No 956/68 of the Commission of 12 July 1968, No 2086/68 of the Commission of 20 December 1968 and No 1403/69 of the Commission of 18 July 1969 on the denaturing of common wheat which were wrongly paid to the recipients must, at the present stage in the development of Community law, be decided in accordance with the national law of the intervention agency responsible for the relevant sector of the market.

Community law does not prevent the application of provisions or principles of national law the effect of which may be to restrict the period during which such repayment may be claimed, provided always that that question is settled in accordance with the same rules as those which apply to the performance of similar supervisory duties carried out by the national administrative authorities in the spheres in which they have sole responsibility.

Touffait Pescatore Due

Delivered in open court in Luxembourg on 12 June 1980.

A. Van Houtte
Registrar

A. Touffait
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 8 MAY 1980 [1]

Mr President,
Members of the Court,

1. Already in the first few months of this year the Court has had occasion to consider more than once questions connected with the reimbursement of sums wrongly received or paid by the Member States pursuant to the common agricultural policy. Two days ago I delivered my opinion in Case 130/79, *Express Dairy Foods.* That was concerned

1 — Translated from the Italian.

with a claim for the refund of monetary compensatory amounts by a company which had been required to pay them on the basis of Commission regulations which should be declared invalid. Today the issue with which I am concerned is the claim by the national authorities for the recovery of sums paid some years ago to two undertakings by way of premiums for the denaturing of common wheat, it having been ascertained that those undertakings failed to comply with the conditions for receiving the premiums. The immediate precedent on this subject is the judgment of 5 March 1980 in Case 265/78, *Ferwerda.* There again the particular problem was the recovery of sums wrongly paid (by way of export refunds) by the responsible national authority to a private undertaking pursuant to the agricultural policy. Again, as for the question of principle, it is basically to establish whether it is Community law or national law which governs the conditions for the refund of sums unduly paid. The most delicate aspect concerns limitation periods.

Let me summarize the facts. By measures adopted on 30 July 1976 and 20 January 1977 the Federal institution which is charged with managing the common agricultural policy in Germany (the Bundesanstalt für landwirtschaftliche Marktordnung, hereinafter referred to as "the Bundesanstalt") claimed from two co-operative undertakings (the Lippische Hauptgenossenschaft and the Westfälische Central-Genossenschaft) repayment of the amounts received by them by way of denaturing premiums for operations carried out respectively during the periods November 1968 to February 1974 and November 1968 to July 1970. It appeared from inspections carried out that the two undertakings had not complied with the Community rules relating to the percentage of colouring matter to be used in denaturing grain. In this respect it should also be recalled that in Article 8 (1) of Regulation No 729/70 of 21 April 1970 the Council required the Member States "*in accordance with national provisions laid down by law, regulation or administrative action*" to take the measures necessary to "prevent and deal with irregularities" and "recover sums lost as a result of irregularities or negligence": that is to say the sums paid to undertakings in pursuance of the common agricultural policy but not due because the applicable rules were not observed.

The two above-mentioned co-operatives objected to the claims and brought the matter before the Verwaltungsgericht Frankfurt am Main where they sought to rely *inter alia* on the five-year period of prescription which they claimed was to be inferred from the system of the EEC Treaty. The plaintiffs claimed that since payment of the denaturing premiums is made on the basis of Community law it is on the basis of that same law that problems relating to the extinction and lapse of the right to repayment of premiums wrongly paid should be resolved. In the absence of express Community rules governing prescription the plaintiffs maintain that it is possible to have recourse to analogy and they refer to Article 43 of the Statute of the Court of Justice of the EEC which, in relation to actions against the Community in matters of non-contractual liability, provides a period of limitation of five years from the occurrence of the event giving rise to

liability. According to the plaintiffs, since that is the period fixed for the prescription of the rights which individuals may assert against the Community, the rights of the Community as against individuals should similarly be extinguished after the same period of time. On the other hand the Bundesanstalt maintains that prescription is governed by national law and not by Community law.

