OPINION OF ADVOCATE GENERAL LÉGER

delivered on 4 December 1997 *

1. Are recipients of Community subsidies paid in error entitled to plead that the enrichment no longer exists, as they are entitled to do under their national law, in order to resist the recovery of the subsidy? That, in substance, is the issue in the case referred to the Court by the Verwaltungsgericht Frankfurt am Main.

2. In order to support Community production, the grant of a subsidy for oilseeds harvested and processed within the Community is provided for by Article 27(1) of Council Regulation No 136/66/EEC of 22 September 1966 on the establishment of a common organisation of the market in oils and fats. [1] The principles for granting the subsidy are laid down by Council Regulation (EEC) No 1594/83 of 14 June 1983 on the subsidy for oilseeds, [2] which is supplemented by Commission Regulation (EEC) No 2681/83 of 21 September 1983 laying down detailed rules for the application of the subsidy system for oilseeds. [3]

3. To ensure that subsidies are granted only for seeds which qualify for them, a two-part Community certificate was introduced, [4] one part relating to the identification of the seeds ('the I. D. part' [5]) and the other certifying that the amount of the subsidy has been fixed in advance (the 'A. P. part' [6]).

4. The procedure for 'identifying' seeds is carried out by the competent agency of the Member State from which the subsidy is requested (Article 3 of Regulation No 1594/83, as amended).

* Original language: French.

1 — OJ 1966, 172, p. 1.

2 — OJ 1983 L 163, p. 44. This regulation replaces Council Regulation (EEC) No 2114/71 of 28 September 1971 on the subsidy for oilseeds (OJ 1971 L 222, p. 2), which was last amended by Council Regulation (EEC) No 851/78 of 24 April 1978 (OJ 1978 L 116, p. 4). Regulation No 1594/83 was repealed on 1 July 1995, i. e. after the material events, and was replaced by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105).

3 — OJ 1983 L 266, p. 1. This regulation was amended several times, finally by Commission Regulation (EEC) No 2964/91 of 9 October 1991 (OJ 1991 L 282, p. 15), before being repealed on 1 July 1996 and replaced by Commission Regulation (EC) No 658/96 of 9 April 1996 on certain conditions for granting compensatory payments under the support system for producers of certain arable crops (OJ 1996 L 91, p. 46).

4 — Article 4 of Regulation No 1594/83, as amended by Council Regulation (EEC) No 935/86 of 25 March 1986 (OJ 1986 L 87, p. 5).

5 — Pursuant to Article 5 of Regulation No 2681/83.

6 — Ibid.

5. In practice, the subsidy paid to the processer takes the form of a refund of the difference between the Community target price and the world market price. In accordance with Article 33 of Regulation No 2681/83, it is fixed by the Commission 'whenever the market situation makes it necessary and in such a way as to ensure its being applied at least once a week'. First, the Commission fixes the 'gross' subsidy in ecus. This figure is converted into the national currencies, plus or minus a correction factor, to give the 'definitive' subsidy. Finally, this figure is converted into the currency of the State where the seed is processed, if it was not produced in the same State, at the spot and the future exchange rate of the ecu in the national currencies. Consequently the subsidy varies from one State to another, depending on the monetary situation of each State.

6. The issue in the main proceedings brought by two oil mill operators, Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH&Co. KG ('the plaintiffs in the main proceedings') against the Bundesanstalt für Landwirtschaft und Ernährung (the German authority responsible for the administration of Community subsidies, 'the defendant in the main proceedings') is whether the partial recovery of subsidies granted for the processing of rape is lawful.

7. Each plaintiff purchased a large quantity of rape from suppliers who guaranteed the origin of the goods. On both occasions the defendant in the main proceedings initially issued identification certificates showing the origin of which it had been informed and granted the corresponding subsidies.

8. Following investigations by the competent customs authorities, which showed that the origin of some of the goods differed from that for which the subsidy had been granted, the defendant in the main proceedings, by partial revocation and recovery notices, annulled the identification certificates in relation to the amount paid in error and also annulled the notices of grant, at the same time demanding the repayment by each plaintiff of the corresponding proportion of the subsidy granted.

9. As their objections were rejected, the oil mill operators brought an action before the Verwaltungsgericht Frankfurt am Main seeking the annulment of the notices in question. In essence their arguments are the same.

10. While denying that the origin of the goods was that disclosed by the customs investigations, they contend that they have been deprived of the greater part of the enrichment in the form of the subsidy because they passed the pecuniary advantage on to their respective suppliers by paying the target price. They add that their rights of recourse against the suppliers are in practice worthless, primarily because of the expiry of

the limitation periods and the fact that the suppliers are insolvent. However, they offer to assign any rights to indemnification which they may have against the suppliers.

11. The national court points out that, in German law, although decisions granting advantages unlawfully must in principle be revoked, [7] the recovery of illegally granted subsidies may be precluded if the recipients are in a position to plead loss of the enrichment. [8] However, the loss of enrichment cannot be pleaded where the person who should make repayment was aware of the circumstances rendering the administrative act illegal or was unaware of them as a result of gross negligence. [9]

12. By virtue of these provisions, the national court is inclined to the view that the enrichment of the plaintiffs no longer exists and that consequently the defendant's repayment notices should be annulled as unlawful.

13. However, the national court is in doubt as to whether that plea can be entertained because of the limits laid down by the Court's case-law with regard to the recovery of payments made in error, to which I shall revert later, particularly in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633. The national court justifies its reservations by observing that, in circumstances such as those in point in the present case, 'as a result of the application of the principles of the rules on enrichment, aid which has been paid out cannot normally be reclaimed, particularly where the pecuniary advantage gained from the aid has already been passed on to third parties ... and save in cases in which the recipient is aware of the circumstances giving rise to the illegality or in cases of gross negligence, *a fortiori* since allowable claims for compensation on the part of recipients of aid against their suppliers are mostly doubtful, by reason of difficulties in enforcing them, and are thus worthless'. [10] The national court adds that it finds support for its reservations in the Court's case-law concerning the repayment of national aid granted contrary to the Community rules. [11] It observes that the Bundesverwaltungsgericht recently sought a preliminary ruling on the similar question of 'the circumstances in which a person from whom recovery is claimed is precluded, pur-

7 — Paragraph 10(1) of the Gesetz zur Durchführung der gemeinsamen Marktorganisation (Law implementing the common organisation of the markets, 'MOG'), in the version published on 27 August 1986, which refers to Paragraph 48(2) to (4) of the Verwaltungsverfahrensgesetz (Law on Administrative Procedure, 'VwVerfG') and to Paragraph 49a(1), first sentence, and (2) of the same Law. These provisions refer to Paragraphs 812 and 813 of the Bürgerliches Gesetzbuch (German Civil Code, 'BGB').

8 — Under the combined provisions of Paragraph 10(1), second part of the first sentence, of the MOG, Article 48(2), sixth sentence, of the VwVerfG (now replaced by Paragraph 49a(2)) and Paragraph 818(3) of the BGB.

9 — Paragraph 48(2), seventh sentence, of the VwVerfG (now replaced by Paragraph 49a(2), second sentence).

10 — English translation of the order for reference, p. 11.

11 — On this point the national court cites the judgment in Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437.

suant to the seventh sentence of Paragraph 48(2), from relying on the loss of enrichment'. [12]

14. In order to resolve these doubts, the Verwaltungsgericht Frankfurt am Main has referred the following question to the Court:

'Is it compatible with Community law for German national law to preclude the recovery of aid wrongly granted for the processing of rape where the recipient, who was unaware of the facts giving rise to the illegality of the notice of grant and whose ignorance thereof did not result from gross negligence (*Paragraph 48(2), seventh sentence, now Paragraph 49a(2), second sentence, of the Verwaltungsverfahrensgesetz*), is able to rely, pursuant to Paragraph 48(2), sixth sentence, of that Law (*Paragraph 49a(2) of the new version*) in conjunction with Paragraph 818(3) of the Bürgerliches Gesetzbuch, on the absence of unjust enrichment, where there would normally be held to be no such enrichment if the recipient has already passed on the pecuniary advantage of the aid at the time when it is granted by paying the target price provided for under Community legislation and has obtained no right of recourse, or merely a worthless right of recourse, against the supplier of the processed rape?'

15. This question must be examined in the light of the Court's settled case-law concerning the recovery of payments made in error.

16. Leaving aside for a moment the particular instance of the recovery of illegal State aid, the Court's case-law has developed essentially in relation to three types of situation. [13]

17. Thus the Court has had to deal with actions for the repayment of amounts received by the State authorities under a national measure which was incompatible with Community law. [14] Other cases involved payments received by national authorities acting on behalf of the Community pursuant to a Community provision which was subsequently found to be invalid. [15] Finally, as in the present case, the Court has previously had to consider claims

12 — The judgment in this case was given on 20 March 1997, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591.

13 — For a general survey, see Gimeno Verdejo, C.: 'El Cobro de lo Indebido en Derecho Comunitario', in *Ordenamiento Jurídico Comunitario y Mecanismos de Tutela Judicial Efectiva*, published by the Basque Government, Department of Justice, the Economy, Employment and Social Security, December 1995.

14 — See Case 33/76 *Rewe* [1976] ECR 1989, and Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165.

15 — See, for example, Case 130/79 *Express Dairy Foods* [1980] ECR 1887.

for the repayment of sums granted by State bodies as a result of the misapplication of Community law. [16]

18. The following principles can be extracted from this case-law: the right to repayment is founded in the Community legal system. On the other hand, at the present stage of development of Community law, the conditions for bringing an action for recovery and the procedural rules governing it remain subject to national law. However, there must be certain limits to the principle that national law applies, as otherwise the uniform application and, consequently, the primacy of Community law may be compromised. [17]

19. The judgment in *Deutsche Milchkontor*, mentioned above, to which the national court refers, [18] seems to me to illustrate perfectly the basic principles in the matter. What it has in common with the present case is that the national legislation in issue is the same.

20. The plaintiffs in the main proceedings there were manufacturers of compound feedingstuffs and companies trading in milk products. The German authority responsible for paying aid for the processing of skimmed-milk powder sought the recovery of wrongfully paid aid on the ground that the milk for which the plaintiff undertakings had received the aid did not fulfil the conditions laid down by the Community legislation. The plaintiffs resisted the claim for recovery by pleading Paragraph 48 of the VwVerfG.

21. The Court began by pointing out that by virtue of Article 5 of the Treaty 'it is for the Member States to ensure that Community regulations, particularly those concerning the Common Agricultural Policy, are implemented within their territory' [19] and then inferred, from this duty of cooperation, that 'in the absence of provisions of Community law, disputes concerning the recovery of amounts unduly paid under Community law must be decided by national courts pursuant to their own national law'. [20]

22. Therefore, although the principle in this matter is that national law must be applied *in the absence of applicable Community rules*, that principle cannot be unconditional and must be reconciled with the need to apply Community law uniformly so as to avoid unequal treatment of producers and traders.

16 — See, for example, Joined Cases 119/79 and 126/79 *Lippische Hauptgenossenschaft* [1980] ECR 1863, and Case 265/78 *Ferwerda* [1980] ECR 617.

17 — A. Barav, 'La Répétition de l'Indu dans la Jurisprudence de la Cour de Justice des Communautés européennes', *Cahiers de droit européen* 1981, 5-6, p. 507. See also F. Hubeau, 'La Répétition de l'Indu en Droit Communautaire', *RTDE*, 1981, 3, p. 442.

18 — It may be observed that this judgment was also given on a reference for a preliminary ruling from the Verwaltungsgericht Frankfurt am Main.

19 — Paragraph 17.

20 — Paragraph 19.

Consequently certain essential Community imperatives set limits to this procedural independence and constitute the threshold beyond which national law cannot be applied. The reference to national law is 'subject to the limits imposed by Community law inasmuch as *the rules and procedures laid down by national law must not have the effect of making it virtually impossible to implement Community regulations and national legislation must be applied in a manner which is not discriminatory* compared to procedures for deciding similar but purely national disputes'. [21]

23. On the basis of these principles, the Court concluded that 'Community law does not prevent national law [in the present case, Paragraph 48 of the VwVerfG] from having regard, in excluding the recovery of unduly paid [Community] aids, to such considerations as the protection of legitimate expectation, the loss of unjustified enrichment, the passing of a time-limit or the fact that the administration knew, or was unaware owing to gross negligence on its part, that it was wrong in granting the aids in question, provided however that the conditions laid down are the same as for the recovery of purely national financial benefits and the interests of the Community are taken fully into account'. [22]

24. Consequently this judgment is particularly illuminating with regard to the present case, and there are no new factors which would justify a reconsideration of the conclusions it reaches.

25. The case-law to which I have referred shows that there are three limitations on the application of national law and it will be necessary to consider their effects in the present case.

26. First, national law applies 'in the absence of provisions of Community law'. [23] Conversely, national law must yield to Community law when the latter itself regulates the particular question. [24]

27. However, just as in the *Deutsche Milchkontor* case, at the material time in the present case there were no harmonisation measures relating to the recovery of amounts wrongly paid under Community law. [25]

21 — Ibid., emphasis added.

22 — Paragraph 33, and paragraph 3 of the operative part of the judgment.

23 — *Rewe*, cited above, and Case 45/76 *Comet* [1976] ECR 2043 express the same idea when referring to 'the present state of Community law'. *Fewerda*, cited above, was likewise delivered by reference to 'Community law in its present state'.

24 — See, for example, Case 66/80 *International Chemical Corporation* [1981] ECR 1191.

25 — The Commission recognises the existence of this gap in the legislation in stating, in paragraph 31 of its observations, that 'the Community legislation concerning the grant of subsidies for oilseeds does not contain any special provisions for the recovery of subsidies wrongly paid'.

28. With the Court, I certainly deplore this 'regrettable absence', as it may entail differences in treatment on a Community scale, [26] particularly as the legal machinery necessary for the adoption of such measures exists. [27]

29. Nevertheless, 'in the present state of Community law', national rules relating, in particular, to the designation of the courts having jurisdiction and to the procedural conditions governing actions at law, [28] to the time-limits for bringing actions, [29] to the payment of interest [30] and to the recovery of charges unlawfully levied apply, even if they differ from one Member State to another.

30. On this last-mentioned point, which is of particular relevance to the present case, there is now a substantial body of case-law in which the Court has held that national courts may take account 'in accordance with their national law' of the possibility that charges wrongly levied may have been passed on. [31]

31. Thus in the *Just* judgment, which was given in a case concerning the repayment of sums levied by the State authorities under a national measure which was incompatible with Community law (differential excise duty), the Court held that 'Community law does not prevent the fact that the burden of the charges which have been unlawfully levied may have been passed on to other traders or to consumers from being taken into consideration'. [32]

This was confirmed in the *Express Dairy Foods* and the *San Giorgio* judgments: 'national legislative provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay such charges has actually passed them on to other persons'. [33]

32. The Court's reason for finding that the passing-on of the charges may be relied upon in order to resist repayment of the amount wrongly paid remains the same and relates to unjustified enrichment: 'the Community legal order does not require the grant of an order for the recovery of charges improperly levied in conditions such as would involve an unjustified enrichment of assigns ...'. [34]

26 — *Express Dairy Foods*, cited above, paragraph 12. See also Case 54/81 *Fromme* [1982] ECR 1449, paragraph 4.

27 — For example, in *Comet*, cited above, the Court observed that 'Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market' (paragraph 14).

28 — Case 68/79 *Just* [1980] ECR 501, paragraph 25.

29 — *Rewe* and *Comet*, cited above.

30 — *Express Dairy Foods* (paragraph 17) and *Fromme* (paragraph 8), cited above.

31 — *Just*, cited above, and Case 61/79 *Denkavit* [1980] ECR 1205; Case 199/82 *San Giorgio* [1983] ECR 3595; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, and *Comateb and Others*, cited above.

32 — Paragraph 27.

33 — *San Giorgio*, cited above, paragraph 13.

34 — *Express Dairy Foods*, cited above, paragraph 13.

33. The most recent judgments concerning the recovery of national charges which are contrary to Community law confirm the position consistently taken by the Court. Thus in *Comateb and Others*, cited above, and Case C-242/95 *GT Link* [1997] ECR I-4449, after referring to the principle that a Member State must repay charges levied in breach of Community law, the Court added that 'there is, however, an exception to that principle. ... [such repayment is not required] where it is established that the person required to pay such charges has actually passed them on to other persons'. [35] The Court justified this exception as follows: 'In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge'. From this, the Court reached the conclusion that 'it is accordingly for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment', [36] adding that 'if the burden of the charge has been passed on only in part, it is for the national authorities to repay the trader the amount not passed on'. [37]

34. In the present case, therefore, it must be accepted that, in conformity with this case-law, in the absence of applicable Community measures, the national court should apply the national rules for the recovery of payments wrongly made. The fact that the national law may allow a number of general principles to be taken into account to justify the non-repayment of the subsidies, such as the protection of legitimate expectations and, in particular, the loss of unjustified enrichment because the subsidy has been passed on to other traders, is not in itself contrary to Community law.

35. Secondly, the condition that national procedural rules apply if they are not 'less favourable than those for similar actions in domestic law' also appears to be fulfilled in the present case.

36. On this point the Court stated, in the *Deutsche Milchkontor* case, that the principle of non-discrimination presupposes the fulfilment of two conditions: '... first ... in such cases the national authorities must act with the same degree of care as in comparable cases concerning solely the application of corresponding national legislation and in accordance with rules and procedures which do not make the recovery of the sums in question more difficult. Secondly, ... the obligations imposed by national legislation on undertakings wrongly granted pecuniary advantages based on Community law must be no more stringent than those imposed on undertakings which have wrongly received similar advantages based on national law, provided that the two groups of recipients

35 — *Comateb and Others*, cited above, paragraph 21.
36 — Ibid., paragraphs 22 and 23.
37 — Ibid., paragraph 28.

are in comparable situations and therefore different treatment is objectively unjustifiable'. [38]

37. Therefore it is sufficient, in order to meet the abovementioned requirement of non-discrimination, if the national provisions apply without distinction to situations governed by Community law and to those which are purely national. According to the information in the order for reference, the German legislation in question appears to fulfil this condition. In any event, it is for that court to ensure that the national provision which allows a plea of loss of enrichment is applied in a manner which is not discriminatory by comparison with the recovery of purely national subsidies.

38. Finally, the third limit which the Court's case-law has set to the application of national law is that the national rules apply so long as they do not make it practically impossible to exercise the rights which the national courts have an obligation to safeguard: 'the application of national law must not affect the scope and effectiveness of Community law. That would be the case in particular if the application of national law made it impossible in practice to recover sums irregularly granted'. [39]

39. In the *Ferwerda* judgment the Court made it clear that, although the principle of legal certainty may be relied upon in order to resist the repayment of sums wrongly levied, 'no consideration whatever which under one of the national legal systems of the Member States is or may be based on a principle of legal certainty can in all cases constitute a defence against a claim for the recovery of Community financial benefits wrongly granted. It must in each case be considered whether such application does not jeopardise the very basis of the rule providing for such recovery and whether it does not result in practice in frustrating such recovery.' [40] In the *Ferwerda* case the Court held that 'Community law in its present state ... does not preclude the application in proceedings concerning the recovery by the authorities of the Member States of sums paid in error ... of a principle of legal certainty based on national law whereby financial benefits granted in error by the public authorities may not be recovered if the error committed was not due to incorrect information supplied by the beneficiary or if such error, despite the fact that the information supplied was incorrect though provided in good faith, could easily have been avoided.' [41] Consequently the Court took the view that the principle of the effectiveness of Community law was not infringed merely by the non-recovery of aid granted in error.

40. In the same way it seems to me that, in the circumstances of the present case, the application of national law does not affect the scope and effectiveness of Community law.

38 — Paragraph 23.

39 — *Deutsche Milchkontor*, paragraph 22.

40 — Paragraph 15.

41 — Paragraph 21 and operative part of judgment.

41. In this connection it is clear from the information in the order for reference concerning the relevant German legislation that the principle in the matter remains that aid unlawfully granted must be repaid. Consequently there is no obstacle whatever to the possibility of recovering the amounts paid.

42. It may be noted that the application of Community law is not made impossible in practice because a refund may still be made, under national law, even if the enrichment no longer exists, where the recipient of the aid received it in awareness of the facts or as a result of gross negligence on his part. [42] A refund will also be possible where the recipient is still in possession of the enrichment because the subsidy has not been passed on or has been passed on in part only. Even in this situation, if the subsidy has been passed on national law provides that it must be repaid if the recipient has a right of indemnification against those to whom it was passed on. [43]

43. These considerations seem to me to show that the effectiveness of Community law is not undermined by the application of national provisions such as those in the present case. It will be for the national court to rule on this point.

44. It may also be observed that, in weighing the competing interests in the balance, which is what is involved when assessing compliance with the principle of the effectiveness of Community law, it would appear, to say the least, unfair to leave the *bona fide* recipient alone with the burden of something which is akin to strict liability, even though, in accordance with the established system, he has transferred to his suppliers the subsidies he received, without benefiting from them directly and without having been able to check the origin of the goods in question, which determines whether the subsidies were properly granted. In this connection, it must be borne in mind that, should a certain malfunctioning become apparent in the implementation of the system for the grant of Community aid, the Community legislature or the competent national authorities are not untouched by it. The Court has, moreover, addressed two warnings to them in the *Deutsche Milchkontor* judgment. Accordingly, it would be difficult to understand why the Community authorities should hesitate to allow a reference to national principles when, 'if disparities in the legislation of Member States proved to be such as to ... impair the functioning of the common market, it would be for the competent Community institutions to adopt the provisions needed to remedy such disparities.' [44] Likewise it is first and foremost for the national

42 — On this point the court making the reference states (in II, C, paragraph 3, of the order for reference, that 'those criteria are not fulfilled, since there is nothing in the documents before the court to suggest that the plaintiffs or their representatives knew that the origin of the rape supplied was other than that indicated'.

43 — The court making the present reference states (II, C, paragraph 6, of the order for reference) that 'since ... the considerable evidential difficulties surrounding the plaintiffs' potential claims by way of recourse against their suppliers are, as matters stand, such as to render those claims extremely doubtful, the plaintiffs' possible claims for damages cannot be relied on in opposition to the objection of loss of enrichment'.

44 — Paragraph 24.

authorities which are responsible for ensuring, by means of appropriate checks, that the product in respect of which the aid is granted conforms to the Community legislation, so as to ensure that Community aid is not paid for products which do not qualify for it, to decide on the controls necessary for that purpose. It cannot be ruled out that a failure to discharge the obligation of supervision may be taken into account. The Court gave a forewarning of this when it observed that: 'As regards the consequences of a failure to exercise such supervision for the recovery of sums unduly paid and in particular the question whether the recipients of the aids may rely on the failure as a defence to an action for recovery, ... those consequences are determined by national law ... It is therefore ... the task of the national courts to determine them on the basis of the relevant national law.' [45]

45. To conclude, therefore, in response to the question referred to the Court, Community law as it now stands does not preclude the national legislation concerned from taking account, in excluding the recovery of subsidies wrongly granted, of factors such as the loss of the unjustified enrichment because the pecuniary advantage arising from the subsidy has been passed on, where the recipient of the subsidy has no right of recourse against the traders to whom it was passed on, or where such right is worthless, provided however that the conditions are the same for the recovery of purely national financial charges and provided that the interests of the Community are taken fully into consideration.

46. For the sake of completeness, let me consider, in accordance with the national court's request, the relevance of comparing the Court's case-law concerning the recovery of State aid with the present case.

47. The Court has consistently held that a State's obligation to repeal an aid which the Commission finds incompatible with the common market is designed to bring about the restoration of the previous situation. Just as for the recovery of Community aid, the recovery of a State aid must in principle be effected in accordance with the relevant provisions of national law, provided that they are applied in a way which does not make it impossible in practice to effect the recovery required by Community law. In particular, the interests of the Community must be taken fully into consideration when applying a provision which makes the revocation of an unlawful administrative act subject to an assessment of the different interests arising.

48. On the other hand, the Court's case-law relating to these two areas differs considerably.

45 — Paragraph 44.

49. The specific nature of State aid justifies the Court's very rigorous approach to pleas based on principles of national law such as that of the protection of legitimate expectations or that of legal certainty in order to resist the repayment of aid. Accordingly, the Court has consistently pointed out, most recently in the *Alcan Deutschland* judgment, to which the national court refers, that 'in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed'. [46]

50. It is in the light of that specificity that one should read the judgment, referred to by the national court, in *Commission* v *Germany*, cited above, which restricts the right to plead, in the sphere of Article 93, the protection of legitimate expectations pursuant to Paragraph 48(2) of the VwVerfG.

51. I do not think this case-law can be transposed on this point to situations, such as those in the present case, of the recovery of Community subsidies which have been wrongly granted. As Advocate General Jacobs observed in paragraph 40 of his Opinion in the *Alcan Deutschland* case: 'It seems to me that [in the *Deutsche Milchkontor* judgment] the Court properly left the matter to be decided in accordance with national law since there was no overriding Community interest justifying encroachment upon the procedural autonomy of the Member State concerned. By contrast, if a similar situation arose in relation to a State aid, it would jeopardise attainment of the aims of the Treaty provisions to allow the recipient to resist recovery because he had passed on the benefit of the aid to his customers by lowering his prices. In such circumstances he would with impunity receive a significant competitive advantage.'

Conclusion

52. For the reasons I have given, I propose that the Court reply as follows to the question from the Verwaltungsgericht Frankfurt am Main:

Community law as it now stands does not preclude the national legislation concerned from taking account, in excluding the recovery of sums wrongly paid as sub-

46 — Paragraph 25. See also the judgments cited.

sidies under Community legislation, provided that the recipient of the subsidy was unaware of the circumstances rendering the decision granting the subsidy unlawful and provided that such ignorance was not the result of gross negligence, of a factor such as the loss of the unjustified enrichment, this being generally found to have occurred where the recipient has passed on the pecuniary advantage arising from the subsidy by paying the target price laid down by Community law and where he has no right of recourse against the supplier or where such right is worthless, provided however that the conditions laid down are the same for the recovery of purely national financial charges and provided that the interests of the Community are taken fully into consideration.