naturing premiums provided that those rules do not give rise to any difference in treatment which is not objectively justified between traders receiving such premiums and those who, as the case may be, obtain similar benefits of a purely national nature.

In Case 54/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht [Administrative Court] Frankfurt am Main for a preliminary ruling in the action pending before that court between

FIRMA WILHELM FROMME, Salzgitter,

and

BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG [Federal Office for the Organization of Agricultural Markets], Frankfurt am Main,

on the interpretation of a number of provisions of the EEC Treaty and principles of Community law to enable the national court to decide whether Article 11 (1) of the Order of the Federal Minister of Food, Agriculture and Forestry of 8 August 1968 concerning premiums for the denaturing of cereals (Bundesanzeiger No 148 of 10 August 1968, p. 1) is compatible with those provisions and principles,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

1. In 1970 the defendant in the main action in this case, the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as "the Bundesanstalt"] granted the plaintiff in the main action, the undertaking Fromme, premiums for the denaturing of common wheat amounting to DM 128 497.62 on the basis of Regulation No 172/67/EEC of the Council of 27 June 1967 on general rules governing the denaturing of wheat and rye of breadmaking quality (Official Journal, English Special Edition 1967, p. 139).

2. By a number of decisions dated 8 December 1977 the Bundesanstalt subsequently demanded repayment of those premiums on the ground that the conditions for entitlement to the premium were not met. By a number of decisions dated 17 January 1980 the Bundesanstalt also demanded interest calculated from the date of payment of the premium until the date of its repayment at a rate of 3 % above the discount rate of the German Federal Bank and in any event at not less than 6½%. It relied for this purpose on the second subparagraph of Article 11 (1) of the Order of the Federal Minister of Food, Agriculture and Forestry of 8 August 1968 concerning premiums for the denaturing of cereals (Bundesanzeiger No 148 of 10 August 1968) — as amended by the Order of the same Minister of 14 February 1973 concerning the adjustment of the interest rates laid down in orders implementing the common organizations of the markets (Bundesanzeiger No 34 of 17 February 1973).

The Federal Minister of Food, Agriculture and Forestry was empowered to enact rules on interest by the German Law on the Implementation of the Common Organizations of the Markets (Marktordnungsgesetz) of 31 August 1972 (Bundesgesetzblatt I, p. 1617). Article 12 of that Law provides that:

"The orders referred to in Article 9 [authorizing the Federal Minister to adopt the necessary measures] may provide for interest at a rate not exceeding 3% above the discount rate of the German Federal Bank to be charged in the case of demands for the refund of benefits wrongly paid and in the case of the late payment of levies".

3. The Bundesanstalt rejected the objections made by the plaintiff in the main action against the said decisions whereupon the plaintiff brought an action before the Verwaltungsgericht Frankfurt am Main.

4. The Verwaltungsgericht stayed the proceedings and in accordance with Article 177 of the EEC Treaty submitted the following questions to the Court for a preliminary ruling:

"1. Is it compatible with the Treaty establishing the European Economic Community for the Federal Republic

of Germany to charge on undue payments of denaturing premiums interest calculated from the day of payment at 3% above the prevailing discount rate of the German Federal Bank but in any event at not less than 6.5%, without being authorized to do so by any provision of Community law?

2. If the answer to the foregoing is in the negative:

Does Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) confer any authority entitling the Federal Republic to charge interest of the kind mentioned in Question 1?

3. If the answer to the foregoing is in the negative: Is there any other provision or general principle of Community law from which such authority may be deduced?"

5. In its order making reference to the Court the Verwaltungsgericht observes with regard to the first question that it is clear from the decisions of the Court that where the Member States have transferred legislative powers to the Community which has exercised them in the form of directly applicable law, they are no longer empowered to alter or add to that law. The Court permits only two exceptions to that principle one of which is concerned with the adoption of procedural provisions and the other with the adoption of penal provisions.

As the Federal Republic of Germany has transferred power to the Community to legislate on the subject of the common organizations of the markets it may no longer issue substantive rules of national law in this field. Accordingly, in the view of the Verwaltungsgericht, the Federal Republic is also debarred from adopting provisions of substantive law governing the reclaiming of subsidies which have been wrongly paid. The claim for interest is not based on a mere procedural provision but is a matter of substantive law. Nor does it constitute a penal provision, if only because the claim is not related to any wrongdoing.

