**3. In the case referred to under 1. above, where the Member State in which denaturing has taken place pays in its own currency a premium which is expressed in the statement of award issued by the State in which the tender is invited in the currency of that State, the conversion must be effected at the rate of exchange provided for in Article 2(1) of Regulation No 129.**

Lecourt Kutscher

Donner Trabucchi Monaco

Delivered in open court in Luxembourg on 26 January 1972.

A. Van Houtte — Registrar

R. Lecourt — President

## OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 15 DECEMBER 1971[1]

*Mr President,*
*Members of the Court,*

Before beginning to consider the specific questions involved in this case, I think it may perhaps be useful to recall briefly the Community system applying to the denaturing of sugar.
It is a very complicated system which results from numerous, sometimes obscure texts. It is, however, possible to sift a certain number of facts out of this 'jungle':

1. The common organization of the market in sugar obliges the national intervention agencies to obtain at the Community intervention price all the quantities of sugar which are offered to them.

2. In order to absorb the surpluses which this obligation may create the Community authorities have provided for two systems:

— an aid to exports to third countries by means of the grant of 'refunds',

— an arrangement intended to encourage the denaturing of sugar, in particular by transforming sugar for human consumption into products intended for animal feed.

3. The latter system involves numerous detailed rules, but the only one of interest to us in this instance is that known as the tender.
By means of a certain number of complex measures the Community authorities authorized the national intervention agencies to award tenders for denaturing certain quantities of sugar under certain conditions. This system in fact constitutes a sale to commercial organizations by a State intervention agency of quantities of sugar intended for denaturing; in the original

1 — Translated from the French.

plan, two factors made for competition between possible purchasers:

— first, the purchase price, and here it is settled that the tender accepted is that of the 'highest bidder';

— then the denaturing premium and here it is settled that the tender accepted is that of the 'lowest bidder', that is to say, the one asking the lowest premium.

Finally, whatever the system adopted, the successful tenderer is entitled to carry out the denaturing in a State other than that in which the intervention agency effecting the sale is established.
For various reasons which it would take too long to investigate in depth, this original arrangement was gradually modified in two respects.

(a) While the original system merely involved the Community's fixing a minimum offer price, subsequent developments led to the selling price being fixed in advance by the Community authorities and in this way the 'price' factor was eliminated from the competition which the system of sale by tender was intended to ensure.

(b) This competition now only extends to the amount of the denaturing premium, and even then under different circumstances according to the individual case.

In certain cases the maximum amount of the premium is fixed by the Community authorities before the tender is invited. In other cases, in accordance with the texts, the maximum is regarded as fixed after the tender is invited on the basis of the tenders submitted and the market situation; this in fact amounts to a system in which the Community authorities are entitled to accept or to refuse the denaturing premium arrived at on the basis of the tender accepted by the national intervention agency, by taking account in particular of the result of the invitations to tender issued in the other countries.
It is a tender of this latter type which forms the basis of the action before the College van Beroep voor het Bedrijfsleven and which has been referred to you.
The German intervention agency had been authorized by the Community authorities to sell white sugar for denaturing and for subsequent use as animal feed.
The selling price had been previously fixed at 21.73 u.a. per 100 kg by Regulation No 820/70 of the Commission.
The maximum denaturing premium had not been fixed in advance.
The Westzucker company submitted various tenders in respect of a total of 3000 metric tons, indicating its readiness to accept denaturing premiums, the amount of which it expressed in Deutschmarks.
Westzucker also indicated that if its tender were accepted the denaturing would be done, not in the Federal Republic of Germany, but in the Kingdom of the Netherlands.
It was this company which proposed the lowest premium in its tender.
This also applied to the Dietz company as regards a different lot of 25000 metric tons.
The Community authorities then intervened in order to fix the maximum denaturing premium, that is, in effect to approve the outcome of the tender procedure.
They fixed the maximum premium at the amount offered by the 'lowest bidders', who were subsequently declared to be the successful tenderers.
As the sugar was denatured in the Netherlands the companies in question requested the Netherlands intervention agency to issue a certificate establishing their entitlement to the denaturing premium.
The Netherlands agency complied with this request but it fixed the amount of the premium in units of account and indicated in brackets the amount in guilders calculated according to the fixed rate of conversion between the national currency and the unit of account established by Regulation No 129.
The companies in question found this procedure highly unsatisfactory.
In the light of the fluctuations of the foreign exchange market at this time it was in the interest of these companies for the premium to be fixed at the amount in

Deutschmarks shown in their tender, and for this amount to be paid in Deutschmarks.
By reselling these marks on the free foreign exchange market they would in fact have obtained more guilders than under the system adopted by the Netherlands agency and this would have been to their advantage, particularly as regards payment of any sums due from them to the Netherlands undertakings which had denatured the sugar.
The companies in question therefore contested the decision of the Netherlands intervention agency, first, with this agency itself and then before the College van Beroep voor het Bedrijfsleven.
In the course of this action the latter referred you the six questions which are before you today.
As the Commission has fully appreciated, the questions referred by the Netherlands court in fact concern three problems which may arise where denaturing takes place in a State other than that in which the tenders are invited.
I will suggest that you consider these questions in the following order:

(1) Which State must pay the denaturing premium?

(2) In which currency must this State express the amount of such premium?

(3) What conversion rate must be used in order to fix the amount of such premium?

## I

I consider the solution to the first of these problems to follow from the wording itself of the Community regulations applicable in this matter. It is true that Regulation No 1987/69 of the Commission left certain doubts hanging over the question, in that Article 9 thereof merely provided that the Member State in which denaturing is effected 'shall ... issue the denaturing premium certificate' and the question could therefore arise, as it did before the Netherlands court, who was required to settle the debt established by the certificate and whether the creditor was not in some way entitled to choose to which debtor he would apply. However, as regards the period in question here, I consider that the ambiguity is entirely removed by Article 6 of Regulation No 2049/69 of the Council laying down general rules on the denaturing of sugar for animal feed.
This Article lays down a principle and a possible exception.
The principle is as follows: 'The denaturing premium shall be granted by the Member State on whose territory denaturing takes place'. The exception is as follows: during the 1969/1970 marketing year the denaturing premium may be granted by the Member State in which the tender is invited, even if the denaturing takes place on the territory of another Member State.
As the Commission observes, chiefly on the basis of the grounds for the regulation, this latter provision gives an option not to the traders but to the States.
As the Federal Republic of Germany did not believe that it had to exercise this option, it is only the principle laid down by the first paragraph of Article 6 which is applicable in this instance.
Does the phrase 'the denaturing premium shall be granted' imply both the issue of the certificate and payment?
One may of course ask this question, as does the Commission. For my part, however, I am firmly of the opinion that an affirmative answer must be given for the following three reasons:

1. A comparison of the terms of this Article 6 of Regulation No 2049/69 with the text contained in other regulations on the same subject appears to me to be significant. The earlier texts only referred to 'the issue of the certificate', which did not settle the problem of payment.
If the Council, which was aware of this situation, used a very general verb or verbal phrase (in the French text the premium is 'accordée', in German 'gewährt', in Italian 'accordato', in Dutch 'toegekend'), this was done intentionally in order to cover all the transactions involved from the grant of the certificate to the actual payment.

2. Moreover, the final subparagraph of Article 6(2) confirms this intention. It states in effect that, apart from the exceptional case where the State in which the tender is invited has intended to reserve to itself payment of the premium whatever the State in which the denaturing takes place, 'a denaturing premium certificate shall be valid only for denaturing in the Member State which issues that certificate'. The necessary result is that it is only from this Member State that payment of the premium may be claimed since, if it were claimed from another Member State, that State would be entitled to maintain that the certificate submitted to it was invalid.

