

OPINION OF MR ADVOCATE GENERAL CAPOTORTI
DELIVERED ON 18 MARCH 1982¹

*Mr President,
Members of the Court,*

1. In its references for a preliminary ruling which form the subject-matter of this opinion, the court hearing the main action raises certain problems of interpretation concerning the provisions of Community law relating to the grant and revocation of premiums for the denaturing of wheat and rye of bread-making quality.

I shall briefly summarize the main facts of the case.

Between 1969 and 1974, four undertakings: BayWa AG, Munich; Raiffeisenbank Unterspiesheim und Umgebung e.G., Unterspiesheim; Raiffeisen Bütthard e.G., Bütthard; and Raiffeisen Hauptgenossenschaft e.G., Hanover (all in the Federal Republic of Germany) denatured cereals — the first three undertakings by the colouring method and the fourth by the use of fish oil — and obtained from the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as "the Federal Office"] the denaturing premiums provided for by Community law. Later, in 1975 and 1976, the Federal Office demanded the repayment of the premiums by those undertakings, in the light of inspections carried out on their premises, on the ground that, according to the accounting records, they had not purchased denaturing agents in sufficiently large quantities to enable the denaturing to be effected in the manner prescribed. The recipient undertakings objected to that demand, initially by lodging a complaint

with a higher authority and, following its rejection, by bringing an action before the Verwaltungsgericht [Administrative Court] Frankfurt am Main. Accordingly, three sets of proceedings were instituted before that court, all with the same object in view. In the first action the plaintiffs are: BayWa AG, Munich; Raiffeisenbank Unterspiesheim und Umgebung e.G., Unterspiesheim; Raiffeisenbank Bütthard e.G., Bütthard; and, as an intervener *iussu iudicis*, Rhenus AG, Mannheim. The plaintiff in the second and third actions is Raiffeisen Hauptgenossenschaft e.G., Hanover. By three identical orders of 30 April 1981, the court hearing the case stayed the proceedings and referred to the Court of Justice, pursuant to Article 177 of the EEC Treaty, the following questions for a preliminary ruling:

- “(a) Has a denaturing premium granted on the basis of Article 4 (2) of Regulation (EEC) No 172/67 of the Council of 27 June 1967 (Official Journal, English Special Edition 1967, p. 139) been allocated unlawfully only when the denaturing operation has failed to achieve the purpose specified in Article 2 (1) of the regulation or when the standard method laid down in Annex I to Regulation (EEC) No 1403/69 of the Commission (Official Journal, English Special Edition 1969 (II), p. 345) has not been adhered to?
- (b) Can recovery of the denaturing premium be based on the results of an audit of the accounting records carried out on completion of the denaturing process or does it follow

¹ — Translated from the Italian.

from Articles 4 (3) and 5 of Regulation No 1403/69 that the results of *ex post facto* audits are to be disregarded? If *ex post facto* checks are taken into account, how important are they in relation to the exercise of supervision provided for in Article 4 (3) of Regulation No 1403/69?

- (c) Does Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 218) require Member States in every case to recover unlawfully granted denaturing premiums or does the regulation allow Member States to leave individual cases of recovery to the discretion of the competent authorities, in accordance with national legal provisions?"

By order of 15 July 1981, the Court, pursuant to Article 43 of the Rules of Procedure, ordered the joinder of the three related cases for the purposes of the oral procedure and the judgment since they were concerned with the same subject-matter.

2. In connection with its agricultural policy relating to the markets in cereals, the Community has established, amongst various forms of intervention, that of guaranteeing the grant of denaturing premiums to producers. Denaturing means a process capable of ensuring that a given agricultural product can no longer be used for human consumption. It is encouraged in order to maintain the prices of certain products normally intended for human consumption but which are available in such large

quantities as to threaten the maintenance of profitable price levels, unless recourse is had to machinery for limiting supply.

The legislative background against which this dispute should be viewed is composed of three Council Regulations (Nos 120/67, 172/67 and 729/70) and two Commission Regulations (Nos 1403/69 and 1092/70).

Regulation (EEC) No 120/67 of the Council of 13 June 1967 governs the common organization of the market in cereals. In Article 7 (3) it provides that the intervention agencies designated by the Member States may offer for sale, for export to non-member countries or for supply to the internal market, common wheat and rye of bread-making quality, after having them rendered unfit for human consumption by denaturing. Article 7 (3) adds, in the final subparagraph that: "They may also grant a denaturing premium for common wheat". Article 7 (4) entrusts the Council with the task of adopting "general rules governing intervention and denaturing".

On the basis of the latter provision, Regulation (EEC) No 172/67 of 27 June 1967 lays down general rules governing the denaturing of wheat and rye of bread-making quality. Article 2 (1) of that regulation provides that: "The methods employed for denaturing must ensure that denatured wheat and rye can no longer be used for human consumption", and Article 2 (2) provides that: "These methods must be at least as effective as a standard method to be determined". According to Article 4 (2), the denaturing premium is to be granted at the request of the interested party, if the conditions referred to in Article 2 are

observed, the cereals are of a minimum quality and quantity to be determined and the denaturing is effected in agreement with the intervention agency and under its supervision.

Regulation (EEC) No 1403/69 of the Commission of 18 July 1969 lays down detailed rules for the application of the abovementioned Council regulation. In particular, the standard method of denaturing provided for by Article 2 (2) of Regulation No 172/67 is defined as the process of colouring the cereal by dissolving in water the colouring agent known as "Patented Blue V" (see Article 1 which refers to Annex I). Furthermore, the second paragraph of Article 1 provides that: "In the case of denaturing by colouring, the standard method only shall be used" and the third paragraph repeats that: "In the case of denaturing otherwise than by colouring, the means used must be at least as reliable as the standard method". Finally, Article 4 (3) provides that: "The granting of a denaturing premium shall be subject to supervision by the intervention agency of the process of denaturing of common wheat or of its admixture, unaltered, with compound feedingstuffs ..." and that: "The duration of the denaturing process shall not exceed one day per 40 metric tonnes of cereals processed".

Next, the Commission adopted Regulation (EEC) No 1092/70 of 10 June 1970 which entered into force on 1 August 1970 and defines with greater precision the reference to methods of denaturing otherwise than by colouring (contained in the third paragraph of Article 1 of Regulation No 1403/69) by introducing a second method based on the use of fish oil and fish-liver oil. The rules governing that method are set out in detail in a separate annex.

Finally, mention must be made of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy. It is relevant in this case in so far as it relates, in particular, to the recovery of premiums unduly paid, a problem which the national court refers to mainly in its third question. In that connection, reference must be made to Article 8 according to which: "The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to ... recover sums lost as a result of irregularities or negligence".

3. The first question submitted by the Verwaltungsgericht Frankfurt am Main is concerned essentially, as we have seen, with the problem of the grounds for refusing to grant or for revoking the denaturing premium. Is such refusal or revocation justified by a failure to use the standard method provided for in Annex I to Regulation No 1403/69 or must the denaturing have failed to achieve its objective which is to render the product no longer fit for human consumption?

To answer that question it is necessary in the first place to define the scope of the "standard methods" which are to be determined by the Commission (we know that so far it has adopted two methods: the first by Regulation No 1403/69 and the second by Regulation Nr 1092/70). I would remind the Court that the methods of denaturing applicable to wheat and rye were referred to for the first time in Article 2 of Regulation No 172/67. Whilst paragraph 1 of that article merely defines their function (to ensure that those products can no longer be used for

human consumption), paragraph 2 lays down a fundamental condition, namely that such methods must be "at least" as effective as a standard method to be determined. The precise meaning of that provision is clarified by the first recital in the preamble to the same regulation where it states that "it is . . . advisable to lay down technical methods offering minimum safeguards in that respect" (in other words, that the denatured cereals cannot be used for human consumption) and "to provide that in no case could the methods actually employed by Member States result in a lesser degree of denaturing".

The legislation adopted by the Council thus gave rise to two consequences: the Member States retained the right to establish systems of denaturing designed to achieve the objective pursued, provided that such systems were no less efficient than the method to be laid down by the Commission which was termed "the standard method" precisely on account of its function as a minimum parameter. Clearly, the undertakings concerned had no freedom of choice whatsoever as regards the method of denaturing. Therefore, there was no reason to suppose that the attainment or otherwise of that end in individual cases was of paramount importance for the purposes of the grant or refusal of the premium. In other words, the purpose of Article 2(1) of Regulation No 172/67 was by no means to shift the emphasis from the means to the result as far as the producers were concerned. The latter were required to comply with the methods laid down either by the Commission (standard method) or by the State in which the denaturing was

carried out, according to the terms of Article 2(2).

The implementing provisions are in keeping with that approach. It should be observed that Article 1 of Regulation No 1403/69 distinguishes between denaturing by colouring, which is the "standard" method, and other processes (which are by implication left to the choice of the Member State). As regards the latter, the condition that: "The means used must be at least as reliable as the standard method" is re-affirmed, whilst in the case of denaturing by colouring the regulation provides that: "The standard method only shall be used." That implies that all the requirements relating to that method, set out in detail in Annex I, which specifies the characteristics of the colouring agent, the quantities to be used in preparing the solution, the quantity of cereal to be coloured grains, must be carefully complied with when the cereals are denatured by colouring. The Member States themselves have no discretion in the matter.

However, the Federal Republic of Germany enacted rules governing denaturing as early as 1967/68 which permitted, *inter alia*, recourse to the method based on the use of fish oil or fish-liver oil. In Regulation No 1092/70, the Commission took into account the use of that process "for a substantial proportion of denatured products" but since certain oils "may not be effective" it took the view that "denaturing by that method should be authorized only with oils which are effective for the purpose

and . . . the characteristics of that method should be determined" (see the second recital in the preamble to Regulation No 1092/70). By clarifying the reasons for which a process initially adopted by a Member State was subsequently incorporated into Community law, that passage confirms the strict nature of the requirements laid down (which are contained in Annex II, added to Regulation No 1403/69 by Article 2 of Regulation No 1092/70). Moreover, that fact is confirmed by the wording of Article 1 of the regulation in question which provides that "denaturing with fish oil or fish liver must satisfy the requirements laid down in Annex II".

It is reasonable to infer from the above considerations that a producer who has selected for the denaturing of wheat or rye a system based on either one of the methods established by the aforesaid Commission regulations or on a different method prescribed by a Member State, which is capable of providing the guarantees required by Community law, has not fulfilled the conditions laid down for the grant of a denaturing premium if he has complied with the method only in part. The fact that a producer may have succeeded in denaturing the product (or may claim to have achieved that result) is insufficient to create a right to the premium. If producers were given an opportunity to choose a given type of process and then not to comply with it in its entirety a detailed description of Community standard methods or methods adopted under national law would be deprived of any purpose. Instead I believe that methods of that kind have been prescribed in order to restrict the undertakings' freedom of action in regard to all matters concerning the various stages involved in the denaturing process so as to prevent them from claiming the result obtained

as satisfactory, irrespective of the means employed.

4. In its second question, the court hearing the main action compares supervision on the spot while the denaturing operations are in progress with subsequent audits of the accounting records in order to determine whether such audits are significant for the purposes of the recovery, where necessary, of the denaturing premium and, if they are, how much weight is to be attached to them in relation to the results of "physical" supervision exercised at the time of the denaturing.

