JUDGMENT OF THE COURT (Fifth Chamber)
21 March 1991 *

In Case C-314/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Siegfried Rauh

and

Hauptzollamt Nürnberg-Fürth (Federal Republic of Germany),

on the interpretation and validity of Article 3a of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (Official Journal 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 (Official Journal 1989 L 84, p. 2),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, G. C. Rodríguez Iglesias, Sir Gordon Slynn, F. Grévisse and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: German

after considering the observations submitted on behalf of:

— Mr Rauh, the plaintiff in the main proceedings, by Gerd Gorewoda and Hartmut Heinrich, Rechtsanwälte of Munich,

— the Commission of the European Communities, by Dierk Booss, Legal Adviser, and Klaus-Dieter Borchardt, a member of its Legal Department, acting as Agents,

— the Council of the European Communities, by Arthur Brautigam, Principal Administrator, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral arguments presented by the parties at the hearing on 13 November 1990,

after hearing the Opinion of the Advocate General at the sitting on 15 January 1991,

gives the following

Judgment

1 By order of 2 October 1989, which was received at the Court on 13 October 1989, the Finanzgericht München (Finance Court, Munich) referred two questions to the Court of Justice under Article 177 of the EEC Treaty on the interpretation and validity of Article 3a of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (Official Journal 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 (Official Journal 1989 L 84, p. 2).

2 Those questions were raised in proceedings between Siegfried Rauh, who operates an agricultural holding, and the Hauptzollamt Nürnberg-Fürth (Principal Customs

Office of Nürnberg-Fürth) regarding a reference quantity under the rules on the supplementary levy on milk.

3 Siegfried Rauh took over the holding in question on 1 January 1985 as future heir to the farm under the terms of a contract of usufruct with his parents. His parents had earlier entered into a non-marketing undertaking under Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (Official Journal 1977 L 131, p. 1). The five-year non-marketing period came to an end on 21 December 1984, that is to say shortly before Siegfried Rauh took over the holding.

4 In 1989, following the insertion in Regulation No 857/84 of Article 3a by amending Regulation No 764/89, Siegfried Rauh submitted an application to the competent German authorities for the grant of a special reference quantity under that new provision. His application was rejected on the grounds that he had not taken over the holding until after the expiry of the non-marketing period and that he could not therefore found any right on that provision. Siegfried Rauh brought proceedings against that rejection before the Finanzgericht München.

5 The Finanzgericht München considered that the decision on the case depended on the interpretation and possibly the validity of the Community rules in question. It stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'1. Where a dairy farm is transferred by inheritance or a similar transaction, are producers who did not take over the holding until after the expiry of the non-marketing undertaking also entitled to receive a special reference quantity under Article 3a of Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989?

2. If not:

Is Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, valid in so far as where a dairy farm is transferred by inheritance or a similar transaction producers who did not take over the holding until after the expiry of the non-marketing undertaking are not entitled to receive a special reference quantity?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community provisions and the procedure and observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Question 1

7 Question 1 is essentially asking whether Article 3a of Regulation No 857/84 must be interpreted as meaning that, subject to the conditions laid down therein, a special reference quantity may be granted to a producer who has taken over a holding by inheritance or by any similar transaction after the expiry of the non-marketing undertaking entered into under Regulation No 1078/77 by his predecessor in title.

8 It should be noted at the outset that the Community rules on the supplementary levy on milk originally contained no specific provision envisaging the grant of a reference quantity to producers who had not, pursuant to an undertaking under Regulation No 1078/77, delivered milk during the reference year chosen by the Member State concerned. However, in its judgments of 28 April 1988 in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and in Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, the Court held that those rules were invalid for breach of the principle of the protection of legitimate expectations in so far as they did not provide for such grant.

9 In those judgments the Court held, on the one hand, that a producer who has voluntarily ceased production for a certain period cannot legitimately expect to be able to resume production under the same conditions as those which previously applied and not to be subject to any rules of market or structural policy adopted in the meantime (*Mulder*, paragraph 23, and *Von Deetzen*, paragraph 12); but on the other hand, where such a producer has been encouraged by any Community measure to suspend marketing for a limited period in the general interest and against payment of a premium, he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions (*Mulder*, paragraph 24, and *Von Deetzen*, paragraph 13).

10 It was following those judgments that the Council adopted, on 20 March 1989, the abovementioned Regulation No 764/89. That Regulation inserted a new Article 3a in Regulation No 857/84 providing essentially that producers who have not, pursuant to an undertaking entered into under Regulation No 1078/77, delivered milk during the reference year are to obtain, subject to certain conditions, a special reference quantity calculated on the basis of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the twelve calendar months preceding the month in which the application for the non-marketing or conversion premium was made.

11 That provision was supplemented by Article 7a of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (Official Journal 1988 L 139, p. 12), as amended by Commission Regulation (EEC) No 1033/89 of 20 April 1989 (Official Journal 1989 L 110, p. 27), the first paragraph of which provides in particular that: 'The special reference quantity granted under the conditions laid down in Article 3a of Regulation (EEC) No 857/84 shall, in the event of the transfer of the holding by inheritance or by any similar transaction, be transferred . . . provided that the producer to whom the holding is transferred in whole or in part undertakes in writing to comply with the undertakings of his predecessor'.

12 However the abovementioned first paragraph of Article 7a envisages the case in which the holding has already been granted a special reference quantity under Article 3a of Regulation No 857/84 at the time of the transfer by succession or by

a similar transaction. On the other hand, it does not provide for a situation such as that at issue in the main proceedings where the transferor in the succession had not already himself been granted such a special reference quantity.

13 The same conclusion applies as regards Article 7(1) of Regulation No 857/84 in which the provisions on transfer of a holding by succession do not, in any event, envisage the case of a holding which, at the time of the transfer, has not been allocated a reference quantity.

14 It follows that a producer in a situation such as that of the plaintiff in the main proceedings cannot rely on any provision other than Article 3a of Regulation No 857/84 in order to claim a reference quantity.

15 In this respect the Commission claims that the right to be allocated a reference quantity given by Article 3a of Regulation No 857/84 is the counterpart of the non-marketing undertaking. As a result, only a producer who has himself entered into such an undertaking can rely on that provision. While Article 3a can therefore be relied on by an heir or a person treated as an heir who takes over the holding in the course of the non-marketing period provided that he complies with the obligations entered into by his predecessor, that provision cannot avail an heir or a person treated as an heir who, as in this case, takes over the holding after the expiry of the non-marketing undertaking entered into by his predecessor.

16 That point of view cannot be upheld.

17 The Court has consistently held (see most recently the judgment in Joined Cases 201 and 202/85 *Klensch* v *Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1986] ECR 3477, paragraph 21) that where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law.

18 In this respect it should be noted that a producer who, as in the case envisaged by the national court, has, by virtue of the application of Community provisions which infringe the principle of the protection of legitimate expectations, been denied the possibility of obtaining a reference quantity upon the expiry of his undertaking pursuant to Regulation No 1078/77 has consequently been unable to transfer the benefit flowing from the grant of such a quantity to his heir or to his successor in a transaction similar to succession. Such a producer has thus been subject to restrictions affecting him specifically precisely because of his non-marketing undertaking.

19 Those restrictions would be maintained if Article 3a of Regulation No 857/84 were interpreted as not permitting such an heir or successor to have granted to himself, in the same way as the producer himself, a special reference quantity under the conditions laid down in Article 3a.

20 The Commission has raised the objection that even if a producer who has entered into an undertaking under Regulation No 1078/77 could invoke the principle of the protection of legitimate expectations in order to enable his heir or a person treated as such who takes over the holding after the expiry of the non-marketing period to obtain a special reference quantity, such a possibility must, in any event, be confined to cases where the predecessor did all that was necessary, before the transfer of the holding, for the holding to be allocated a special reference quantity, which means in particular, that he must have made an application to that effect.

21 That objection cannot be upheld since it cannot be held against a producer that he failed to apply for the grant of a reference quantity to which the Community rules applying at the time gave him no right.

22 It follows that if Article 3a of Regulation No 857/84 were construed as the Commission suggests it would be incompatible with the requirements stemming from the principle of the protection of legitimate expectations as applied in the abovementioned *Mulder* and *Von Deetzen* judgments.

23 On the other hand such incompatibility can be avoided if that article is interpreted as meaning that for the purposes of that provision 'producers' includes not just farmers who themselves entered into an undertaking pursuant to Regulation No 1078/77 but also those who, after the expiry of the undertaking entered into by the farmer, have taken over the holding in question by succession or by a similar transaction.

24 In those circumstances the latter interpretation must be adopted.

25 For all those reasons it should be ruled in reply to the first question that Article 3a of Council Regulation No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as amended by Council Regulation No 764/89 of 20 March 1989, must be interpreted as meaning that, subject to the conditions laid down therein, a special reference quantity may be granted to a producer who has taken over a holding by way of succession or a similar transaction after the expiry of a non-marketing undertaking entered into pursuant to Council Regulation No 1078/77 of 17 May 1977 by his predecessor in title.

Question 2

26 In view of the reply to the first question, the second question is redundant.

Costs

27 The costs incurred by the Council of the European Communities and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht München, by order of 2 October 1989, hereby rules:

Article 3a of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, must be interpreted as meaning that, subject to the conditions laid down therein, a special reference quantity may be granted to a producer who has taken over a holding by way of succession or a similar transaction after the expiry of a non-marketing undertaking entered into pursuant to Council Regulation (EEC) No 1078/77 of 17 May 1977 by his predecessor in title.

Moitinho de Almeida Rodríguez Iglesias

Slynn Grévisse Zuleeg

Delivered in open court in Luxembourg on 21 March 1991.

J.-G. Giraud
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber