OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 12 December 1989 *

Mr President,
Members of the Court,

1. The Verwaltungsgericht Frankfurt am Main (hereinafter referred to as 'the national court') referred to the Court the following question for a preliminary ruling:

'Must Article 1(b) of Commission Regulation No 1821/81 of 2 July 1981 (Official Journal 1981, L 182, p. 10) be interpreted as meaning that the rye in respect of which a carry-over payment is applied for must be owned by the applicant milling undertaking not only on 31 July of the marketing year in question but also at the time when it is milled for human consumption, or is it sufficient if the rye is milled for human consumption by another milling undertaking, to which it was sold by the applicant undertaking after the application was lodged?'

2. The question concerns carry-over payments which may be granted for certain cereals still in stock at the end of the marketing year. These carry-over payments have their legal basis in Article 9(1) of the basic regulation for the cereals sector (hereinafter referred to as 'the basic regulation').[1] This article was amended in 1986, after the material facts in this case.[2]

The carry-over payments are designed to compensate for the fact that, towards the end of the marketing year and in particular just before the beginning of the new marketing year (which begins with a lower intervention price) the monthly increases in intervention prices[3] constitute a very powerful stimulus as a result of which 'cereals that in normal conditions could remain on the market are liable to be offered for intervention'.[4] By providing a payment to compensate to some extent for the difference between the intervention price at the end of the old marketing year and the beginning of the new marketing year, this undesirable increase in the cereals offered for intervention may be avoided.[5]

The regulations

3. Article 9(6) of the basic regulation provides that detailed rules for the application of carry-over payments, and in particular the categories of those entitled to it, are to be adopted in accordance with the procedure laid down in Article 26, that is to

* Original language: Dutch.

1 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ 1975, L 281, p. 1).

2 — See Council Regulation (EEC) No 1579/86 of 23 May 1986 amending Regulation (EEC) No 2727/75 on the common organization of the market in cereals (OJ 1986, L 139, p. 29). On this amendment, see footnote 9 below.

3 — Article 6 of the basic regulation, cited above in footnote 1.

4 — Recitals in the preamble to Council Regulation (EEC) No 1949/81 of 13 July 1981 amending the basic regulation (OJ 1981, L 198, p. 2).

5 — The maximum amount of the payment was laid down at the material date in Article 9(3) of the basic regulation, as amended by the regulation cited in footnote 4.

say the 'management committee for cereals' procedure. This procedure led to the adoption of Commission Regulation No 1821/81 (hereinafter referred to as 'the implementing regulation'), Article 1 of which is at issue in these proceedings. [6]

The recitals in the preamble to the implementing regulation state first of all that stocks of cereal remaining at the end of a marketing year are generally held by the trade or by the processing industry, and therefore, to simplify administration, in particular as regards supervision, the carry-over payment should be granted at the trade or processing industry stage; in the case of rye, supervision requirements are such that the payment should be made only to the milling industry. [7] In the text of the implementing regulation, this recital led, as regards rye, to Article 1(b):

'The carry-over payment fixed by the Council for a given marketing year shall be granted:

...

(b) to milling undertakings, in respect of stocks of rye harvested in the Community to be milled for human consumption and owned by them on the above date.'

'On the above date' refers to '31 July', the date referred to in Article 1(a) with regard to common wheat.

Another recital in the preamble to the implementing regulation states that the arrangements for carry-over payments are connected with those for intervention, so that in order to qualify for carry-over payments the cereal must comply with the quality requirements for intervention. [8] It then states that in the case of rye held by the milling industry, milling for human consumption should be accepted as proof of sufficient quality. [8] This rule is to be found in the second subparagraph of Article 2(2) of the implementing regulation, which reads as follows:

'In respect of rye held by the milling industry at the end of the season, milling for human consumption shall be accepted as proof of sufficient quality.'

4. This case concerns rye which on 31 July 1985, that is to say at the end of the marketing year, was held by Wilhelm-Lampe-Mühle (hereinafter referred to as 'Lampe-Mühle'), a milling undertaking.

According to the third subparagraph of Article 9(1) and Article 9(3) of the basic regulation, the Council must decide before 15 March 1985 whether a carry-over payment should be granted in respect of rye, and, if so, to what extent. [9] In 1984/85,

6 — Commission Regulation (EEC) No 1821/81 of 2 July 1981 laying down the conditions for granting carry-over payments for certain cereals in stock at the end of the marketing year (OJ 1981, L 182, p. 10), and in particular the last recital in the preamble.