3. Finally, let me add that in addition to the deposit to be lodged with the State in which the tender is invited, Article 6(3) of Regulation No 2049/69 provided for a 'denaturing deposit' which is paid to the State responsible for issuing the denaturing premium certificate, that is, save in the exceptional case referred to in the final subparagraph of paragraph (2), to the State in which the denaturing takes place. For all these reasons I suggest that you reply to Questions 2 and 3 referred by the Netherlands court as follows:

'Except where the Member State in which the tender has been invited has exercised the option open to it in respect of the 1969/1970 marketing year under the second subparagraph of Article 6(1) of Regulation No 2049/69, the issue of the denaturing premium certificate and the payment of the premium are the responsibility, under the first subparagraph of that provision, of the Member State on whose territory denaturing takes place.'

However, even if you adopt this reply it does not settle all the questions which are raised by the second and third problems to which I have just referred, although it indicates a guideline for the argument of these questions.

## II

The second problem is that raised by the first of the questions referred by the Netherlands court: Is the Member State in which denaturing takes place obliged to express the denaturing premium solely in the currency of the State in which the tender was submitted and the award made? It is clear that the Netherlands court has considered, from this point of view, the compatibility with Community rules of a certain Netherlands regulation put before it, which provides for the amount of the premium to be expressed in guilders.

The difficulty here arises from a certain ambiguity in the Community rules concerning the invitation to tender.

In fact, although in invitations to tender the price of the sugar and the amount of the deposit required in connexion with the invitation are expressed in units of account and only secondly in Deutschmarks, it is expressly provided that the amount of the premium shall be expressed in the national currency. This provision presents no problem where denaturing takes place in the State in which the tender is invited.

On the other hand, it is likely to raise problems, first, where denaturing takes place in another Member State and, secondly, where the commercial rates of exchange differ considerably from the parities accepted by the Community authorities for transactions on the agricultural markets.

These difficulties should have been settled by regulation, but the practice has tended to vary.

In fact, the invitations to tender provide:

— sometimes, for the premium to be expressed solely in the national currency,

— sometimes, for the premium to be expressed solely in units of account (the only system which removes all the difficulties),

— sometimes, as in this instance, for the premium to be expressed in the national currency but with a note drawing attention to the parity of this currency with the unit of account.

It is this situation which forms the basis of the main argument of the companies who are the plaintiffs in the main action.

They maintain that as they submitted their tender in marks the sum owed to them should be fixed in this currency and should moreover be paid in it.
I consider that this argument must be set aside for the following three reasons:

(1) Although the tenderer is only obliged to indicate the amount of the premium in the national currency the system as a whole necessarily implies that this tender, which for practical reasons is expressed in the national currency, is merely the expression in this currency of a certain value in units of account calculated according to a fixed conversion rate. This is the basic reason for the added note in the provisions of the invitation to tender concerning the formulation of the offers for denaturing premiums.

(2) In fact, the whole system of Community review of the invitations to tender cannot function unless that part of the tender which concerns the amount of the premium is known to have been calculated in this way.
Where the maximum amount of this denaturing premium is fixed in advance, it is of course fixed in units of account.
Where it is fixed in the light of the result of the invitations to tender the decision implies a comparison between the tenders for the premium put forward by the 'lowest bidders' throughout all the countries of the Community, since the aim of the operation is to ensure, for the least cost, the carrying out of transactions which affect the balance of the sugar market throughout the whole of the Community and not merely in one or other national market.
Clearly such a comparison can only be made by converting the tenders expressed in the national currency into units of account.
Moreover, the maximum amounts for the two transactions in question were fixed in units of account: cf. Commission Decisions of 20 May, 3 June and 10 June 1970 (JO L 126, 10.6.1970, p. 26; JO No 131, 16.6.1970, p. 19; JO L 138, 25.6.1970, p. 22).