As to the second question, the Verwaltungsgericht emphasizes that Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) empowers the Member States to adopt measures which enable only the actual sums lost to be recovered, which in this case are the denaturing premiums. On the other hand it does not contain any authority for establishing rules on payments which go beyond mere recovery.

Interest charged to cancel out the benefit obtained from unjust enrichment does not constitute an integral part of the payment made without any legal basis but is a separate ancillary claim.

The court making the reference for a preliminary ruling observes that according to the second subparagraph of Article 8 (2) of Regulation (EEC) No 729/70 the sums recovered are to be paid to the paying authorities or bodies The interest charged by the defendant in the main action is not paid back to the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the Fund") but is credited to the Federal Budget. Therefore the sums in question are not those referred to in Article 8 of Regulation (EEC) No 729/70.

The claim for restitution of the gain obtained is based on the legal doctrine that a person should not profit from benefits which he has obtained without being legally entitled thereto but that such gain belongs to the person suffering the loss. However, the interest charged by the Federal Republic is not paid to the Fund but is retained by the Federal Republic itself. Therefore the charging of interest does not lead to the restitution of subsidies wrongly granted but only to a transfer of the unjust enrichment from the Community trader to the Member States.

Even if the view were taken that Article 8 of Regulation (EEC) No 729/70 empowers Member States to claim back, in addition to the sum improperly paid, the gain obtained from that sum, it is in any event not permissible to place a national value on gain without taking the circumstances of each case into account; nor is it permissible to assess that gain at a flat rate in the form of a fixed rate of interest. For since there are no Community provisions on the nature and amount of the flat rate, it would be possible for it to be determined differently by the Member States as they thought fit; however, that would necessarily lead to unequal treatment of traders in the various Member States.

As regards the third question, the Verwaltungsgericht observes that there is also no unwritten principle of Community law which empowers the Member State to charge interest on wrongly-granted denaturing premiums.

6. The order for reference was registered at the Court on 11 March 1981.

In accordance with Article 20 of the Protocol of the Statute of the Court of Justice of the European Economic Community written observations were lodged by the plaintiff in the main action, represented by J. Gündisch, Rechtsanwalt, Hamburg, the Government of the Federal Republic of Germany, represented by M. Seidel, Ministerialrat, and H. H. Boie, Oberregierungsrat, both at the Federal Ministry for Economic Affairs, acting as Agents, and the Commission represented by M. Hilf, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order of 30 September 1981 the Court decided to assign the case to the Second Chamber.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court (EEC)

1. In the view of the *plaintiff in the main action* Community law does not prevent Member States from adopting rules of substantive law on the reclaiming of wrongly-granted subsidies. It submits that the charging of interest on sums recovered forms part of those rules and refers in this regard to Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) according to which advantages granted from the Community funds as a result of irregularities are to be recovered "in accordance with national provisions laid down by law, regulation or administrative action".

It states that its view is borne out by the decisions of the Court (judgments of 21 May 1976 in Case 26/74 *Roquette* [1976] ECR 677, 5 March 1980 in Case 265/78 *Ferwerda* [1980] ECR 617, 12 June 1980 in Case 130/79 *Dairy Foods* [1980] ECR 1887 and 12 June 1980 in Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft* [1980] ECR 1863).

The Court has however recognized a number of exceptions to the principle according to which the adoption of rules of substantive law governing the recovery of wrongly-granted subsidies is a matter for the Member States. Those rules may not alter the scope of the provisions of Community law (judgment of 28 June 1977 in Case 118/76 *Balkan* [1977] ECR 1177) or make recovery impossible in practice *(Ferwerda)*, and they may not be less favourable than the rules concerning similar cases governed by national law (judgment in the *Ferwerda* case and, in more general terms, the *Lippische Hauptgenossenschaft* cases).

Those limits of Community law have been exceeded first because the German legislation in question has the effect of altering the scope of Article 8 of Regulation No 729/70.

Within the framework of that basic provision of Community law there is in principle nothing which excludes rules on interest provided that the interest charged on the amounts to be repaid represents no more than the recovery of the gain which the recipient of the wrongly-paid benefit has made from it in the meantime. From that it follows, first, that the gain must accrue to the person from whose resources the wrongly-paid benefit was granted and, secondly, that the interest charged must constitute a genuine refund of the gain.

