JUDGMENT OF THE COURT (Third Chamber)
27 January 1994 *

In Case C-98/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry) for a preliminary ruling in the proceedings pending before that court between

A.A. Herbrink

and

Minister van Landbouw, Natuurbeheer en Visserij

on the validity of Article 3a 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 Council 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), and on the interpretation of Articles 3a and 12(c) 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),

* Language of the case: Dutch.

THE COURT,(Third Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, F. Grévisse and M. Zuleeg (Rapporteur), Judges,

Advocate General: C.O. Lenz,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr A.A. Herbrink, by E.H. Pijnacker Hordijk, of the Amsterdam Bar,

— the Netherlands Government, by B.R. Bot, Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by R.C. Fischer, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, the Netherlands Government, represented by T. Heukels, assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and the Council of the European Communities, represented by A. Brautigam, Legal Adviser, acting as Agent, at the hearing on 22 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 9 December 1992,

gives the following

Judgment

1 By orders of 7 March and 26 June 1991, which were received at the Court on 21 March 1991 and 1 July 1991 respectively, the College van Beroep voor het Bedrijfsleven referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the validity of Article 3a 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 Council 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), and on the interpretation of Articles 3a and 12(c) 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 The questions arose in proceedings between Mr Herbrink, the lessee, in association with his son-in-law, of an agricultural holding, and the Minister van Landbouw, Natuurbeheer en Visserij (Minister of Agriculture, Nature Conservation and Fisheries), concerning a special reference quantity under the levy system.

3 Mr Herbrink was the lessee of an agricultural holding at Laag Zuthem. In 1979 he gave a non-marketing undertaking pursuant to 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). In return for the grant of a non-marketing premium, he undertook not to market milk or milk products from his holding during the period from 17 May 1979 to 17 May 1984.

4 In 1986 Mr Herbrink resumed milk production on the holding leased by him and produced milk there until the expiration of the lease in February 1987. A previous application to the competent Netherlands court for an extension of the lease had ultimately been rejected by the Pachtkamer (Tenancy Chamber) of the Gerechtshof (Regional Court of Appeal) Arnhem in February 1986.

5 In 1988 Mr Herbrink resumed milk production in association with his son-in-law on another holding leased by the association without legal personality which he had formed that year with, amongst others, his son-in-law. That association produced milk in the 1988/89 marketing year.

6 In June 1989 Mr Herbrink applied to the competent national authority for the grant of a special reference quantity pursuant to Article 3a of Council Regulation No 857/84, Article 3a of Commission Regulation No 1546/88, cited above, and the Beschikking superheffing SLOM-deelnemers (Decree on the Application of the Super Levy to Participants in a Scheme for the Slaughter or Conversion of Dairy Herds), a Netherlands decree of 13 June 1989. That application was rejected. A complaint lodged by Mr Herbrink against the rejection decision was itself held to be unfounded. In the circumstances, the plaintiff in the main proceedings brought an action before the College van Beroep voor het Bedrijfsleven.

7 The College van Beroep voor het Bedrijfsleven, considering that the decision to be given depended on the interpretation and validity of the Community rules in the matter, stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Is Article 3a of Regulation (EEC) No 1546/88 of the Commission of the European Communities, as inserted therein by Commission Regulation (EEC) No 1033/89 of 20 April 1989, regard being had to the recitals in the preamble thereto, incompatible with higher-ranking Community law, and in particular with Article 3a of Regulation (EEC) No 857/84 of the Council of the European Communities, as inserted therein by Council Regulation (EEC) No 764/89?

(2) Must Article 3a, in conjunction with Article 12(c) of Council Regulation (EEC) No 857/84, be interpreted as meaning that a person or group of

persons are not prevented from being regarded as producers to whom both the first and second indents of Article 3a(1) and Article 3a(1)(a) are applicable by the fact that the conversion agreement was entered into by one person whereas, at the date of the request for a reference quantity on the basis of Article 3a, that person is operating a holding in collaboration with one or more other persons?

(3) If Question 2 is answered in the affirmative, must the person who entered into the conversion agreement or the group of persons which operates the holding at the date of the request referred to in Question 2 be regarded as the person entitled to a reference quantity by virtue of Article 3a?

(4) If Question 1 or Question 2 is answered in the negative, is Council Regulation (EEC) No 857/84 valid in so far as it does not provide for remission or repayment of the levy, or in so far as this is precluded by Article 3a(5) of the regulation, in respect of the period between the expiry of the conversion agreement and the date at which there was a change in the situation, as a result of which the producer concerned is not eligible for a provisional special quantity, in so far as the quantity of milk produced in that period does not exceed the reference quantity which would have been allocated if that change had not taken place?'

The first question

8 By its first question, the national court asks, in essence, whether Article 3a of Commission Regulation No 1546/88, as inserted by the amending regulation, Regulation No 1033/89, is not incompatible with higher-ranking Community law.

9 Before a ruling can be given on the question whether that provision is incompatible and invalid by reason of its going beyond the bounds of the enabling legislation, it should be considered, as the Netherlands Government has suggested, whether it may not in this case be interpreted as being consistent with the council

regulations at issue and with the principle of the protection of legitimate expectations. The Court has consistently held (see the judgment in Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 21, and, most recently, the judgment in Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 17) 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, and, more particularly as regards Article 3a of Regulation No 857/84, with the principle of the protection of legitimate expectations (judgment of 19 May 1993 in Case C-81/91 *Twijnstra*, not yet published in the ECR, paragraph 24).

10 Under Article 3a(1) of Regulation No 1546/88, as inserted by Regulation No 1033/89, requests for the grant of a special reference quantity, made pursuant to Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, 'shall be made by the producers concerned to the competent authority... and provided that the producers can prove that they still operate, in whole or in part, the same holdings as those they operated at the time of the approval... of their premium applications'.

11 Article 3a of Regulation 857/84, which was added by Regulation No 764/89 aforesaid, provides in paragraph (1) that producers whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation No 1078/77, expires after 31 December 1983, or, as the case may be, after 30 September 1983, are to receive provisionally a special reference quantity, subject to certain conditions laid down in the paragraph, particularly in subparagraph (a). The grant of a special reference quantity is subject to the proviso that the persons concerned 'did not... transfer the whole of their dairy enterprise before the end of the non-marketing or conversion period'.

12 It should be noted that the system of special reference quantities provided for in Article 3a of Regulation No 857/84 was introduced by Regulation No 764/89 in the light of the judgments in Case 120/86 *Mulder* [1988] ECR 2321 and Case 170/86 *von Deetzen* [1988] ECR 2355, with a view to ensuring the grant of a special reference quantity to producers who did not, pursuant to an undertaking given under Regulation No 1078/77 of 17 May 1977 aforesaid, supply any milk during the reference year, and that that system enshrines the general principle that every reference quantity is to remain attached to the land in respect of which it is allocated.

13 The Court has held in that regard, particularly in its judgments in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 15, and in Case C-81/91 *Twijnstra*, cited above, paragraph 25, concerning the transfer of a holding by way of assignment or by a surrender upon the expiry of a lease, that the entire system of reference quantities is characterized by the principle laid down by Article 7(1) of Council Regulation No 857/84 and Article 5 of Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (Official Journal 1984 L 132, p. 11), as superseded subsequently by Article 7 of Commission Regulation (EEC) No 1546/88; according to that principle, a transfer of land in respect of which a reference quantity has been allocated necessarily entails the transfer of the reference quantity itself. It is therefore with a view to ensuring the application of that principle also with respect to special reference quantities that Article 3a(1) of Regulation No 1546/88, as inserted by Regulation No 1033/89, reinforces the condition laid down in Article 3a(1)(a) of Regulation No 857/84, by requiring that the producer must still be operating, in whole or in part, the same holding.

14 However, an exception to that general principle is established by Article 7(4) of Council Regulation No 857/84, inserted by Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 laying down 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 1985 L 68, p. 1), for the application of which detailed rules are laid down by subparagraph (4) of the first paragraph of Article 7 of Regulation No 1546/88. Article 7(4) of Regulation No 857/84 authorizes Member States to put the reference quantity granted pursuant to Article 2 of Regulation No 857/84 at the disposal of a lessee who intends to continue milk production following the expiry of a non-renewable lease. It is necessary to conclude that Mr Herbrink's position is analogous to that situation.

15 Since, as is demonstrated by the judgment in Case C-44/89 *von Deetzen II* [1991] ECR I-5119, paragraph 21, a lessee could expect, in his capacity as a producer and by virtue of the principle of the protection of legitimate expectations, to be able to carry on his activity under conditions that involved no discrimination between him and other producers, he was entitled, at the end of his non-marketing period, to expect also to benefit from a special reference quantity on the expiry of his lease, in so far as the Member State concerned had availed itself of the authorization provided for by Article 7(4) of Regulation No 857/84 and subparagraph (4) of the first paragraph of Article 7 of Regulation No 1546/88.

16 Neither the provisions of Regulation 1033/89 nor its recitals show that the intention of that regulation was to remove persons to whom Article 3a of Regulation No 1546/88 applies from the scope of the system provided for by Article 7(4) of Regulation No 857/84. The Commission could not, moreover, lawfully have modified the scope of a regulation of the Council.

17 The answer to the first question must therefore be that consideration of Article 3a(1) of Regulation No 1546/88 has disclosed no factor of such a kind as to affect its validity, since that provision is to be interpreted as meaning that it does not preclude a lessee of a holding who finds himself in the situation provided for in Article 3a(1) of Regulation No 857/84 from being able, even after the expiry of his lease, to benefit from a special reference quantity where it is put at his disposal by the Member State concerned under the conditions specified in by Article 7(4) of Regulation No 857/84 and subparagraph (4) of the first paragraph of Article 7 of Regulation No 1546/88.

The second and third questions

18 By these two questions, which should be considered together, the national court asks whether, for the purposes of the allocation of a special reference quantity following the reletting of a holding to the initial lessee in collaboration with other persons, the producer, within the meaning of Articles 3a and 12(c) of Regulation No 857/84, and thus the person entitled to the special reference quantity, is the association or group of persons, or only the initial lessee.

19 There is nothing, on the basis of the actual wording of Articles 3a and 12(c) of Regulation No 857/84, to preclude an initial lessee who is eligible for a special reference quantity from carrying on his milk production activity within the framework of an association or a group of persons formed by him and other persons for the purposes of operating a tenanted holding. However, the Court has held (see the judgment in *von Deetzen II*, cited above, paragraph 38), that a special reference quantity can be allocated only if the association or group of persons was not

formed for the sole purpose of realizing, for the benefit of the initial lessee, the marketable value of that special reference quantity.

20 The status of a person entitled to a special reference quantity attaches to a producer within the meaning of Articles 3a and 12(c) of Regulation No 857/84. The concept of producer, which is the same as that under Article 3a of Regulation No 1546/88, refers to a farmer who operates, for the purposes of milk production, a set of production units for which he is himself responsible; where the holding is leased, those conditions are fulfilled in the person of the lessee alone, who enjoys the right to the use of the holding (judgment in Case C-236/90 *Maier* [1992] ECR I-4483, paragraph 11). Where the holding is relet to an association or a group in the circumstances set out above, the status of producer attaches to all the persons comprised in the association or group.

21 For those reasons, the answer to the second and third questions must be that Article 3a of Regulation No 857/84 is to be interpreted as meaning that it does not preclude the allocation of a special reference quantity following the reletting of a holding to the former producer, who was the initial lessee, in collaboration with other persons, and that that association or group of persons is to be regarded as a producer within the meaning of Articles 3a and 12(c) of Regulation No 857/84 and thus as the person entitled to the special reference quantity.

The fourth question

22 In the event that the producer concerned could not obtain a special reference quantity, the national court calls in doubt, in its fourth question, the validity of Regulation No 857/84, on the ground that it does not provide for the retroactive remission of the additional levy in respect of the class of producers who do not fulfil the conditions governing eligibility for a special reference quantity at the time of lodging their request.

23 The national court states that in the present case there was no change in the lessee's situation until his lease expired in February 1987. He could thus expect, like any

other producer who had entered into a non-marketing undertaking, to receive, in respect of that period, the same treatment as the producers to whom Article 3a(5) of Regulation No 857/84 relates.

24 That article provides that producers 'who receive a special reference quantity... shall not be liable to the additional levy in respect of quantities produced prior to the sixth period of application of the scheme...', that is to say, prior to the year ending on 31 March 1989. Consequently, a farmer who has produced milk after the expiry of his non-marketing period and is not covered by that provision remains liable to the additional levy.

25 Contrary to the contention of the plaintiff in the main proceedings, the rules at issue do not infringe the principle of the protection of legitimate expectations.

26 The principle of the protection of legitimate expectations does not preclude the Community rules from imposing conditions which are inherent in any scheme which seeks to limit agricultural production by establishing a system of quotas, in so far as that scheme does not specifically affect that class of producers by reason of the non-marketing undertakings given by them. A producer could not legitimately expect to resume production on the expiry of the non-marketing period without being liable to a levy under the scheme establishing an additional levy on milk introduced previously by 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), as long as he had not obtained a reference quantity exempt from that levy. Consequently, a producer who did not ultimately fulfil the conditions for the allocation of a reference quantity at the time when he resumed production could not expect to be exempted retroactively from the additional levy.

27 Nor, finally, contrary to the contention of the plaintiff in the main proceedings, do the rules as interpreted constitute a breach of the prohibition of discrimination, as laid down in Article 40(3) of the Treaty, which is the specific expression of the

general principle of equality (see the judgments in Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 13, and Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 18).

28 It is true that the plaintiff in the main proceedings cannot benefit from a retroactive remission of the additional levy, unlike producers who fulfil the conditions for the allocation of a special reference quantity up to the time when they lodge their respective requests. However, since the two classes of producers are not in the same situation, a difference in treatment is justified. Regulation No 764/89, in which the system of special reference quantities is defined, allows (as is confirmed in its second recital) the grant of a special reference quantity with a view to a resumption of production. In order to facilitate such resumption, it seeks to remove the burden of the past constituted by levies due or already paid. That objective has no relevance in the case of producers who do not fulfil the conditions for the grant of a special reference quantity at the time of lodging their request.

29 For those reasons, the answer to the fourth question must be that consideration of Regulation No 857/84, in the version resulting from Regulation No 764/89, has disclosed no factor of such a kind as to affect its validity, notwithstanding the fact that it does not provide for the retroactive remission of the additional levy in favour of producers who no longer fulfil the conditions for the grant of a special reference quantity at the time of lodging their request.

Costs

30 The costs incurred by the Netherlands Government, the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Third Chamber),

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by two orders of 7 March 1991 and 26 June 1991, hereby rules:

1. Consideration of Article 3a(1) 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, as amended by Commission Regulation (EEC) No 1033/89 of 20 April 1989, has disclosed no factor of such a kind as to affect its validity, since that provision is to be interpreted as meaning that it does not preclude a lessee of a holding who finds himself in the situation provided for in Article 3a(1) 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, from being able, even after the expiry of his lease, to benefit from a special reference quantity where it is put at his disposal by the Member State concerned under the conditions specified in Article 7(4) of Regulation No 857/84 and subparagraph (4) of the first paragraph of Article 7 of Regulation No 1546/88;

2. Article 3a of Regulation No 857/84 is to be interpreted as meaning that it does not preclude the allocation of a special reference quantity following the reletting of a holding to the former producer, who was the initial lessee, in collaboration with other persons, and that that association or group of persons is to be regarded as a producer within the meaning of Articles 3a and 12(c) of Regulation No 857/84 and thus as the person entitled to the special reference quantity;

3. Consideration of Regulation No 857/84, in the version resulting from Regulation No 764/89, has disclosed no factor of such a kind as to affect its validity, notwithstanding the fact that it does not provide for the retroactive

remission of the additional levy in favour of persons who no longer fulfil the conditions for the grant of a special reference quantity at the time of lodging their request.

Moitinho de Almeida Grévisse Zuleeg

Delivered in open court in Luxembourg on 27 January 1994.

J.-G. Giraud
Registrar

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