By two orders dated 12 July 1979 the Verwaltungsgericht Frankfurt am Main referred to this Court three questions for a preliminary ruling, asking:

(a) Whether the question of the period within which claims for repayment of denaturing premiums may be made is to be decided in accordance with Community law;

(b) If that is the case, whether the claim for repayment is subject to a limitation period, and if so what period;

(c) Whether there is in Community law a principle according to which, after the lapse of the period provided for in the national law for the preservation of documents relating to denaturing, it is no longer possible to rely on records still available or other documents to prove that the denaturing processes were irregular and to claim repayment of the premiums paid.

In the grounds of the orders making the reference the national court voiced its doubts concerning the applicability of the national provisions on prescription, especially having regard to the fact that the diversity of the laws in force in the Member States would cause disparity in treatment as between the citizens of the Community. Further, to clarify the object of the third question, the national court stressed that the German law implementing the Community regulations on denaturing premiums requires the undertakings to preserve documents relating to deanturing operations for seven years. That is why it wondered whether there ought not at least to be some realtionship between the said period and that within which it is possible to claim repayment of premiums wrongly paid; in this respect it referred to the principles of the protection of legitimate expectation and of proportionality recognized by Community law.

2. The answer to the first question is facilitated by the aforesaid judgment given by the Court on 5 March 1980 in Case 265/78, *Ferwerda.* In that case the Court recalled that the general principle of equality plays a dominant role in the general system of the financial provisions of the Treaty (to which may also be traced back the rules on "the conditions for the granting and payment of financial benefits to traders from the Community budget"). In consequence there ought not to be any discrimination as to the substantive and procedural conditions upon which *inter alia* the authorities of the Member States, acting on behalf of the Community, may claim reimbursement of financial benefits wrongly received by undertakings: the judgment in *Ferwerda* thereby recognized a requirement strictly connected with the principle of equality. The same judgment, however, had to recognize that that requirement has only recently

begun to find expression in Community rules (it cited Council Regulations Nos 1430/79 of 2 July 1979 and 1697/79 of 24 July 1979, which are due to enter into force on 1 July 1980 and are applicable respectively to the repayment of import or export duties and to the recovery of such duties if they were not paid at the time by the undertakings liable). Those regulations are only a first step towards the aim of non-discrimination in the field which we are considering. On the other hand, however, the necessarily technical and detailed nature of that type of rules means that their absence may be remedied only partially by means of interpretation by the Court, as the latter has expressly recognized. It follows that cases in which a claim is made for the reimbursement of sums paid or received by national administrative authorities on behalf of the Community fall within the jurisdiction of the national courts and must be decided "under national law in so far as no provisions of Community law are relevant".

In my opinion that important ruling in the case of *Ferwerda* should be confirmed in full in the present case. Further, it is important to bear in mind that the same judgment in *Ferwerda* contains a reference to the said Article 8 of Regulation No 729/70 of the Council which, as I have said, requires Member States to recover the sums paid as Community aids when it is ascertained that there has been irregularity in that payment. That requirement appeared particularly significant to the Court in so far as it provided that the recovery should take place "in accordance with national provisions laid down by law, regulation or administrative action". Those words imply in effect that the recovery of undue payments is subject to national law not only as regards the procedure but also as regards terms of a substantive nature. Therefore there is no doubt but that prescription too must be determined according to the law of the Member States. There is no reason to be surprised that such scope is accorded to national law, in spite of the fact that payment of the aids in question is governed by Community law: it is well known that on other occasions also the case-law of this court has recognized the complementary function of national law where there are lacunae in Community law (cf. for example the judgment of 11 July 1973 in Case 3/73 *Hessische Mehlindustrie* [1973] ECR 745).