7 — First recital in the preamble to the implementing regulation, cited above in footnote 6.

8 — Third recital in the preamble.

9 — Council Regulation No 1579/86, cited above in footnote 2, transferred the power to decide whether or not carry-over payments should be granted wholly to the Commission; see the new Article 9 and the ninth recital in the preamble.

however, the Council had not yet done so, since at the very end of July 1985, a few days before the beginning of the new marketing year, it had not yet fixed prices for the cereals sector; consequently the Commission on 26 July 1985 adopted precautionary measures in Regulation (EEC) No 2124/84 and decided in particular that the Member States should grant a carry-over payment for rye intended for human consumption.[10] The second subparagraph of Article 4(3) of the regulation states as follows:

'For rye held by mills at the end of the marketing year, the milling thereof with a view to human consumption shall be taken as proof of sufficient quality. Proof of such milling shall be given by the end of 1985 at the latest.'

In addition, Article 4(4) states once again that Regulation No 1821/81, that is to say the implementing regulation, applies to the carry-over payments the granting of which (by the Member States) has been decided upon by the Commission.

The main proceedings

5. The preliminary question concerns the interpretation of the implementing regulation, Regulation No 1821/81. Lampe-Mühle brought an action before the national court challenging the refusal on the part of the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agricultural Markets, hereinafter referred to as the 'Federal Office') to grant it a carry-over payment for a consignment of rye (320.08 tonnes) owned by it on 31 July 1985, in its stocks at that date and harvested in the Community. The reason given for the refusal was that, after submitting the application, Lampe-Mühle had sold the rye in question to seven different milling undertakings, each of which had milled its own share of the rye. The Federal Office does not deny that the rye was milled; that is clear from the documents submitted by Lampe-Mühle ('Vermahlungsbestätigung' — declaration of milling), which I will consider further below), on which the respective purchasers confirm that they milled the rye in question. From this declaration it is also clear that Lampe-Mühle did not attempt to conceal that it had sold the rye and that the rye had been milled by the purchasers thereof.

The preliminary question

6. It is clear from an examination of the preliminary question (set out in paragraph 1) that there are two, closely related questions: first of all, whether or not the applicant for the carry-over payment must own the rye at the time of milling, and secondly, whether the rye must be milled by the applicant itself or may be milled by another milling undertaking. In theory, the reply to one question is not determined by the reply to the other. It is possible to imagine rules whereby the applicant milling undertaking must own the rye at the time of milling but may have the rye milled by a third party, just as it is also possible to imagine rules whereby the applicant milling undertaking may transfer to third parties ownership of part of the rye before it is

10 — Commission Regulation (EEC) No 2124/85 of 26 July 1985 on precautionary measures in the cereals sector other than durum wheat (OJ 1985, L 198, p. 31), and in particular the sixth recital in the preamble and Article 4; the precautionary nature of the regulation is referred to in Article 6.

milled but without delivering the rye until it has been milled.

7. In fact, however, it is clear from the terms of the regulation, from the order requesting the Court for a preliminary ruling and from the observations submitted to the Court that the question whether the applicant undertaking must own the rye at the time of milling is of no real importance. The only significant question is who must mill the rye and it is on this question alone that the observations submitted by Lampe-Mühle, on the one hand, and by the Federal Office and the Commission, on the other, differ. According to the Federal Office and the Commission, the rye must be milled by the applicant itself, whether or not it is still owner at the time. Lampe-Mühle considers that the applicant need not own the rye at the time of milling or mill the rye itself.

The question to be determined is therefore whether or not the applicant for the carry-over payment must itself mill the rye.

The two possible interpretations

8. Lampe-Mühle considers that it does not appear from the terms of Article 1(b) that the applicant for a carry-over payment in respect of rye and the milling undertaking which actually mills the rye in question must be the same. This argument, based on a literal interpretation of the provision and confirmed by the form of the 'Vermahlungsbestätigung' used in the Federal Republic, finds support in the fact that the requirement that the rye should be milled for human consumption is purely a *quality* requirement (in other words, the emphasis is on fitness for human consumption), which may be satisfied even where the rye is milled by an undertaking other than that which applied for the carry-over payment.

The Federal Office and the Commission contend that the milling requirement is not purely a quality requirement. In their view it also performs an important *supervisory* function which means that the rye can be milled exclusively by the undertaking applying for the payment. They dismiss the literal interpretation put forward by Lampe-Mühle on practical grounds of supervision, which are in their view also clear from the relationship between the provisions of the regulation and the annexes thereto.

I shall now examine the various arguments in the order which appears to me to be logical, but without stating which of the parties put the argument before the Court.

No indication may be found from the national implementing rules

9. According to the literal interpretation put forward by Lampe-Mühle, Article 1(b) which is at issue imposes only one requirement: that on 31 July the stock of rye must be owned by the milling undertaking which applies for the carry-over payment. The words 'to be milled for human consumption' merely restate the method provided for in Article 2(2) of proving that the rye satisfies the 'minimum quality standards for intervention', that is to

say of showing that the rye is milled for human consumption.

In support of its literal interpretation, Lampe-Mühle annexed to its observations a copy submitted by it of the declarations of milling ('Vermahlungsbestätigungen') the standard form of which was published by the Federal Office in the *Bundesanzeiger* as Annex 2 to a communication on carry-over payments for 1984/1985.[11] According to Lampe-Mühle, it is clear from this form that the applicant and the milling undertaking do not have to be the same. This is, at least, what Lampe-Mühle seeks to show by producing a copy of the declaration which it submitted, and on which at the top, in the space provided for 'name and address of applicant', Lampe-Mühle's address is stated, whereas below, on the line provided for 'date and commune' and 'signature and stamp' *another* milling undertaking is referred to.

10. It seems to me that a form used in the Federal Republic can hardly be relevant as regards the interpretation of the Community rule at issue here. Even if support could be found in that form for Lampe-Mühle's interpretation of Article 1(b) of Commission Regulation No 1821/81, which I doubt,[12] that merely proves the way in which the Federal Office interpreted the regulation but still does not mean that this was also the meaning intended by the authors of the regulation.

The Federal Office's interpretation — even if, as I have said, it were established — might have given rise to a legitimate expectation on the part of Lampe-Mühle. It is not, however, for the Court to determine whether it should have those consequences under national law.[13]

Arguments based on the terms of the regulation

11. The rejection of any arguments which may be derived from the national implementing rules does not necessarily mean that Lampe-Mühle's argument based on the terms of the regulation (see 9 above) is unfounded. I will now examine that argument in connection with other elements which may be derived from Regulation No 1821/81.

As regards the provisions of the regulation, I would state first of all that, although in all the language versions of Article 1(b) the milling requirement and the requirement that the rye must be owned by the applicant undertaking on 31 July appear in a single sentence, it may be concluded from the English version in particular and, to a lesser extent, from the French and German versions that the applicant must also itself mill the rye. In those three languages the milling requirement is mentioned before the requirement that the rye must be owned by

11 — 'Communication No 10/85/21 of 25 July 1985 on the granting of carry-over payments for cereals for 1984/85', *Bundesanzeiger*, 1985, p 8481 *et seq*

12 — In the first annex to the notification, the application form for the payment, the applicant must sign the declaration that 'the rye will be milled by me/us for human consumption' From a comparison of the two forms annexed to the notice, little support can be found for the interpretation which Lampe-Mühle infers from the way in which it completed the second form, the declaration of milling, as described in 9 above

13 — For the rejection of a claim of legitimate expectation by the German administrative courts, with regard to the (identical) previous regulation, Regulation (EEC) No 1554/73, because the undertaking had obtained no information on the meaning of Article 1(b) which in its view was unclear, see the judgment of the Eighth Senate of the Hessischer Verwaltungsgerichtshof (Administrative Court, Hessen), 30 May 1983, VIII OE 28/79 *Recht der Landwirtschaft* (1983), p. 333, at p 335

the applicant undertaking on 31 July. The text is, however, ambiguous, as appears even more clearly from the Dutch version, in which the milling requirement is referred to at the end.

A different argument may be derived from Annex II to Regulation (EEC) No 1821/81, which states the 'minimum information to be supplied when applying for a carry-over payment'. Point 4, in particular, requires a declaration that 'the cereal belongs to the applicant' and that 'in the case of rye, it will be milled for human consumption'. Again, it is impossible, on the basis of the text, to exclude the possibility that the applicant undertaking might use another undertaking to carry out the milling. There is, however, some doubt as to what is the use of the declaration that 'the rye will be milled', in conjunction with further information required in Annex II, namely the 'place of storage', if the rye may be transported to another milling undertaking for milling.

The Federal Office states that the category of those entitled to the payment is limited under Article 1(b) to milling undertakings on the grounds of supervision, as referred to in the first recital to the preamble. This restriction is narrower than that for other cereals referred to in Article 1(a) and (c), in which all 'trade and processing undertakings' are eligible, not only milling undertakings. The question arises whether this is not an indication that the applicant undertakings must *themselves* mill the rye. Otherwise, would it have been necessary to draw this distinction with other cereals? This contextual argument, in itself quite strong,[14] is weakened by the fact that the regulation could have stated even more clearly and expressly that the applicants must themselves mill the rye, as could easily have been achieved by drafting the provision as follows: 'milling undertakings, in respect of stocks of rye harvested in the Community, to be milled *by them* for human consumption and owned by them on the above date' (emphasis added).[15]

It is clear from this examination of the regulation that none of the arguments based on its provisions can furnish a definitive solution and that in order to interpret the regulation it is necessary to consider the underlying reasons as well, as the Federal Office has already suggested with regard to the last-mentioned argument and as will be shown below.

The argument regarding supervision

12. The Federal Office bases its interpretation, which it acknowledges cannot clearly follow from the text alone, on an examination of the system of control which is centred on the person and undertaking receiving the payment. This system of control consists of measures which the Member States are required to adopt and implement by virtue of Article 8(1) (and the ninth recital in the preamble) of the implementing regulation.

14 — This argument is regarded as important by the Eighth Senate of the Hessische Verwaltungsgerichtshof, with regard to the identical Article 1(b) of Regulation (EEC) No 1554/73, the predecessor to Regulation No 1821/81, in its judgment cited in footnote 13, at p. 334.

15 — This is Lampe-Mühle's literal argument, to which reference is made in 8.

The ninth recital in the preamble to the implementing regulation reads as follows:

'Whereas the procedures and supervision measures as regards stocks of cereals and their movements should be the responsibility of the competent agencies of each Member State; whereas those agencies should take the necessary measures to ensure that Community provisions on the ground of carry-over payments are observed.'

Article 8(1) of the implementing regulation provides as follows:

'For purposes of the implementation of this regulation, the competent authority of each Member State shall carry out the necessary checks. It shall for this purpose adopt all the measures necessary to take account of the special conditions within its territory, particularly with regard to variation and movement of stocks and the time for which the stocks are subject to check.'

The supervisory function of the authorities of the Member State consists of checking stocks at the end of the marketing year and the milling (which may be later) of the various consignments in stock at that date. Apart from physical checks at that moment, which can only be made on random samples, it is necessary for *ex post facto* supervision that the undertakings to be checked should be obliged to keep a stock book and also a milling register containing the consignments of cereal milled.

13. Undertakings are in general required only to keep accounts and not to record individual variations and movements of goods. In the case of the Federal Republic applicants for carry-over payments are obliged by Paragraph 5 of the 'Verordnung über die Gewährung von Übergangsvergütung für Getreide' (regulation on the granting of carry-over payments for cereals) of 9 July 1979 to keep and retain such stock books.[16] This is in accordance with the authority conferred on the Member States in Article 8(1) of implementing regulation (EEC) No 1821/81.

In its observations to the Court, the Federal Office stated that if Lampe-Mühle's interpretation were accepted, proof that the consignments of rye for which a carry-over payment was requested had actually been milled could not always be based on the stock books of undertakings which declare that they carried out the milling.

14. In order to give this argument, which was contested by Lampe-Mühle at the hearing, a fair appraisal, the parties represented were asked[17] whether third parties, that is to say milling undertakings which had not applied for a payment, were subject to accounting obligations which, in addition to physical checks at the relevant time, would enable an equivalent check to be made as to whether the milling obligation had been carried out and could be

16 — 'Verordnung uber die Gewahrung von Übergangsvergutung fur Getreide', 9 July 1979, *Bundesgesetzblatt* I, p. 1021

17 — The precise question asked, to which Lampe-Muhle and the Federal Office and the Commission were able to reply in writing after the hearing, read as follows: 'On what legal basis are milling undertakings not applying for a carry-over payment in the Federal Republic of Germany required to keep, retain and make available systematic records on entries and exits of cereals (a "stock book") and on millings of cereals (a "milling register")'

supplemented by *ex post facto* checks of the accounts. [18]

In this regard I would state that, in order to make a serious contribution to supervision, a milling register and stock records must be kept throughout the year, must relate to all millings carried out by the undertaking and must be available for checks by the authorities at any time in the year, by means of a comparison with the stocks and activities established from a physical on-the-spot check.