The German rules on interest offended against those two principles.

The Court making the reference for a preliminary ruling rightly observes that under the second subparagraph of Article 8 (2) of Regulation No 729/70 the sums recovered are repaid to the authorities or bodies which paid them, in this case the Fund. However, the interest charged by the defendant in the main action accrues to the Federal Republic of Germany.

No Community decision on the treatment of the interest received which would justify Member States in crediting it to their own budgets has yet been taken. Therefore it is not compatible with the scope of the provisions of Community law on the recovery of wrongly-granted aids to claim interest for the benefit of the budget of a Member State.

Nor, in this regard, as the Verwaltungsgericht also rightly states, is such a result justified from the point of view of the withdrawal of unjust enrichment. It is the Fund alone which has suffered the loss. Therefore the charging of interest does not lead to the restitution or recovery of subsidies wrongly paid but only to the shifting of the unjust enrichment from the trader to the Member State in question.

Quite apart from those considerations relating to the recipient of the payment, the German rules on interest contravene the scope of the basic provision of Community law on the recovery of

payments wrongly paid because they do not represent recovery of the benefit and the gain made from it but owing to their inflexibility are penal in nature.

The Verwaltungsgericht rightly observed in this regard that there can be no question of finding, on the basis of a legal fiction, and without having regard to the circumstances of the case in point, the existence of a gain which may, in appropriate circumstances, be recovered as a debt ancillary to the sum wrongly paid.

Further to that point made by the Verwaltungsgericht the plaintiff in the main action observes that it has not made any gain from the denaturing premium for common wheat which was wrongly paid to it. Repayment of the premium was claimed because it was subsequently discovered, on the occasion of a check carried out on the plaintiff's business documents, that during the period in question too little of the colorant *Patentblau* had been used. It is however accepted that, despite the fact that the common wheat in question may have had too little colouring, it was used for its intended purpose, namely for animal-feed. Thus the denaturing premium for common wheat was also used in order to bring down the high price of bread-grain to the lower price of feed-grain. Therefore the plaintiff in the main action did not acquire any advantage from the aid, the grant of which was wrong only on formal grounds, but immediately passed on the advantage to its customers, namely the farmers who bought grain from it. Since it made no gain from the aid, which was wrongly granted to it only for purely formal reasons, no gain is recoverable.

The German rules on interest contravene in particular the limits which the Court has placed on provisions of national law governing the recovery of sums paid by the Community primarily because the rules on interest in the case of denaturing premiums for grain are different from other similar provisions of German law.

There is no principle in German law to the effect that wrongly-paid subsidies must bear interest irrespective of the gain made; still less is there any provision requiring the rate of that interest to be 3% above the discount rate of the German Federal Bank.

Therefore the only general rule of German law which may be applicable is the principle according to which, by analogy with the rule of civil law laid down in Article 291 of the German Civil Code, interest of 4% is payable from the date on which the Court is seised, that is to say as from the date on which the action was brought and not, as in the case, interest at 3% above the discount rate of the German Federal Bank as from the date on which the wrongly-granted aid was received.

The plaintiff in the main action therefore proposes that the questions submitted for a preliminary ruling by the Verwaltungsgericht Frankfurt am Main should be answered as follows:

"1. It is compatible with the Treaty establishing the European Economic Community for Member States to adopt interest rules in respect of the restitution of aids wrongly paid by the Community, in particular denaturing premiums for common wheat. However, those rules must not affect the scope of the provisions of Community law on the recovery of pecuniary advantages, especially those contained in Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the

common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218). Further, they must correspond to the same rules laid down for the payment of interest and on the restitution of similar aids (subsidies) granted under national law. Therefore the rules on interest contained in the second subparagraph of Article 11 (1) of the Order of the Federal Minister of Food, Agriculture and Forestry of 8 August 1968 concerning premiums for the denaturing of cereals (Bundesanzeiger No 148 of 10 August 1968), in the version contained in the Order of 14 February 1973 concerning the adjustment of rules on interest contained in orders implementing the common organizations of the markets (Bundesanzeiger No 34 of 17 February 1973), constitute a breach of Community law inasmuch as they provide for the payment of interest at a rate of 3% above the prevailing discount rate of the German Federal Bank as from the date of payment of the wrongly-granted aid.

2. Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy confers no authority enabling the Federal Republic of Germany to charge interest of the kind mentioned in Question 1.

3. There is, furthermore, no other provision or general principle of Community law from which such authority may be inferred."

2. The *Government of the Federal Republic of Germany* takes the view that the answer to the first question must be in the affirmative. In the present state of Community law it is for the Member States, in implemention of the common agricultural policy, to regulate all ancillary matters relating to the recovery of benefits wrongly paid.

That follows from the allocation of functions between the Community and the Member States whereby the legislatures of the Member States in principle retain the power to implement and ensure the application of rules of Community law, especially where the Community legislature has not yet been able to adopt particular implementing measures.

The implementation of the common agricultural policy in particular is based on that allocation of functions.

In the view of the Federal Government the contested rules on interest in the case of a demand for reimbursement of wrongly-paid denaturing premiums constitute one of the matters left to Member States for the purpose of ensuring the operation of the organization of the market. At present there are no Community rules governing the charging of interest. The Council has not been able to agree on a proposal made by the Commission for general rules on the charging of interest on amounts which have been paid from the European Agricultural Guidance and Guarantee Fund or by way of food aid and which must be recovered. Nevertheless, it is in principle unanimously accepted within the Community that this kind of claim for reimbursement must be accompanied by a claim for interest. Every Member State has rules to that effect and the application of that legal principle serves the proper implementation of the common organizations of the markets since the possibility of making a financial gain from benefits wrongly acquired might in the end even encourage irregularities.

The Federal Government is not unaware of the fact that Community law places some limits on the application of national law where it is applied to implement the common organization of the market. Those limits stem primarily from the rules of the basic Community regulation itself the scope of which may not be restricted (judgments of the Court of 18 February 1970 in Case 40/69 *Bollmann* [1970] ECR 69, of 18 June 1970 in Case 74/69 *Krohn* [1970] ECR 451 and in *Balkan*).

Secondly, the application of national law must conform with the general rules of Community law. In particular it must not lead to discrimination against traders by taking the form of rules which are stricter than comparable implementing rules of national law (judgments of the Court in Cases 33/76, *REWE* [1976] ECR 1989, *Ferwerda* and *Dairy Foods*).

As to that point the Federal Government takes the view that the charging of interest on claims for the repayment of denaturing premiums meets those requirements. It admits that the application of national rules on interest might create differences in the burdens borne in the various Member States; however, those differences, which can be eliminated only through harmonization, must be accepted.

The Federal Government is also of the view that the form which the contested rules on interest take also satisfies the requirements of Community law. Above all, they were adopted in conformity with the rules applying to similar demands for repayment governed by national law, which meets the requirement emphasized in the decisions of the Court cited above. That is true for each of the points mentioned in the order making the reference concerning the date from which interest runs, the level of interest and the fixed rate.

The Federal Government also observes that, from the point of view of Community law, it makes no difference whether the rules on interest of the Member States require interest to be calculated on the basis of the gain actually proven in each case or whether interest is calculated on the basis of general rules which place a hypothetical figure on the advantage obtained by taking into account prevailing market conditions.

The Federal Government considers that its view is borne out by the way in which the relevant secondary law of the Community is framed. It believes that in particular from Regulation No 729/70 of the Council and Council Directive No 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties (Official Journal, L 73, p. 18), it is possible to infer a clear indication that the Community legislature leaves the question of interest to national provisions laid down by law, regulation or administrative action.

Article 8 of Regulation No 729/70 contains a general reference to national law as regards the correct execution of all transactions financed by the Fund. According to that provision Member States are required to ensure that transactions are correctly carried out in accordance with national provisions laid down by law, regulation or administrative action. In particular they must ensure that denaturing premiums are

granted only on the conditions contained in the Community regulations and that any infringement of Community legislation by traders is appropriately punished. To that end the Member States must carry out checks and in addition, by applying the relevant national implementing rules, take all measures necessary to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence. The charging of interest by Member States on claims for the repayment of sums lost as the result of irregularities or negligence helps to achieve those two objectives.

The fact that under the regulations now in force interest is not paid to the Fund but credited by the Federal Budget does not alter the fact that the charging of interest is a measure within the meaning of Article 8.

