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 Regulation No 1078/77 by his predecessor in title.

REPORT FOR THE HEARING
in Case C-314/89 *

I — Facts and procedure

1. *The relevant Community provisions*

(a) 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) introduced *inter alia* a system of non-marketing premiums which were to be granted on request to any milk producer who undertook not to supply milk or milk products from his holding, whether for a consideration or free of charge, for a period of five years (Articles 1 and 2).

(b) Council *Regulation (EEC) No 856/84* of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal 1984 L 90, p. 10) introduced an additional levy on quantities of milk delivered in excess of a reference quantity to be determined. The levy system is implemented in each region of the territory of the Member State in accordance with one of the following formulas (Article 1):

under formula A, the levy is payable by the milk producers on the quantities of milk delivered to a purchaser which exceed a reference quantity to be determined (producer formula);

under formula B, the levy is payable by the purchasers of the milk or other milk products (dairies) on the quantities of milk delivered by producers which exceed the reference quantity to be determined; the purchaser liable to the levy is to pass on the burden only to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (purchaser formula).

* Language of the case: German.

(c) Implementing rules concerning the additional levy are laid down in 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. In particular, that regulation fixes the reference quantity referred to in the basic regulation, No 856/84, that is to say the quantity exempt from the additional levy. The reference quantity is, in principle, equal to the quantity of milk or milk equivalent delivered by the producer (formula A) or purchased by a purchaser (formula B) during the 1981 calendar year, plus 1% (Article 2(1)). However, Member States may provide that on their territory the reference quantity is to be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity *(Article 2(2))*.

Articles 3, 3a, 4 and 4a of Regulation No 857/84, as amended, enable the Member States to take account of certain particular situations when fixing reference quantities or to grant special or additional reference quantities. Of particular relevance in this case is Article 3a inserted by the amending regulation, Council *Regulation (EEC) No 764/89* of 20 March 1989 (Official Journal 1989 L 84, p. 2), which is worded as follows:

'Article 3a

1. Producers referred to in the third paragraph of Article 12(c):

— whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation (EEC) No 1078/77, expires after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to the March of the following year;

— who have not received a reference quantity under the terms laid down pursuant to Article 5(4)(b) and/or Article 9(2) of Regulation (EEC) No 1546/88 and/or, with regard to the person to whom the premium is transferred, pursuant to Article 2 of this Regulation,

shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity and provided that such producers:

(a) did not cease farming within the meaning of Article 2(3) and (4) of Regulation (EEC) No 1078/88 or transfer the whole of their dairy enterprise before the end of the non-marketing or conversion period;

(b) establish in support of their request, to the satisfaction of the competent authority, that they are able to produce on their holding up to the reference quantity requested;

(c) undertake to sell milk or other products direct to the consumer and/or to deliver milk to a buyer;

(d) undertake, as regards the special reference quantity, not to apply for assistance under any programme for the abandonment of reference quantities until the end of the additional levy scheme.

2. The special reference quantity shall be equal to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made, as determined by the competent authority concerned pursuant to Article 5(1)(e) of Regulation (EEC) No 1391/78, as last amended by Regulation (EEC) No 84/83, and for which the producer has not lost his entitlement to the premium.

Where the producer has obtained a reference quantity pursuant to Article 3, points 1 and 2, and/or Article 4(1)(b) and (c), the special reference quantity referred to in the first subparagraph of the paragraph shall be reduced by such quantity.

Where the producer has transferred part of his holding during the non-marketing or conversion period:

— the transferor's special reference quantity as established above shall be equal to 60% of the quantity for which entitlement to the premium has been retained,

— the transferee's special reference quantity as established above shall be equal to 60% of the quantity for which entitlement to the premium has been acquired.

3. . . .

4. That part of the special reference quantity which is not intended for use during a 12-month period may not be the subject of a temporary transfer as referred to in Article 5c (1a) of Regulation (EEC) No 804/68.

Where the holding is sold or leased before the end of the eighth period of application of the additional levy scheme, the special reference quantity shall be returned to the Community reserve. Where only part of the holding is sold or leased, part of the special reference quantity shall be returned to the Community reserve. Such part shall be calculated on the basis of the feed-crop area sold or leased in accordance with the detailed rules to be defined under the procedure laid down in Article 30 of Regulation (EEC) No 804/68.

