5. The national authorities must monitor the manufacture of skimmed-milk powder by conducting inspections at the manufacturer's premises if this is necessary to ensure that the Community rules are observed. It is for the national court to determine the consequences of any failure to fulfil that duty on the basis of the relevant national law.

Everling Mackenzie Stuart

Due Galmot Kakouris

Delivered in open court in Luxembourg on 21 September 1983.

For the Registrar
H. A. Rühl
Principal Administrator

U. Everling
President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 8 JUNE 1983 [1]

Mr President,
Members of the Court,

1. Introduction

1.1. Summary of previous decisions

In Joined Cases 205 to 215/82 the Court is once again confronted with a number of legal issues concerning the obligation laid down in Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 218) requiring Member States *inter alia* to "recover sums lost as a result of irregularities or negligence" in connection with the financing of the common agricultural policy. In my Opinion in Case 54/81 *Fromme* [1982] ECR 1449 at p. 1466.

1 — Translated from the Dutch.

I analysed the judgments [1] which had already been delivered on Article 8 at that time or were indirectly relevant to it. I shall therefore confine myself to the following brief summary of the Court's established case-law. According to that case-law, the recovery of wrongly-paid amounts is governed by national law in so far as rules of Community law do not exist or expressly refer to national law. There are a number of conditions attached to the application of national law. First, the scope and effectiveness of Community law must not be affected. In particular, the way in which a Member State implements Community law must be no less effective than the way in which it implements comparable national rules (see paragraph 8 of the decision in *Lippische Hauptgenossenschaft).* Secondly, it is clear from the analysis I made of the Court's judgments in *Ferwerda, Express Dairy Foods* and *Lippische Hauptgenossenschaft* that individuals must not be treated less favourably than when purely national provisions are applied to them (the operative part of the *Fromme* judgment is to this effect). According to the Court's case-law, Community law does not therefore preclude the application of general legal principles of national law such as those of legal certainty and the protection of legitimate expectation or, put in another way, the receipt of payments in good faith (*Ferwerda*), the principle of fairness (*Balkan Import-Export* and — since my 1982 analysis — Case 113/81 *Reichelt* [1982] ECR 1963) and other general legal principles of national law (*Lippische Hauptgenossenschaft*). I have not come across any decisions dealing with the question whether an unreasonably strict approach to recovery by a Member State may fall foul not only of general principles of national law but also of general principles of Community law besides the principle of the prohibition of discrimination which I have already mentioned. Generally speaking, that question might arise only if the general principles of the national law in question do not afford sufficient legal protection.

Of the judgments delivered since that in *Fromme* the judgment in Joined Cases 146, 192 and 193/81 *BayWa AG and Others* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1503 is especially relevant to this case. When explaining the reasons for its fifth question in this reference the national court stated in particular that the *BayWa* judgment gave rise to "certain doubts" as to the applicability of general principles of national law such as the principle of the protection of legitimate expectation, as referred to in the *Ferwerda* judgment. The doubts of the national court are due in particular to paragraph 30 of the decision in *BayWa* which reads as follows:

"In particular, it is appropriate to point out that the very wording of Article 8 (1) of Regulation No 729/70 concerning the

1 — Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, Case 265/78 *H. Ferwerda BV* v *Produktschap voor Vee en Vlees* [1980] ECR 617 and Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft eG and Another* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1980] ECR 1863. I also discussed the judgments in Case 118/76 *Balkan Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1177 and Case 130/79 *Express Dairy Foods Limited* v *Intervention Board for Agricultural Produce* [1980] ECR 1887 which are also material to the recovery of wrongly-paid amounts, as well as other judgments indirectly relevant to this issue. Paragraph 13 of the decision in Case 130/79 cited above and paragraph 26 of the decision in Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana srl* [1980] ECR 1205 at p. 1226 are particularly material to the question whether it is relevant that the wrongly-paid amounts are passed on.

recovery by the Member States of sums lost as a result of irregularities, expressly requires the national authorities responsible for operating Community machinery for agricultural intervention to recover sums unduly or irregularly paid; and such authorities, acting on behalf of the Community, may not, on such occasions, exercise a discretion as to the expediency of demanding repayment of Community funds unduly or irregularly granted. The opposite interpretation would lead to an erosion both of the principle of equal treatment between undertakings from different Member States and of the application of Community law which must, so far as possible, remain uniform throughout the Community."

I agree however with the national court (see the second paragraph of its elucidation of the fifth question) that the paragraph just cited may be regarded only as an extension and not as an alteration of the Court's previous case-law. Consequently, claims for the recovery of wrongly-paid amounts may certainly be waived on the basis of general legal principles recognized by national law but not on the basis of discretionary considerations of expediency.

1.2. The facts and course of the procedure

The facts and course of the procedure in these cases are fully summarized in the first part of the statement of grounds in the orders for reference and the Report for the Hearing which also sets out the relevant provisions of Community law. I can therefore confine myself to the following brief summary of the facts whilst referring for a proper understanding of my ensuing arguments to the orders for reference and the Report for the Hearing for further details.

The aid in question was granted to the plaintifs for the processing of skimmed-milk powder into feedingstuffs as part of the plan to reduce the surplus of milk. It is governed by Regulation (EEC) No 986/68 of the Council (Official Journal, English Special Edition 1968 (I), p. 260) and Regulation No 990/72 of the Commission (Official Journal, English Special Edition 1972 (II), p. 428). Article 1 of the Council regulation contains a definition of *inter alia* milk and skimmed-milk powder and Article 10 of the Commission regulation requires the Member States to adopt measures of control to ensure that *that* regulation is complied with. One of the points arising in this case, therefore, is the extent to which Member States are required to take such measures to ensure that *other* regulations are complied with.

In all the present cases the skimmed-milk powder came from the undertaking Auetal. That undertaking had produced skimmed-milk powder, partly at least, by a method which was not compatible with Community law. Nevertheless, in the fourth paragraph of the statement of its reasons on which its first question is based the national court states that "at any event at the time at which the operations carried out by Auetal took place, that is to say in the middle of 1979, it could not be said that those methods of chemical analysis" — developed in order to determine irregular manufacturing methods — "were generally recognized". In my view that finding of fact and also the earlier finding of fact made by the national court (in the third paragraph of the first part of the statement of grounds in the judgment) that the Kassel analytical institute commissioned to examine the

powder had not found any irregularity should be adopted by the Court as the factual basis for its answer to the questions raised. From those facts, taken as a starting point, it follows that the plaintiffs who had received Auetal powder could not be expected to discern or to establish that the powder released into circulation under the description "Sprühmagermilchpulver" [spray-dried skimmed-milk powder] was not in fact normal spray-dried skimmed-milk powder (see the penultimate paragraph on page 7 of the Report for the Hearing). Private customers cannot reasonably be expected to establish facts which even an analytical institute whose services were enlisted by the authorities proved incapable of discovering. Only a clear obligation to that effect, imposed on those undertakings by Community or national law, might lead to a different view, but such a clear obligation does not appear to exist.

The irregular method of manufacturing the product in question was not discovered until May 1979 whereupon a demand was made for the repayment of the aid paid to the plaintiffs. The German intervention agency relied upon the rule as to burden of proof contained in Paragraph 9 of the German implementing regulation referred to in the Report for the Hearing. According to that provision, the recipient continues to bear the burden of proof of the existence of the preconditions for the grant of aid until the third year after its receipt. However, in assessing the merits of the claim for repayment Article 8 of Regulation No 729/70 of the Commission, referred to earlier, must also be considered. That provision is also set out in the Report for the Hearing.

1.3. The preliminary questions

After unsuccessfully lodging objections to the decisions to recover the aid the 11 plaintiffs each brought an action before the Verwaltungsgericht [Administrative Court] Frankfurt am Main. In particular they relied on the provisions relating to the protection of legitimate expectation and forfeiture of unjustified enrichment contained in Paragraph 48 of the German Verwaltungsverfahrensgesetz [Law on Administrative Procedure] of 25 May 1976. The text of that provision may be found in the statement of reasons relating to the seventh question contained in the order for reference. The plaintiffs contended that the German intervention agency was responsible for the irregularities in the manufacture of the skimmed-milk powder because it failed to fulfil its duty of supervision over Auetal by not immediately drawing the necessary conclusions from the inspection report of July 1978.

The Verwaltungsgericht thereupon referred the following questions to the Court for a preliminary ruling:

"1. Does a product consisting of a spray-dried mixture of skimmed milk and a dried-milk product come within the definition of skimmed-milk powder laid down in Article 1 (c) of Regulation (EEC) No 986/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260) if that end product reveals the same composition (protein, carbohydrate etc.) as skimmed-milk powder derived directly from the milk of the cow?

2. Does Article 10 of Regulation (EEC) No 990/72 of the Commission of 15 May 1972 (Official Journal, English Special Edition 1972 (II), p. 428) found an obligation on the part of the authorities of the Member States to supervise the production of skimmed-milk powder on the producer's premises?

3. Does Article 10 of the last aforementioned regulation enure for the benefit of the recipients of aid as third parties, that is, may they invoke failings of the authorities in that respect so as to preclude a demand for repayment?

4. Does Community law, in particular Article 8 (1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 218), contain rules governing the substantive burden of proof or are those rules determined by national law as regards the question whether, in a given case, aids for skimmed milk and skimmed-milk powder for use as feed under Regulation No 986/68 of the Council, and Commission regulations adopted in implementation thereof, have been unlawfully granted? If Community law contains rules governing the burden of proof: What are those rules?

5. Does Article 8 (1) of Regulation No 729/70 of the Council of 21 April 1970 provide a direct legal basis upon which national authorities may demand reimbursement of aid granted unlawfully with the result that the factual preconditions to be satisfied for such a demand are definitively laid down in that provision?

6. If the fifth question is answered in the affirmative: Within what provisions, if appropriate supplemented by unwritten legal principles of Community law, is the expectation of the recipient of aid protected and if so under what conditions and to what extent? May the recipient of aid in particular under certain circumstances plead loss of enrichment and is there such a loss where the recipient of aid has passed the aid on in the selling price? Is recovery precluded where the authority knew or, as a result of gross negligence, did not know that it was granting the aid unlawfully?

7. If the fifth question is answered in the negative: Is it compatible with Community law for national law to preclude a demand for repayment of aid granted unlawfully:

Where the beneficiary relied upon the notice granting aid being maintained in force and that expectation, weighed against the public interest in revocation, is worthy of protection (Paragraph 48 (2), first to third sentences, of the Verwaltungsverfahrensgesetz [Law on Administrative Procedure] of 25 May 1976 — BGBl I p. 1253);

Where the beneficiary can plead loss of enrichment unless he knew or, as a result of gross negligence, did not know the circumstances leading to the illegality of the notice granting the aid (seventh sentence of Paragraph 48 (2) of the Verwaltungsverfahrensgesetz);

Where a period of one year has elapsed beginning with the point in time at which the authority received knowledge of facts justifying the revocation of an unlawful notice granting aid, irrespective of whether the person concerned knew that such facts had come to the notice of the authority (Paragraph 48 (4) of the Verwaltungsverfahrensgesetz);

Where the authority knew or, as a result of gross negligence, did not know that it was granting the aid unlawfully (sixth sentence of Paragraph 48 (2) of the Verwaltungsverfahrensgesetz in conjunction with

Paragraph 814 of the Bürgerliches Gesetzbuch [German Civil Code])?"

Those questions may in fact be reduced to the following points:

(1) Does skimmed-milk powder which has the same composition as skimmed-milk powder derived directly from the milk of the cow but which consists of a spray-dried mixture of skimmed-milk and a dried-milk product conform with Article 1 of Regulation No 968/68 of the Council (as amended by Regulation No 472/75) (Question 1)?;

(2) Are the authorities of the Member States required to supervise the production of skimmed-milk powder (Question 2)?;

(3) Do Member States have a direct right of recovery and do there exist Community rules as to the burden of proof based upon Article 8 of Regulation No 729/70, so that that right and those rules are not partly based on national implementing provisions (Questions 5, 6 and 4)?;

(4) Is the application of the general principles of the relevant national law (embodied in particular in Paragraph 48 of the German Verwaltungsverfahrensgesetz and mentioned in Question 7 of the reference) compatible with Community law (Questions 3 and 7)?

In the remainder of my opinion I shall deal with those points in that order. As regards the sixth question, we shall see that the answers which I propose to give to the fourth and fifth preliminary questions deprive it of any purpose.

2. My first point (Question 1)

Question 1 should clearly be answered in the negative. It is quite clear from the definition of skimmed-milk powder in conjunction with that of milk given in Article 1 of Regulation No 986/68 that skimmed-milk powder can only be the powder form of "the milk-yield of one or more cows, to which nothing has been added and which has, at the most, been only partially skimmed". As the question of the national court does not refer to the German implementing provisions and these cannot moreover validly derogate from the relevant Community law, it is immaterial for the purposes of the first question whether the German implementing provisions might themselves call for a different answer to that question.

3. My second point (Question 2)

For the Court's answer to be of use the question as to the existence of an obligation on the part of the authorities of the Member States to supervise the production of skimmed-milk powder should not, I think, be restricted to an interpretation of Article 10 of Regulation No 990/72 of the Commission. Only some of the plaintiffs in the main proceedings believe that Article 10 does in fact found such an obligation. In other written observations the obligation is inferred or partly inferred more from Article 8 of Regulation No 729/70. The United Kingdom and the Federal Republic of Germany advance powerful arguments supporting a negative answer to the question and the Commission, too, believes that that obligation cannot

be founded upon Article 10 of Regulation No 990/72. It believes that the obligation arises from Article 4 (2) of Regulation No 986/68 of the Council, as amended by Regulation No 1038/72 (Official Journal, English Special Edition 1972 (II), p. 456). In my view, however, it is certainly possible to deduce from that provision that Member States have a *power* to supervise, but not an *obligation.*

In my Opinion in the *Fromme* case I observed that in very general terms it may be inferred from the first sentence of Article 5 of the EEC Treaty that Member States have the obligation to adopt appropriate measures, whether general or particular, to ensure the implementation of the regulations in the field of the common agricultural policy ([1982] ECR 1469, second column). In my view the obligation to supervise the production of skimmed-milk powder also arises from Article 5 of the EEC Treaty. It also arises, however, from the distribution of powers between the Community and the Member States within the common organization of agricultural markets in which "the machinery for intervention is operated by the national intervention agencies which are, accordingly, responsible for performing all the functions of supervision needed to ensure that denaturing premiums are allocated only on the conditions prescribed by Community law and that any breaches by traders of the rules of Community law are duly penalized". Although paragraph 21 of the decision in *BayWa* which I have just cited relates to denaturing premiums, it also clearly applies in my view to premiums of the kind in question in this case. This is confirmed by paragraph 22 of the decision which is cast in very general terms.

4. My third point (Questions 5, 4 and 6)

The third point in my summary of the questions referred to in the Court is primarily whether a right of recovery (Question 5) and rules as to the burden of proof (Question 4) in such recovery cases may be directly deduced from Article 8 (1) of Regulation No 729/70 of the Council.

According to the established case-law of the court which I cited in the introduction to my opinion, both parts of that question must be answered in the negative. What is more, in all the written observations which have been submitted it is taken as axiomatic that there are no rules of Community law governing the manner of recovery of aid unduly granted. The Commission for one also states that, according to the Court's judgments in *Ferwerda* and *BayWa,* amounts thus unduly paid must be recovered in accordance with the procedural and substantive rules of national law, with due regard, however, to the limits set by Community law. Since the national court's fourth and fifth questions are not concerned with those limits, I do not consider it necessary to examine in detail here the points which some of the plaintiffs in the 11 main actions, the United Kingdom and the Commission have made with respect to those limits. According to the Court's

judgment in Case 113/81 *Otto Reichelt GmbH* v *Hauptzollamt Berlin-Süd* [1982] ECR 1957, the most important restriction on the application of national rules governing the recovery of amounts unduly paid and allocating the burden of proof is, of course, that the same conditions must apply to the recovery of benefits financed by the Community as apply to those financed by the Member States themselves. To my mind that principle is also relevant to my last point (summarizing the national court's third and seventh questions). Before examining that fourth point I would however point out for the sake of completeness that the national court's sixth question does not, of course, need to be answered now that its fifth question is to be answered in the negative.

5. My fourth point (Questions 3 and 7)

In essence the national court's third question also concerns the protection of the plaintiffs' legitimate expectation that the product they had bought from Auetal met the conditions in force which only the German authorities could verify. As Community law does not contain any principle such as that which the national court suggests in its third question, the answer to the point raised must once again be sought in national law. In this regard I would again refer to the Court's judgments in *Ferwerda* and *BayWa*. For the sake of completeness I would merely add with regard to the national court's third question that, since the duty to supervise production which I deduced in particular from the first sentence of Article 5 of the EEC Treaty is in the nature of an obligation to act in good faith in Community matters, it cannot be considered to apply also in favour of undertakings which have suffered damage owing to remissness in carrying out that duty.

The remaining points arising from Question 3 and the four parts of Question 7 are, I think, on the basis of the Court's case-law hitherto, best answered together as a whole, without any detailed examination of the provision of German law cited by the national court. I have already indicated this in my formulation of the fourth point raised by the reference.

In my view a comprehensive answer to the fourth point might then be framed as follows on the basis of the Court's previous decisions:

"Provided that nationally-financed aid and aid financed by the Community are not treated differently (except where objective differences are taken into account), it is compatible with Community law for national law to exclude the recovery of wrongly-granted aid on the basis of general legal principles recognized in the national law in question such as the principle of the protection of the legitimate expectation of the recipients of the aid, the principles concerning unjust enrichment and the principle of the limitation of claims. When the relevant general principles of law are applied to a specific case and in particular when this requires the interests of individuals to be weighed against the public interest, objective differences existing between purely national interests and Community interests in withdrawing the aid should be taken into account. However, the interest in the uniform and effective application of Community law cannot turn the balance by itself."

By way of explanation of that qualification I would point out that the stipulation in the first sentence of Paragraph 48 (2) of the Verwaltungsverfahrensgesetz requiring the public interest in withdrawing the aid to be taken into account cannot in my view mean that the clearance of accounts between the Community and the Member States for the purposes of the European Agricultural Guidance and Guarantee Fund (EAGGF) is possibly the decisive factor in determining the extent of the public interest in withdrawing the aid. Conversely, if a claim for the repayment of wrongly-granted aid financed by the Community is excluded on the ground of general principles of law, this will not necessarily mean that the EAGGF must still finance the aid. On the contrary, in paragraph 9 of the Court's decision in Case 11/76 *Netherlands* v *Commission* ([1979] ECR 245 at p. 279) the Court held, in short, that if a distortion of competition between Member States arises as a result of a difference in the application of provisions of Community law, it cannot be financed by the EAGGF but must in any event be borne by the Member State concerned. Apart from a case like that under discussion of a *bona fide* error in construing Community law, that principle should naturally apply *a fortiori* in the event of gross maladministration or negligence on the part of the national authorities in the application of Community law (as is also clear from the first subparagraph of Article 8 (2) of Regulation No 729/70). Those rules on the clearance of accounts between the Community and the Member States should not however, as such, have any effect on the application in the Member States of general principles of law in the recovery of aid wrongly paid as a result of such negligence. It will thus not always be possible for Member States to steer between the Scylla of a breach of their own general principles of law and the Charybdis of the Community's refusing to approve their statements of expenditure financed by the EAGGF (on this point see, besides Case 11/76 cited above, the Court's recent judgment of 15 March 1983 in Case 45/82 *Netherlands* v *Commission*).

6. Conclusion

To sum up, then, I suggest that the Court should answer the questions raised by the national court as follows, having if necessary condensed and reformulated them in the manner I have suggested:

First question

This question should be answered in the negative. It is quite clear from the definition of skimmed-milk powder in conjunction with that for milk given in Article 1 of Regulation No 986/68 that skimmed-milk powder can only

mean the powder form of "the milk-yield of one or more cows, to which nothing has been added and which has, at the most, been only partially skimmed".

Second question (in my wider reformulation)

An obligation to supervise production, as referred to in the question, arises from Article 5 of the EEC Treaty and from the distribution of powers between the Community and the Member States within the common organization of agricultural markets in which "the machinery for intervention is operated by the national intervention agencies which are, accordingly, responsible for performing all the functions of supervision needed to ensure that ... premiums are allocated only on the conditions prescribed by Community law and that any breaches by traders of the rules of Community law are duly penalized" (see paragraphs 21 and 22 of the *BayWa* judgment).

Fifth, fourth and sixth questions in my recombination

Neither a right of recovery nor rules on the burden of proof in recovery actions may be directly derived from Article 8 (1) of Regulation No 729/70 of the Council, that is to say in the absence of national implementing provisions. The sixth question does not therefore arise.

Third and seventh questions as combined and reformulated by me

Provided that nationally-financed aid and aid financed by the Community are not treated differently (except where objective differences are taken into account), it is compatible with Community law for national law to exclude the recovery of wrongly-granted aid on the basis of general legal principles recognized in the national law in question such as the principle of the protection of the legitimate expectation of the recipients of the aid, the principles concerning unjust enrichment and the principle of the limitation of claims. When the relevant general principles of law are applied to a specific case and in particular when this requires the interests of individuals to be weighed against the public interest, objective differences existing between purely national interests and Community interests in withdrawing the aid should be taken into account. However, the interest in the uniform and effective application of Community law cannot turn the balance by itself.