Finally the Government of the Federal Republic of Germany also refers to the system of cooperation between Member States introduced by the Council in the aforesaid Directive No 76/308 to recover sums owed to the Fund, as well as agricultural levies and customs duties. That system, too, is based on the principle that the making of rules on interest and the fixing of interest rates is the responsibility of the Member States. Article 2 (d) of the directive expressly states that the rules may determine and provide for the recovery of "interest and costs identical to the recovery of the claims referred to above". In the absence of Community provisions that can only mean interest on rules laid down by national law.

Since the two other questions were asked only in case the first question was answered in the negative, there is no need to reply to them.

3. The *Commission* states that Community law does not contain any general provision dealing with the charging of interest or any specific provision on the charging of interest where a claim is made for the repayment of wrongly-paid premiums. In principle therefore the Community leaves it to the Member States to implement Community law within their territory by applying their own national provisions laid down by law, regulation or administrative action.

The Commission gives examples of specific cases in which interest is charged under Community law and reaches the conclusion that it is not possible to derive any general legal principles from those provisions of Community law just as it is not possible to apply one of those provisions by analogy to the present case.

The Commission emphasizes that Regulation (EEC) No 283/72 of the Council of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy (Official Journal, English Special Edition 1972 (I), p. 90), which also applies in this case, contains no provision in regard to interest.

The Commission further points out that it has made a formal proposal to introduce uniform rules on interest throughout the Community. However, that proposal was not accepted by the Council. In view of the express adoption of that negative attitude on the part of the Member States it must be that much more difficult for the Commission to attempt to lay down general principles of

Community law on the charging of interest.

The Commission takes the view that the construction which the Verwaltungsgericht places on Article 8 of Regulation No 729/70 of the Council does not take proper account of the allocation of powers between the Community and the Member States resulting from that article.

On the one hand the Community legislature requires Member States to ensure that the measures financed by the Community are implemented and that sums wrongly paid are recovered. On the other hand it also refers to the application of "national provisions laid down by law, regulation or administrative action". Therefore, for the time being, the Community legislature has refrained from laying down rules governing the procedure for recovery and leaves it to Member States to apply their own relevant national legislation. That legislation covers all existing provisions which are applied *inter alia* in national law for the recovery of sums wrongly paid.

However, the reference in Community law to existing or future provisions laid down by law, regulation or administrative action is subject to the limits which the Court has gradually defined in its decisions. In particular, the prohibition of discrimination, which the Court has made a central feature of its case-law, does not forbid derogations on matters of detail by provisions of national law provided that they are objectively justified, that is to say not determined arbitrarily. If, for example as in this case, the German legislature lays down a fixed rate of interest based on a variable factor for the specific purpose of implementing the common organization of the market, whereas in other similar cases governed by national law on subsidies it makes the demand for repayment dependent on proof of the gain actually made, the existence of which may as a rule be presumed and the amount of which must be roughly comparable, such a difference of degree may not be regarded as discriminatory. The different nature of the financial transactions envisaged by Community law and the particular risks involved in view of the size of the amounts in question and the difficulty of supervision warrant the adoption of provisions comparable to those of Article 12 of the Marktordnungsgesetz to enable Community law to be effectively implemented.

In the present state of Community law the Community legislature accepts in principle the application of different rules in the individual Member States. In this regard it makes no express distinction between rules on procedure and those which, like rules on interest, come within the province of substantive law as separate ancillary claims (judgments in *Ferwerda* and *Dairy Foods).* Consequently a province of the law of a Member State which, as in this case, allows interest to be claimed on the restitution of sums wrongly paid, is in principle covered by Article 8 of Regulation No 729/70.

Apart from that provision Community law does not contain any general principle of law authorizing Member States to charge interest in cases of this kind. In particular, Article 40 (3) of the EEC Treaty, merely by enunciating the general prohibition of discrimination, places limits on the exercise of the legislative powers of the Community and the Member States but it does not state the reasons for them.

In the Commission's view the decisions of the Court bear out its interpretation of the legal provisions and principles which have been mentioned. Those decisions show that as long as Community law has not regulated a subject or a particular field of law, it is for the Member States to adopt the necessary substantive and procedural provisions, as, for example, in the wide areas concerned with the implementation of Community law.

