in Italy. But is that assumption well founded?

The nub of the problem — as we know — lies in determining what designations are needed to enable the consumer easily to identify and ascertain the nature of the pasta products available on the market; and in that connection it is not inappropriate to recall the judgment of 10 December 1980 in Case 27/80 (*Fietje* [1980] ECR 3839): 'If national rules — the Court stated — relating to a given product include the obligation to use a description that is sufficiently precise to inform the purchaser of the nature of the product and enable it to be distinguished from products with which it might be confused, it may . . . be necessary, in order to give consumers effective protection, to extend this obligation to imported products also, even in such a way as to make necessary the alteration of the original labels of some of [them]. . . . However, there is no longer any need for such protection if the details given on the original label of the imported product have as their content *information on the nature of the product* and that content includes at least the same information, and is just as capable of being understood by consumers in the importing State, as the description prescribed by the rules of that State' (emphasis added).

This is the important point. If we use the words just quoted, the difficulty in the present case lies in ascertaining what the opponents of Law No 580 take for granted, namely whether Directive 79/112/EEC effectively ensures that the Italian consumer and Community consumers are given information as to the nature and identity of the product enabling them to make a well-informed choice from among pasta products of varying compositions. It follows from the conclusion which I reached in part 8 of this Opinion, and as will be better illustrated in due course, that the reply can only be negative.

Those who seek to uphold the Italian provisions must then be accused of an even more serious error: that of starting from the premiss that durum-wheat pasta products are of superior quality and must therefore be protected at Community level as well by the only means appropriate to that purpose, namely by prohibiting the use of other cereals. Admittedly, from the social and economic point of view, the levels attained in world trade in durum-wheat pasta products undeniably lend some credence to

that view. But courts work on the basis of legal provisions and, in their eyes, until such time as Community law has upheld the superiority of such pasta products, other pasta products will also enjoy a recognized status and freedom of movement.

If these observations are correct, it seems to me to be superfluous to set out the arguments advanced to prove that Law No 580 is compatible with Community law. The judgment in the German beer case has rendered them obsolete. Or rather, it has obliterated all of them except one: the one which saves the law in question by describing it as essential to the common policy on durum wheat. The prohibition of using other cereals — it is said — responds to an imperative Community requirement; and its repeal would totally negate all the progress achieved by the Community in the last 20 years both with respect to the production of durum wheat and with respect to the farmers who grow it. And from the financial point of view, the disappearance of a reliable commercial outlet for the type of wheat at issue here would entail a considerable accumulation of surpluses and the costs of assimilating them would constitute a heavy burden upon Community resources.

These, as we have seen, are hallowed views and moreover they are shared by the Commission's experts. However, it cannot be said that they are sufficient to render the purity requirement compatible with the principle contained in Article 30. As far as surpluses are concerned, in particular, it may be appropriate to bear in mind what the Court said in response to a similar argument put forward by the French Government in connection with milk surpluses: '... les produits laitiers sont soumis à une organisation commune de marché, destinée à stabiliser le marché laitier notamment par le recours à des mesures d'intervention. Il ressort d'une jurisprudence constante ... que, dès lors que la Communauté a établi une [telle] organization ... dans un secteur déterminé, les Etats membres sont tenus de s'abstenir de toute mesure unilatérale qui rentre de ce chef dans la compétence de la Communauté. *Il incombe donc à la Communauté et non à un Etat membre de rechercher une solution à ce problème* dans le cadre de la politique agricole commune' (judgment of 23 February 1988 in Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 18, emphasis added).

Although it does not fulfil the objective for which it was intended, the argument as to the superiority of pasta products made from durum wheat may nevertheless serve another purpose, namely that of highlighting the fact that, if it really intends to liberalize trade in pasta products, the Commission must impose legal conditions capable of protecting the designation and the presentation of such products. Only by means of such rules can Community consumers continue to exercise their preference for durum-wheat pasta products — all consumers, including therefore those in the north of Europe who, although having demonstrated a growing predilection for such products, are for obvious reasons those least well equipped to recognize them.

13. I referred a few moments ago to the judgment in the beer case; and, if only because it embodies a masterly summary of the jurisprudence of the Court on this subject, I intend to take it as the starting point for the argument upon which I shall base my proposal for the answers to be given to the questions submitted by the national courts. The German Government — it will be remembered — had maintained that the purity requirement imposed by Article 10 of the Biersteuergesetz was essential for the protection of German consumers because, in their minds, the word

'Bier' could not be dissociated from the image of a beverage produced using only the ingredients prescribed by law; and the Court's reply deserves to be reproduced in full.

