REPORT FOR THE HEARING
delivered in Case 113/88 *

I — Facts and written procedure

1. *The applicable provisions of Community law*

(a) 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) amended that latter Regulation by the insertion of an Article 5(c). That provision established an additional levy payable by producers or purchasers of cows' milk for five consecutive periods of 12 months beginning on 1 April 1984. The objective of that levy is to curb the increase in milk production while at the same time permitting the structural developments and adjustments required.

Under paragraph 1 of the new provision the levy system is to be implemented in each region of the territory of the Member States in accordance with one of the following formulas:

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

(ii) under Formula B, the levy is payable by purchasers of milk or other milk products (dairies) on the quantities of milk delivered by producers in excess of a reference quantity to be determined. The purchaser liable to the levy is required to pass on this levy only to the producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (purchaser formula).

(b) The general rules for the application of the additional levy are contained in Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5(c) of Regulation (EEC) No 804/68 in the milk and milk products sector (Official Journal 1984, L 90, p. 13), as amended. Article 1(1) of this latter Regulation fixes the levy at 75% of the target price for milk where Formula A (the producer for milk) is applied and at 100% of the target price for milk when Formula B (the purchaser formula) is applied.

Regulation No 857/84 also fixes the reference quantity referred to in Regulation No 856/84, that is to say the quantity exempt from the additional levy. This is in principle 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

* Language of the case German

States may provide that on their territory the reference quantity shall be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 or 1983 calendar year weighted by a percentage established so as not to exceed the guaranteed quantity. This percentage may be varied on the basis of the level of deliveries of certain categories of persons liable for the levy, the trend in deliveries in certain regions between 1981 and 1983 or the trend in deliveries of certain categories of persons liable during this same period (Article 2(2)).

Articles 3, 4 and 4(a) of Regulation No 857/84, which allow Member States to take into account certain special situations when determining the reference quantities or to allocate specific or additional reference quantities, should also be mentioned.

More specifically, Article 3 provides as follows:

'For the determination of the reference quantities referred to in Article 2 and in connection with the application of Formulas A and B, certain special situations shall be taken into account as follows:

(1) ...

(2) ...

(3) Producers whose milk production during the reference year referred to under Article 2 has been affected by exceptional events occurring before or during that year shall obtain, on request, reference to another calendar year within the 1981 to 1983 period.

The following situations may justify application of the first subparagraph:

(i) a serious natural disaster affecting the producer's farm to a substantial extent,

(ii) the accidental destruction of the producer's fodder resources or buildings used for dairy livestock,

(iii) an epizootic affecting all or part of the milk herd.

Member States shall inform the Commission of cases of application of the first subparagraph. Additions to the list of situations referred to in the second subparagraph may be made according to the procedure laid down in Article 30 of Regulation (EEC) No 804/68.'

(c) The detailed rules for the application of the additional levy were laid down in 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 5(c) of Regulation (EEC) No 804/68 (Official Journal 1984, L 132, p. 11), as amended.

2. *The German provisions implementing the Community rules*

The additional milk levy was implemented in the Federal Republic of Germany by the

Verordnung über die Abgaben im Rahmen von Garantiemengen im Bereich der Marktorganisation für Milch und Milcherzeugnisse (Milch-Garantiemengen-Verordnung) (Regulation on levies in connection with guaranteed quantities under the organization of the market for milk and milk products (milk guaranteed quantities regulation)) of 25 May 1984 (*Bundesgesetzblatt* I, p. 720), as most recently amended by the Regulation of 18 June 1986 (*Bundesgesetzblatt* I, p. 911).

Paragraph 1 of the Regulation lays down the principle that in Germany it is the producer and not the purchaser who must pay the levy. Paragraph 4(2) provides that 'the reference quantity shall be the quantity delivered by the milk producer to a purchaser in the calendar year 1983, minus 4%. This rate of abatement shall be raised if the quantity delivered in the calendar year 1983 is higher than that delivered in 1981'.

3. *The main proceedings*

In 1980 Karl Leukhardt, a farmer, delivered 188 954 kg of milk to the dairy Milchwerk Tübingen. The figures for 1981, 1982 and 1983 were 160 707 kg, 142 417 kg and 142 747 kg respectively. On the basis of the delivery in 1983 the dairy allocated him a reference quantity of 138 300 kg.

On 26 October 1984 the competent Landwirtschaftsamt (Agricultural Office) issued Mr Leukhardt with a certificate which attested that from March 1981 onwards he had suffered an excessive loss of milk cows which had persistently affected his milk production. For that reason the quantity delivered in 1981 could be taken into account. By written notice of 6 December 1984 Milchwerk Tübingen allocated Mr Leukhardt a new reference quantity of 155 500 kg, calculated on the basis of the quantity delivered in 1981.

The plaintiff then brought proceedings against the Hauptzollamt (Principal Customs Office) Reutlingen in which he claims that the reference quantity to be allocated to him should be calculated on the basis of his deliveries in 1980.

He submits first that it is contrary to the prohibition of discrimination laid down in Article 40(3) of the EEC Treaty and the general principle of equality developed in the Court's case-law to refer to 1981 or 1982 as the reference year not only in the case of a producer whose milk production was adversely affected by an extraordinary event in 1983, but also in the case of milk producers whose milk production was in addition affected by an extraordinary event in 1981 and 1982. By virtue of the principle of equality, the plaintiff in the main proceedings is entitled to require that the calculation of the reference quantity be based on the milk delivered in the 1980 calendar year, which would give rise to a reference quantity of approximately 182 600 kg.

In the alternative, Mr Leukhardt submits that the reference quantity should be recalculated on the basis of the quantity

delivered in 1981 plus 1%, as set out in Article 2(1) of Regulation No 857/84, which would result in a reference quantity of 162 314 kg.

In the opinion of the Hauptzollamt, the defendant in the main proceedings, it is not contrary to the Community law principle of equality or to the prohibition of discrimination laid down in Article 40(3) of the EEC Treaty to refer to 1981, if it was the producer's most favourable calendar reference year, pursuant to Article 3(3) of Regulation No 857/84, even if milk production in that year was also adversely affected by an exceptional event. Nor is the plaintiff entitled to rely on the method provided for in Article 2(1) of that Regulation, since the methods for the calculation of the reference quantity set out in Article 2(1) and (2) are to be chosen by the Member States and not by the individual milk producers.

Having regard to these arguments of the parties the Finanzgericht Baden-Württemberg stayed its proceedings, by order of 8 April 1988, and referred the following questions for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

'(1) Is Article 3(3) of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5(c) of Regulation (EEC) No 804/68 in the milk and milk products sector (Official Journal L 90, 1.4.1984, p. 13) to be interpreted as meaning — or, if it is in part invalid, to be supplemented so as to provide — that a milk producer whose milk production was affected by an exceptional event in every year from 1981 to 1983 may choose as the calendar reference year a different year, such as the next earliest, in which his milk production was not affected by an exceptional event?

(2) If Question 1 is answered in the negative: are Article 2(1) and (2) and Article 3(3) of Regulation No 857/84 to be interpreted as meaning that a producer delivering to a purchaser whose milk production was affected by an exceptional event in the reference year chosen (in the Federal Republic of Germany, 1983) may require the delivery reference quantity to be granted to him to be calculated either according to the method laid down in Article 2(2) of Regulation No 857/84, on the basis of another calendar reference year (1981 or 1982), or, according to the method laid down in Article 2(1) of Regulation No 857/84, on the basis of the quantity of milk delivered during the 1981 calendar year plus 1%?'

In the grounds of the order making the reference the Finanzgericht observes that the fact that Article 3(3) of Regulation No 857/84 limits the reference years available to a producer to 1981, 1982 or 1983 may be

a breach of the prohibition of discrimination contained in Article 40(3) of the EEC Treaty or the Community law principle of equality. Since the plaintiff is in a worse position than a comparable producer whose milk production was not affected by an exceptional event until after the end of 1981 and whose 1981 milk delivery was therefore comparatively higher, Article 3(3) may be invalid in so far as no substantial objective reasons may be found to justify the equal treatment of the plaintiff and the other producer. With regard to the second preliminary question the Finanzgericht appears to be inclined to accept the arguments of the defendant Hauptzollamt.

4. *Procedure before the Court of Justice*

The order making the reference was received at the Court Registry on 11 April 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted by the plaintiff in the main proceedings, Karl Leukhardt, represented by Lutz Frauendorf, Rechtsanwalt, Tübingen, by the Government of the Federal Republic of Germany, represented by Martin Seidel, and by the Commission of the European Communities, represented by its Legal Adviser Peter Karpenstein.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. Pursuant to Article 95 of the Rules of Procedure the Court decided on 7 December 1988 to assign the case to the Third Chamber.

II — Written observations

1. *The first question*

(a) Mr Leukhardt submits that, taking into account the fundamental rights guaranteed by Community law, in order to comply with the Treaty, Article 3 of Regulation No 857/84 should be interpreted to the effect that a milk producer may opt for a reference year before the 1981 to 1983 period if all those three years were adversely affected in equal measure by an exceptional event. To limit the choice of a reference year to the 1981 to 1983 period breaches the prohibition of discrimination contained in Article 40(3) of the EEC Treaty and also the principle of equality which must be complied with in European Community law.

Failure to take into account a situation such as that of the plaintiff in the main proceedings in the disputed Community Regulation cannot be justified on the basis of legislative discretion. Admittedly, Community institutions have a wide discretion in the implementation of the objectives of the agricultural policy. However, in this case the consideration of freedom of legislative action cannot play a

role since the main concern is the consistency of the system. Comparability of reference points is provided for under Article 3(3) of Regulation No 857/84. Under Article 39(2) of the EEC Treaty, in the working out of the common agricultural policy and the special methods for its application account must be taken of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions, and the need to effect the appropriate adjustments by degrees. That also requires that special situations be taken into account.

When the Community legislature creates a system to take into account special situations that system must be consistent. It may not exclude precisely those persons who are the most severely affected. It is contradictory that Article 3(3) of Regulation No 857/84 is intended to give assistance to producers who have been adversely affected by exceptional events but because of the limitation on the period which may be taken into account it excludes the persons who have been most severely affected. According to the prohibition of discrimination contained in Article 40(3) of the EEC Treaty special account should have been taken of these producers.

If the provision cannot be interpreted in conformity with the Treaty then it is invalid in so far as it does not take into account a special situation such as that of the plaintiff in the main proceedings. The legislature is not free to decide whether or not to take into account special situations; it must do so on grounds of protection of property and the protection of legitimate expectations.

Furthermore, the disputed rules were adopted in breach of the right to property, economic activity, legal certainty and the protection of legitimate expectations. Taking into account protection of property and freedom of economic activity, the operational level of a producer such as the plaintiff cannot be fixed at a point which was not determined by him but by exceptional circumstances.

(b) The Government of the Federal Republic of Germany considers that the first question has already been decided by the judgment of the Court of 17 May 1988 (Case 84/87 *Erpelding* [1987] ECR 2647).

In that case the Court held that a producer whose milk production was affected by an exceptional event to a substantial extent throughout the 1981 to 1983 period could not obtain reference to the quantity of milk or milk equivalent which he delivered in a year prior to 1981 or to a quantity to be calculated by extrapolation on the basis of the normal trend in his deliveries in a period prior to the exceptional event. The Court

also held that this rule did not cast any doubt on the validity of Council Regulation No 857/84 and Commission Regulation No 1371/84.

(c) The Commission, like the German Government, takes the view that the answer to the first question is contained in the judgment of the Court of 17 May 1988 (*Erpelding, supra*).

In that judgment the Court held that the limit on the possible reference years contained in Article 3(3) of Regulation No 857/84 did not constitute any discrimination.

On this basis the Commission proposes that the first question should be answered as follows:

'Article 3(3) of Regulation No 857/84 does not allow a milk producer whose production was affected by an exceptional event throughout the 1981 to 1983 period to refer to production in a year prior to 1981. Consideration of the questions raised by the national court has disclosed no factor of such a kind as to affect the validity of Regulation No 857/84.'

2. *The second question*

(a) Mr Leukhardt takes the view that Article 2(1) of Regulation No 857/84 is to be interpreted as meaning that the quantity of milk delivered in the 1981 calendar year, plus 1%, is to be taken as the basis. In its judgment of 27 January 1987 (*Zeitschrift für Zölle und Verbrauchssteuern*, 1987, p. 115) the Bundesfinanzhof decided to that effect.

This method of calculation cannot be objected to on the ground that it is applicable only to the State as a whole, since the guaranteed total quantity allocated to the State is not affected by such an application. Even the reference quantity in respect of sale for direct consumption may be cut if the Federal Republic of Germany's reference quantity is exceeded.

(b) The Government of the Federal Republic of Germany submits that the second question seeks to determine whether the weighting to be applied to the quantity of milk for the year chosen by the applicant is that applicable to the reference year actually chosen by the Member State under Article 2 of Regulation No 857/84 or that which would be applicable had the Member State taken as a general basis the year chosen by the applicant. The first alternative is the correct answer.

The determination of a reference quantity under Article 3(3) of Regulation No 857/84 is governed by Articles 2 and 3. There is a strict hierarchy between those provisions. Article 3(3) follows on from the scheme in Article 2. Article 3(3) only becomes

applicable when the Member State has chosen the applicable reference year pursuant to Article 2. Article 2 allows the Member State, and only the Member State, to select the applicable reference year.

In principle the reference quantity which is not subject to levy is the quantity of milk delivered in 1981, plus 1% (see the first subparagraph of Article 2(1) of Regulation No 857/84). However, the German legislature decided, pursuant to indent (a) of the second subparagraph of Article 2(1) in conjunction with the first subparagraph of Article 2(2) of that Regulation to select the quantity of milk delivered by the producer in 1983, adjusted by certain abatements. That precludes any recourse in the Federal Republic of Germany to the rule in the first subparagraph of Article 2(1). That holds also in the application of Article 3(3), which, unlike Article 2, refers to the individual producer.

Indeed that follows from the wording of that provision. The first subparagraph of Article 3(1) of Regulation No 857/84 simply permits 'reference' to another reference year within the 1981 to 1983 period. That does not enable the producer to rely, for the purpose of determining his reference quantity, on the first subparagraph of Article 2(1). In relation to the Federal Republic of Germany, the producer can merely claim that in the calculation of the reference quantity to be allocated to him the quantity of milk delivered in 1981 or 1982 should be taken as a basis, instead of that delivered in 1983. In all other respects, in the absence of a derogating rule in the first sentence of the first subparagraph of Article 3(1) the method of calculation set out in indent (a) of the second subparagraph of Article 2(1), in conjunction with the first subparagraph of Article 2(2), continues to be applicable.

This solution cannot be challenged on the ground that it places a producer who chooses 1981 as a reference year at a disadvantage because the quantity of milk delivered by him is then subject to the rate of abatement provided for in respect of 1983, the year of the higher milk delivery. Article 3(3) is a fairness clause. Its purpose is not to place the affected producer in every respect in the position in which he would have been had the exceptional event not occurred and had his milk production developed normally. Its purpose is only to avoid or to ameliorate exceptional and unfair hardship.

The interpretation proposed by the Federal Government does complete justice to that purpose. Since in cases when Article 3(3) of Regulation No 857/84 is applied the quantity of milk delivered in 1981 or 1982 is in any event considerably higher than that delivered in 1983, even when the rates of abatement provided for in Paragraph 4(2) and (3) of the Milch-Garantiemengen-Verordnung are applied the producer is still in a better position than he would be in if the quantity of milk delivered in 1983 were used.

On those grounds the Federal Republic of Germany suggests that the second preliminary question should be answered as follows:

'Article 2(1) and (2) and Article 3(3) of Regulation No 857/84 are to be interpreted as meaning that a producer delivering to a purchaser whose production was affected by an exceptional event in 1983, the calendar year chosen in the relevant Member State, may not require the reference quantity to be allocated to him to be calculated according to the method laid down in Article 2(1) of Regulation No 857/84 on the basis of the quantity of milk delivered during the 1981 calendar year plus 1%.'

(c) The Commission assumes that the methods for the allocation of the reference quantities provided for in Article 2(1) and (2) are at the disposal only of the Member States. Individual sellers of milk cannot choose between those methods. They are bound by the method of calculation for which the State on whose territory they are producing milk has opted.

Since the Federal Republic of Germany has opted for a calculation on the basis of milk deliveries in 1983, reduced by 4% (Paragraph 4 of the Milch-Garantiemengen-Verordnung), variations from this method are possible, according to the wording of Article 2(2) of Regulation No 857/84, only with regard to the percentage by which the quantities delivered in 1983 are to be reduced, to ensure that every State remains within the overall quantity allocated to it. The reference year chosen, 1983, cannot itself be altered.

The judgments of the Court of 25 November 1986 (in Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3477, at paragraph 15) and the judgment of 28 April 1988 (in Case 61/87 *Thevenot* [1988] ECR 2375, at paragraphs 18 and 19) also suggest that the methods made available by Article 2 of Regulation No 857/84 are options granted to the Member States alone. It must be concluded from those judgments that if the conditions for the application of Article 3(3) of Regulation No 857/84 are met, that provision merely allows another reference year within the 1981 to 1983 period to be chosen but does not allow any departure from the method for which a Member State opted when introducing the system of reference quantities.

In summary the Commission therefore suggests that the second question should be answered as follows:

'Where milk production has been affected by exceptional events, Article 3(3) of Regulation No 857/84 allows the choice of another reference year only within the limits set out in that provision. Neither Article 2 nor Article 3(3) of Regulation No 857/84 may be interpreted as allowing a departure from the method of calculation for which the Member State opted pursuant to Regulation No 857/84.'

III — Answers to questions asked by the Court

1. In answer to the Court's question as to whether the first question referred should be regarded as already settled by the judgment of 17 May 1988 in Case 84/87 *Erpelding*, Mr Leukhardt submits in essence that that judgment did not provide the desired interpretation of Regulation No 857/84 consistent with the EEC Treaty and left open the question of the calculation of the reference quantity in a case where Article 3(3) of Regulation No 857/84 is applied. That question is not limited to the problem of the choice of the reference year. The method of calculation established by the Bundesfinanzhof in its judgment of 27 January 1987 (*supra*) (fixing of the reference quantity on the basis of the production in 1981, plus 1%) is unobjectionable.

2. In answer to a question from the Court the Commission states that the practice of the Member States is in conformity with the rules confirmed by the Court in its judgment of 28 April 1988 in Case 61/87 *Thevenot*. In cases when Article 3(3) of Regulation No 857/84 is applied reference may certainly be made to a reference year other than that generally chosen by the Member State. However, apart from the choice of the reference year the other rules in Article 2 for the determination of the producers' reference quantity continue to apply. Accordingly, the weightings to be applied to the reference quantities of producers to whom Article 3(3) is applied are those applicable to producers to whom Article 3(3) is not applied.

M. Zuleeg
Judge-Rapporteur