I would recall that under Article 7 of Regulation No 172/67, in order to confer entitlement to the premium, the denaturing operations must be effected in agreement with the intervention agency and under its supervision. I would also recall that pursuant to Article 4 (3) of Regulation No 1403/69, the grant of denaturing premiums "shall be subject to supervision by the intervention agency of the process of denaturing of common wheat . . .". Article 5 re-affirms, moreover, that the premium is to be paid "only if the conditions laid down in Article 4 (3) are fulfilled". National intervention agencies are therefore under an obligation to exercise supervision while the denaturing operations are in progress and producers must agree if they wish to qualify for the Community premium. It remains to be determined whether the Member States retain the power to provide for and carry out further checks based on scrutiny of the accounting records, in addition to those envisaged by the Community legislation.

The plaintiff undertakings in the main action contend that further checks of that kind, expressly provided for by German law, would amount to the introduction of a new condition which undertakings must fulfil in order to qualify for the denaturing premiums. From that point of view, such checks are contrary to the relevant rules of Community law which, by referring solely to the exercise of supervision on the spot while the denaturing operation is in progress, exclude the legality of subsequent checks. However, that view cannot be supported for various reasons. In the first place, the literal meaning of the provisions cited above does not justify the restrictive interpretation proposed by the plaintiff undertakings. Even though Regulations Nos 172/67 and 1403/69 provide only for supervision at the time, it is unreasonable to assume that the Community legislature intended to rule out other forms of control. Instead, there are sound reasons for the view that any other check which is, of course, additional and not a substitute is quite compatible with Community law. It should not be forgotten that the purpose of supervision is to prevent abuses by recipients of the premium and to ensure that the policy of providing incentives for denaturing is properly implemented in all the Member States. The imposition of checks to supplement those actually prescribed by the provisions of Community law is in keeping with rather than contrary to those provisions. Additional checks are, in short, a further guarantee of the implementation of the objectives of agricultural policy pursued by the regulations on cereals. Any step taken by the Member States to ensure that the measures adopted by the institutions achieve the desired effect is consistent with the fundamental principle embodied in Article 5 of the EEC Treaty. In the light of all those considerations, I am inclined to interpret the rules of Community law which are at issue as minimum provisions which the Member

States may not derogate from in any way although they may strengthen them by producing a more detailed and comprehensive set of rules.

The case-law of the Court does not conflict with that point of view. The plaintiff undertakings rely on the judgment of 14 January 1981 in Case 819/79 *Federal Republic of Germany v Commission* [1981] ECR 21; there it was necessary to establish whether Regulation No 990/72 on detailed rules for granting aid to producers of skimmed-milk powder intended for use as feed which provides for supervision of denaturing operations on the spot, was compatible with a national system of supervision based on subsequent clearance of the accounts of the undertakings concerned. The Court held that the national system was excluded by the Community rules inasmuch as it entailed partial non-compliance with those provisions and it proceeded to lay down the principle that the Member States must abide by the control mechanisms prescribed by Community law. However, that view has no bearing on the argument which I have put forward. The Court gave a ruling on a case in which State controls derogated (partially) from Community controls but it did not by any means rule out the possibility that the former might, where appropriate, supplement the latter. In my opinion of 25 November 1980 in Case 819/79, I criticized the German Government's interpretation of Article 10 of Regulation

No 990/72 in the sense that it authorized a departure from the Community system of supervision but I observed that the same provision "allowed Member States who so wished to add accounting supervision to physical supervision, provided that the system of notification was observed". It should however be borne in mind that the Court, in its judgment of 11 July 1973 in Case 3/73 *Hessische Mehlindustrie* [1973] ECR 745, stated, in connection with the interpretation of the provisions relating to the supervision of operations involving the denaturing of wheat and rye of bread-making quality set out in Regulations Nos 172/67 and 1403/69, that the Community legislature had left "the Member States the power to regulate the detailed rules of supervision" (paragraph 6 of the decision) provided that the national legislature "ensures that the denaturing is carried out in accordance with the relevant provisions and that claims for premiums are well-founded" (paragraph 4 of the decision). In my opinion, that judgment supports by implication the view that the Member States are empowered to introduce further types of control alongside those expressly provided for by Community sources.

