OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 28 MAY 1975 [1]

Mr President,
Members of the Court,

1. The questions which require to be resolved in these proceedings are reminiscent of the almost identical ones referred in Case 78/74, which was the subject of your judgment of 18 March last. In fact, in this case, too, the problem is to establish whether regulations which have, to the disadvantage of the plaintiff in the main action, amended the arrangements applicable to denaturing premiums for common wheat, were in breach of the second sentence of Article 4 (1) of Regulation No 172/67/EEC of the Council of 27 June 1967, as amended by Regulation No 644/68/EEC of 29 May 1968. A subsidiary question is whether the regulations concerned apply also to denaturing operations which were the subject of due notice to the intervention agency before entry into force of the new arrangements, even though the denaturing was, in fact, carried out subsequently.

Regulation No 2859/73 of the Commission of 19 October 1973 reduced during the marketing year, and with effect from 1 November 1973, the denaturing premium which had been fixed for the 1973/74 marketing year by Regulation No 1897/73/EEC. Subsequently, Regulation No 175/74 of the Commission of 23 January 1974, which again supervened during the marketing year, fixed the amount of the denaturing premium at zero with effect from 10 February 1974.

The first task is to establish whether these two provisions were adopted in breach of the provision in the second sentence of Article 4 (1) of Regulation No 172/67/EEC of the Council. It must be borne in mind that Article 4 (1) of this Regulation, which lays down the general rules governing the denaturing of wheat and rye of bread-making quality, provides that the denaturing premium shall be fixed before the beginning of and for the duration of each marketing year. The reason for this provision is set out in the third recital of the preamble to Regulation No 172/67/EEC, which declares that the existence of this premium should be known to possible beneficiaries from the beginning of the marketing year, in order to enable them to plan a suitable use for denatured common wheat.

On the other hand, however, the Council, in Regulation No 644/68 of 29 May 1968, stated that, despite the recognized need to announce the amount of the premium before the beginning of the crop year, it was also necessary to make provision enabling the Commission to adjust the amount of the premium during the crop year where the balance of the market was likely to be disturbed by substantial changes in the factors on which it is based.

I need not reiterate what I had to say during the proceedings in Case 78/74 about the aims and objects of the mechanism for denaturing premiums. On those points I refer to my opinion in that case; here I do no more than point out that your judgment was, by implication, based on the concept of the wise discretion which the Commission is recognized as possessing when assessing the market situation under the provisions of Article 1 of Regulation No 644/68 of the Council, referred to above, concerning adjustment of the denaturing

1 — Translated from the Italian.

premium during the marketing year. This follows the precedents established by this Court according general recognition that, as regards its interventions in the market, the Commission enjoys a wide freedom of evaluation, with the result that, when examining the lawfulness of the exercise of such freedom, the courts cannot substitute their own evaluation of the matter for that of the competent authority but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of powers (paragraph 14 of the judgment in Case 57/72, *Westzucker v Einfuhr- und Vorratsstelle Zucker* [1973] ECR 340).

2. The German court making the reference expresses doubts about the adequacy of the reasons given in Regulation No 2859/73 to justify changing the amounts of the denaturing premiums. On the basis of information supplied by the plaintiff, it especially doubts whether the factors which played a decisive rôle in calculating the original amount of the premium have undergone substantial changes subsequent to that calculation. It even refers to the possibility of a misuse of powers and voices the suspicion that the real reason for the provision was the purely financial necessity to make good the drop in Community receipts following the reduction in import levies.

The court expresses similar doubts regarding Regulation No 175/74.

In the statement of reasons for Regulation No 2859/73, the Commission first of all declares that the world market in common wheat has moved rapidly towards a tight situation; that this situation brought about, in turn, the limitation of the duration of validity of export certificates, the termination of import levies, and the setting up of an export levy. The Commission further declared that because the denaturing premium was excessive in the present circumstances, common wheat was, in consequence, competing with, in particular, barley, the situation of which on the market gave rise to fears of intervention on a large scale.

For these various reasons, the Commission drew the conclusion in the Regulation referred to that there was a threat of disturbance on the market sufficient to justify changing the denaturing premium during the marketing year.

The plaintiff in the main action contends that the difficulties indicated by the Commission could have been avoided by means other than those employed, particularly as the Commission was aware of the situation advanced to justify Regulation No 2859/73 at the time when it fixed the premium for the 1973/74 marketing year.

We have seen that, in order to prevent the courts from trying to substitute their own evaluation of the most suitable measures to meet a change in the economic circumstances, they may challenge the choice made by the Executive in the matter only if it is vitiated by serious and patent error. As I had occasion to observe in the opinion I gave in Case 78/74, the concept of a threat of disturbances as envisaged in Regulation No 644/68 of the Council does not necessarily refer to serious and exceptional developments such as those which would call for application of the safeguard clauses. This case is, in fact, concerned with the danger of diverting, to a greater extent than necessary, in other words, uneconomically, a product from its normal use which, in the absence of any special difficulty in disposing of it, is the only use consistent with a healthy working of the market. The powers of the Commission to alter the denaturing premium during the marketing year must be taken as implying restriction or, *a fortiori*, discontinuance of the application of exceptional arrangements, such as one

must consider the grant of a denaturing premium, which amounts to nothing more than a measure designed to meet a situation of abnormal plenty.

The very fact that, at the material time, an export levy had already been introduced on common wheat in the Community clearly demonstrates that Community interest in encouraging the use of common wheat for a purpose other than the normal one could not remain unaffected; this has special force when a comparison is made with the previous situation, in which grain exports from the Community were not only not subject to a levy but, on the contrary, were in receipt of premiums. This would suffice to justify the Regulation under consideration.

The problem of competition with barley and of the consequent danger of massive offers of this product to the intervention agency is an additional consideration. The Commission explains that, in consequence of the substantial reduction in the difference between wheat and barley prices, it was no longer necessary, in order to make wheat competitive as animal food, to grant a premium for denatured wheat as high as that fixed at the beginning of the marketing year; and that to grant it would have been likely to create difficulties in the market in barley. In these circumstances, it does not seem to me possible to follow the plaintiff and argue that there is no reasonable connexion between the maintenance of the denaturing premium at its original level and the threat of an increase in barley offered for intervention.

On the other hand and in more general terms, it should be noted that, at a time when there was a substantial increase in the price of wheat, when the international situation was far from clear and, even though stocks were plentiful, there was, consequently, justified apprehension of short-term difficulty on the subject of future supplies, the Commission does not, in view of the Community's international obligations, especially as regards provision of food aid, appear to have been without justification in trying to avoid the problem by reducing the incentive to divert wheat from its natural use as human food, especially as the retention of those incentives without alteration might have helped to give an impetus to an already strong tendency for prices to rise.

Three months after adoption of the above-mentioned provision for a reduction of the premium, there was an aggravation of the difficult situation in the world market in common wheat and of the difficulty of supplying that market, which was liable to cause a further rise in prices (a situation which had already caused, *inter alia,* the increase of the levy on export of Community wheat). In face of this the Commission, in Regulation No 175/74 decided to reduce the amount of the premium to zero. It established, *inter alia,* that the increase in the demand for common wheat had already caused prices on the Community market to rise considerably. In a situation of this nature, the considerations described in connexion with Regulation No 2859/73 are an even more powerful reason for rejecting the doubts expressed by the national court concerning the validity of Regulation No 175/74.

3. In its second question, the national court asks whether the two regulations of the Commission which we are considering also apply to denaturing operations which were notified in due form to the competent intervention agencies before the regulations came into force but which were completed at a later date, even though this date was within the time-limit laid down for that purpose by the national laws governing the operations of the competent intervention agency.

In the grounds for its judgment in Case 78/74, referred to above, the Court

interpreted Regulation No 849/70 of the Commission, which reduced the denaturing premium during the 1969/70 cereal marketing year, to mean that the reduction was not to be applied to consignments of goods purchased before entry into force of the regulation, provided that the request referred to in Article 4 (2) of Regulation No 172/67 had been duly submitted to the intervention agency before expiry of the period laid down in the regulation during which denaturing operations had to be taken into account for the purposes of applying the arrangements in force before the regulation came into effect. Thanks to this interpretation, the Court was able to overcome the doubts expressed by the national court concerning the validity of the regulation in view of the absence of transitional provisions. This interpretation was largely based on the need for legal certainty in the interests of economic operators; this was a clear reminder of the need for the legitimate expectations of those subject to the regulations to be respected.