5. . . .

6. . . .'

Account must also be taken of Article 7 of Regulation No 857/84, which is as follows:

'Article 7

1. Where an undertaking is sold, leased or transferred by inheritance, all or part of the corresponding reference quantity shall be transferred to the purchaser, tenant or heir according to procedures to be determined.

2. Under formula B, where a purchaser replaces, wholly or in part, one or more purchasers, his annual reference quantity shall be established:

— for the end of the current 12-month period, by taking into account all or part of the reference quantities on a pro rata basis of the time still to run;

— for the following period of 12 months, by adopting all or part of the reference quantities of the purchaser or purchasers whom he replaces.

3. Member States may provide that a part of the quantities be added to the reserve referred to in Article 5.'

(d) 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 No 1033/89 of 20 April 1989 (Official Journal 1989 L 110, p. 27), provides that:

'Article 7a

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 in accordance with the first and third subparagraphs of Article 7 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. Article 3a(4) of Regulation (EEC) No 857/84 shall continue to apply to the special reference quantity thus transferred.

Where the second subparagraph of Article 3a(4) of Regulation (EEC) No 857/84 applies, the producer shall notify his intentions in advance to the competent authority, which shall issue him with an acknowledgement of receipt. Within one month from the date of acknowledgement of receipt, the competent authority shall determine the quantity which is to return to the Community reserve and, where appropriate, notify the producer of the special reference quantity which will continue to be granted to him.

In the latter case, the part which is to return to the Community reserve shall be calculated on the basis of the area under forage within the meaning of Article 1(1)(d) of Regulation (EEC) No 1391/78 sold or leased.'

2. *The main proceedings*

The plaintiff in the main proceedings, Siegfried Rauh, runs a small farm which he took over on 1 January 1985 as future heir

('Hoferbe') under a contract of usufruct with his parents.

As from the time he took over the farm in 1985 Mr Rauh has sought to obtain the grant of a reference quantity for milk production exempt from the additional levy. The quantity he requested was refused on the grounds that he could show no milk production for his farm as a result of a non-marketing undertaking applying during the 1983 reference year and no hardship clause was envisaged for cases where milk production was resumed after the end of the non-marketing period.

It appears from the documents in the case that the non-marketing undertaking had been given by Mr Rauh's parents, who, in return for payment of a non-marketing premium, had undertaken not to market milk or milk products during a period of five years ending on 21 December 1984.

Following the judgments of the Court of Justice 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 aforesaid Regulation No 764/89 recognized the right of producers whose non-marketing period expired after 31 December 1983 (that is, after the reference year adopted by the Federal Republic of Germany) to be granted a special reference quantity. Mr Rauh thereupon again requested a reference quantity. That request was rejected by the competent German authority on the grounds that Mr Rauh had taken over the holding after the expiry of the non-marketing period and that he could not therefore derive any right under Regulation No 764/89.

The dispute before the Finanzgericht München relates to the German authorities' refusal to grant Mr Rauh a special reference quantity exempt from the additional levy on milk pursuant to Regulation No 764/89.

The Finanzgericht München considered that its decision depended on the interpretation and on the validity of provisions of the Community rules on the additional levy on milk and therefore 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?'

In the grounds for its order for reference, the Finanzgericht München states that in its view Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, also allows for the grant of a special reference quantity to an heir who does not take over the farm until the expiry of the reconversion or non-marketing period. In the event that interpretation of the provision does not allow of such a grant, the Finanzgericht München has doubts as to the compatibility of that provision with the principle of the protection of legitimate expectations, the guaranteed right of ownership and the principle of equality.

3. *Procedure before the Court*

The order for reference was received at the Court's Registry on 24 October 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by: Mr Rauh, represented by G. Gorewoda and H. Heinrich, Rechtsanwälte of Munich, the Council of the European Communities, represented by A. Brautigam, Principal Administrator in the Council's Legal Department, acting as Agent, and the Commission of the European Communities, represented by its Legal Adviser, D. Booß, and K.-D. Borchardt, a member of the Commission's Legal Department, acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 4 July 1990, pursuant to Article 95 of the Rules of Procedure, to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry.