In the said judgment in *Ferwerda*, as in other recent cases relating to refunds *(inter alia* the judgment of 27 February 1980 in Case 68/79, *Just)* the Court has moreover stated that the application of national provisions must be effected in a non-discriminatory manner having regard to the procedure for resolving purely national disputes of the same type and that at all events matters of procedure may not have the result of making impossible in practice the exercise of rights conferred by Community law.

The foregoing shows clearly that in the present state of Community law rules on prescription in relation to the right of national authorities to claim repayment of denaturing premiums wrongly paid are subject to the relevant national law.

The concern expressed by the Verwaltungsgericht to avoid discrimination in the treatment of Community citizens is perfectly justified. However, the requirement of equality is not sufficient to overcome the failure by the Community legislature to adopt a uniform rule in relation to prescription. In the grounds of the order making the reference the same national court cited the judgment of the Court of 15 July 1970 in Case 41/69 *ACR Chemiefarma* [1970] ECR 661. Now it should be remembered that in dismissing the plea of prescription put forward by the applicant in relation to an offence found by the Commission the said judgment stated that the provisions in force did not provide for prescription in the relevant field and that to fulfil their function of ensuring legal certainty limitation periods had to be fixed in advance by the Community legislature. It is apparent from that that the Court cannot itself determine a period of limitation in the absence of a general rule to that effect in Community law.

3. Once it is found that the prescription of the right of national authorities to claim repayment of denaturing premiums is governed by national law the second question loses its purpose.

The answer to be given to the third question follows logically from the considerations put forward so far. Since the question of the recovery of sums wrongly paid by the authorities of the Member States is subject to municipal law as regards both procedure and substance, it is for the same municipal law to determine whether there is a principle according to which the right to recover denaturing premiums may be restricted or even excluded when it is asserted after the lapse of the period laid down for the preservation of documents relating to the denaturing operations, and if so, whether that principle applies in a case such as the present.

It is necessary to stress that Community law is not opposed to claims for reimbursement made by the authorities being subject in the relevant municipal law to restrictions resulting from general principles such as respect for good faith and protection of legitimate expectations. Such restrictions might be important in a situation of the kind alleged in the present case by the Lippische Hauptgenossenschaft, in which, apart from the fact that a longer period has elapsed than that laid down for the perservation of documents relating to the denaturing operations, it seems that the company was constantly inspected by a body whose duty it was to do so (the Einfuhr- und Vorratsstelle für Getreide und Futtermittel) and that the latter had never raised any objection regarding the percentage of colouring matter employed. That, however, is an issue upon which the national court is called upon to pronounce, in the same way as it must decide the weight to be attributed to the fact, alleged by the aforesaid undertaking, that the feeding-stuff in question was always in fact employed as animal feed and thus the purpose of the denaturing premium in the present case was fully fulfilled. If in municipal law factors of that kind were to justify, in the light of the above-mentioned general principles, restrictions upon the right of the authorities to recover sums irregularly paid out, nothing in Community

law as it now stands would prevent the application of such restrictions: the same requirement imposed on the Member States by the said Article 8 of Regulation No 729/70 cannot be invoked as an argument *a contrario* since the measures to recover such sums must be adopted in accordance with municipal law.

4. My opinion is therefore that the Court, in answer to the questions referred to it for a preliminary ruling by the Verwaltungsgericht Frankfurt am Main by order dated 12 July 1979, should declare as follows:

1. As long as the Community legislature has not laid down a period of limitation for the recovery of sums wrongly paid by the administrative authorities of Member States to undertakings in implementation of the common agricultural policy the said period remains governed by national law.

2. It is compatible with Community law that national courts, before which disputes are pending concerned with the recovery of amounts wrongly paid by the national administrative authorities to individuals in the context of the common agricultural policy, should apply restrictions resulting from general principles, such as respect for good faith and the protection of legitimate expectations, always providing that the authority concerned is not subject, in carrying out duties on behalf of the Community, to restrictions more onerous than those which apply to its normal duties subject to national law.