# OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 7 JUNE 1973

*My Lords,*

As Your Lordships know, one of the features of the common agricultural policy is the support of the wholesale market for certain products by the device of 'denaturing'. The present case, a reference for a preliminary ruling by the Hessischer Verwaltungsgerichtshof, is concerned with the interpretation of certain Community regulations relating to the denaturing of common wheat.

Essentially, the denaturing of common wheat means its treatment in such a way as to render it fit only for use in or as animal feed, so as to take it off the market for wheat of bread-making quality and thereby maintain the prices ruling in that market. The device is seen as preferable to that at one time used in certain parts of the world of dumping great quantities of wheat in the sea.

The relevant Community regulations envisage three ways of denaturing common wheat of bread-making quality:

1. by the admixture into it of coloured grains;

2. by the admixture into it of fish-oil or fish-liver oil;

3. by its incorporation into certain kinds of compound animal feedingstuffs.

In each case the regulations prescribe in some detail the technical standards to be observed in the process of denaturing, for instance the type and the quantities of dye or of oil to be used for admixture, and (by reference to a heading of the Common Customs Tariff) the characteristics to be attained by feedingstuffs resulting from incorporation. The observance of these standards is obviously necessary, on the one hand to ensure that the denatured cereal is indeed fit for use in or as animal feed and, on the other hand, to ensure that that cereal cannot again be placed on the market for human consumption either in its original state or as a processed product. As one would expect, the regulations also specify minimum quality standards that must be reached by any wheat that is to be denatured, for denaturing is costly to Community funds and those funds could not justifiably be called upon to bear the cost of denaturing wheat of a quality such as to be in any case fit only for use as fodder. As one would further expect, the regulations require that the wheat to be denatured should be of Community origin.

Such wheat may either be held by an intervention agency or belong to a private person, natural or legal. Where it belongs to a private person, that person is, subject to certain conditions, entitled to the payment of a premium, the amount of which is fixed from time to time by Community regulations. This premium contains two elements, one intended to make up the difference between the price that could have been obtained for the wheat before denaturing and the price of feed grains, and the other intended to cover the cost of the denaturing process.

Among the conditions that must be satisfied before a denaturing premium becomes payable are those prescribed by Article 7 of Council Regulation No 172/67/EEC, which reads:

'To qualify for the premium, denaturing should be effected in agreement with the intervention agency and under its supervision.'

This is the main provision that the Court is called upon to interpret in the present case. Its requirement as to supervision by the intervention agency is repeated (but not enlarged upon) in Article 4 (3) of

Commission Regulation (EEC) No 1403/69.

Thus, in this field, the Community regulations have left the concepts of 'agreement' with the intervention agency and of 'supervision' by that agency wholly undefined. They have, in other words, left it to each Member State to lay down the manner in which effect is to be given to Article 7 within its territory. In substance what the Court is asked to rule upon in the present case is the extent of the discretion thereby given to Member States.

The Federal German legislation on the matter is summarized in Part I of the Grounds of the Order of the Hessischer Verwaltungsgerichtshof referring the case to this Court. Briefly, that legislation provides that denaturing for which a premium is to be claimed may be carried out only in a recognized denaturing plant and at a time of which the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, the German intervention agency, which is the defendant in the present case, is aware and at which it can send inspectors to the plant. The right to the premium is not, however, made dependent on an inspector having in fact supervised the denaturing. Forms drawn up by the defendant envisage three different kinds of 'supervision', namely:

1. complete supervision on the spot;
2. supervision on the spot by means of sampling;
3. inspection of books.

In cases where there has been no actual supervision, or been incomplete supervision, the denaturing premium is granted on the mere basis of a 'denaturing certificate' completed by the denaturing plant.

In order to obtain recognition, a denaturing plant must have the requisite equipment and qualified staff. In addition, the applicant for recognition and, in so far as he is not himself in charge of the plant, the person in charge of it, must be regarded as sufficiently 'reliable' to carry out the denaturing in accordance with the law.

In the present case an application by the plaintiff firm to be recognized as a denaturing plant was rejected by the defendant on the ground that its member with personal liability could not be considered reliable in view of the fact that he had been several times convicted of offences involving dishonesty in connection with the cereal and flour trade.

