REPORT FOR THE HEARING
delivered in Case C-174/88 *

I — Facts and procedure

1. *Legal background to and facts in the main proceedings*

Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, Special Edition 1968 (I), p. 176), hereinafter referred to as 'the basic regulation', has been amended *inter alia* by Council Regulation (EEC) No 856/84 of 31 March 1984 (Official Journal 1984, L 90, p. 10), which inserted a new Article 5c introducing an additional levy for five consecutive periods of 12 months. Under the first paragraph of the article the Member States were able to choose between two formulas. Depending on the choice made, the levy was payable by milk producers (formula A) or by purchasers of milk (formula B). The levy is payable on the quantities of milk and/or milk equivalent which the producer has delivered to a purchaser (formula A) or which have been delivered by producers to a purchaser (formula B) and which, during the 12 months concerned, exceed a reference quantity to be determined.

Article 5(c)(2) provides that the levy is also payable by every milk producer on the quantities of milk and/or milk equivalent which he has sold for direct consumption and which, during the 12 months concerned, exceed a reference quantity to be determined.

In Article 2(1) of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy (Official Journal 1984, L 90, p. 13) it is stated that the reference quantity is to be equal to the quantity of milk or milk equivalent delivered by the producer during the 1981 calendar year (formula A), or to the quantity of milk or milk equivalent purchased by a purchaser during the 1981 calendar year (formula B), plus 1%. Under Article 6(1) of the regulation, 'each producer of milk and milk products referred to in Article 5c(2) of Regulation (EEC) No 804/68 shall be assigned a reference quantity corresponding to the direct sales made by the producer during the 1981 calendar year, increased by 1%'.

According to Article 6(2), the total of the reference quantities granted under paragraph (1) may not exceed the quantities fixed in the annex to the regulation: in the case of the United Kingdom, that quantity amounts to 187 000 tonnes.

Article 12(c), (f) and (h) of Regulation No 857/84 states that for the purposes of the regulation the following meanings are to apply:

'(c) producer: a natural or legal person or group of natural or legal persons farming a holding located within the geographical territory of the Community:

* Language of the case: English.

(i) selling milk or other milk products directly to the consumer, and/or

(ii) supplying the purchaser;

...

(f) Undertaking treating or processing milk or other milk products: an undertaking or grouping, the dairy-related activities of which are restricted to collection, packaging, storage and chilling or to one of these operations;

(h) Milk or milk equivalent sold directly to consumption: milk or milk products processed into milk equivalent, sold without going through an undertaking treating or processing milk'.

Commission Regulation (EEC) No 1371/84 of 16 May 1984 (Official Journal 1984, L 132, p. 11) lays down detailed rules for the application of the additional levy referred to in Article 5c of the basic regulation. Under Article 4 of the Commission regulation:

'1. Producers of milk and/or milk products to whom Article 5c(2) (of the basic regulation) apply shall send to the competent authority ... an application for registration accompanied by a statement listing the products and quantity of these products sold by direct sale during the 1981 calendar year ...

2. Producers who began the direct sale of milk and milk products from 1 January 1981 but before 1 April 1984 who have greatly altered their operations since 1 January 1981 shall in the statement accompanying their application for registration list the products and quantities of these products sold by direct sale in their last 12 months of operation, expressed where appropriate in terms of milk equivalent.

If their operations cover less than 12 months they shall list the products and quantities of these products sold during the actual selling period.

3. ...

4. Member States shall, within the limits of the quantities referred to in Article 6(2) of Regulation (EEC) No 857/84 and fixed in the annex thereto, assign:

(a) to producers to whom paragraph 1 applies, a reference quantity corresponding to their direct sales in the 1981 calendar year plus 1% and corrected where appropriate by a uniform percentage in order to comply with the abovementioned Article 6(2);

(b) to producers to whom paragraph 2 applies, a reference quantity corresponding to their sales in their last 12 months of operation before 1 April 1984, weighted by a percentage where appropriate. In the case of producers who have been conducting operations for less than 12 months, Member States shall determine an annual sales quantity on the basis of actual sales and assign to such producers a reference quantity in accordance with the provisions set out above ...'

Council Regulation (EEC) No 590/85 of 26 February 1985 (Official Journal 1985, L 68, p. 1) amended Regulation No 857/84, cited above, in particular by replacing Article 6 by the following provisions:

'*Article 6*

1. Each producer of milk and milk products referred to in Article 5c(2) of Regulation (EEC) No 804/68 shall be assigned a reference quantity corresponding to the direct sales made by the producer during the 1981 calendar year, plus 1%.

However, Member States may provide that, on their territory, the producer's reference quantity is equal to the quantity of direct sales which he has made during the 1982 or 1983 calendar year, weighted by a percentage. This percentage may be modified on the basis of the level of sales by certain categories of persons liable for the levy, the trend in sales in certain regions between 1981 and 1983 or the trend in sales by certain categories of persons liable for the levy during the same period, in accordance with the conditions to be determined under the procedure laid down in Article 30 of Regulation (EEC) No 804/68.

2. Subject to the provisions of Article 6a, the total reference quantities assigned in accordance with paragraph 1 may not exceed the quantities set in the annex.'

In the United Kingdom, which opted for Formula B (purchase), the Minister for Agriculture, Fisheries and Food ('the Minister') is responsible under the Dairy Produce Quota Regulations 1984 (SI 1984, No 1047) for assigning a primary direct sales quota (the reference quantity for those sales provided for by Community legislation) to every producer of milk and milk products who has submitted an appropriate request and who fulfils the conditions necessary for the grant of a quota. Once the Minister has fixed a primary quota, if the person concerned objects to the amount he has been granted, he may raise an objection to the decision within 21 days before the Dairy Produce Quota Tribunal for England and Wales ('the Quota Tribunal').

Hall & Sons (Dairy Farmers) Limited ('Hall') carries on business as a supplier of milk and milk products such as cheese, cream and yoghurt. Hall sells directly to its customers (retail and wholesale) and not through a scheme operated by the Milk Marketing Board. Hall produces some milk from its own cows but also buys milk from other sources in order to have sufficient milk for its requirements.

On 22 August 1984 Hall applied to the Minister to obtain a direct sales quota. By letter of 21 January 1985 the Minister informed Hall that he intended to award it a primary direct sales quota of 1 323 193 litres based on an estimate of the milk obtained from its own cows. Hall appealed by way of objection to the Quota Tribunal which, by a decision of 29 August 1985, directed that it was unable to vary the primary quota awarded. According to the Quota Tribunal, for the purpose of examining the quantity of milk quota to which Hall is entitled, it could take into consideration only sales of milk and milk products derived or originating from Hall's own holdings. However, Hall contended that its total sales in the relevant period must be taken into account and that there was no need to establish whether the milk was produced by its own cows or bought from the Milk Marketing Board.

Hall then made an application for judicial review to the Queen's Bench Division of the High Court. That court decided to stay the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Whether the reference quantity to be assigned to a producer of milk and milk products in accordance with the provisions of 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 and 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 is to be calculated by reference to all the direct sales made by the producer in the relevant calendar year or else by reference only to the direct sales made by him during that period out of the milk produced by himself.'

2. *Procedure before the Court of Justice*

The order of the Queen's Bench Division of the High Court was registered at the Court Registry on 28 June 1988.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Hall, represented by Stuart Isaacs and Neil Calver, barristers, and D. Jackson, solicitor, by the United Kingdom, represented by George Pulman, barrister, and S. Hay, acting as Agent and by the Commission of the European Communities, represented by D. Grant Lawrence, in the written procedure, and Peter Oliver, in the oral procedure, members of its 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 October 1989 to open the oral procedure without any preparatory inquiry and assigned the case to the First Chamber. However, the Court wrote to the United Kingdom Government asking it to supply, by 25 October 1989 at the latest, an unabridged copy of the 'Dairy Produce Quota Regulations 1984'. The request was complied with within the time allowed.