'Firstly, consumers' conceptions which vary from one Member State to the other are also likely to evolve in the course of time within a Member State. The establishment of the common market is . . . one of the factors . . . in that development. Whereas rules protecting consumers against misleading practices enable such a development to be taken into account, legislation contained in the Biersteuergesetz prevents it from taking place. As the Court has already held in another context . . . the legislation of a Member State must not "crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them".

Secondly, in the other Member States . . . the designations corresponding to the German designation "Bier" are generic designations for a fermented beverage manufactured from malted barley, whether malted barley on its own or with the addition of rice or maize. The same approach is taken in Community law as can be seen from heading No 22.03 of the Common Customs Tariff. . . .

The German designation "Bier" and its equivalents in the languages of the other Member States of the Community may therefore not be restricted to beers manufactured in accordance with the rules in force in the Federal Republic of Germany. It is admittedly legitimate to seek to enable consumers to attribute specific qualities to beers manufactured from particular raw materials to make their choice in the light of that consideration. However, as the Court has already emphasized . . . that possibility may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other Member States and, in particular, "by the compulsory fixing of suitable labels giving the nature of the products sold". By indicating the raw materials utilized in the manufacture of beer "such a course would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in trading and in offers to the public". . . .

Contrary to the German Government's view, such a *system of consumer information may operate perfectly well* even in the case of a product which, like beer, is not [always] supplied to consumers in bottles or in cans capable of bearing the appropriate details. That is borne out once again, by the German legislation itself [which] provides for a system of consumer information in respect of certain beers, even where those beers are sold on draught, when the requisite information must appear on the cask or the beer taps' (paragraphs 32 to 36, emphasis added).

It seems to me that there are two considerations in that passage which deserve to be emphasized. In the first place, in the Court's view the German designation 'Bier' and the corresponding words in the other Community languages are generic and cannot therefore be reserved for a given type of beer. Moreover, before de-restricting the German beer market, the Court sought to check in detail whether the

information provided to the consumer was really sufficient. Can it be said that the same conclusions — in other words, that 'pasta' is a generic term and the purchaser is effectively protected — be applied to the present case? The Commission thinks they can. For consumers not to be led into error — the Commission has told us — it is sufficient if the package identifies the product as 'pasta' and lists the ingredients from which it is made (durum wheat, common wheat or others). I, on the other hand, say that they cannot. In other words, my view is that, whilst all the foregoing is doubtless in conformity with Directive 79/112/EEC, it is still not sufficient to protect the consumer.

Let us see why. In the first place, the fact must be repeated that durum-wheat pasta and common-wheat pasta products are different from each other. That is clearly the case as regards their nature. And it is also true from the commercial point of view if it is borne in mind that: (a) the Common Customs Tariff classifies them under different subheadings; (b) as far as the relationship between the raw material and the finished product is concerned, one is the basis for the criterion (non-stickiness in cooking) by reference to which aid is granted and the others constitute the foundation for the requirement (non-stickiness when mechanically kneaded) laid down for the determination of an intervention price; (c) in commercial relations between the EEC and the United States only durum wheat pasta is protected.

Having said that, let me come back to the basic features of the Italian system, which can be summarized in three statements: (a) 'pasta di semola di grano duro' is a *mandatory* designation, *reserved* for foodstuffs produced from that cereal and is *generic*; it must also appear on the wrapping regardless of the form of the pasta inside; (b) this labelling requirement ensures the necessary clarity as to identity (pasta) and nature (durum wheat meal) of the product, but leaves the manufacturers free to describe by the most varied names (spaghetti, vermicelli, and so on) the form of the pasta marketed by them; (c) this freedom is enjoyed by pasta makers because of fear of the confusion which would arise from the obligation to specify for every form of pasta the ingredients used in its preparation (for example, spaghetti made from durum wheat meal, spaghetti made with eggs, spaghetti made from durum wheat meal with spinach and so on). 'Spaghetti', 'vermicelli' and so on are therefore *specific* terms, *distinct* from the term 'pasta di semola di grano duro', they indicate the form of the pasta and they do not in any way refer to its nature.

This clear separation between the designation 'pasta' and the terms used for its one hundred or one thousand forms exists, as far as I know, only in Italy. In the rest of the world, whilst 'pasta' is still a generic designation, 'spaghetti' is no longer a specific designation; on the contrary, as is pointed out by the Netherlands Government (observations in the *Zoni* case, p. 5), that word — and perhaps also 'macaroni' — has finally become a *synonym for pasta* or, even better, has taken on the meaning of *pasta par excellence*. It follows, it seems to me, that 'spaghetti' (or 'macaroni') cannot be classified as an unequivocally specific designation like yoghurt or, to mention two products with which the Court will have to concern itself in the near future, sausages and 'Edam'. 'Edam' is not a synonym for cheese, not even in the small city where it originated or in the famous Alkmaar market.

Put it to the test: ask the average Community consumer what cheese is; you can bet that his answer will not be 'Edam'. Immediately afterwards ask him what pasta is: the chances that he will reply 'spaghetti' are extremely high (whereas I repeat, in Naples or Milan the man in the street would reel off at least a dozen names). In addition, heading 1902 of the Common Customs Tariff has always been worded as follows: 'Pasta ... such as spaghetti, macaroni, noodles, lasagne, gnocchi, ravioli, canneloni', and let no one tell me that it is merely an accident that the first pasta products mentioned in that list are precisely spaghetti and macaroni!

Indeed, we can say that, by contrast with 'beer', pasta may well be a generic term, but it does not have the same generic significance in all the Member States of the Community. In Italy, it indicates above all the mixture from which the various pasta products are obtained by means of a traditional process; outside Italy, pasta also has that meaning and, at the same time, indicates a food product that is long, flexible and not hollow (spaghetti) or, sometimes, one comprising unfilled tubes of varying length and thickness (macaroni). Conversely, whereas 'spaghetti' or 'macaroni' are, in Italy, specific terms which indicate two of the many ways in which pasta is presented, outside Italy they are *generic designations in habitual use.*

14. Bearing this in mind, let us now imagine that we are in the 'pasta products' department of a supermarket in Luxembourg (to which, let it be said parenthetically and metaphorically, we should have been taken by the Commission; but by now we know that in these proceedings the Commission, like Santiago the fisherman in Hemingway's *The Old Man and the Sea,* has often 'fallen asleep dreaming of lions'). Before us there they are four packets of pasta, of which the visible sides look like this: [1]

The four packets were made, in order, in Italy, Belgium, Germany and Switzerland and, as you will see, they all bear the clearly legible word 'spaghetti'. But what is this spaghetti made of? The only packet front which tells us anything specific in that regard and does so in three languages, of which two are spoken in the Grand Duchy, is the last one: the raw materials for the product contained in the bag are 'whole' (an adjective, moreover, which is rather equivocal) wheat and soya. The others — except the first on which appear the words, but only in Italian, 'pasta di semola di grano duro' — say nothing. To find out more, it is necessary to read the information which appears, in microscopic letters, on the back; we then learn that the second packet is made from durum wheat and the third from a mixture of durum wheat and common wheat plus 150 grams of egg — 'fresh', of course — per kilogram.

1 — At this point in the roneoed version of the Opinion there was a photograph of the four packets, which, for technical reasons, cannot be reproduced here.

On the basis of what I have said in part 8 of this Opinion, the forms of presentation which I have just analysed *all* fulfil the requirements of 'horizontal' Directive 79/112/EEC; if he reads them carefully, therefore, the Luxembourg consumer (and we must sympathize with him) ought to be able to choose the pasta, or rather the spaghetti, which he prefers. But — and here is the difficulty — could Italian, French or Greek purchasers? No, replied the Commission in the *Zoni* case. Since in Italy, France and Greece dry pasta is manufactured exclusively from durum-wheat flour, labels like those on the second and third packets would certainly not be 'sufficient' to inform the consumer of the ingredients and nature of the products concerned (*supra*, part 11).

It is easy to say: an appropriate label, 'ça suffit'. But in practice, as has just been shown, daily dealings in pasta products raise problems which the labels prescribed by the directive are absolutely incapable of resolving. This brings to mind again the observation of the Parliament's Legal Affairs Committee which suggested to the Brussels experts that rules should also be adopted for the 'designations in current use in the trade, such as spaghetti or macaroni'. But in particular Article 5 (2) of the proposal for a directive on pasta products becomes pertinent. You will recall the text: 'where the mandatory details [namely the specified designations and the terms for shapes of pasta] do not appear in the . . . national languages', the Member States 'may prohibit trade in the products' to which they relate.

15. The objection will be made that those problems can be resolved even without compelling the Council to undertake a far-reaching reform: more specifically, in order to provide better protection for Italian consumers than is provided by Directive 791/112, the Italian legislature could, after removing the existing purity requirement which prevents imports of common-wheat pasta, impose upon Community manufacturers of spaghetti the obligation to print on the front of the packet the description 'pasta di farina di grano tenero'. I doubt, however, whether such an expedient would be sufficient to establish, as required by the beer judgment, a 'system of consumer information' which can 'operate perfectly well'.

Once again, the difficulty lies in the use of the designation 'spaghetti'. For those who have purchased and consumed for years (or, in the Mezzogiorno, for ever) only durum wheat spaghetti, the term 'pasta di grano tenero' cannot be considered sufficiently informative where there appears above them, in very large letters, the word spaghetti. Today the habitual consumer of champagne who is offered a bottle of 'vin

mousseux — méthode champenoise' may be better informed than the habitual consumer of spaghetti would be in the hypothetical situation that I have just described; but we know that the Community has protected him by going so far as to prohibit the use of that term. Without fear of being guilty of exaggeration, it can be said that to grant non-Italian pasta producers the right to use the same specific designation (spaghetti) for products prepared using different flours would amount to exposing national purchasers to an outright deception and small-scale manufacturers to a not inconsiderable form of unfair competition.

What then? I believe that if the Italian (or French or Greek) legislature intended setting up a really perfect system of consumer information only one course would be open to it: to require foreign producers to have the designation 'spaghetti di grano tenero' (or 'vermicelli di grano tenero', and so on) printed in all cases, alone, on the front of the packet. But would a rule of that kind be lawful? Here too my answer is negative. If the first solution does not go far enough, this second solution goes too far; so far, I fear, that it would be tantamount to a measure having equivalent effect.

I will illustrate this by giving an example. Let us suppose that a Netherlands pasta maker produced only common-wheat pasta. Since 'spaghetti' is a word which is understood throughout the Community the company would obviously have an interest in using only that term on the front of the packet and using the back for the list of ingredients, in the various languages; by so doing, it would use only one type of packaging for its Community trade, thus achieving considerable savings. On the basis of the rule which I have outlined, however, presentation of that kind would not be sufficient and the pasta producer in question would have to change it for products sent to Italy, France and Greece, by adding the words 'spaghetti di grano tenero', 'spaghetti de blé tendre' and 'σπαγέτα από μαλακό σιτάρι'.

That having been said, let us read paragraph 15 of the *Fietje* judgment cited earlier: the extension of a national provision 'which prohibits the sale of certain alcoholic beverages under a description other that prescribed by national law to beverages imported from other Member States' and thus makes 'it necessary to alter the label under which the imported beverage is lawfully marketed in the exporting Member State, is to be considered a measure having an effect equivalent to a quantitative restriction . . . in so far as the details given on the original label supply the consumer with *information* on the nature of the product in question which is *equivalent* to that in the description prescribed by law' (emphasis added). In my example, the information available on the back of the packet is without doubt equivalent to that required by the Italian, French or Greek rules on the presentation of pasta. If he were compelled to change the word 'spaghetti' on his label to 'spaghetti di grano tenero', the Netherlands producer would then be fully entitled to invoke Article 30 of the Treaty.

16. This point having been reached, one conclusion seems to me to be obvious: national shortcuts are not a tenable proposition and are even liable to have pernicious effects. To liberalize Community trade in pasta products and then to leave matters to Member States would not only make it impossible for their legislative authorities to devise measures providing appropriate protection for the interests of producers and consumers. Such an inchoate manoeuvre would do worse: it would encourage the various pasta makers, in the awareness that they could rely upon inadequate rules on designation and presentation, to win new markets by manufacturing products which would be sold at ever decreasing prices, but would be increasingly misleading as regards their identity and nature.

In those circumstances it seems to me that the only practical way out was indicated in the judgment of 23 February 1988: responsibility for finding a solution attaches 'à la Communauté et non à un État membre'. In other words, if it is desired to provide freedom of movement for all pasta products manufactured in the various Member States, at the same time avoiding the problems to which I have referred, the *Community must intervene directly in its own right* and must do so by a means placed at its disposal by the Treaty which, although perhaps not the simplest or the most rapid, is certainly the one best suited to the purpose, namely the directive. Moreover, the Court too suggested to the Commission that it should adopt a directive, specific to the pasta industry, in order to resolve problems not so very far removed from those involved in this case. I would refer you to the judgment of 17 December 1981 in Joined Cases 197 to 200, 243, 245 and 247/80 (*Ludwigshafener Walzmühle Erling KG and Others* v *Council and Commission* [1981] ECR 3211): 'only by harmonization of national legislation would it be possible to remedy the difficulty referred to by the applicants' (paragraph 54).