(3) By enabling the purchasers of sugar intended for denaturing to carry out this process in a country other than that in which tenders are invited (a possibility which is in any case rather open to objection in certain respects) the Community authorities sought to give traders an opportunity to get the work done more easily but certainly did not seek to strain the rules which continue to be applied until the introduction of a monetary union.
So far no Community regulation has imposed an obligation on the Member States to express their debts, of whatever kind, in a currency which is specially designated for the purpose, in particular in a currency other than their national currency.
The rules concerning the EAGGF are rather significant in this respect since they expressly provide that the national intervention agencies shall be bound to declare to the EAGGF the amount of such interventions expressed in their national currency, whatever the currency in which they may have had to pay the expenses involved in these interventions.
In these circumstances the fact that the offer of the denaturing premium has been expressed in one national currency does not prevent the responsible agency in another Member State from expressing the amount of the premium in its own national currency when denaturing has taken place in that State.
I therefore suggest that you reply to the first question referred by the Netherlands court as follows:

'The Member State which is responsible for the issue of the denaturing premium certificate and for payment of the premium may fix the amount of this premium and pay it in its national currency.'

## III

There remains the final question which concerns the rate of conversion applicable. In this respect the plaintiffs in the main action maintain:

(1) that if, as they claim in their principal conclusions, the premium certificate had to be drawn up in marks, then if it

wished to pay in guilders the Netherlands agency had to apply the daily rate of exchange as shown by the quotations on the foreign exchange market;

(2) alternatively, that if the premium certificate might have been expressed in guilders, then to convert into this currency the amount in marks which results from the invitation to tender it was necessary to use the daily rate of exchange on the foreign exchange market and not the fixed rate of conversion accepted for the operation of the market organizations.

As a result of my explanations on the preceding question I do not need to spend further time on the plaintiffs' principal arguments.
I also consider that for similar reasons it is impossible to accept the alternative arguments and to this I will only add three observations.

(a) If the method suggested by the plaintiffs in the main action were accepted it might result, and in the present instance would result, in allowing the companies in question to obtain a premium exceeding the maximum fixed in units of account by the Community authorities whose agreement was necessary for completion of the sale by tender.

(b) This is clearly contrary to the provision contained in Regulation No 129 (Article 2(1)) which provides that 'Where measures taken [that is to say, measures taken in pursuance of the regulations concerning the common agricultural policy] require sums given in one currency to be expressed in another currency, the exchange rate to be applied shall be that which corresponds to the par value communicated to the International Monetary Fund', that is, in more practical terms, to the par value fixed between the currencies of the Member States as expressed, for the purpose of the common agricultural policy, by their relation to the unit of account.

(c) The application of these provisions is not as unfavourable or unfair to the companies in question as has been sought to make it appear.
It in fact insures them against the fluctuations in the exchange rate which may occur on the money market during the period between the removal of the goods and the payment of the denaturing premium.
It may of course, as is the case in this instance, deprive them of an anticipated profit which could be expected in the light of the tendencies of the foreign exchange market at a particular time. From a Community point of view, however, I do not consider this to be particularly unfortunate, for the following reasons:

(1) such a situation will discourage undesirable transactions which, although 'they may be of interest in commercial terms, are in no way justified from the point of view of the organization of the agricultural markets in question;

(2) it will in particular avoid the establishment of a sort of 'legal fraud'. Let me say at once that there is certainly no question of this in the present case.

However, if the argument put forward by the plaintiff companies were accepted there would be no means of preventing a transaction of the following type:
Taking into account the fluctuations between the mark and the guilder during the period in question, an undertaking purchases sugar in Holland and then, attracted by the high rate for the mark, offers it for intervention buying in Germany.
It subsequently obtains in Germany an invitation to tender for the same tonnage of sugar which it gets denatured in Holland and the second profit on the exchange rate which it obtains on payment of the premium enables it to restart the operation.
The sacrifices accepted by the taxpayers of the common market in order to finance the EAGGF are clearly not made in order to enable such transactions to take place.
I will therefore suggest that you reply to the fourth, fifth and sixth questions referred by the Netherlands court as follows:

'In order to fix the amount of the denaturing premium in its national currency, the Member State in which denaturing has taken place must convert the amount which is shown in the invitation to tender in the national currency of the State in which the tender is invited by applying the rate of exchange provided for in Article 2(1) of Regulation No 129 of 23 October 1962.'

I am therefore of the opinion that you should reply to the questions referred by the Netherlands court on the lines of my observations on each of these questions.