II — Written observations

1. *Question 1*

(a) *Mr Rauh* considers that for the reasons set out in the order for reference, Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, also allows for the grant of a special reference quantity in cases such as this where the heir does not take over the dairy holding until after the expiry of the non-marketing or reconversion period.

(b) The *Council* points out that Article 3a of Regulation No 857/84 envisages two categories of entitled persons who may claim the grant of a special reference quantity:

— producers who originally took part in the non-marketing scheme and who, on the expiry of their non-marketing undertaking after 31 December 1983, find themselves unable to resume milk production under the rules laid down by

Regulations Nos 856/84 and 857/84 in the absence of an express provision envisaging the grant of reference quantities to them;

— producers who have taken over all or part of a dairy holding of the original entitled persons during the non-marketing period (transferees of the premium), that is to say producers who, during the non-marketing period, have succeeded to the title of a producer who entered into a non-marketing undertaking and who took over that undertaking in accordance with Article 6 of Council Regulation (EEC) No 1078/77 of 17 May 1977.

Article 3a thus expressly provides that an heir who has taken over a holding before the expiry of the non-marketing undertaking may be granted a special reference quantity. Similarly Article 3a(4), as expounded by Article 7a of Commission Regulation No 1546/88, provides for the transfer by inheritance of the special reference quantity after it has been granted to the producer who originally entered into the non-marketing undertaking, or to his heir if the latter inherited the holding in question during the non-marketing period.

However, Article 3a does not contain any express provision on the intermediate case where the heir who seeks to rely on Article 3a took over the holding after the expiry of the non-marketing undertaking (31 December 1983) but before a reference quantity was granted to his predecessor.

In the Council's view it cannot be inferred from the silence of the provisions that the Community legislature wished the latter case to be treated differently. Any derogation from the rules under Article 3a must be either expressly laid down or must follow necessarily and unequivocally from the aims of the rules in question. It is clear, the Council says, that no express derogation excluding an heir from being granted a reference quantity in such circumstances is set out in the text of Article 3a or can be inferred its context in the rules.

The Council considers, therefore, that that interpretation must be rejected, particularly since any derogation which restricts the rights of individuals should, for reasons of legal certainty, be expressly set out in the text. In those circumstances the general rule under Article 7 of Regulation No 857/84 must remain fully applicable and the heir must, in principle, enjoy the same rights as his predecessor.

That interpretation seems all the more appropriate as no objective reason is apparent for treating the case of an heir who has taken over a holding after the specific reference quantity was granted to his predecessor, who can rely on Article 3a, differently from the similar case of an heir who has taken over a holding after the expiry of the non-marketing period but before a reference quantity was granted to his predecessor.

Accordingly, the Council proposes the following answer to Question 1:

'Article 3a of Council Regulation No 857/84 must be interpreted as also enabling a special reference quantity to be granted on the conditions laid down therein to an heir who did not take over the dairy holding from his predecessor until after the expiry of the predecessor's non-marketing undertaking.'

(c) The *Commission* considers that Article 3a(1) of Regulation No 857/84 confers a right to the grant of a special reference quantity on

— producers who have themselves entered into a non-marketing undertaking under Regulation No 1078/77 and whose non-marketing period expired after 31 December 1983 or after 30 September 1983 (see Article 3a(1), first indent);

— producers who did not personally enter into a non-marketing undertaking but have taken over the holding during the non-marketing period and accepted the non-marketing obligation in conformity with Article 6(1) of Regulation No 1078/77 (Article 3a(1), second indent).

What those two categories have in common is that they both cover producers who have given up marketing and can therefore count on being allowed to resume milk production after the expiry of the non-marketing period and can, accordingly, claim the right to a special reference quantity.

The same applies to Article 7(1) of Regulation No 857/84 which provides that where an undertaking is sold, leased or transferred by inheritance, all or part of the corresponding reference quantity is to be transferred to the purchaser, tenant or heir. It is implicit in that provision that the undertaking to be transferred has already been granted a special reference quantity.

The transfer of holdings by inheritance or by any similar transaction is now explicitly regulated by Article 7a of Regulation No 1546/88, as amended by Regulation No 1033/89, which expressly refers to the 'special reference quantity granted under the conditions laid down in Article 3a of Regulation (EEC) No 857/84'. That provision specifies that the holding to be transferred must already have been granted a reference quantity. In view of the aims of the Community rules on the grant of special reference quantities, cases where the necessary steps have been taken, before transfer of the holding, for the holding to be granted a special reference quantity can be treated in the same way as the aforementioned situation. This relates essentially to the proof that the foregoing producer did indeed intend and was indeed able to resume milk production.