What should be the scope of such a measure? Let us consider the American experience. Under the Food, Drug and Cosmetic Act, the Food and Drug Administration adopted in 1964 a series of rules concerning 'macaroni and noodle products'. Having laid down in subparagraph (a) that 'macaroni products [that is to say pasta] are the class of food each of which is prepared by drying formed units of dough made from semolina, durum flour, farina, flour or any combination of two or more of these, with water and with or without one or more of the optional ingredients . . .', Section 16.1 (b), (c) and (d) gives the designations and criteria for identifying a number of typical forms: 'The name of each food for which a definition and standard of identity is prescribed' — reads subparagraph (e) — 'is "macaroni product" or alternatively the name is "macaroni", "spaghetti or vermicelli", as the case may be'. Finally, Sections 16.2 to 16.5 cover respectively 'milk macaroni', 'whole wheat macaroni', 'wheat and soy macaroni' and 'vegetable macaroni'. According to the shape and the raw material used in their preparation, each of those products has a mandatory designation, such as 'whole wheat spaghetti', 'wheat and soy spaghetti', 'spinach spaghetti', and so on.

It is of course a law which is very heedful of the interests of purchasers; and the Community legislature would do well to follow its example. I will be happy, however, if it does no more than issue rules covering designations having regard, naturally, not only to the conditions prevailing in the individual national markets and the laws governing them but also to the many factors — political, agricultural and commercial-policy considerations, the protection of consumers and of durum

wheat growers — with which I have dealt in the preceding pages. I will be happy with a solution of that kind for numerous reasons, among which the possibility that it would provide of determining whether or not a law such as Law No 580 is compatible with Article 30 of the Treaty is not the least important — in fact, in a case such as this one it is of prime importance.

17. At the present time, the question submitted by the national courts cannot be answered clearly — or at least the answer would only be regarded as clear by someone who was prepared to put up with a situation which would be unsatisfactory in any case. Let us bear in mind the consequences of the alternatives before us. A ruling of compatibility would endanger, perhaps for good, the movement of pasta products lawfully manufactured in eight of the twelve Member States and for that reason would threaten the solidity of one of the pillars upon which the Community edifice rests. On the other hand, a ruling of incompatibility would (a) leave without proper defence not only the Italian durum-wheat pasta consumer but also the Community purchaser of spaghetti of the most varied composition; (b) reward and encourage inertia on the part of the Brussels legislature, justifying its claim that it had resolved the problem for once and for all by means of the horizontally applicable general provisions of Directive 79/112/EEC; (c) *de facto*, but irretrievably, impair the conditions upon which the Community policy for durum wheat and the agreement between the EEC and the United States on the production and marketing of pasta manufactured from that cereal are based.

What is to be done then? The course of action which I think is preferable takes the form of a compromise and, like the celebrated Order of 29 May 1974 made by the German Constitutional Court, it is based on an adverb of time: 'until'. Underlying it is an obvious consideration: if in the last 20 years or so the durum wheat pasta exported from Italy to the north of the Community has increased from 102 000 to 1 680 000 quintals per annum, it cannot be denied that, although able to choose from pasta products of various kinds and compositions, Belgian, Luxembourg, Netherlands, German, and after them United Kingdom, Irish and Danish, consumers have shown an increasing preference for that type of food product. It is therefore above all for them that we must provide a guarantee, to repeat once again the words of the German beer judgment, a 'system of information . . . able to operate perfectly'. If we allow — but only temporarily — the present market situation to persist, we shall enable the north European purchasers to continue to choose the pasta products which they like best, whilst the Italians, the Greeks and French will not — by reason of imprecise and insufficient information provided by the label on imported products — run the risk of purchasing products which are not to their taste.

Last but not least, maintenance of the legal and economic status quo will ensure the continuing existence of the conditions on the basis of which the Council decided to review its policy on cereals and was able to conclude with the United States a commercial agreement protecting durum-wheat pasta products. Not least, I repeat. It should be borne in mind that, according to Article 39 (2) of the EEC Treaty, 'in working out the common agricultural policy . . . account shall be taken of: (b) the need to effect the appropriate adjustments *by degrees*; (c) the fact that in the Member States agriculture constitutes a sector *closely* linked with the economy as a whole' (emphasis added); and we should not forget that that obligation is binding upon courts no less than upon legislators.

18. In the light of the foregoing considerations I suggest that the Court should give the following answer to the questions submitted by the pretore of Bolzano and pretore of Milan by Orders of 31 October 1985 and 19 March 1986:

Until such time as the Community has issued rules on the production and/or designation of pasta products, which take account in particular of the requirement of consumer protection, Article 30 of the EEC Treaty will not prevent the application of a law of a Member State which imposes the obligation to use exclusively durum wheat for the manufacture of pasta products intended to be marketed within that State.