According to the Commission, the limits which Community law places on Member States were first defined by the Court in cases in which a trader had made a claim for repayment against the administration of a Member State. The Commission cites in this regard the judgments of the Court in the *Roquette* and *Dairy Foods* cases. However, the Court considers that those principles are equally applicable where the case is one of recovering an advantage wrongly granted to a trader (judgments in the *Ferwerda* and *Lippische Hauptgenossenschaft* cases). The Commission is therefore of the view that when recovering premiums which have been wrongly granted Member States may, in the present state of Community law, charge interest pursuant to their own legislation provided that they observe the limits, indicated above, imposed by the prohibition of discrimination when applied to similar financial transactions governed by national law and thus avoid impairing the effectiveness of Community law.

Contrary to the suggestion of the Verwaltungsgericht Frankfurt am Main it is of no importance in this case whether the interest charged is credited to the Community budget or is reserved to national budgets thus entailing, in some circumstances, an unjust enrichment of the Member States.

The Commission therefore proposes that the questions referred to the Court for a preliminary ruling should be answered as follows:

1. In the present state of Community law it is compatible with the Treaty establishing the European Economic Community for the Federal Republic of Germany to charge interest, pursuant to its national law, on denaturing premiums which have been wrongly paid, provided that those provisions, compared with provisions governing the charging of interest in purely national matters are not discriminatory and do not impair the effectiveness of Community law.

2. In referring to national provisions laid down by law, regulation or administrative action, Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 also covers provisions on the charging of interest.

III — Oral procedure

At the sitting on 19 November 1981 oral argument was presented by the following: J. Gündisch, Rechtsanwalt, Hamburg, for the plaintiff in the main action, the undertaking Wilhelm Fromme, H. H. Boie, Oberregierungsrat at the Federal Ministry for Economic Affairs, acting as Agent, for the Government of the Federal Republic of Germany and M. Hilf, a member of the Legal Department of the Commission, acting as Agent, for the Commission.

At the sitting the Commission made submissions on four points which, in its view, the national court should consider:

1. It would be contrary to Community law for the repayment of sums wrongly received under Community law to be subject to rules less favourable to the Community than those applicable to comparable cases governed by national law.

2. One reason for the difference might be that the application of Community law causes greater problems of supervision than the application of national law.

3. Since some provisiors of Community law stipulate interest rates which are higher than those charged in this case Member States cannot be criticized for laying down comparable rates.

4. From the point of view of Community law it is in conformity with the principle of legal certainty for a Member State to apply fixed interest rates and to do so in a measure which is solely concerned with the application of Community law.

The undertaking Fromme emphasized, and the Commission agreed, that an interest rate applying to cases governed by Community law which diverges too far from the national level might impair the effect of Community law for producers would no longer have recourse to denaturing because of the risk of paying high interest would be greater.

The Advocate General delivered his opinion at the sitting on 21 January 1982.

Decision

1 By order of 5 February 1981, which was received at the Court on 11 March 1981, the Verwaltungsgericht [Administrative Court] Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions as to the interpretation of various provisions of the EEC Treaty, certain principles of Community law and Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) to enable it to decide whether Article 11 (1) of the Order of the Federal Minister of Food, Agriculture and Forestry of 8 August 1968 concerning premiums for the denaturing of cereals (Bundesanzeiger No 148 of 19 August 1968), as amended by the Order of 14 February 1973 concerning the adjustment of the rules on interest laid down in orders implementing the common organizations of the markets (Bundesanzeiger No 34 of 17 February 1973), which makes provision for interest, which accrues to the Federal Budget, to be charged on wrongly-paid denaturing premiums, is compatible with the above-mentioned provisions and principles.

2 Those questions were raised in an action between a German dealer in agricultural products, the undertaking Wilhelm Fromme, and the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as "the Bundesanstalt"] which claimed from that undertaking the repayment of premiums for the denaturing of common wheat, which are provided for by Regulation No 172/67/EEC of the Council of 27 June 1967 on general rules governing the denaturing of wheat and rye of bread-making quality (Official Journal, English Special Edition 1967, p. 139). Both parties agree that those premiums were wrongly paid. By separate decisions and pursuant to the aforesaid orders the Bundesanstalt claimed from the undertaking Fromme interested calculated from the date of payment of the premium until the date of its repayment at a rate of 3 % above the discount rate of the Federal German Bank and in any event at a rate not less than 6½ %. Fromme's objection to those decisions was rejected and it then brought an action contesting them before the Verwaltungsgericht.