The reasoning set out above leads to recognition that a check *ex post facto* in the form of an audit of the accounting records is not only consistent with observance of the Community system of supervision at the time of the denaturing but is of great importance and may lead to the recovery of a denaturing premium already allocated once it has been established that one of the requirements for the grant thereof (for example, the use of a minimum quantity of colouring

matter) has not been satisfied. The court hearing the main action also wishes to know the weight to be attached to *ex post facto* checks in relation to the exercise of "physical" supervision at the time. In other words, on the assumption that the results of the supervision during the denaturing operation are such as to permit the conditions for granting the premium to be regarded as having been satisfied, may checks *ex post facto* invalidate that result? In my opinion, that question must be answered in the affirmative, especially since the exercise of supervision at the time does not necessarily take the form of personal supervision by an intervention agency official (see in that connection paragraph 1 of the operative part of the decision and the aforesaid *Hessische Mehlindustrie* case).

In more general terms, I believe that it is necessary above all to stress that supervision during the denaturing operation and audits *ex post facto* are of equal value as evidence. There is no formal order of priority, in the sense that the results yielded by one method carry more weight in legal terms. Against that background, it is for the court hearing the main action to compare the results obtained and to reach its own conclusion on the basis thereof. Clearly, if the same facts (for example, the quantity of colouring matter used) have been the subject of both checks, which have yielded conflicting results, it will be necessary to determine which check is the more reliable, by reference either to the manner in which it has been carried out in a particular case or to the degree of objectivity in the assessment. If, on the other hand, the facts are different, some facts having emerged during the physical supervision and others as a result of an

audit of the accounting records, the Court will be called upon to make a comprehensive appraisal and to establish on the basis thereof whether the conditions for granting the premium have been complied with in their entirety.

sums unduly paid. Taking the opposite view, the Agent for the Commission and the representative of the government of the Federal Republic of Germany, an intervener in the proceedings, are of the opinion that the Member States are in all cases under an obligation to take action to recover premiums irregularly paid.

5. The third question raised by the national court is more awkward. Since there is a provision of Community law governing the recovery by the Member States of sums lost as a result of "irregularities or negligence" (Article 8 of Regulation No 729/70), the national court wishes to ascertain whether the Member States have any discretion in the matter. Accordingly, it is necessary to determine the extent to which national rules of administrative law concerning recovery of sums unduly paid by the administration may be applied in cases where premiums for the denaturing of wheat and rye of bread-making quality have been irregularly paid to undertakings by the competent intervention agencies.

In order to gain a better understanding of the position adopted by Counsel for the undertaking concerned, it should be recalled that the German legislation does not require the administration to revoke its own unlawful decisions or, therefore, to recover sums paid on the basis of those decisions but merely provides that an irregular decision *may* be revoked unless certain conditions are fulfilled which in substance reflect the need to protect a *bona fide* recipient of the premium (see Article 48 of the Law of 25 May 1976 codifying general principles already well-established in administrative practice and in legal decisions). If that criterion were applied in the cases at issue, the recipient undertakings would be able to avoid repaying the premiums obtained if the German administration were prepared to exercise its discretion in their favour and, in particular, if the existence were recognized of conditions which, in accordance with the above-mentioned statutory provision, prevent recovery (for example, the lapse of a considerable period of time from the date of payment until the date on which the administration realizes that the payment in question was irregular).