The importance of the principle that trust in the Community's legal order must be respected was recently emphasized in the judgment of 14 May last in *Comptoir National Technique Agricole* (Case 74/74, English translation available). For the Court, this principle constitutes one of the superior rules of the Community legal order for the protection of individuals, the infringement of which is capable of giving rise to non-contractual liability on the part of the Community.

The question with which, in view of the precedents established by the Court, we are now faced is the following: in view of the circumstances in which the regulations under consideration in this case were adopted, must undertakings carrying out common wheat denaturing operations be recognized as having either a subjective right or, at least, a valid expectation, that there should be no change in the level of the premium in force at the time when they notified their intention to denature the supplies of common wheat which they had already purchased — with the consequence either that the two regulations concerned are to be interpreted in such a way as to uphold the legal right of an individual party which is worthy of protection or that, if this is not possible, the provisions must be declared invalid.

4. If the judgment in Case 78/74 is to be interpreted as meaning that an undertaking which has duly notified the national intervention agency of its intention, on a certain date, to denature a given quantity of wheat which has already been purchased, *ipso facto* has a vested right to receive the premium, subject only to completion of the denaturing within the periods prescribed by the national laws applied to the competent intervention agency, it would be reasonable to reach a similar conclusion in the present case. It cannot be said that the wording of the two regulations precludes such an interpretation, even though those responsible for drafting them disagree with it. In the observations which it submitted in the present proceedings, the Commission, in fact, steadfastly denied that entitlement to a denaturing premium arises before the undertaking has in fact carried out the denaturing operations (by mixing or colouring the wheat to be denatured).

In reality, however, the question is more complicated. First of all, if we wish to take into account the attitude recently adopted by the Court on the subject of trust, when delivering its judgment in *Comptoir National Technique Agricole* (Case 74/74), which dealt with an application for damages on the basis of the Community's non-contractual liability, we must be clear about what is involved in order to avoid an extension of rulings given by the Court in particular circumstances and in a clearly identified factual situation.

The confidence of the denaturing undertaking, which was upheld in Case 78/74, that it would receive the premium on which it had relied, notwithstanding the subsequent alteration in the legislative provisions involved, was based on a promise. A promise made to all and sundry creates a commitment with a corresponding obligation to fulfil it in favour of a promisee who has taken action on the basis of and in relation to the promise.

But the promise embodied a premise founded upon the situation on which the expectation of fulfilment is based.

The problem is, therefore, that of establishing whether a prudent undertaking could, in the circumstances of the present case, legitimately rely on the continuing existence of the promises although the premises underlying the two above-mentioned regulations of the Commission underwent a change.

This approach to the question enables us to avoid the dangers associated with recognition, in broad theory, that a right arises on completion of a mere formality, such as notification of intention to carry out denaturing, which, outside the context of the economic circumstances which the provisions concerned were intended to regulate, involves no commitment for the undertaking.

I take the view therefore that a straightforward extension of what was decided in Case 78/74 is not what is required and that the Court must look at the two regulations concerned and the corresponding situation of the undertakings involved in the light of market developments and of market conditions as they evolved.

5. The principles laid down on the subject of the protection of expectations in the judgment in Case 74/74 in order to identify the appropriate premises are not of importance solely in relation to non-contractual liability, but can be used more generally in establishing the existence of legitimate expectations worthy of being protected, even though protection may take forms other than that of compensation for damages.

The existence of legitimate expectations worthy of protection can be established only on the merits of each case, with due regard to the facts of the situation in the context of which the undertakings operate. By its very nature the principle does not lend itself to mechanical application, which might lead to unjustified generalizations and would accord neither with its specific equitable function nor with the day-to-day requirements of Community rules governing the economy.

In order to establish whether there is an expectation worthy of protection, reference must, therefore, be made to the actual situation which forms the context of the Community act and of the conduct of the undertakings which claim that their legitimate expectation has been disregarded. It should be remembered that such an expectation is not the same as an individual right, but can exist even without the right. In this connexion my opinion in Case 78/74 noted that the facts which were material in the main action took place during the period prior to the crisis on the world market in wheat. At the material time in that case there was no widespread shortfall in production nor had there been a discernible tendency towards a substantial increase in the prices of the product concerned. It was also noted that there had been no indication that the undertaking concerned had indulged in speculation on the basis of receipt of the denaturing premiums, nor, speaking more generally, was it possible to establish that, on the common market, there had been any speculation based on application of the mechanism of denaturing premiums.