On 12 August 1970 the plaintiff took proceedings in the Verwaltungsgericht of Frankfurt-on-Main to have the decision of the defendant reversed. The plaintiff's action was dismissed by that Court on technical grounds of German law not affecting the substance of the case. The plaintiff now appeals to the Hessischer Verwaltungsgerichtshof, and it is as a step in that appeal that the latter Court has referred to this Court the question whether Article 7 of Council Regulation No 172/67/EEC and Article 4 (3) of Commission Regulation (EEC) No 1403/69:

'are to be interpreted as meaning that the denaturing must be carried out entirely — i.e. from the determination of the quantity and quality to the completion of the colouring or admixture with fish oil, etc — under the personal supervision of an official of the intervention agency;

or whether the requirement of supervision may be satisfied if the intervention agency merely ensures the possibility of an inspection of the denaturing operation at any moment, but requires "reliability" on the part of the person in charge of the denaturing plant.'

The reasoning of the Hessischer Verwaltungsgerichtshof underlying those questions is set out in the following passage which is to be found in Part II of the Grounds of its Order:

'The requirement of ... "reliability" ... is needed ... in implementation of the EEC provisions on the denaturing

premium, if the supervision of the denaturing on the part of the defendant is of a purely general character, as it may be under the Regulation on the denaturing premium for cereals, and in the defendant's practice it in fact is. The requirement of reliability would, however, be superfluous and unjustified if the defendant's practice were not in accordance with the provisions of the Council and the Commission of the EEC mentioned in the question referred, and every denaturing had to be entirely supervised. For in that case manipulations in determining the quantity and quality of the cereals, and in the denaturing process itself, would be completely excluded, and the submission of information would no longer be of any importance.

In order to decide the present case, therefore, it is necessary to determine how the word "supervision" in the Regulations of the Council and the Commission of the EEC is to be understood . . .'

My Lords, with all respect to the Hessischer Verwaltungsgerichtshof, I doubt if this reasoning is sound.

In the first place it is by no means clear that the presence of an inspector throughout the process of denaturing is necessarily effective completely to exclude the possibility of manipulation. Both the Government of the Federal Republic of Germany, in its written observations, and the Commission, in its oral observations, have forcibly asserted that it is not — that an expert bent on fraud can hoodwink an inspector. I observe, moreover, that in those Member States where the presence of an inspector is required throughout the process of denaturing, at all events where the denaturing is by admixture, namely Belgium, Denmark, France, Ireland, Italy and the United Kingdom, additional checks by way of sampling or of inspection of books and documents or of both, are provided for. This suggests that the responsible authorities in those states also do not regard the presence of an inspector as a complete safeguard.

Secondly, the requirement of 'reliability', to be found in the German legislation, is not really part of the process of 'supervision' at all. If anything, it is a feature of the other process enjoined by Article 7, viz that 'denaturing should be effected in agreement with the intervention agency'.

As is pointed out by the Commission, one must distinguish in this context between a 'denaturer' in the sense of the owner of wheat to be denatured and a 'denaturer' in the sense of the owner of a denaturing plant. (My Lords, I use the word 'plant' to cover what, in the provisions applicable in the different Member States is called by different names having much the same meaning, for instance 'installation' in Belgium, 'centre (de dénaturation)' in France, 'premises' in Ireland, 'installation' in the United Kingdom). The owner of a denaturing plant may denature wheat that he owns himself, in which case he is the denaturer in both senses and, if all the requisite conditions are fulfilled, will receive the denaturing premium; or he may denature, under contract, wheat belonging to someone else, who is a 'denaturer' only in the first sense. In the latter case it is the owner of the wheat who, again if all the requisite conditions are fulfilled, receives the denaturing premium; the owner of the denaturing plant receives only, from the owner of the wheat, a contractual fee representing, presumably, the cost of carrying out the denaturing process plus an element of profit.

Most of the Member States (this includes Belgium, Denmark, France, Ireland, Italy, the Netherlands and the United Kingdom) require, as does the Federal Republic of Germany), that denaturing, if it is to earn a premium, should be carried out in a 'recognized' or 'approved' or 'licensed' denaturing plant. The authorities in all these states require, before they 'recognize' or 'approve' or 'license' a plant, to be satisfied that it has the necessary equipment and qualified staff. The imposition of such requirements is clearly consistent with

Community legislation. As I see it, 'recognition' or 'approval' or 'licensing' of a plant is part of the process of obtaining the 'agreement' of the intervention agency to denaturing taking place there. It helps to serve the object of ensuring, so far as possible, that premiums are paid only for denaturing that complies with the technical standards laid down in the Community regulations.

In the Federal Republic of Germany, and there alone, one finds this additional requirement of 'reliability' on the part of the person in charge of the plant. It is, I think, important to understand the nature of this requirement.

I should for my part have found it easy to accept as valid a provision empowering the intervention agency in any Member State to reject an application for recognition or approval or licensing of a denaturing plant if it found that the person in charge of the plant had previous convictions for offences involving dishonesty. The opportunities for fraud in this field are so great, and the importance of protecting Community funds against it so manifest, that such a provision would, I think, be justified. One is familiar with provisions of that kind in other spheres where a licence is required to carry on a particular trade. Moreover such a provision would, I think, fit in well with the concept of 'agreement' by the intervention agency that one finds in Article 7. But its crucial characteristic for present purposes would be that it imported an objective test, that of previous convictions. The requirement of 'reliability' in the relevant German legislation, in contrast, allows the intervention agency to make a subjective judgment. This is well illustrated by the facts of Case 39/70 *Fleischkontor* v *Hauptzollamt Hamburg* (Rec 1971 p. 49), where German law purported to impose the same requirement in the context of applications for special licences to import meat for processing, such licences carrying the benefit, under Community regulations, of relief from customs duty. Although the plaintiff company in that case had been acquitted of all criminal charges by the German courts, it remained open, under the German statute there in point, for the German customs authorities to refuse that company a licence on the ground that they did not consider it reliable. This Court held, not surprisingly, that such a power was incompatible with Community law.

My Lords, it was suggested by the Commission in its written observations and also by the plaintiff's counsel in his oral submissions, that this requirement is not unique to the Federal Republic of Germany, that one finds it also in France, where it is provided that denaturing may be carried out by 'collecteurs de céréales' and where a person, in order to be licensed as a 'collecteur de céréales', must satisfy certain conditions of 'moralité' and of solvency. This suggestion is, in truth, misconceived. In the first place, the relevant French legislation does not confine the right to denature to licensed 'collecteurs'; it merely expressly includes them among those who may denature — see paragraphs 1 and 7 of Circular STE 4 No 23.237 of 13 August 1971 of the Office National Interprofessionel des Céréales. Secondly the conditions of 'moralité' and of solvency that must be fulfilled by licensed 'collecteurs' are purely objective. They are contained in the second paragraph of Article 6 of the codifying decree of 23 November 1937, which reads as follows:

'Toutefois le Comité départemental devra rayer du registre des déclarations les négociants qui auront été condamnés à des peines afflictives et infamantes ou à des peines correctionnelles pour vol, escroquerie, abus de confiance, ou pour autres faits contraires à la probité, ou encore qui auront été condamnés pour des infractions à la législation sur le blé ou qui se trouvent en état de faillite ou de liquidation judiciaire.'

Nothing could be more objective than that.

The stark question therefore is — and on this the plaintiff, the Government of the Federal Republic of Germany and the Commission in effect all agree — whether the discretion given to each Member State by Article 7 enables that state to empower its intervention agency to refuse its agreement to denaturing taking place at a particular plant if, in its subjective judgment, the person in charge of that plant is unreliable.

The plaintiff, relying on the *Fleischkontor* case, submits not.

The Government of the Federal Republic of Germany and the Commission argue that that case is distinguishable because the Community regulations there in point prescribed in detail the safeguards that were to be adopted against fraud, so that it would have been inconsistent with the principle of the uniformity of application of Community law to allow a Member State to prescribe additional or different safeguards. Here in contrast the relevant regulations leave it entirely to each Member State to adopt such measures as it considers appropriate in the light of the conditions ruling in that State. The Commission also points out that for a person to be refused recognition of his plant as a denaturing plant does not exclude him from the right to earn denaturing premiums, for he can always have his wheat denatured, for a fee, in someone else's plant; whereas in the *Fleischkontor* case refusal of a licence necessarily meant that the importer concerned was deprived of any possibility of benefiting from the reliefs provided for by Community law.

My Lords, these are powerful arguments and, had the test of 'reliability' prescribed by German law been an objective one, I should have said that they ought to prevail. But we are here concerned with a subjective test, albeit that in this particular case the criterion by reference to which it was applied (previous convictions) was an objective one. The question remains: Is the adoption of such a test, in the application of Community law, compatible with that law?

To that question I would answer 'No', because it seems to me that, except perhaps where there is no other practicable means of protecting society against grave dangers, to make the rights of a citizen depend on the view subjectively taken of him by an administrative authority (as distinct from a judicial body) is incompatible with that very rule of law, which, in one formulation or another, all our countries accept, indeed proclaim, and on the foundation of which the Communities themselves rest.

In taking this view I am encouraged by what was said by Mr Advocate-General Dutheillet de Lamothe in the *Fleischkontor* case at pages 66 and 67 of the report, and not least by the passage (at page 66) where he records, in effect, that the concept of allowing an administrative authority to make a subjective judgment about the reliability of a trader is not traditional in German law, but was introduced into it in the late 1930s, at a time when Germany was under the heel of an autocrat.

Although the judgment of the Court in the *Fleischkontor* case can be interpreted as resting on narrower grounds, it too I think recognizes that a subjective test of 'reliability', for the grant or withholding of a licence to carry on a particular trade, is in general incompatible with Community law.

It was submitted on behalf of the plaintiff, both in writing and orally, that the only test of 'reliability' that should be adopted was that applicable under the general industrial law of the Member State where the plant was situate. My Lords, this idea should in my opinion be rejected, if only because it would, in some of the Member States, be meaningless.

My Lords, if I am right so far, the question what is the precise meaning of the word 'supervision' in the Community regulations under consideration is probably irrelevant to the decision of this case. But that question has been asked and I must, I think, advert to it.

In my view, the use of the word 'supervision' does not import that an official of the intervention agency must always be present throughout the process of denaturing. Four main considerations seem to me to lead to that conclusion:

1. As I have already mentioned, it may be inferred from the observations of the Commission and of the Government of the Federal Republic of Germany in this case, as well as from a study of the measures adopted in other Member States, that the presence of such an official is not necessarily a perfect safeguard.

2. Such a study also reveals that, even among the Member States who require the constant presence of such an official where the denaturing is by admixture, some have shrunk from requiring it in every case where the denaturing is by incorporation. For instance in France paragraph 20 of the circular that I have already cited states that, in the case of denaturing by incorporation, the method of supervision is to be determined separately for each factory. In the United Kingdom the relevant circular (MS/CER/6) does no more than to require those licensed to denature by means of fixed (as distinct from mobile) incorporation plant to install and maintain certain prescribed records, to permit verification and audit of these records, and to permit inspection of any part of their installation, at any time, without prior notification, and, similarly, sampling. The inference is that, in these states, it has been thought impracticable to provide attendance by an inspector at all times when denaturing is taking place by incorporation.

3. The Commission, both in its written and in its oral observations, emphasized the variety of the conditions prevailing in the different Member States and the need not to impose on them requirements that would be either impractical or unreasonably expensive.

4. If the authors of the relevant Community regulations had intended to require the presence of an inspector throughout every process of denaturing, nothing would have been easier for them than to say so. The fact that they forbore to say so, but left the expression 'supervision' undefined, leads to the inference that they intended no such requirement, but intended to leave it to each Member State to adopt for each case the most effective means of supervision reasonably practicable in all the circumstances.

On the other hand, I do not think that mere inspection of books, whether or not coupled with a requirement as to reliability, suffices. That is not supervision at all. It is simply audit.

I am therefore of the opinion that the question referred to the Court by the Hessischer Verwaltungsgerichtshof should be answered as follows:

1. Article 7 of Regulation No 172/67/EEC of the Council and Article 4 (3) of Regulation (EEC) No 1403/69 of the Commission are to be interpreted as meaning, not that the denaturing must necessarily be carried out entirely under the personal supervision of an official of the intervention agency, but that it must be supervised by the intervention agency by the most effective means reasonably practicable in all the circumstances.

2. A provision empowering the intervention agency to decide whether or not to agree to denaturing taking place at a particular plant by reference to the subjective judgment of that agency as to the reliability of the person in charge of that plant is incompatible with those Regulations.