15. In reply to the question asked, Lampe-Mühle referred to the 'Verordnung über Meldepflichten der Getreide-, Stärke- und Futtermittelwirtschaft', of 26 June 1978, [19] which requires all milling undertakings which mill a minimum quantity per annum to make monthly returns giving data relating to stocks at the beginning of the year, stock changes during the year, and stocks at the end of the period. [20] The necessary information to enable them to make these returns must be made systematically and kept for three years. [21]

In its observations on this information supplied by Lampe-Mühle, the Federal Office states that these compulsory returns were introduced for another purpose and are consequently not specifically adapted to supervision of the carry-over payments at issue and in particular are expressed globally, in tonnes — that is to say, in quantities. They therefore cannot guarantee that registers will in fact be kept of the origin and destination of individual consignments. The Federal Office acknowledges, however, that such records are probably required in order to comply with the obligation to make returns. It states in addition that small milling undertakings are either not subject to that obligation (if their annual turnover is less than 250 tonnes) or required to make declarations at different intervals (if they have a turnover of between 250 and 500 tonnes).

16. As regards the supervision argument and the parties' comments on it, I would point out that in its judgments on aids the Court has always attached great importance to interpretations which promote the effective supervision of the use of the Community's financial resources. [22]

The argument put forward by the Federal Office on supervision must therefore be given serious consideration. In view of the aim of the carry-over payments in question, which are intended to subsidize

18 — The Federal Office had in particular stated in its written observations that the fact that it also has, under the general provision laid down in Paragraph 33(2) of the 'Gesetz zur Durchführung der gemeinsamen Marktorganisationen' (Law on the implementation of the common organization of the market, as contained in the notice of 27 August 1986 in *Bundesgesetzblatt* I, p. 1397) a right to check milling undertakings which acquire the rye, does not solve the problem, since such purchasers not applying for a carry-over payment are not required to keep stock and milling records. In other words, the Federal Republic could make an on-the-spot check but find no evidence. The question asked was intended to give Lampe-Mühler an opportunity of refuting this argument.

19 — *Bundesgesetzblatt*, 1978, I, pp. 883 to 888.

20 — Paragraph 2(1) and (2) of the Verordnung and Annex I thereto.

21 — Paragraph 5 of the Verordnung.

22 — Both in paragraph 12 of the judgment of 12 December 1985 in Case 276/84 *Metelmann* [1985] ECR 4057, referred to by the Commission, and in the judgments of 3 January 1985 referred to by Lampe-Mühle, namely Case 20/84 *De Jong* [1985] ECR 2061, paragraph 17, and of 1 October 1985 in Case 125/83 *Corman* [1985] ECR 3039, paragraph 22, the Court accepted an interpretation of an agricultural regulation which guaranteed the efficacy of the system of control.

consignments of rye which are in the stocks of milling undertakings at the end of the marketing year, that is to say in this case on 31 July, it is a matter of interpreting the provision in question in such a way that the supervision measures adopted by the Member States are not rendered ineffective or unnecessarily complicated. At the same time, however, it is necessary to ensure that the supervision measures are kept within reasonable limits and interfere with normal dealings as little as possible.

Under those circumstances it seems to me that it is not incompatible with Article 1(b) of Commission Regulation No 1821/81 for stocks owned by the applicant milling undertaking at the end of the marketing year to be milled by different milling undertakings, provided that they are capable of supplying the supervisory authorities, by means of reliable stock records and a reliable milling register, with detailed information equivalent to that which the applicant milling undertaking must itself provide, that they keep such information at the disposal of the supervisory authorities — and if necessary send the books to those authorities — and that they also allow the supervisory authorities to carry out an on-the-spot check on their premises if they so wish.

It is of course for the national court to examine whether these conditions may be satisfied in this case.

Conclusion

17. On the basis of the foregoing considerations, I propose that the Court should give the following reply to the preliminary question:

'Article 1(b) of Commission Regulation (EEC) No 1821/81 of 2 July 1981 (Official Journal 1981, L 182, p. 10) must be interpreted as meaning that rye for which a carry-over payment is requested and which is owned by the applicant milling undertaking at the end of the marketing year may also be milled for human consumption by other milling undertakings on condition that the latter are in a position to supply the supervisory authorities, by means of reliable stock records and a reliable milling register, with detailed information equivalent to that which the applicant milling undertaking must itself supply, that they keep such information at the disposal of the supervisory authorities — and if necessary send the books to those authorities — and that they also allow the supervisory authorities to carry out an on-the-spot check on their premises if they so wish.'