What is important, according to the Commission, is to prevent a producer who can claim a special reference quantity as a

producer who has given up marketing, from having such a reference quantity granted to him solely in order to increase the economic value of his holding and thus to obtain higher rent or selling price.

On the basis of the information available, the Commission considers that in the context of the Community rules on the grant of special reference quantities the plaintiff's situation corresponds most closely to that of a young farmer within the meaning of Article 3(2) of Regulation No 857/84. Under that provision a special reference quantity may be granted to the plaintiff as a young farmer by the Member State concerned. However the plaintiff does not have a right to the grant of such a quantity.

Accordingly, the Commission proposes the following answer to Question 1:

'Pursuant to Article 3a(1) of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of 20 March 1989, a special reference quantity is to be granted to a producer who took over a holding by way of inheritance or by a similar transaction only after the expiry of the non-marketing undertaking, in conformity with Article 7 of Regulation No 857/84 in conjunction with Article 7a of Commission Regulation No 1546/88 of 3 June 1988, as amended by Commission Regulation No 1033/89 of 20 April 1989, only if the holding has already been given a special reference quantity or if the person concerned has proved that he did indeed intend and was indeed able to resume milk production.'

2. *Question 2*

(a) *Mr Rauh* examines the scope of the principle of the protection of legitimate expectations, the principle of the guarantee of the right of ownership and the principle of equal treatment.

In so far as the principle of the protection of legitimate expectations is concerned, Mr Rauh notes that in its judgments in *Mulder* and in *Von Deetzen*, cited above, the Court held that total and continuous exclusion from the grant of a reference quantity of producers who, in pursuance of an undertaking given under Regulation No 1078/88, had not delivered milk during the reference period could not have been foreseen by those producers when they entered into the undertaking, for a limited period, not to deliver milk. The Court held that such an effect frustrated those producers' legitimate expectations that the effects of the system to which they had rendered themselves subject would be limited.

Mr Rauh admits that by definition the only person who can invoke this principle is someone who himself has an expectation which merits protection. In so far as the resumption of milk production after the non-marketing period is concerned, that is generally the person who entered into the non-marketing undertaking. However, where a holding is transferred by inheritance or by a similar transaction, on the expiry of the non-marketing period, the heir, as the sole successor in title, is in the legal situation of the transferor and thus

himself also acquires the same legitimate expectation as the transferor, precisely as regards the possibility of resuming milk production at the end of the non-marketing period.

In Mr Rauh's view, it follows that a quota system from which the plaintiff's parents are excluded because they assigned the use of the holding to the future heir — who is himself excluded because he did not give the non-marketing undertaking — affects the legitimate expectations of the plaintiff as much as his parents as regards the holding. As regards the principle of the guarantee of the right of property ownership, Mr Rauh claims that the right of succession is an integral part of private property stemming from the guarantee of rights of property ownership. Such rights are secured in the Community legal order in accordance with the principles common to the constitutions of the Member States.

In the circumstances of this case, Mr Rauh states that while the *de facto* ban on marketing milk as a result of the charging of the additional levy does not deprive him of his property, it does undermine to an excessive extent his enjoyment of his property. In any event the means used under the rules are disproportionate to the aim pursued since they effectively rule out economic exploitation of the agricultural land and other parts of the holding as no equivalent alternative forms of production are available.

As far as concerns the principle of equal treatment, Mr Rauh maintains that no reasonable distinguishing criterion is discernible under which a special reference quantity is to be granted to heirs who inherited dairy holdings during the non-marketing period but heirs who only took over the holding at the end of the non-marketing period are excluded. Such differentiation is contrary to the principle of equal treatment because one group of persons is treated differently under the rules from others even though there exists no difference of a kind or magnitude to justify such different treatment.

Moreover, it is contrary to the system to accept on the one hand the principle of the transfer of delivery reference quantities and, on the other hand, to exclude the transfer to a future heir on the grounds that it is the testator who entered into the non-marketing undertaking.

(b) The *Council* has not submitted any observations on Question 2 in view of its proposed answer to Question 1.

(c) The *Commission* examines the question of breach of the principle of the protection of legitimate expectations, breach of the guarantee of rights of property ownership and breach of the principle of equality.

Legitimate expectations cannot, in the Commission's view, be acquired after the expiry of the non-marketing period, even by way of exclusive succession, since there is no longer a case of a trader who gave up marketing and thus the very basis for the formation of legitimate expectations is lacking.

The answer depends on the legal nature of the possibility of resuming milk production after the expiry of the non-marketing period. A distinction must here be drawn between recognizing guaranteed legal situations as 'vested rights' and, on a lower level, the creation of a potentiality which is not consolidated into a guaranteed legal situation until the person concerned takes steps in order to realize the possibilities open to him.

The legitimate expectations of a farmer who gave a non-marketing undertaking goes no further than the possibility of resuming milk production, and is subject to the condition that he can show that he intends and is indeed able to produce on his holding all of the reference quantity applied for. There is not yet any question of the immediate vesting of a right; a farmer who has given a non-marketing undertaking is simply in a position capable in principle of leading to the acquisition of a guaranteed legal position but before such a position can materialize the person concerned must still take appropriate economic steps. It is only legitimate expectations in that sense, therefore, which may be taken into account for transfer by way of inheritance or by a similar transaction.

In the Commission's view the Finanzgericht failed to appreciate the limits on the protection of legitimate expectations by holding that the legitimate expectation of a farmer who had given a non-marketing undertaking extended to the resumption of milk production by his successor. Such an expectation meriting protection relates exclusively to the possibility of resumption of production by the producer who himself acquired such an expectation on giving the non-marketing undertaking. The further expectancy that the same possibility will be open to his successor qualifies for legal protection only when steps are taken which lead to the materialization of the existing expectation by producing legal situations capable of being transferred to the successor.

Such a case is not comparable, in the Commission's view, with succession or transfer by a similar transaction before the expiry of the non-marketing period. In such a case the right of the successor to the grant of a special reference quantity rests not on the expectation of the transferor but it is the person concerned himself who is in the position of a trader who has ceased marketing and may, therefore, seek the grant of a special reference quantity in reliance on a right vested in him himself.

As regards the right of property ownership, the Commission points out that the legal situation challenged by the plaintiff does not deny him his right of property ownership nor does it restrict his capacity to enjoy it in a manner going to the essence of the property right.

Moreover it is only legal situations actually in existence on the date of succession or of the act of transfer which, as certain property rights, can be transferred to the successor by way of inheritance or a similar transaction. The possibility, related to the status of a trader who has ceased marketing, of requesting a special reference quantity does not become a guaranteed and transferable property right until the person entitled, that is to say the trader who ceased marketing, takes appropriate steps which in this context take the form of proof of the intention and the real possibility of resuming milk production.

Therefore it is only where the expectation of the possibility of resuming milk production is given concrete form, whether by an application for a special reference quantity or by the installation of the equipment for resuming milk production, that a legal situation can arise which is transferable to the successor by way of inheritance or by a similar transaction.

On the other hand if no steps are taken to give concrete form to the wish to resume milk production, the existing situation regarding legitimate expectations remains a mere possibility of acquiring a special reference quantity which does not enjoy any particular protection from the point of view of transfer of property by way of succession.

As regards, finally, the principle of equality, the Commission denies that the different treatment of heirs according to whether succession takes place before or after the expiry of the non-marketing period and before or after the grant of a special reference quantity constitutes discrimination.

Whereas heirs who succeed to the testator during the non-marketing period can claim an individual right to the grant of a special reference quantity, heirs to whom the holding was transferred only after the expiry of the non-marketing period take over the holding in the legal state it was in at the time of transfer. Unlike the former, the latter take over the holding without being subject to any non-marketing obligation whatsoever and they are, therefore, in theory in a similar position to young farmers who wish to start milk production. To recognize their right to the grant of a special reference quantity inherited from the testator would precisely lead to heirs being placed in an unjustifiably favourable position by comparison with the aforementioned young farmers.

In short, the Commission proposes the following answer to Question 2:

'Consideration of the documents in the case has disclosed no factor of such a kind as to affect the validity of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of 20 March 1989.'

M. Zuleeg
Judge-Rapporteur