It is appropriate to cite once again the text of Article 8 which forms part of the body of rules on the common agricultural policy. It provides that: "The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to ... recover sums lost as a result of irregularities or negligence." In the opinion of the undertakings which have effected denaturing, that provision leaves the Member State the power to determine, case by case, in the light of the provisions of national law applicable to recovery, whether or not there is any justification for demanding repayment of

The provision of Community law on which the solution of the problem depends calls for careful consideration. It does indeed refer to "provisions laid down by law, regulation or adminis-

trative action", the meaning of which is that the national measures envisaged must comply with the provisions in question. On the other hand, however, it clearly specifies the objectives which those measures pursue, in particular, "to recover sums lost as a result of irregularities or negligence". Emphasis is laid on the achievement of that result. The Member States are required to adopt the measures needed for the recovery of sums lost. Accordingly the procedural and substantive provisions of national law governing recovery will be operative to the extent to which they enable certain measures to be taken and regulate the detailed rules involved, always on condition that they are consistent with the attainment of the objective pursued.

recognize that the public authorities are at liberty to decide whether or not to recover a loan from a trader by reference not only to the principle of the protection of legitimate expectation but also to other requirements of a general nature, such as the need to guarantee the level of employment or to prevent the insolvency of an undertaking. However, as far as the recovery of Community premiums is concerned, to confer such discretion on the national authorities would be incompatible with the general principle of equality which must also be observed with regard to the administration of Community funds.

That interpretation of Article 8 is also supported by the consideration that when the Member States proceed to recover premiums irregularly granted (just as when they pay the premiums to the undertakings) they act on behalf of the Communities and administer Community funds. It is well-known that agricultural intervention measures are financed by the European Agricultural Guidance and Guarantee Fund and are accordingly charged to the Community budget (see in particular Articles 1, 3 and 4 of Regulation No 729/70 which, as we know, relates to the financing of the common agricultural policy). Against that background, it stands to reason, in my opinion, that in administering resources which are not their own the States do not enjoy the same discretion as may be conferred upon them by their national rules with regard to the administration of their own funds. A national legal system may, for example,

In that connection, it is appropriate to recall that the Court has had an opportunity to re-affirm the principle of equality with reference precisely to the administration of Community funds. In its judgment of 5 March 1980 in Case 265/78 *Ferwerda* [1980] ECR 617, it stated that financial advantages charged to the Community budget "must be so arranged and applied as to constitute a uniform burden or to confer uniform benefits on all persons who meet the conditions specified in the Community provisions on such burdens or advantages" (paragraph 8 of the decision). The guidelines thus laid down obviously affect the solution of the problem in question. An interpretation of Article 8 of Regulation No 729/70 based on the attribution to the Member States of a wide discretion to determine whether or not to demand repayment of the premium would be contrary to the principle given prominence in the *Ferwerda* judgment. To recognize that discretion would be to compromise the uniform application of the Community system of premiums and would thus give

rise to differences in treatment between undertakings and to distortions of competition in the common market.

Conversely, no purpose would be served in reliance on the principle repeatedly upheld by the Court that disputes relating to the repayment of aids granted under the common agricultural policy are within the jurisdiction of the national courts and must be resolved by them in accordance with national law. That principle applies only *if there are no provisions of Community law in the matter* (see the following judgments: 21 May 1976 in Case 26/74, *Roquette* [1976] ECR 677; 5 March 1980 in Case 265/78, *Ferwerda*, previously cited; 12 June 1980 in Case 130/79, *Express Dairy Foods* [1980] ECR 1887; 12 June 1980 in Joined Cases 119 and 126/79, *Lippische Hauptgenossenschaft* [1980] ECR 1863). If, therefore, as in the present case a specific provision of Community law requires the Member States to recover premiums irregularly paid, recourse may no longer be had to the substantive rules of national legal systems as regards that aspect of the arrangements concerning premiums.

Furthermore, the fact that in the absence of specific provisions of Community law there is no alternative but to resort to national law lies at the root of certain instances of unequal treatment to which I have pointed on other occasions. I have already observed, in my Opinion in Case 130/79 *Express Dairy Foods* [1980] ECR 1887 at p. 1910, on the subject of

monetary compensatory amounts, that: "Making reference to national law to determine the detailed conditions for recovery of undue payment . . . certainly does not represent the most fair or convenient solution" and I emphasized that effect had not yet been given to the general principle of equality between all Community traders in regard to the conditions of form and substance governing claims for recovery of undue payment. I expressed similar views in my Opinion in Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft* [1980] ECR 1863 at p. 1885. In that case, I acknowledged, in connection with the prescription of the right of national intervention agencies to demand repayment from recipients of premiums unlawfully granted, that the need to avoid differences in treatment between Community citizens was justified but I added that the requirement of equality was insufficient "to overcome the failure by the Community legislature to adopt a uniform rule in relation to prescription". In this case, inequality in treatment would arise only if Article 8 were to be interpreted in a manner which I regard as incorrect.

Finally, I would add that to adopt the interpretation of Article 8 which I have criticized, would be to acknowledge that the application of rules of national law may affect the scope of provisions of Community law. That possibility has quite properly been ruled out by the Court of Justice. In its judgment of 28 June 1977 in Case 118/76 *Balkan* [1977] ECR 1177, in connection with the distribution of functions between the Community and the Member States in relation to the levying of monetary compensatory amounts, the Court stated that a national authority might not apply a provision of national law "in so far as

its effect would be to modify the scope of the provisions of Community law"; that is to say, if its application would alter the effectiveness of the rules of Community law (see in particular paragraph 5 of the decision).

All the arguments which I have so far propounded show exhaustively, in my opinion, that Article 8 must be construed to the effect that it imposes on the Member States an obligation to take action in all cases to recover premiums unduly paid. Of course, that does not mean that the obligation in question, which owes its existence to a provision of Community law, may not in individual cases be qualified by certain principles

recognized by the Community legal order itself, which are moreover common to all the Member States. The principles which I have in mind are those of legal certainty, protection of legitimate expectation and proportionality. That subject, which is outside the scope of this dispute, was recently discussed by Mr Advocate General VerLoren van Themaat in the Opinion delivered by him on 21 January 1982 in Case 54/81 *Fromme* [1982] ECR. He expressed the view that it was necessary to take into account the principle of proportionality in the interpretation of any extension of the duty on the part of the Member States to recover premiums irregularly granted.

6. In conclusion, I propose that in reply to the questions formulated by the Verwaltungsgericht Frankfurt am Main, which I quoted at the outset, the Court should rule as follows:

1. Articles 2 and 4 (2) of Regulation No 172/67 of the Council of 27 June 1967 must be interpreted as meaning that the premium for the denaturing of wheat and rye of bread-making quality is not due if producers have not complied in full with the requirements of one of the standard methods specified in the relevant Commission regulations or with those prescribed by a Member State which has adopted a different method of denaturing at least as reliable as the standard methods.
2. Article 7 of Regulation No 172/67 of the Council and Article 4 (3) of Regulation No 1403/69 of the Commission of 18 July 1969 must be interpreted as meaning that the Member States may subject denaturing operations not only to supervision on the spot while they are actually in progress, in accordance with the provisions of Community law, but also to subsequent audits of the accounting records. Such audits *ex post facto* and "physical" supervision at the time both have the same probative value. Accordingly, they may also be taken into account for the purposes of the

recovery of denaturing premiums already granted. It is for the court hearing the case to compare the results of the checks carried out at the time of and after the operations and to reach its own conclusion on the basis of a comprehensive assessment of those results.

3. Article 8 of Regulation No 729/70 of the Council of 21 April 1970 must be interpreted as meaning that the Member States are under an obligation to take action to recover sums unduly paid to individuals by way of denaturing premiums. Accordingly, they are not empowered to confer on the competent national authorities a discretion to determine, case by case, whether or not to demand repayment of premiums irregularly granted, even where that possibility is in certain circumstances envisaged by national law.