3 The questions referred to the Court of Justice by that court were worded as follows:

"1. Is it compatible with the Treaty establishing the European Economic Community for the Federal Republic of Germany to charge on undue payments of denaturing premiums interest calculated from the day of payment at 3 % above the prevailing discount rate of the German Federal Bank but in any event at not less than 6·5 %, without being authorized to do so by any provision of Community law?

2. If the answer to the foregoing is in the negative: Does Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) confer any authority entitling the Federal Republic to charge interest of the kind mentioned in Question 1?

3. If the answer to the foregoing is in the negative:

Is there any other provision or general principle of Community law from which such authority may be deduced?"

4 In order to answer those questions, which should be considered together, it must be recalled that the Court, whilst regretting the difference in treatment which such a solution may cause between traders in the various Member

States, has repeatedly held in its decisions that actions for the recovery of sums which have been wrongly paid under Community law must be decided by national courts in accordance with their own national law in so far as Community law has not provided otherwise. In particular, it is for the national authorities to settle all ancillary questions relating to such recovery, such as the question of payment of interest.

5 Therefore, by providing that Member States are, in accordance with national provisions laid down by law, regulation or administrative action, to take the measures necessary to recover sums lost as the result of irregularities or negligence, Article 8 of Regulation No 729/70 does no more than confirm expressly an obligation already incumbent on the Member States by virtue of the principle of cooperation enunciated in Article 5 of the Treaty.

6 However, in its above-mentioned decisions the Court has placed limits on both the express reference to national laws contained in Article 8 of Regulation No 729/70 and the implied reference which has been acknowledged to be necessary in the absence of Community rules. Thus the application of national law must not adversely affect the scope or impair the effectiveness of Community law by making the recovery of sums wrongly paid impossible in practice. Nor may it make the recovery of such sums subject to conditions or detailed rules less favourable than those which apply to similar procedures governed by national law alone. In such matters the national authorities must proceed with the same care as they exercise in implementing corresponding national laws so as not to impair, in any way, the effectiveness of Community law.

7 In establishing those limits on the reference to national law the Court has held with regard to the relationship to procedures for determining similar, but purely national, disputes that the application of national law on the basis of that reference must be effected in a non-discriminatory manner as compared with those procedures. The rule against discrimination so enunciated also implies that the obligations imposed by national legislation on undertakings which have been wrongly granted pecuniary advantages

based on Community law must not be more stringent than those imposed on undertakings which have wrongly received similar advantages based on national law, assuming, however, that the two groups of recipients are in comparable situations and therefore that that different treatment is not objectively justifiable.

8 Since at its present stage of development Community law has no rules governing the procedure for the recovery of wrongly-paid denaturing premiums and particularly as to whether interest should be charged on their recovery, it follows from the foregoing that, within the limits indicated above, it is compatible with Community law for a Member State to charge, in accordance with its national law, interest which, in the absence of rules requiring it to be paid to the Community, accrues to its own budget.

9 Even if the charging of interest of the kind described by the Verwaltungsgericht cannot be considered as adversely affecting the scope or impairing effectiveness of Community law there may be grounds for the national court to consider, where appropriate, whether the charging of the interest is in conformity with the principle of non-discrimination mentioned above.

10 Therefore the answer to the questions put to the Court should be that it is compatible with Community law in its present state for a Member State to charge, in accordance with the rules of its own national law, interest on wrongly-paid Community denaturing premiums provided that those rules do not give rise to any difference in treatment which is not objectively justified between traders receiving such premiums and those who, as the case may be, obtain similar benefits of a purely national nature.

Costs

11 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in

so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions submitted to it by the Verwaltungsgericht Frankfurt am Main by order of 5 February 1981, hereby rules:

It is compatible with Community law in its present state for a Member State to charge, in accordance with the rules of its own national law, interest on wrongly-paid Community denaturing premiums provided that those rules do not give rise to any difference in treatment which is not objectively justified between traders receiving such premiums and those who, as the case may be, obtain similar benefits of a purely national nature.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 6 May 1982.

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber