OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 26 FEBRUARY 1975 [1]

Mr President,
Members of the Court,

1. The question referred by the German administrative court concerned the validity of Regulation (EEC) No 849/70 of the Commission of 11 May 1970, which revoked the increase in the denaturing premium for common wheat having a specific weight exceeding 77 kg/hl provided for by Regulation (EEC) No 1403/69 of the Commission of 18 July 1969. This involves establishing whether Regulation No 849/70 is invalid owing to:

(a) inadequacy of the statement of reasons for it; or

(b) its lack of legal basis;

and, if the answer is in the negative, whether the first two articles of the regulation should not in any case be treated as without effect in as much as they also apply to common wheat purchased by a denaturer before the regulation came into force.

In times like those we live in, when there is a scarcity of wheat on the world market, an undertaking which objects to the withdrawal of an increase in the premium designed to encourage wheat to be used for purposes other than human consumption is liable to evoke a spontaneous and unfavourable reaction. But we must not forget that the application which the firm of Deuka is making in the case pending before the German court refers to the 1969/70 marketing year for cereals, a period which was certainly not marked by any scarcity of wheat and the world market. The application is also the result of the fact that the mechanism of denaturing premiums for wheat continued to exist and to be applied even after the period which witnessed the events which are the underlying cause of the dispute before the German court.

Before considering the questions from the German court, let me briefly remind you of the Community instruments on the denaturing of wheat which may be relevant in these proceedings.

The power to grant a denaturing premium for common wheat, provided for originally under Article 7 (3) of the EEC Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals, was based on ground rules set out in Regulation No 172/67/EEC of the Council of 27 June 1967. The first recital of this regulation expressed the need for methods of denaturing to be effective enough to prevent the denatured cereal from being placed again on the market for human consumption. The purpose of denaturing is, in fact, to maintain a market for products which cannot find a natural outlet by diverting some of them from their normal use. In the case with which we are concerned, wheat rendered unfit for human consumption is normally used for the production of fodder.

Under Article 5 of the regulation the amount of a denaturing premium shall be fixed at such a level as not to cause disturbances on the barley and maize markets. Under Article 5 of Regulation No 242/67 of the Commission of 30 June 1967, laying down detailed rules for the application of the aforesaid provisions, the denaturing premium shall consist of a component allowing for the differences between the prices for common wheat and for barley and

1 — Translated from the Italian.

another allowing for the technical costs of denaturing.

Considering the expense which this method of maintaining the market means for the public, it is clear that its use must be confined to what is strictly necessary for the pursuit of its legal purpose. The rules concerned ensure that the premium is paid only in respect of cereals which meet given standards of quality (Article 2 of Regulation No 242/67). Moreover, provision is made in Article 7 (2) for the premium to be reduced in the case of cereals having a specific weight less than that fixed for the standard quality. No provision is however made for any mechanism to ensure an overall limit of quantity. However, under Article 7 of Regulation No 172/67, to qualify for the premium, denaturing must be effected with the prior agreement of the intervention agency and under its supervision.

The Community legislators were also concerned to safeguard the interests of undertakings engaged in denaturing operations. The third recital of the Council regulation referred to accordingly provides that the existence of the 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. Article 4 (1) of the regulation therefore provides that the premium shall be fixed before the beginning of and for the duration of each marketing year.

The provision in Article 4 for the amount of the premium to be varied refers both to the fixing of a different basic premium for different periods of the year (as, for example, under Regulation No 957/68 of the Commission of 12 July 1968) and the power to fix increases or reductions in the premium according to variations in the marketability of the various types of common wheat. The Commission made use of this power in Regulations No 956/68 and No 1403/69 of 18 July 1969, which provide that, when common wheat to be denatured has a specific weight exceeding 77 kg/hl, the denaturing premium shall be increased by applying certain percentages to the basic intervention price for common wheat valid at the beginning of the marketing year.

Moreover, in order to make it, generally speaking, still easier to dispose of wheat on the internal market, the Commission, in Regulation No 1404/69, granted a further incentive for denaturing by making provision for a fixed sum of 2·50 units of account to be added to the first of the two components of which the premium consists, i. e., for the sole purpose of calculating the premium, artificially increasing the price difference between common wheat and barley.

Finally, in view of the increased quantities of stocks and the difficulty of storing them, the Commission, in Regulation No 1583/69 of 8 August 1969, provided for a further increase of 2 units of account in the amount of the premium.

2. However, Regulation No 172/67 involved a lacuna in that it failed to make it possible for the premium to be adjusted during the crop year. Experience had shown that inability to adjust the premium during the crop year could, when the factors on which it is based change considerably during the year, reduce or increase the incentive for operators to denature cereals, thus disturbing the balance of the market, in particular when the market situation obliges intervention agencies to buy in large quantities of cereals. In view of this, the Council, in Regulation No 644/68 of 29 May 1968, declared that, although it was necessary to publish the amount of the premium before the beginning of the crop year, adjustments should be allowed where the balance of the market was likely to be disturbed by the factors referred to above. To this end it supplemented Article 4 (1) of Regulation No 172/67 by making it possible for the premium to be adjusted

during the crop year 'where the balance of the market in cereals is likely to be disturbed'.

The Commission took advantage of the power thus provided for in Regulation No 849/70 of 11 May 1970, and it is with the validity of that regulation that this case is concerned. In that instrument the Commission declared that present circumstances in the market in cereals of breadmaking quality, and in particular the satisfactory progress made in the disposal of surpluses of common wheat of a high specific weight, might disturb the market in that cereal where denaturing was still encouraged, and repealed the provision in Article 4 (2) of Regulation No 1403/69 for the denaturing premium to be increased when common wheat to be denatured has a specific weight exceeding 77 kg/hl, no change being made in the other increases of a general nature provided for under Regulations No 1404/69 and No 1583/69, to which reference has been made above.

3. The set of rules which emerges from the abovementioned provisions of Council Regulations No 172/67 and No 644/68 is primarily intended to ensure that, in the public interest, the market in cereals should function properly and at the same time satisfy the desire of private undertakings to be able to rely in principle, on the rules remaining unchanged, and, in particular, on the advantages provided for denaturing wheat continuing in force during a crop year. However, the fact that the Community legislators have not provided for cereals a mechanism such as that for denaturing sugar, by means of entitlement to a denaturing premium which ensures that the amount of premium remains the same throughout the year, shows that, for reasons of economic and market policy, on whose wisdom the Court is not competent to pass judgment, the legislators intended that the interests of private parties should, in the case of cereals, be subordinated to those of the public much more clearly and decisively than in the case of sugar. They wanted not only to ensure that the Community authority remained free to vary the amount of the premium for denaturing common wheat during the crop year, but also to avoid giving particular undertakings individual guarantees in respect of their annual denaturing programmes.

Although there is no legal guarantee that the amounts fixed at the beginning of the crop year for the denaturing premiums for cereals will remain unaltered, operators who rely on the premiums in committing themselves on the market are, thanks to a fundamental requirement of a system based on the principles of the rule of law, nevertheless guaranteed against the premiums being arbitrarily altered by the rule which makes exercise of the Commission's power to vary the premium during the crop year dependent upon a change in the factors on which the level of the denaturing premiums is based. And it is not a question of just any change, but of a substantial one, which is liable to disturb the balance of the market, as would, in particular, be the case if the market situation in cereals was likely to oblige intervention agencies to buy in large quantities. This is, as we have seen, the effect of the rule introduced by Regulation No 644/68 of the Council supplementing Article 4 (1) of Regulation No 172/67 in the light of the first recital of Regulation No 644/68.

The fact that, in the recitals of Regulation No 644/68, the Community legislators expressly refer to such a combination of circumstances indicates that, when they made provision for adjustments during the crop year, a situation of surplus was uppermost in their minds and, in consequence, an adjustment of the premium in an upward direction. While, of course, this does not rule out the possibility of the regulation being applied in the reverse situation, it does serve to shed light on the situation 'where the balance of the

market in cereals is likely to be disturbed' which, under Regulation No 644/6 of the Council, must be established as existing before there can be any adjustment of the premium during the crop year.

More specifically, the concept can have a different connotation depending upon whether it refers to a situation of substantial surplus or to a situation in which the sales difficulties justifying the institution or the increase of the premium have ceased.

As the first case involves a possible increase of the denaturing premium during the crop year, it is understandable that, being essentially concerned with this set of circumstances, which reflected the market situation of that time, the Community legislators should wish to proceed with the greatest caution, as is proper when further demands are being made on public funds, especially when the operations financed thereby have the effect of depreciating the value of the goods concerned.

If the second case is viewed from the standpoint that denaturing wheat, with the object of using it for a different purpose from the normal one, is an 'anti-economic' operation which is justified only in so far as it is necessary in order to avoid the worse evils which could result from a surplus of the product on the market, the only conclusion that can be reached is that, once the underlying reasons for such justification cease to exist, to continue to encourage denaturing would itself constitute a threat to the balance of the market by distorting its normal working; and this is due not so much to the unnecessary expenditure to which denaturing processes give rise as to the reduction in the commercial value of the product and its unnatural diversion from the use to which it is normally put.

4. I now turn to the questions put by the German court.

The first concerns the adequacy or otherwise of the statement of reasons for Regulation No 849/70 of the Commission of 11 May 1970.

On the assumption that a preliminary ruling which the Court may be called upon to give on the question of validity is in principle — as may be inferred from the Court's judgment in Joined Cases 21-24/72 (Internation Fruit Co., Recueil 1972, p. 1226, paras 4-6) — no more restricted in its scope or subject-matter than one which the Court may be called upon to give in proceedings for annulment where the legality of a measure adopted by the Community Executive is being challenged, there is no justification for applying different criteria in assessing the adequacy of the statement of reasons according to whether the validity of a decision is being reviewed under Article 177 or its legality is being reviewed under Article 173 of the Treaty.

The only distinction which may be validly drawn in this context is between a measure affecting an individual or individuals an a legislative act of general application. The case-law of this Court has established that the criteria to be applied to the statement of reasons for a legislative measure are less strict than those applicable to decisions addressed to individuals. In the case of a measure which forms part of a complex system it could be accepted that, as it appears in its context, a statement of reasons, even though not in itself exhaustive is capable of being clarified by other legislative measures of earlier date and of which those who are commercially engaged in the sector concerned may be deemed to be aware.

In its judgment in *Beus GmbH*, (Case 5/76, Receuil 1968, p. 129) the Court ruled that the extent of the requirement laid down by Article 190 of the Treaty to state the reasons on which measures are based depends on the nature of the measure in question. In the case of a measure such as a regulation, intended for general application, the statement of the reasons on which it is based may consist of nothing more than an

indication of the overall position which led to its adoption and of the general objectives it is designed to achieve. It cannot, therefore, be contended that the statement should identify the sometimes numerous and complicated considerations of all kinds which led to its adoption, even less that it should contain a fairly comprehensive appraisal of their comparative importance. These principles were reiterated in the judgment in Case 80/72 *Koninklijke Lassiefabrieken* [1973] ECR 650.

The reasons for the provision revoking the increase in the premium are set out in the second and third recitals of Regulation No 849/70.

After reference, in the first recital, to the enactment which conferred power to alter the denaturing premium during the marketing year, the Commission, in the second recital, refers to the circumstances prevailing at the time in the market in cereals of breadmaking quality and, in particular, to the satisfactory progress made in the disposal of surpluses of common wheat of a high specific weight, with consequent risk of disturbance of the market in that type of cereal if the increase in the denaturing premium were to be maintained.

It is clear from the observations submitted in the course of these proceedings that the result of this progress was to remove the danger of excessive sales to the intervention agencies of common wheat of a high specific weight, a danger which, as the representative of Deuka himself recognized, had led to introduction of the special increase in the premium for that type of cereal; indeed, certain milling interests had even experienced supply difficulties.

In the light of these details, the above-quoted reference made in the regulation to satisfactory progress in disposing of the product in the Community is sufficient to account for the disappearance of the conditions which led the Commission to introduce the special increase in question.

As, in fact, this increase represented nothing more than the response to an abnormal situation, the removal of the danger which gave rise to it means that, if the Commission continued to apply it, it would have been possible to divert the 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. Giving medicine to a person in good health is itself harmful. Accordingly, in circumstances where the disposal of a product is being brought back to normal, a statement that there is a threat of disturbance of the denaturing premium is left unchanged, to which there is a reference in Regulation No 644/68 of the Council, is in itself sufficient justification because the premise on which the decision is based lies in the fact that satisfactory progress has been made in the disposal of the product.

This is sufficient to justify replying in the negative to the first question put by the German court concerning the statement of reasons for Regulation No 849/70 of the Commission.

5. As regards the question concerning the existence of a real threat of disturbance which, under Article 1 of Regulation No 644/68 of the Council is laid down as a condition for altering the denaturing premium during the marketing year, the Deuka undertaking point out that this condition could have been fulfilled only if there had been a widespread shortage of the product concerned throughout the whole Community, whereas, owing to the volume of stocks held by the intervention agencies, which would have made it possible for an adequate supply to be available to the end of the current marketing year, or to the possibility of replacement, in order to meet the need of the milling industry, of common wheat of a high specific weight by

common wheat of average specific weight, there was no such shortage.

Even if these statements corresponded with economic reality, they would not suffice to exclude the existence of the legal condition laid down for altering the premium because they would not, in any case, invalidate the reality that satisfactory progress had been made in the disposal of the product concerned, which, as has been seen, is enough to satisfy the aforesaid condition enabling the premium to be altered in a downward direction. A shortage was not to be regarded as proof of the disturbance which the premium might create but serves only, and *a fortiori*, to demonstrate that reason justifying an increase in the premium no longer existed.

In view of the limitations which must, in accordance with the precedents established by this Court, circumscribe any review it undertakes of the way in which the Community Executive exercises its power to appraise, in terms of furtherance of the objectives of the common policy, complex economic situations (see the judgment in Case 57/72, *Westzucker*, [1973] ECR 340, 14), I do not regard the facts alleged or the arguments adopted by the Deuka undertaking as capable of demonstrating that the regulation in question is, in the context of the existence of the threat of disturbance alleged by the Commission, so defective as to be invalid.

6. As regards the last question from the national court, I would observe that, on the other hand, the considerations advanced by the Commission cannot explain why it should be necessary to withdraw the benefit of the increase in the premium even from those cereals which were already set aside for denaturing in fulfilment of contractual obligations undertaken before the regulation was issued, and in respect of which the agreeement of the intervention agencies, as provided for under Article 7 of Regulation No 172/67 of the Council, could be regarded as having been received. It is difficult to see how, in respect of supplies already validly committed and which could not normally in any case have been put on the market again for use otherwise than in the way intended, continuation of the benefit in question could possibly create disturbances on the market in the product. Incidentially, I would observe that it does not appear from the evidence that the Deuka Company had, at the material time, set aside abnormally large quantities of the product for denaturing. If we apply the principle of the means matching the end and of the restriction imposed on individuals being reasonable in relation to the resultant advantage for the community, the regulation cannot be regarded as being applicable to common wheat of a high specific weight which was denatured after it came into force, in accordance with firm commitments entered into in the normal course of business before the regulation was adopted.

The need for legal certainty which, because of the concomitant commitments and obligations, plays a part in the development of economic activity, also requires that when a market system is altered and specific economic operations are deprived of something to their advantage or subjected to a heavier obligation, an exception must be made of those operations which constitute nothing more than straightforward discharge of obligations contracted for under the requirements of the system which was more favourable, unless this is incompatible with the achievement of the objectives of the new system. It was precisely on the basis of the need to ensure that the new system is fully effective, and in the light of the detailed arrangements under the system of denaturing licences for sugar, that in your judgment in Case 57/2 *Westzucker* [1973] ECR 342, you held that there was no obligation to provide for transitional provisions for the benefit of undertakings who had already entered

into commitments before they had an advance-fixing 'premium certificate' for the quantities of sugar required to fulfil those commitments.

Considerations of this kind could have no relevance in the present case.

The Commission has, of course, on several occasions given full weight to the need for legal certainty in connexion with compensatory monetary charges and has adopted transitional provisions which exempted operations arising from contracts concluded before a certain date from imposition of the new charges; see, for example, Article 4 of Regulations No 1013/71 of 17 April 1971 (OJ L 110/8) and No 2887/71 of 13 December 1971 (OJ L 288/57) and, more recently, Article 2 of Regulation No 2966/74 of 25 November 1974, (OJ L 316/5).

In the absence of transitional provisions on the same lines, in the present case the date when the regulation revoking the increase in the premium was adopted must be the basis used. This must hold good at least in circumstances where, before that date, the firm which later carried out denaturing in fulfilment of previous commitments had, in respect of the denaturing operations provided for thereunder, completed, as far as the intervention agencies are concerned, the formalities laid down in Article 7 of Regulation No 172/67 of the Council. This is because, for that very reason the firm would by then have already become entitled to receive the premium provided for under the arrangements at that time in force. Apart from the need for legal certainty, respect for acquired rights is another, even stronger, reason why, in such circumstances, the regulation should not be applied.

When, in Case 1/73 *Westzucker* [1973] ECR para. 5 of the judgment and in Case 143/73 *Sopad* [1973] ECR 1441, para. 8 of the judgment, the Court recalled a generally accepted principle that 'the laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law', it was referring to the application of a new legislative provision which is of greater benefit to the undertakings, and the principle certainly does not operate to undermine the foundations of the solution recommended in the case of a new system of less benefit in circumstances involving protection of an acquired right.

Finally, considerations of public interest which, in my view, justify the decision to discontinue future allocations of a premium which would no longer have served any purpose and whose effect would even have been prejudicial to the economy, are insufficient to justify, in terms of individual rights, discontinuing payment of the premium promised at a time when expectations were underwritten by the force of a regulation which was amended only after the undertakings had entered into commitments towards their clients and the intervention agencies.