II — Summary of the written observations submitted to the Court

The applicant in the main proceedings, Hall, sets out the provisions of Community and national law at issue and explains that it is common ground between Hall and the Quota Tribunal that Hall is a 'producer' within the meaning of Article 12(c) of Regulation (EEC) No 857/84. In Hall's opinion, that definition also applies in the context of the other regulations concerning the additional levy. Since the milk sold by Hall does not go through any undertaking treating or processing milk, it is sold directly to consumption.

Hall argues that it necessarily follows that it is one of the producers referred to in Article 6 of Regulation No 857/84, both in its original form and as amended, who, under the provisions of that article, must be assigned a reference quantity which must necessarily correspond to the direct sales made by them. That interpretation is moreover confirmed by the provisions of Article 4(2) and (4)(b) of Regulation No 1371/84 applicable in the present case.

Hall submits that its interpretation not only conforms with the plain meaning of the relevant provisions, but is consistent with the concept of a 'reference quantity' in Community law. As that concept relates to the quantity of milk marketed and access to the market, the reference quantity is correctly to be calculated by reference to all the sales of a direct seller during the relevant base period and is not tied to his production. Referring to the declaration on liquid milk made by the United Kingdom on 27 October 1970 and to the declaration on liquid milk annexed to the Final Act of Accession of the United Kingdom to the EEC, Hall maintains that one of the objectives of the common policy is to use as much milk as possible for liquid consumption throughout the Community, and that in applying the policy care should be taken not to impede that aim, which supports Hall's interpretation of the Community provisions in question. According to Hall, that interpretation is also supported by the Court's judgments of 28 April 1988 in Case 61/87 *Thevenot* v *Centrale laitière de Franche-Comté* [1988] ECR 2375 and of 17 May 1988 in Case 84/87 *Erpelding* v *Secrétaire d'État à l'agriculture et à la viticulture* [1988] ECR 2647, because those judgments show clearly that, in determining the applicable reference quantity, what is important is the quantity of milk delivered by the producer ('livrée par le producteur') in the relevant base period.

Hall submits that any interpretation of Article 6 of Regulation No 857/84 which results in the additional levy being calculated by reference only to the direct sales of milk produced by itself must be rejected

(a) as contrary to the plain meaning of Article 6, cited above;

(b) as placing an unwarranted limitation on the plain, clear and unequivocal meaning ascribed in Article 12(h) to the phrase 'milk or milk equivalent sold directly to consumption';

(c) as inconsistent with the concept of a reference quantity and with the policy objectives of the Community;

(d) as having no basis in clear and specific provisions, whereas certain provisions of Community law, such as Article 7(1) of Council Regulation (EEC) No 1422/78 of 20 June 1978 concerning the granting of special rights to milk producer organizations in the United Kingdom (Official Journal 1978, L 171, p. 14), Article 5c(2) of the basic regulation, Article 6 of Regulation No 857/74 and Article 4 of Regulation No 1371/84, show that the Community legislature has taken into consideration to a great extent the category of producers constituted by direct sellers;

(e) because, although Hall's interpretation means that a reference quantity would be awarded twice, the award would not be made on the same basis in both cases, but on the basis of two distinct situations for which the applicable regulations make separate provision;

(f) because Hall's interpretation does not give rise to any discrimination between producers, in view of the wide interpretation which must be given to a text of Community secondary legislation in order to avoid such discrimination (see

the judgments of 13 December 1983 in Case 218/22 *Commission* v *Council* [1983] ECR 4063 and of 25 November 1986 in Joined Cases 201/85 and 202/85 *Klensch* v *Secrétaire d'État* [1986] ECR 3477), the conditions which must be satisfied for there to be a risk of discrimination (see the judgments of 13 June 1978 in Case 139/77 *Denkavit* v *Finanzamt Warendorf* [1978] ECR 1317 and of 19 October 1977 in Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St Annen* [1977] ECR 1753), and the fact that Hall, like other direct sellers, is in a special position which is neither comparable with nor identical to that of other producers who sell their milk only to the Milk Marketing Board (see, by way of analogy, the two 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 2555);

(g) because the anomaly created by Hall's interpretation, that is to say that the same milk would bear a reference quantity twice, is not *per se* such as to invalidate Hall's interpretation (with regard to the existence of such anomalies in the quota/additional levy system in the milk sector, see Special Report No 2/87 of the Court of Auditors).

Hall therefore proposes that the Court's reply to the question referred to it for a preliminary ruling should be that the reference quantity must be calculated by reference to all the direct sales made by the producer in the relevant calendar year and not only by reference to the direct sales made by him during that period out of milk produced by himself.

The United Kingdom points out that much of the detailed arrangements for dividing national quota between individual producers in a Member State and collecting the levy has been left to the discretion of the Member States. The meaning of 'dairy produce sold by a producer by direct sale' must however be interpreted in the light of Community provisions and not in relation only to domestic provisions.

The United Kingdom considers that Hall is carrying out two activities: it is farming a holding and selling milk products directly to consumers; and it is buying in milk and selling milk or milk products directly to consumers. According to the United Kingdom only the first of those activities comes within the scope of Article 5c(2) of the basic regulation. The guaranteed total quantities for wholesale deliveries (Article 5c(3)) and the guaranteed total quantities for direct sales (annex to Regulation No 857/84) are independent of each other. However, the relationship between the two is made clear by Article 6a of Regulation No 857/84 (inserted by Regulation No 590/85), which provides that, where a producer has two reference quantities, one for deliveries and one for direct sales, an increase may be guaranteed in a 12-month period to one of the reference quantities so long as there is a corresponding reduction during the same 12-month period to the other reference quantity.

Since Hall does not sell milk to the Milk Marketing Board it does not have a wholesale quota. It has only a direct sales quota. All milk purchased by Hall from the Milk Marketing Board has already been subject to quota in the hands of the original producer. It is quite the contrary of the purpose of the dairy produce quota scheme

for milk to be subject to quota on more than one occasion. If anyone owning one cow but purchasing milk from the Milk Marketing Board was entitled to quota on all the milk which he thus purchased, substantial dairy organizations would be able to defeat the quota scheme and obtain an unfair advantage over small producers. There would as a result be substantial discrimination in favour of direct sales producers and against wholesale producers.

The Commission, supporting the United Kingdom's argument, considers that the difficulties facing the national court arise from the fact that Hall is carrying out two different activities or from a degree of confusion between those activities. As owner of a herd of cows Hall is entitled to a reference quantity based on sales of milk obtained from its own herd. On the other hand, Hall is not entitled to a direct sales reference quantity when its activity consists in buying in milk from other producers and selling it on to the consumer either as milk or as milk products, since in that case it is the producer who is the person who has obtained the milk from his cows.

The Commission then examines the potential sources of the milk purchased by Hall. It considers that if the milk were purchased directly from other producers Hall would certainly be entitled, as purchaser, to a reference quantity under formula B in Article 5c(1) of the basic regulation, based on the deliveries made to it. Hall would then have to divide that quota between each of the producers from whom it bought milk. The Commission considers however that in the situation which exists on the milk and milk products market in the United Kingdom it seems more likely that Hall is not buying directly from individual producers but from another body such as the Milk Marketing Board.

The Commission maintains that the definition of producer in Article 12(c) of Regulation No 857/84 does not entitle Hall to a direct sales reference quantity for all the milk it sells to the consumer whether or not the milk was obtained from its holding referred to in the early part of the definition. That reference quantity is intended to benefit the producer who marketed his own milk directly without obliging him to change his practices by passing through a third party.

Finally, the Commission considers that Hall's interpretation could lead to an increase in milk production, contrary to the aim of the Community regulations.

Gordon Slynn
Judge-Rapporteur