In Joined Cases 63 to 69/72

WILHELM WERHAHN HANSAMÜHLE, Neuss/Rhein,
KURT KAMPFFMEYER, MÜHLENVEREINIGUNG KG, Hamburg,
LUDWIGSHAFENER WALZMÜHLE ERLING KG, Ludwigshafen,
KURT KAMPFFMEYER MÜHLENVEREINIGUNG KG, Hamburg, (as they are now known) as successors to the rights and obligations of DUISBURGER MÜHLENWERKE AG,
HEINRICH AUER MÜHLENWERKE KG A.A., Cologne-Deutz,
KURT KAMPFFMEYER MÜHLENVEREINIGUNG KG, Hamburg, (as they are now known) as successors to the rights and obligations of SÜDDEUTSCHE MÜHLENWERKE AG,
PFÄLZISCHE MÜHLENWERKE GMBH, Mannheim,

represented by Fritz Modest of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Me Félicien Jansen, bailiff, 21 rue Aldringen,

applicants

v

COUNCIL OF THE EUROPEAN COMMUNITIES, Brussels, represented by Professor D. Vignes, Legal Adviser with the Legal Service of the Council, as agent, assisted by Professor H. P. Ipsen of the University of Hamburg, with an address for service in Luxembourg at the office of J. N. van den Houten, Director of the Legal Service of the European Investment Bank, 2 place de Metz,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, Brussels, represented by P. Gilsdorf, Legal Adviser, assisted by Professor H. P. Ipsen of the University of Hamburg, with an address for service in Luxembourg at the office of Emile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendants,

Claim for damages and interest based upon Article 215, second paragraph, of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars (Rapporteur),

P. Pescatore, H. Kutscher, C. Ó Dálaigh, A. J. Mackenzie Stuart, Judges,
Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

(a) Objects of the proceedings

The applicants process durum wheat into cereal meal which they deliver mainly to manufacturers of macaroni, spaghetti and similar products. Whilst common wheat production, intended for breadmaking shows a considerable surplus within the Community, that of durum wheat not only shows a considerable deficit, but is moreover concentrated in certain regions, that is to say — as regards France — in Beauce and in the south, and in southern Italy.

The actions are concerned with a claim jointly against the Council and the Commission — in the terms of the application — and against the Community — in the terms of the reply — for payment of sums amounting in all to DM 9 487 281 by way of principal, together with interest at 7 % from 1 February 1972 by way of compensation for the damage which the applicants claim to have suffered during the cereal marketing year 1971/72. This damage is said to have been caused by the deficient, non-rational and illegal management of the common organization of the market in cereals, especially as regards durum wheat, which is said to have resulted in German cereal meal producers being obliged to purchase their basic material — durum wheat imported from third countries — at the threshold prise (125·25 u.a.), whereas their French and Italian competitors had been able to obtain home-grown durum wheat at the intervention price (112·44 u.a.) or at a price approaching the same.

This distortion of competition is said to have lost the applicants 20 % of the German market in cereal meal, made up of manufacturers of macaroni, spaghetti and similar products, the benefit accruing in the main to French undertakings.

In the first place, the applicants base their claim to compensation on a wrongful act on the part of the Community institutions, in the main by reason of their having fixed the intervention price in respect of French and Italian durum wheat at too low a level or the threshold price for durum wheat imported from third countries at too high a level.

As a subsidiary point, in their reply, they further plead the principle of entitlement to compensation arising from an illegal intervention by the administration — even if not culpable — affecting private property and amounting to expropriation or dispossession.

(b) Organization of the market in cereals

The organization of the market in cereals, comprising both common wheat and durum wheat, is based upon the following principles:

Regulation No 120/67 of the Council of 13 June 1967 (OJ No 117, 19. 6. 1967, p. 2269/67) provides that a target price, a basic intervention price, derived intervention prices and a threshold price shall be fixed annually.

In respect of durum wheat, the fixing of a guaranteed minimum price, in excess of the target price and intended to encourage production, is also provided for.

The target price and the basic intervention price are fixed for Duisburg at the wholesale stage (Article 2 (3)). The derived intervention prices are fixed, for the same standard quality at the same stage and under the same conditions as the basic intervention price, for all marketing centres in the Community except Duisburg. Under the provisions of Article 4 (1), second paragraph, their level is calculated in such a way that the differences between them correspond to the price disparities in prices to be expected in a normal harvest under natural conditions of price formation on the market and allow the free movement of cereals within the Community in accordance with the requirements of the market.

The threshold price, calculated for Rotterdam, is fixed for the Community in such a way that on the Duisburg market the sale price of the imported product — taking into account transport costs from Rotterdam — is at the level of the target price.

As regards the guaranteed minimum price, Article 10 of Regulation No 120/67 lays down that 'where the intervention price for durum wheat valid for the marketing centre of the area with the largest surplus is lower than the guaranteed minimum price, aid shall be granted for the production of this cereal'. The payment of this aid, amounting to the difference between the guaranteed minimum price and the aforementioned intervention price is the responsibility of the public authorities. In theory, purchasers of French and Italian durum wheat — in the present case the cereal meal producers of the two Member States — ought not to have to pay more than the intervention price the difference being made up by means of the aid.

The applicants claim that this theory corresponds to the true state of affairs, at any rate as regards a large proportion of the purchases. According to the Council and the Commission, on the other hand, the French and Italian flour mills were competing in the durum wheat market and were offering more than the intervention price, that is to say an additional 3 to 7 u.a. per metric ton above that price.

Regulation No 1528/71 of the Council of 12 July 1971 (OJ L 162, 20. 7. 1971 p. 1) brought about an alteration to Article 4 of Regulation No 120/67 which resulted in there being in future a single derived intervention price for durum wheat applicable at all marketing centres, with the exception of Duisburg, 'provided that the quantities of ... durum wheat marketed at the time of a normal harvest are less than the quantities consumed within the Community' (Article 4 of Regulation No 1528/71). The new single derived intervention price was equal to the lowest derived intervention price existing under Article 4 of Regulation No 120/67.

Regulation No 796/72 of the Council of 17 April 1972 (OJ L 94, 21. 4. 1972 p. 7) abolished the basic intervention price and replaced it by a single intervention price equal to the derived intervention price existing previously (Article 2). Article 4 of Regulation No 120/67 was modified to this effect.

For the 1971/72 marketing year, the prices in force on the market in durum wheat were as follows:

— *Target price:* 127·50 u.a./metric ton. (Article 1 of Regulation No 1054/71 of the Council of 25 May 1971, OJ L 115, 27. 5. 1971 p. 8).

— *Basic intervention price:* 119·85 u.a./metric ton (Article 1 of

Regulation No 1054/71 of the Council of 25 May 1971).

— *Single derived intervention price:* 112·44 u.a./metric ton (Article 1 of Regulation No 1530/71 of the Council of 12 July 1971, OJ L 162, 20. 7. 1971 p. 16).

— *Threshold price:* 125·25 u.a./metric ton (Single Article of Regulation No 1120/71 of the Council of 28 May 1971, OJ L 118, 31. 5. 1971 p. 3).

— *Guaranteed minimum price:* 147·90 u.a./metric ton (Article 1 of Regulation No 1054/71 of the Council of 25 May 1971).

— *Amount granted by way of aid to durum wheat production:* 35·46 u.a./metric ton (i.e. the difference between the guaranteed minimum price and the single derived intervention price: 147·90 u.a. — 112·44 u.a.).

(c) Procedure

The applications, dated 8 September 1972, were filed with the Registry of the Court on 13 September 1972.

By Order dated 31 October 1972, the Court decided to join the present cases for the purposes of procedure and judgment.

By letter dated 8 January 1973 the applicants' representative informed the Court that the original applicants in cases 64/72, 66/72 and 68/72, that is to say 'Kurt Kampffmeyer Mühlen, Hamburg', 'Duisburger Mühlenwerke AG, Duisburg' and 'Süddeutsche Mühlenwerke AG, Frankfurt', had been amalgamated under the common name of 'Kurt Kampffmeyer Mühlenvereinigung KG.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court did not consider it necessary to undertake a preliminary inquiry.

The oral observations of the parties were submitted at the hearing on 19 and 20 June 1973.

The Advocate-General delivered his opinion at the hearing on 18 September 1973.

II — Conclusions of the parties

The *applicants* claim that the Court should:

In Case 63/72

'1. Order the defendants jointly to pay the applicant by way of compensation for the damage sustained by it the sum of DM 667 894·48, plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

In Case 64/72

'1. Order the defendants jointly to pay to the applicant by way of compensation for the damage sustained by it the sum of DM 3 256 931·40, plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

In Case 65/72

'1. Order the defendants jointly to pay to the applicant by way of compensation for the damage sustained by it the sum of DM 1 081 236·76, plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

In Case 66/72

'1. Order the defendants jointly to pay to the applicant by way of compensation for the damage sustained by it the sum of DM 592 648·72, plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

In Case 67/72

'1. Order the defendants jointly to pay to the applicant by way of compensation for the damage sustained by it the sum of DM 959 635·40, plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

In Case 68/72

'1. Order the defendants jointly to pay to the applicant by way of compensation for the damage sustained by it the sum of DM 1 409 662·21 plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

In Case 69/72

'1. Order the defendants jointly to pay to the applicant by way of compensation for the damage sustained by it the sum of DM 1 509 272·04, plus interest at the rate of 7 % as from 1 February 1972.

2. Order the defendants to pay the costs.'

The defendants contend that the Court should:

'Dismiss the applications and order the applicants to pay the costs.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — The application

Issues of fact

Having considered the relevant regulations and having from the point of view of economics analysed the production, processing and consumption of durum wheat in the European Economic Community, as well as the systems for collection and distribution and the methods covering the grant of aids, the applicants put forward the following grounds of complaint:

While the price system for the market in cereals introduced by Regulation No 19 (OJ No 30 of 20 April 1962, p. 933/62), reproduced by Regulation No 120/67 of the Council, has as its object common wheat and barley i.e. cereals produced throughout the Community and in respect of which there exists a Community market, there exists, on the other hand, no free market for durum wheat in the Community. This cereal is only produced in limited areas and is bought by cereal meal producers established in or near those areas. Moreover, fixing the target price and the basic intervention price for Duisburg makes no sense. Whilst admittedly that region has three durum wheat mills, Duisburg is not the biggest importing centre, for it is altogether irrational and contrary to the objectives of stabilization as expressed in Article 39 of the Treaty, to divert from French and Italian areas of production the durum wheat which is harvested there, when there are in fact cereal meal producers in those regions.

The target prices and the basic intervention prices fixed in respect of the 1971/72 marketing year by Regulation No 1054/71 accordingly do not fulfil the purpose for which they are designed. The omission from Regulation No 796/72 of the basic intervention price confirms this conclusion.

A comparison of the level of the single derived intervention price (112·44 u.a.) with the target price (127·50 u.a.) and the basic intervention price (119·85 u.a.) shows that the derived intervention price was not intended to direct goods to Duisburg and that its practical effect was limited to the area surrounding the production centre. The so-called 'derived' intervention prices were thus

intentionally designed as regional prices restricting the circulation of durum wheat to a relatively limited region. In 1971/72 they drastically inhibited the formation of a market for durum wheat harvested within the Community extending into the Federal Republic and the Benelux countries.

This so-called derived intervention price in fact amounted to a true regional target price, so much so that the threshold price fixed on the basis of the imaginary target price likewise had no connexion with prices actually applied in production and processing markets for durum wheat.

In the Member States which do not produce durum wheat and which do not have access to the Community market in durum wheat, the part played by the threshold price is limited to protecting the market in common wheat against importations of durum wheat. But, in France and Italy this is done by means of the intervention prices which are lower than the threshold price. It would therefore have sufficed to have fixed a threshold price in the other Member States at the same level.

The fact that cereal meal producers in Germany and the Benelux countries were obliged during the 1971/72 marketing year to import durum wheat at the threshold price (125·25 u.a.) whilst French and Italian producers were able to cover the major proportion of their needs at the single derived intervention price of 112·44 u.a., resulted in a handicap of 12·81 u.a. per metric ton for the former. French and Italian cereal meal producers were in a position to offer durum wheat meal at prices lower by DM 38 to 50 than those of German and Benelux producers.

On the assumption that the ratio of durum wheat imports from third countries into France and Italy to home production, is as 20 to 80 or as 10 to 90 as the case may be then German and Benelux producers are still subject to a handicap respectively of 10·25 u.a. per metric ton of durum wheat (representing 15·38 u.a. or DM 56·29 per metric ton of cereal meal) and 11·53 u.a. per metric ton of durum wheat (that is 16·30 u.a. or DM 59·66 per metric ton of cereal meal).

Besides, whilst imports of durum wheat meal from France and Italy, amounted to no more than 20 % of German consumption, they resulted in grave market disturbances since, by reason of the dominant position of the Birkel undertaking, (the main buyer of French and Italian cereal meal), German cereal meal producers were obliged to align their prices on those applicable in France and Italy, which were appreciably lower.

The applicants complain that the defendant institutions failed to seek a solution to this situation.

The Council ought, in the applicants' view, either to have brought the threshold price down to the level of the single derived intervention price, treating the latter as the target price or modifying Article 5 of Regulation No 120/67, or to have reduced the aid to producers of durum wheat provided for by Regulation No 135/67 (OJ No 122 of 22 June 1967, p. 2393), reducing it to 22·65 u.a. per metric ton instead of 35·46 u.a.

In this way French and Italian producers would have continued to receive the guaranteed minimum price of 147·90 u.a. per metric ton, but French and Italian cereal meal producers would have paid 125.25 u.a., instead of 112·44 u.a.

In the applicants' view one could even — as had been provided by Regulation No 19/62 (OJ No 30 of 20 April 1962, p. 933) — have granted a preferential margin of 1·1 u.a. per metric ton to French and Italian home production as compared with imports from third countries.

Issues of law

In the applicants' view the defendants, by legislative acts and by regulations as well as by a failure to supervise the market in durum wheat, infringed several important Community principles.

The objective of stabilizing agricultural markets, provided for by Article 39 (1) (c) of the Treaty, the prohibition of discrimination set out in Article 40 (3), second paragraph and, as regards the fixing of the threshold price for the 1971/1972 marketing year, the principle of proportionality envisaged by Article 40 (3) first paragraph are all alleged to have been infringed.

In the circumstances the Council incurred liability, because the fixing of the single derived intervention price prevented the entry of French and Italian durum wheat into the Federal Republic.

The Commission, which made the proposals forming the basis of the criticized acts on the part of the Council, likewise shares this liability.

The principle of proportionality, enshrined in Article 40 (3), first paragraph, of the Treaty was infringed by the fixing of the threshold price at an excessive level. Since in the present case the part played by the threshold price was limited to protecting the production of common wheat against imports of durum wheat and since the same objective was achieved, in countries producing durum wheat, by the fixing of the single derived intervention price, it would have been sufficient to fix the threshold price at the same level, i.e. 112·44 u.a.

Since by adopting the criticized measures the defendant institutions consciously created the division of the market which resulted in the damage suffered by the applicants, those institutions must incur liability. Accordingly the defendants should compensate the applicants for the damage suffered.

B — Defence of the Council

Issues of fact

In its statement of defence the Council in the first place makes certain objections of a general nature in relation to the application.

As regards the price system established by Regulation No 120/67, the Council points out that a target price is always unreal in character, since it amounts to an ideal price. The threshold price, the level of which depends upon a correlation between the markets in durum wheat and in common wheat is not excessive since the resale price of the French and Italian collecting agencies is higher than the intervention price. As regards the latter, the reduced importance of intervention operations on the French and Italian markets justified the removal by means of Regulation No 1528/71 of multiple derived intervention prices. Besides, the criticisms directed against the intervention price in any event lack relevance, because the fixing of an intervention price, even if inadequate, has no effect on the functioning of the market since it is not on the basis of this price that market prices are established.

The absence of real grounds for complaint against the system of Regulation No 120/67 is further shown in the Council's opinion, by the delay in making the complaint, showing the absence of a causal link between the system under Regulation No 120/67 and its application, on the one hand, and the unfavourable situation of which the applicants complain, on the other.

For a true understanding of the handicap to which German cereal meal producers are subject, one might, in the Council's view, to take into account the following factors which to a marked degree limit the real difference between the German prices on the one hand and French and Italian prices on the other.

— The market price paid to French and Italian producers of durum wheat has frequently been higher than the intervention (price on the Paris Stock Exchange there was a difference of between 3 and 7 u.a. in September 1972).

— The German cereal meal producers have a lower rate of extraction, probably due to their attempts to

achieve a higher degree of purity, which would explain in part the higher price asked by them.

— The cost of transport from France to Germany for cereal meal is higher than for durum wheat.

— The exemption from payment of compensatory amounts from May 1971 to May 1972 on imports of durum wheat from third countries had in the case of the German cereal meal producers produced an exchange rate advantage which could be estimated at 14 % up to the official devaluation of the dollar on 9 May 1972 and which was still 5 to 6 % subsequently.

— To calculate the gap between the threshold price (125·25 u.a.) and the market price, one also ought to take into account the profit — margin of the collecting agencies, as well as the possibilities of advance fixing of the levy.

In the Council's view, the impossibility facing the German cereal meal producers of obtaining durum wheat in France and in Italy — insofar as one admits it to be real — is due not to the organization of the market but to a lack of vigilance on the part of the German cereal meal producers in not paying sufficient attention to market development and becoming interested only at a late stage in the possibilities of entering the French and Italian market in durum wheat.

Issues of law

As regards the defendant institutions and their joint liability

An application based upon non-contractual liability, within the meaning of Article 215, second paragraph, cannot be brought jointly against Council and Commission but only against the Community, which alone, under the provisions of Article 210, has legal personality. Accordingly, there can be no question of joint liability on the part of the Council and the Commission since only one party can be liable. Besides, the proceedings are wrongly brought against the Commission since, even it if had made a proposal to the Council involving illegality, it is not liable in respect of an act adopted by the last-mentioned institution.

As regards the general and abstract character of the acts in relation to which liability on the part of the Community is alleged

Whilst admitting the distinction repeatedly asserted by the Court as existing between the action for annulment and the action to establish liability (Judgment of 2 December 1971, Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v Council,* Rec. 1971, p. 975; Judgment of 13 June 1972, Case 11/71, *Compagnie d'Approvisionnement v Commission,* Rec. 1972, p. 391), the Council is of the opinion that it follows from the abstract and general nature of the acts on the basis of which Community liability is alleged, that insofar as an action for annulment in relation to acts not affecting the applicants by reason of their particular characteristics is not admissible (Judgment of 15 July 1963, Case 25/62, *Plaumann v Commission,* Rec. 1963, p. 197; Judgment of 2 July 1964, Case 7/64, *Glucoseries Reunies v Commission,* Rec. 1964, p. 811), an action to establish liability based upon the financial consequences of these acts is likewise not admissible since, as those consequences do not affect the applicants directly, they also could not cause them a direct and special damage, this being a basic condition for establishing liability.

As regards the relation of cause and effect

The Council furthermore denies the existence of a causal link between the allegedly culpable acts and the damage which is said to have resulted therefrom. The applicants do not show that the

insolation of the French market by reason of long-term contracts entered into by the French cereal meal producers resulted from the system under Regulation No 120/67 and its application.

As regards culpability

According to the Council, it is essentially a liability based upon culpability which the applicants allege, that is to say:

— infringement of two higher rules of law, that is first, respect for the objective of stabilization of markets (Article 39 (1)(c)) and, secondly, the rule against discrimination contained in Article 40 (3), second paragraph.

— infringement of the principle of proportionality which must exist between an administrative measure and the effect envisaged thereby, which as regards agriculture, is set out in Article 40 (3), first paragraph, of the Treaty, which provide that the common organization of the markets must not involve measures in excess of those necessary for attaining the objectives defined by Article 39.

As regards the infringement of Article 39 (1)(c) (the objective of stabilization of the market) and of Article 40 (3) second paragraph (discrimination against German cereal meal producers), the Council denies that in the present case the facts amount to a sufficiently clear case of culpable infringement of these obligations.

The complaint based upon the infringement of the principle of proportionality relates to the high level of the threshold price, which is said not to have been necessary in order to attain the objectives of the common policy. The Council replies that since this level was necessary in order to avoid acute disturbance on the market in durum wheat arising from the competition of either imported durum wheat or of common wheat.

Looked at from any point of view, the infringement of the rule of proportionality, when alleged against a general and abstract act constituting a choice of economic policy, must amount to an infringement of a particularly serious kind which it is said was not the case here.

C — Defence of the Commission

Issues of fact

On the substance, the Commission supports the point of view of the Council and considers:

— that the threshold price in respect of durum wheat was not fixed at too high a level in relation to the intervention price applicable in the production areas and that therefore there had not been either discrimination or lack of proportionality;

— that no sufficient link of causality between the legislative measures criticized and the damage alleged had been established;

— the price advantage of French cereal meal producers was smaller than had been asserted by the applicants.

Issues of law

As regards the defendant institutions and their joint liability

The *Commission* points out that the appeal could in any event not result in a condemnation of the institutions, when under the terms of Article 215 it is in fact the Community as such which is liable.

As to which of the institutions shall have to represent the Community in an action based upon non-contractual liability, the Commission rejects the idea that the Community shall be represented by the institution which promulgated the act criticized or which committed an error. In general, the Community must, in actions for damages and interest based upon irregularity of legal acts, be

represented by the Commission. In this connexion, Article 211 of the Treaty is no more than the expression of a principle of wider application, i.e. it lies in the nature of the 'executive' institution within the Community to defend the economic interests of the Community, both before national courts and before the Court of Justice. Any problems that arise where the irregular act was committed within the sphere of influence of other institutions ought to be resolved by agreement between the institutions.

Finally, as regards admissibility, the Commission feels that if one accepts that the Community may be rendered directly liable for legislative measures, then one ought to put some limits to this principle, as had indeed been done by the Court in its Judgments of 2 December 1971 (Case 5/71, *Zuckerfabrik Schöppenstedt*, Rec. 1971, p. 985) and 13 June 1972 (Joined Cases 9 and 11/71, *Compagnie d'Approvisionnement, Rec. 1972, p. 391)*. Thus the applicants' account did not adequately show 'a sufficiently flagrant violation of a higher rule of law for the protection of the individual'.

The Commission nevertheless considers it preferable to examine this question within the framework of the substance of the application rather than in relation to its admissibility.

As regards the legality of the acts criticized

As regards the complaint of discrimination, the Commission admits that it was and it still is easier for French producers of cereal meal to obtain indigenous durum wheat, but it considers that this is a disadvantage which must be accepted. A clear infringement of the principle of equality would imply a certain gravity both from the point of view of the extent and scope of the act in question and from the point of view of the importance of the consequences.

In the case of a legislative measure of general application, such as the creation of a system for the common organization of the market, traders must accept certain inequalities consequent upon the adoption of organizational criteria that apply to all. Accordingly, there is no discrimination unless the inequality is out of proportion to the objective aimed at by the regulation. A stricter interpretation of the principle of equality would limit the discretionary power of the legislator in an unacceptable manner.

The consequences triggered off did not have the effect attributed to them and did not directly result from the acts criticized. A handicap of DM 15 to 20 per metric ton on the price of durum wheat cannot, in the context of an organization of the market, be considered a sufficient indication of a clear infringement of the principle of equality. This is all the more true if that advantage even though undeniable derives from the totality of market conditions and not only from the acts criticized.

The Commission compares such a limitation of liability for legislative acts with the French doctrine of 'particular serious detriment to a small number of persons' ('préjudice spécial et grave à un petit nombre de personnes'), with the special conditions of Article 34 of the ECSC Treaty and with the 'Sonderopfer' in German legal theory.

As regards the complaint of infringement of the principle of proportionality, the Commission considers that whilst admittedly it would have been possible slightly to lower the threshold price without affecting Community production, this does not constitute a clear infringement of the principle of proportionality, when one takes into account the discretionary power of the Administration.

As regards the existence of intentional and flagrant culpability

The Commission rejects the argument according to which the Council and the

Commission intentionally divided the market and knowingly discriminated against German cereal meal producers in terms of price.

As regards the detriment

Finally, the Commission disputes the calculation of the detriment, which it finds all too simple. In order to calculate it correctly, it would be necessary to prove that the alleged price advantage resulted in the loss of a definite part of the market, or in the case of a market that had not been lost, in a diminution of income.

Finally, the Commission argues that the applicants had done nothing to avoid or limit the detriment.

D — Reply of the applicants

Issues of fact

The *applicants* say in reply that if the Community institutions are entitled to encourage the cultivation of durum wheat by the grant of aids, then these measures ought to be harmonized in a way which would not affect the economic interests of the citizens of the Community.

In the course of criticizing the Commission's calculations on various points, such as the under-valuation of the importers' profit margins and the failure to include the costs of customs clearance, of phyto-sanitary inspection, of providing security and of insurance, the applicants estimate the price advantage in favour of French cereal meal producers to be 13·54 u.a. per metric ton of cereal meal, instead of 8 u.a.

The applicants deny the advantage alleged to have been obtained by them as a result of exemption from compensatory amounts on imports of durum wheat from third countries. In practice, the advantages and disadvantages resulting from the non-collection of compensatory amounts applicable to imports of durum wheat and cereal meal made from durum wheat are said to cancel each other out.

The difficulties experienced by German cereal meal producers in obtaining supplies in France are said to be connected with the fact that, bearing in mind the existence of contracts entered into by the 'Symprodur' organization, durum wheat does not reach the open market and cannot influence the price levels on that market. Besides, even where, as is said to be the case in the north of France, durum wheat is not the subject matter of cultivation and delivery contracts, it is nevertheless delivered directly to the three cereal meal producers in that market, both by reason of their dominant position and as a matter of commercial logic.

Increased exports of cereal meal to Germany, which became possible owing to the aids granted for durum wheat production, enable French cereal meal producers to spread their fixed costs over a bigger production and to lower their cost price. They are thus enabled to refrain from modifying their sale price within the country and to lower their export prices considerably. This procedure enables them also to pass on solely on the French market the increase in cost due to obtaining some 20 % of the supplies in durum wheat from third countries und to keep export prices at a low level.

In practice, therefore, German cereal meal producers could not, by reason of their geographical disadvantage effectively compete with the exports of French cereal meal producers to Germany, even if there was a theoretical possibility of so doing. The cost of the necessary transport excludes any profit.

Issues of law

As regards the institutions which are alleged to be liable

An action based upon Article 215, second paragraph, of the Treaty may be brought either against the Council or

against the Commission, depending upon whether the damage is said to have been caused by the agents of one or other institution. An action can therefore equally well be brought against the two institutions in the event where the damage has been caused by the agents of both institutions. Compensation for the damage caused can of course only be claimed once.

As regards the illegal aspects of the organization of the market in durum wheat

Both the prohibition of discrimination and respect for the principle of proportionality constitute higher rules of law protecting the individual and the flagrant violation thereof justifies an action for compensation.

If observance of these rules so requires, the institutions ought to fix several threshold and intervention prices whilst in fact they kept to the simplistic concept of a single threshold price, a single target price and a single intervention price.

As regards the principle of proportionality, the applicants consider that the provisions relating to the discretionary power which under the Treaty is attributed to the EEC institutions, are limited by the meaning and object of the price-fixing mechanism and by higher rules of law. Thus the fixing of the prices ought not excessively to encroach upon the private sector.

The function of the threshold price for durum wheat is to protect on the one hand the market in common wheat and on the other hand the domestic market in durum wheat. The first objective could have been achieved by fixing the threshold price at 112·44 u.a., i.e. the single derived intervention price, which is considered as protecting common wheat in France and Italy sufficiently. The second objective could have been achieved by fixing a threshold price for Rotterdam reduced to the intervention price level, this applying solely in respect of cereal meal producers installed in the Federal German Republic, the Benelux countries and in the new Member States of the Community. There would, in the applicants' view, be no objection to fixing several threshold prices. The unity of the organization of the markets can only be preserved if prices are adapted to regional differences and if, where the situation so requires, several threshold prices are fixed.

In the applicants' view there was grave negligence on the part of the Council and the Commission resulting in liability on their part, in that they did not take these circumstances into account, all the more so since the particular features of the market in durum wheat were known to them as a result of a study made in 1965 by the Commission services.

As regards the obligation to compensate the applicants on the ground of an intervention on the part of the public authority equivalent to dispossession

The *applicants* argue that the legislative measures by which aids were fixed and the price systems created, amounted to illegal intervention striking at private ownership, which was equivalent to dispossession and created an entitlement to damages. Such liability, recognized by German law, is said to exist quite apart from any culpability on the part of the intervening authority if the intervention amounts to an illegal dispossession. The applicants argue that, despite the Bundesgerichtshof having laid down the requirement of a direct link between the intervention and the damage, an indirect link between cause and effect is in fact sufficient.

Since Article 215, second paragraph, of the Treaty in no way links liability to the existence of a fault or to a direct link, the principle of an intervention equivalent to an illegal dispossession is a part of Community law and ought to be applied in the present litigation since the legislative acts by which the aids were fixed, as well as the price systems that were set up, were illegal, not being

necessary for the purpose of achieving the objects of Article 39 of the Treaty, as long as there were other possibilities of fixing prices and promoting the growing of durum wheat without distorting competition between cereal meal producers.

As regards the extent of the damage

Under international law, an injured party has the possibility of evaluating the damage sustained either in an abstract or in a concrete manner. By basing themselves upon the difference between the threshold price fixed for 1971/72 and that which, in their view, ought to have been fixed, the applicants adopted the abstract method because it is the simplest one for all parties concerned.

Besides, one cannot attribute to the applicants a part of the liability, on the basis of an argument that they had not sought to bring an action against the fixing of the levies. Under German fiscal law the applicants, not being importers of durum wheat, were not qualified to appeal against the levies.

E — Rejoinders of the Council and of the Commission

In its rejoinder the *Council* argues firstly that the argument raised by the applicants concerning expropriation or encroachment on property equivalent to dispossession is inadmissible. Article 42 (2), first paragraph of the Rules of Procedure, in fact prohibits the raising of fresh issues in the course of proceedings, unless they are based on matters of law or of fact which only came to light in the course of the written procedure, which does not apply in the present case.

Issues of fact

As regards the facts presented by the applicants, the Council notes that it is incorrect to say that the German cereal meal producers had not been able to purchase durum wheat in France by reason of Community regulations.

In fact, ever since 1967 there had been an increase in exports of French durum wheat to the Federal Republic and the Benelux countries. The fact that this increase remains on a modest scale, is due to the fact that the marketing of durum wheat follows the channels that exist for common wheat and because up to 1972 the applicants made no real efforts to investigate the market possibilities.

Secondly, the price advantage enjoyed by French producers of cereal meal is appreciably reduced by reason of the fact that Community production does not show a surplus. It has not been proved that French cereal meal producers buy French durum wheat at the intervention price. Moreover, French producers of cereal meal who export to Germany are obliged to replenish their stock with Canadian durum wheat.

As regards the complaint based upon the allegation that the applicants are only able to restock at the threshold price whilst their French competitors buy at the intervention price, the Council notes that the different solutions suggested by the applicants — such as abandoning a single threshold price, a single intervention price and a single target price, the fixing of a lower threshold price for non-producing States coupled with an international customs inspection, the reduction of the threshold price or the abandoning of the aid to durum wheat production — would hinder the realization of the common agricultural market and would ruin the possibilities of developing the production of durum wheat, an objective conforming with Article (1) (a), (b) and (d).

For its part, the Commission observes that one cannot apply the term 'discrimination' to negative effects that result from the effort to promote durum wheat. Such a criticism in fact amounts to a criticism of the economic and commercial expediency of the system. In comparing the situation of the German

and French mills, when it comes to their possibilities of purchasing French durum wheat, the Commission points out that whatever might cause any difficulties in obtaining supplies, whether it be commercial traditions or restrictions on competition, at any rate it is not the regulation setting up the organization of the market in wheat which is at fault.

Besides, it is inaccurate to say that a market on which there is a deficit precludes the possibility of exports. In consequence, the increased demand resulting from the presence of foreign buyers ought to stabilize prices at a level higher than that of the intervention price.

As regards the advantages that accrue to French cereal meal producers from their geographical location, the Commission regards this as an inevitable consequence of the enlargement of the market. It is, as a result, perfectly natural that a geographical choice made in a national context might subsequently, in the larger common market framework, turn out to have been eroneous or at least less advantageous. It is certainly not the Community's imperative objective to put an end to imports of durum wheat originating from third countries and to attain a point of self-sufficiency, but if to further the cultivation of durum wheat is recognized as a reasonable objective and if following from this, priority is given to trade within the Community, that would amount to no more than confirmation of that Community preference which is recognized by the Court of Justice, particularly in the *Beus* Judgment of 13 March 1968 (Case 5/67, Rec. 1968, p. 147).

As regards the aid granted to durum wheat production, the applicants themselves admitted that it formed part of the framework of objectives aimed at by Article 39. It likewise does not violate the principles of non-discrimination and of proportionality.

To differentiate the threshold price as suggested by the applicants would have disastrous effects. Thus the fixing for Rotterdam of the threshold price at the intervention price level would run counter to the very objective of the measure intended to aid the production of durum wheat. French prices would stagnate, the French durum wheat market would show a surplus, finally resulting in the diminution of the production of durum wheat. A differentiated threshold price for the markets of Germany and the Benelux countries would moreover have a discriminatory effect at the expense of the French and Italian mills which depend upon imports from third countries.

Finally, the proposed measure would run counter to the objective of removing internal customs barriers and would prompt a series of similar demands in respect of other products for which a common price has been fixed and for which at production level there are regional disparities.

It follows from the foregoing arguments that the price advantages allegedly enjoyed by French cereal meal producers, are of no more than secondary importance, and the Community is not obliged to reduce the threshold price. The fact that the Commission did not take into account the importers' profit margins in its comparative calculations, was quite deliberate: the Commission had, in fact, disregarded all the incidental costs which are practically the same for French and German cereal meal producers.

Following an analysis of transport costs, the Commission points out that it is not denied by the applicants that the producer price may be and sometimes is in excess of the intervention price, a fact which shows that effectively the level of the producer price depends on market conditions and on competition and might thus show tendency to rise.

The Commission likewise insists that during the period covered by the case, there existed a monetary advantage in favour of German cereal meal producers. On a long-term basis this

advantage is said to have been three to four times the advantage derived by French cereal meal exporters and could therefore not have been absorbed by the higher prices that applied on the French market.

In fact, the price advantage enjoyed by French cereal meal producers could in the Commission's view in no case have exceeded DM 30/metric ton and on average amounted to DM 15 to 20 /metric ton. The Commission stresses that in any event this advantage is not a determining factor. If the Court were to take a different view, then a careful examination of the costs situation would be required so as to find out whether there had been a clear infringement of the principle of equality.

As regards Italian cereal meal producers, the Commission denies that these constituted even a potential danger for German producers, having regard to the relatively high transport and marketing costs, and it affirms that in any case on the Italian market a not inconsiderable quantity of durum wheat from third countries, competing with the local production, is imported.

As regards the right to compensation for an intervention by the authorities, equivalent to illegal dispossession

The claim for compensation based upon the concept of expropriation is in the defendant's view unfounded.

Firstly, it is open to argument whether the theory of compensation for an illegal intervention equivalent to encroachment upon private property forms part of the 'general principles common to the laws of the Member States', mentioned in Article 215. The defendants on this point quote the opinion of Mr Advocate-General Gand in Joined Cases 5, 7 and 13 to 24/66 (*Kampffmeyer,* Rec. 1967, p. 358) from which it appears that, in this field, a principle common to the laws of the Member States does not exist.

If the applicants' thesis were to be admitted then it would follow from this that the liability on the part of the Community, aimed at by Article 215, second paragraph, would rest on a double legal basis, when in fact the Court ought to adhere to the uniform principle of liability on the part of the Community. Besides, it follows from the *Kampffmeyer* Judgment that the Court does not consider it possible to apply this German legal theory in matters of liability. Such liability derives from the principle of defence of private property and cannot, in the light of the Court's case law, be invoked against legal acts on the part of the Community institutions.

Neither is it a case of the fundamental right of the individual provided for by the general principles of Community legislation, the observance of which the Court of Justice is obliged to ensure.

Besides, in the defendants' view the situation at issue, both in its factual and legal aspects, does not lend itself to an application of the theory in question, even if — which is not the case — the theory were accepted. For a right to compensation to exist, there has to be an intervention which if it were legal, would represent a dispossession both by its object and by its effect. On the other hand, the mere change in possibilities of obtaining supplies, in volume of production and in the share of the market does not suffice; it would require a real encroachment upon the substance of a commercial or industrial undertaking. The circumstances surrounding the establishment of an undertaking, and therefore in the first place the conditions of obtaining supplies of basic materials, are not part of the elements necessary for its functioning, in relation to which it can ask for protection against an intervention equivalent to dispossession. That was the decision in a judgment of the Bundesgerichtshof of 31 January 1966 (BGHZ, Vol 45, p. 87).

The defendants argue in conclusion, that the theory invoked is foreign to the basic principles of the common market since its proper functioning implies precisely the establishment of industries in the most appropriate place; they go on to say that the Community system does not provide for compensation in respect of difficulties of adaptation caused to enterprises by reason of the interplay of economic laws.

Finally, the Commission considers that the applicants have not succeeded in establishing the direct effect of the intervention upon the functioning of their enterprises, an element which, in Germany, is considered an essential factor for applying the theory of intervention equivalent to dispossession.

As regards the assessment of the damage

The Commission denies that there exists in international law, in private international law or even in international commercial law a rule or custom permitting the damage to be assessed *in abstracto*. As a subsidiary point, it asks that in the event of the Court accepting the existence of liability on the part of the institutions the decision relating to damage be reserved by an interlocutory judgment.

The parties submitted their observations at the hearing of 19 and 20 June 1973.

The Advocate-General presented his opinion at the hearing of 18 September 1973.

Grounds of judgment

1 These actions have the same subject matter and it is appropriate to decide upon them in one and the same judgment.

2 The actions seek — in the terms of the applications — an order jointly against the Council and the Commission and — in the terms of the reply — an order against the Community for payment of an amount of DM 9 487 281 by way of compensation to the applicants for damage sustained by them during the cereal marketing year 1971/1972 as a result of the non-rational and illegal management of the common organization of the market in cereals, as regards durum wheat.

The Regulations particularly referred to Regulation No 120/67 of the Council of 13 June 1967 (OJ L 117, 19. 6. 1967, p. 2269/67) establishing a common organization of the market in cereals, Regulation No 1054/71 of 25 May 1971 (OJ L 115, 27. 5. 1971, p. 8), No 1120/71 of 28 May 1971 (OJ L 118, 31. 5. 1971, p. 3) and No 1530/71 of 12 July 1971 (OJ L 162, 20. 7. 1971, p. 16) fixing in relation to the cereal marketing year 1971/1972 the target price for durum wheat at 127·50 u. a., the threshold price at 125·25 u. a., the basic intervention price at 119·85 u. a., the single derived intervention price at 112·44 u. a. and the guaranteed minimum price at 147·90 u. a.

3 The system of aid to Community production of durum wheat within France and in Italy, as set up by these Regulations, allowed the French and Italian cereal meal producers to obtain home-grown durum wheat at the intervention price (112·44 u.a.) or close thereto, whilst the German cereal meal producers were obliged to purchase durum wheat imported from third countries at the threshold price (125·25 u.a.)

Pursuant to Article 10 of Regulation No 120/67, aid granted to durum wheat producers shall be equal to the difference between the guaranteed minimum price (147·90 u. a.) and the intervention price applicable to the marketing centre of the area with the largest surplus, i.e. it amounts in the present case to the single derived intervention price, that is to say 112·44 u.a.

This provision, combined with the structure of the durum wheat market in France, in the applicants' view necessarily results in giving French mills an artificial advantage as regards their cost of production which on the German market for cereal meal produced distortions in competition to the detriment of German cereal meal producers.

4 The applicants base their right to compensation in the main on their complaint that the Community institutions organized in a defective manner the aid to durum wheat production, in particular by fixing the intervention price at too low a level in respect of home-grown durum wheat, and the threshold price at too high a level in respect of imported durum wheat, at any rate as regards imports to countries other than France and Italy.

If the intervention price had been fixed at a higher level, then the producers of durum wheat would nevertheless have been assured of receiving the minimum price guaranteed to them by the aid system (147·90 u.a.), but the French cereal meal producers would in that case have paid for their basic product a price nearer to that paid by their competitors who were obliged to obtain their supplies from third countries.

In the absence of such a measure, the discrimination alleged could have been avoided by reducing the threshold price in a way that allowed the cereal meal producers who had virtually no access to the French and Italian durum wheat markets to purchase their raw material at prices near to those paid by their competitors who, at any rate indirectly, were favoured by the aid measures.

5 In their reply the applicants further and as a subsidiary point refer to the existence of a principle under which there should be compensation for an illegal intervention by a public authority, equivalent to expropriation.

I — As regards the admissibility of the appeal bearing in mind that it is directed against the Council and the Commission jointly

6 According to the defendants the appeal is inadmissible since it applies for an order against the Council and the Commission jointly, whilst Article 215 lays down that it is the Community which has to make good damage caused by its institutions.

According to the Council, the Community ought in such proceedings to be represented by the institution against which the allegation is made.

According to the Commission on the other hand one must by analogy to Article 211 of the Treaty hold that whatever the institution that caused the fact alleged, it is the Commission's function to represent the Community before the Court.

7 Article 211 of the Treaty deals with the legal capacity and the representation of the Community in the legal systems of the different Member States.

By reason of the differences in this respect which are inherent in these legal systems it was desirable to establish a rule applicable to all cases.

Under the Community legal system on the other hand it is in the interests of a good administration of justice that where Community liability is involved by reason of the act of one of its institutions, it should be represented before the Court by the institution or institutions against which the matter giving rise to liability is alleged.

8 The applicants allege that this matter has its origin both with the Commission and with the Council, the first for having made a proposal, the second for having legislated.

Accordingly they are justified in bringing the proceedings against the Community as represented by the two institutions.

Furthermore, the fact that an order is applied for jointly against the two institutions and not specifically against the Community, is not of a kind that would result in inadmissibility of the application since it does not affect the rights of the defence.

9 The application is admissible.

II — On the substance

10 Since the matter deals with a legislative act involving choices of economic policy, there is no liability on the part of the Community for damage which individuals may have suffered by the reason of this act, bearing in mind the provisions of Article 215, second paragraph, of the Treaty, unless there is a sufficiently flagrant infringement of a superior rule of law protecting the individual.

1. As regards the infringement of Article 39 (1) (c)

11 The applicants allege against the defendant institutions an infringement of Article 30 (1) (c), pursuant to which the common agricultural policy has *inter alia* the objective of stabilizing markets.

12 In creating a system of aids intended to favour the production of durum wheat in the Community the institutions sought to attain several of the objectives in Article 39, in particular assuring the availability of supplies in the Common Market and the stability of the market by encouraging the cultivation of durum wheat which is showing an unfavourable balance as compared with that of common wheat.

The concept of stabilization of the markets cannot cover the maintenance at all costs of positions already established under previous market conditions.

Besides, it emerges from parts of the record that the production of durum wheat, which before 1966 had only a local economic significance, has increased to such an extent that at the time of the application it permitted Community requirements to be covered to the extend of more than 80%.

A new production of this magnitude must normally result in new movements of trade between Member States.

13 By temporarily giving priority to some of the objectives of Article 39, as compared with the maintenance of established positions, the institutions did not infringe paragraph 1 (c) of this provision.

2. As regards the infringement of Article 40 (3), second paragraph, of the Treaty and of the principle of proportionality

14 The applicants allege that the respondents infringed the rule against discrimination and the principle of proportionality expressed in Article 40 (3) of the Treaty, by not ensuring that the system of aids for production of durum wheat be accompanied by measures that would guarantee to mills of Member States not producing this cereal the availability of imported durum wheat from third countries at the same price level as that paid by their French and Italian competitors.

15 The respondents do not deny that the system of aids which is the subject matter of the proceedings resulted in a advantage for French mills as regards the cost of production for cereal meal, but they consider that this advantage could not have exceeded DM 30 per metric ton, whilst according to the applicants it is of the order of DM 38 to 58 metric tons.

According to the latter this advantage arose — at any rate to a large extent — from the unusually large difference — compared with the price of other cereals — between the threshold price and the single derived intervention price for durum wheat.

16 If the authors of the Regulation — following in this respect the declarations made by the respondents at the hearing — believed that the prices demanded by French agricultural producers would notwithstanding the aid be above the level of the intervention price, then reality did not accord with this forecast, since the prices paid by the cereal meal producers in fact remained at about that price level.

Nevertheless everything seemed to encourage these agricultural producers to demand a higher price, since the aid granted to them in addition to the price they obtained did not amount to bringing their income to the level of the guaranteed minimum price, but was in fact once and for all fixed at 35·46 u.a.

for the cereal marketing year 1971/72 (i.e., the difference between the intervention price and the guaranteed minimum price) whatever the market price they could obtain from the cereal meal producers.

Accordingly the advantageous prices obtained by the latter seemed to originate in the closed structure of the French market in durum wheat and especially in the particularly close ties there existing between mills and agricultural producers.

The applicants do not seem to have seriously intended changing this situation by attempting to penetrate the French market but rather seem to have expected to secure from a fixing of Community prices the means of compensating for these disadvantages.

They further argue that even in the event of the market being freed, French cereal meal producers would have retained a *de facto* advantage by reason of their more favourable geographical position close to production centres.

17 This fact does not in itself constitute a prohibitive kind of discrimination but rather the consequence — that is not contrary to the rules of the Treaty — of a more advantageous location of French undertakings.

Nevertheless it does appear that the difference between the German and French market prices for durum wheat exceeds what would result from this advantage, expressed in terms of the difference in transport costs of cereal meal and durum wheat respectively between the Paris area and the German marketing centres.

Whilst this disparity in prices does not originate in Regulation No 120/67 itself, yet it is nonetheless true that the implementing provisions of this Regulation, by not taking into account the special situation of the French market, have facilitated its continuing existence.

18 It is therefore right to examine whether, faced with this situation, the Council ought not to have taken action by providing, even on a provisional basis, measures that would ensure equality of competitive conditions as between the cereal meal producers of the different Member States.

According to the applicants the objectives aimed at by the system of aids could have been attained without imposing upon them that distortion of competition of which they complain, particularly by a reduction in the threshold price for durum wheat.

The alleged infringement of the principle of proportionality results from the excessively high level of threshold prices, that is in excess of its function of protecting the Community market, contrary to Article 40 (3) of the Treaty, according to which the common organization may include all measures 'required' to attain the objectives set out in Article 39 but 'shall be limited' to pursuit of these objectives.

Such protection it is said, does not necessitate a threshold price of 125·25 u.a.

19 There is a relationship between the cost price of durum wheat and of common wheat, the former being generally approximately 20% higher than the latter.

At the risk of seeing an undesirable kind of interference making its appearance on the market in these cereals, this relationship must be taken into account in fixing their respective threshold prices.

The prices fixed for the marketing year 1971/1972, viz. 125·25 u.a. for durum wheat and 107·35 u.a. for common wheat, take this necessity into account.

Besides, the protection granted to Community-grown durum wheat, which is expressed by the difference of 12·81 u.a. between the single derived intervention price and the threshold price, is in fact less than the protection granted to common wheat, that being 14·01 u.a. and not 6·53 u.a. as is claimed by the applicants.

In fact, to measure the respective degrees of protection enjoyed by these two cereals, one must utilize the same terms, that is to say the threshold price and the single derived intervention price and not, as was done by the applicants, to take on one occasion the threshold price and the basic intervention price and on another occasion the threshold price and the derived intervention price.

20 Thus it does not seem that the Council, in its assessment of the level of the threshold price, went beyond what might be considered necessary for achieving the objects of the aid system for durum wheat.

21 According to the applicants, instead of lowering the threshold prices, the institution could in any event have fixed a lower threshold price applying to those Member States not producing these cereals, whilst maintaining the one in existence for the two producer States in the Community, i.e., France and Italy.

22 Such a differentiation would not only run counter to the realization of the single market aimed at by Regulation No 120/67 of 13 June 1967 setting up a common organization of the market in cereals but would put the free circulation of goods in jeopardy.

23 It is also necessary to examine whether the objectives of the aid system for durum wheat ought not to have been achieved by fixing a higher intervention price whilst respecting the equality of competitive conditions as between German and French cereal meal producers.

24 Such a procedure could be considered as being of a kind to place in jeopardy the objective of encouraging the Community durum wheat production.

It was capable — particularly in consumer areas situated at a distance from production centres — of creating the risk of Community durum wheat production being replaced by common wheat, of either Community or imported origin.

In fact, under the system in force, the threshold price for common wheat (107·25 u.a.) was already lower than the intervention price for home-grown durum wheat (112·44 u.a.).

It follows that a further increase in the intervention price, would risk creating an inducement to substitute common wheat for Community durum wheat.

25 It has been suggested that instead of an increase of the intervention price for the whole Community, the alleged drawbacks could have been remedied by an increase of the intervention price, limited to the Rouen marketing centre.

26 In fact the intervention price in 1970/72 for this marketing centre was appreciably higher (117·50 u.a.) than it had been in 1971/72 (112·44 u.a.), so much so that the gap between the threshold price (123·13 u.a. in 1970/71 and 125·25 u.a. in 1971/72) and the intervention price has increased from 5·63 u.a. in one year to 12·81 u.a. in the next.

In the applicant's view it follows that the protection granted to Community producers during the 1971/72 year exceeded what was necessary.

27 The reduction in the intervention price for the secondary marketing centres arises from the fact that the multiple intervention price system was, by Article 4 of Regulation No 1528/71 of the Council of 12 July 1971 (OJ L 162, 20. 7. 1971, p. 1) replaced by a system of single derived intervention prices.

According to the sixth recital to this Regulation, the Council intended for the marketing year 1971/72 to continue making use of the possibility afforded by Article 32 of Regulation No 120/67 of introducing a single derived intervention price.

Since the adoption of a single derived intervention price is permissible by reason of the deficit in durum wheat production it follows logically from the system to treat (as provided by Article 32 of Regulation No 120/67) the lowest derived intervention price — that is to say, that from the area showing the greatest surplus — as the single derived intervention price.

28 Thus, if the Council omitted to correct the disadvantages to which German meal producers were indirectly subject, by reason of the fact that their French competitors enjoyed an advantage from this system, such an omission is nevertheless not capable of rendering the provisions in question illegal.

In enacting them, the Council was at the period in question and in the light of the relevant circumstances not obliged to ascertain whether circumstances of so special a kind could militate against the application of provisions that normally would have been satisfactory.

29 By way of reply and as a subsidiary point the applicants cite the existence of a principle that calls for compensation by reason of an illegal intervention on the part of a public authority, comparable to an expropriation.

30 Without it being necessary to decide the question whether Article 215 covers such a liability, it suffices to state that since the criticised interventions involve no illegality, the submission relating thereto must be rejected.

Costs

31 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

The applicants have failed in their action.

Accordingly they must be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 39, 40, 178, 211 and 215;
Having regard to the Regulations of the Council Nos 120/67 of 13 June 1967, 1054/71 of 25 May 1971, 1120/71 of 28 May 1971, 1528/71 of 12 July 1971, and 1530/71 of 12 July 1971;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

THE COURT

hereby:

1. **Dismisses the actions;**

2. **Orders the applicants to bear the costs.**

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 13 November 1973.

A. Van Houtte
Registrar

R. Lecourt
President