We have seen that the general situation on the market which the two regulations with which we are here concerned were

adopted to meet was clearly a very different one from that which had to be taken into account in connexion with the questions referred to this Court by the national court in Case 78/74. The undertakings which were engaged in denaturing operations could certainly not have been ignorant of the fact that, on the world market in the cereals involved in this case, there was a shortage which was becoming increasingly grave. They were also aware that the Community authorities had already begun to adopt measures designed to avoid a shortage in the Community, among the first of these being the imposition of a levy on exports. We know that the object of the premiums granted by the Community to encourage denaturing of common wheat is, by diverting the product from its natural use, to maintain its market in a situation of surplus which prevents it from finding its natural outlet.

But, at a time when there is an ever-increasing danger of shortage, accompanied by a situation of developing and substantial price increases and by the adoption on the part of the Community authorities of measures restricting exports of the cereal to third countries, it must be recognized that the expectations of undertakings engaged in denaturing wheat are not the same as those which might be entertained in an economic context in which there are abundant supplies of the product intended for denaturing, as was, for example, the situation at the material time in Case 78/74. This is particularly true of the period separating the two regulations concerned, when the reduction in the premium which had taken place, in addition to the fresh increase in the export levy for common wheat exports to third countries, represented a further unmistakable alarm signal.

In the context of such circumstances, it is not possible to establish the existence of certain conditions which, in your judgment in Case 74/74, especially paragraphs Nos 42 and 43, you considered essential before you would, for the benefit of those under the administrative control of the authorities, uphold their expectation that a provision in their favour should continue to apply. In particular, in respect of the changes made in the level of the denaturing premiums by the two provisions we are considering, it seems scarcely possible to accept that the events could not have been foreseen, a condition in whose absence there is no recognizable expectation worthy of protection

Moreover, the absence of machinery, such as the security provided when export refunds are fixed in advance, which makes it impossible to go back on a denaturing operation of which advance notice has been given, enables the conclusion to be drawn that an expectation based on the level of the denaturing premium which will be forthcoming can be regarded as, in principle, unworthy of the same protection as that due to an expectation related to compensatory amounts on exports. A careful assessment of the circumstances by the parties concerned should therefore have sufficed to undermine their confidence in the continuance of provisions whose abolition was required by the organization of the market and elementary consideration for the public interst.

when account is taken of the particular circumstances in which the Commission regulations changing the denaturing premiums supervened, these considerations may suffice to justify denial of entitlement to benefit from the previous arrangements, even in respect of the quantities purchased by the denaturer which had already been duly notified to the intervention agency.

In any case, the said considerations should, at least, mean discontinuance of the benefit of the previous arrangements for undertakings which effected the communication referred to in Article 4 (2) after the publication date of the

regulation introducing new, less advantageous arrangements. In fact, from that date, even taking into account the economic context considered above, there can certainly no longer be any question of protecting the expectation; to keep in operation for a few weeks longer the incentive to denature, already recognized as excessive and counter-productive, would court the risk of encouraging purely speculative operations which, since they diverted further quantities of cereal from their normal use, would run counter to the objectives of the regulations concerned and, in the wider context, of the common market organization.

In the light of these considerations and of the rejection of the possibility that the grounds adduced in the present proceedings are sufficient to justify a declaration that the two regulations of the Commission in question are invalid, the conclusion appears inevitable that there is no valid entitlement to the premium solely by virtue of completion of the formalities, which are not binding on the undertaking, relating to notice of the contemplated denaturing operations; it must also be concluded that, having regard to the particular market situation which led to adoption of the regulations, they must be wholly applied to all denaturing operations carried out after the date provided for their entry into force, even though the relevant requests were submitted prior to that date.

In no case, however, should the restriction be applied for the benefit of denaturing operations which were the subject of notice to the intervention agency after publication of the regulation the application of which is the subject of these proceedings.