REPORT FOR THE HEARING
delivered in Joined Cases 196/88 to 198/88 *

I — Facts and written procedure

1. *The relevant Community provisions*

(a) Council Regulation 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, for a period of five years, an additional levy payable on quantities of milk delivered in excess of a reference quantity to be determined.

(b) The general rules for the application of the additional levy are contained in Council Regulation No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation No 804/68 in the milk and milk products sector (Official Journal 1986, L 90, p. 13), as amended.

Article 2(1) of Regulation No 857/84 lays down the reference quantity referred to in basic Regulation No 856/84, that is to say the quantity exempt from the additional levy. The reference quantity is in principle the quantity of milk or milk equivalent delivered by a producer (formula A) or purchased by a purchaser (formula B) during the 1981 calendar year, plus 1%. However, under Article 2(2), 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 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 to pay 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 the same period.

Articles 3, 4 and 4a of Regulation No 857/84 enable Member States to take into account certain special situations when determining reference quantities or to grant special or additional reference quantities. In the present case, the relevant provision is Article 3, which is worded as follows:

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

(1) Producers who have adopted milk production development plans under Directive 72/159/EEC lodged before 1

* Language of the case: French.

March 1984 may obtain, according to the Member State's decision:

(i) if the plan is still being implemented, a special reference quantity taking account of the milk and milk product quantities provided for in the development plan,

(ii) if the plan has been implemented after 1 January 1981, a special reference quantity taking into account the milk and milk product quantities which they delivered in the year during which the plan was completed.

Investments carried out without a development plan can also be taken into account if the Member State has sufficient information.

(2) . . .

(3) . . .'.

Article 5 of Regulation No 857/84 provides that: 'For the purpose of applying Articles 3 and 4, additional reference quantities may be guaranteed only within the guaranteed quantity limit referred to in Article 5c of Regulation (EEC) No 804/68. These additional quantities shall be drawn from a reserve constituted by the Member State within the abovementioned guaranteed quantity'.

(c) The detailed rules for applying the additional levy are contained in Commission Regulation 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 No 804/68 (Official Journal 1984, L 132, p. 11).

2. *The French rules implementing the Community provisions*

The national provisions necessary for the implementation of the Community rules were adopted in France, first, by means of Decree No 84-661 of 17 July 1984 on the control of production of cows' milk and laying down detailed rules for recovering an additional levy from buyers and producers of cows' milk (JORF, 21.7.1984, p. 2373), and then by a decree of 22 November 1984 determining reference quantities for purchasers of milk in respect of the period from 2 April 1984 to 31 March 1985 (JORF, 29.11.1984, p. 3660) and by the decree of 10 July 1985 determining reference quantities for purchasers of milk in respect of the period from 1 April 1985 to 31 March 1986 (JORF, 14.7.1985, p. 7979).

(a) Under the terms of the abovementioned Decree No 84-661, the additional levy is payable by purchasers of milk (formula B) who pass it on to producers who have exceeded their reference quantity (Article 2). The reference quantity of each purchaser is calculated on the basis of the quantity actually collected in 1983, reduced by a standard but variable percentage which for mountain areas is 1% and for other areas 2% (Article 17).

As regards the grant of special or additional reference quantities, in particular in the context of a development plan, the decree states that 'producers whose deliveries during the calendar year 1983 will have exceeded 200 000 litres of milk may not benefit from the grant of additional reference quantities before 1 April 1986', unless an exception is made in an individual case by the competent administrative authority (Article 5).

(b) The decree of 22 November 1984, mentioned above, provides in respect of the 1984/85 marketing year that, within the limits of their reference quantities, purchasers may allocate to producers delivering milk to them on 2 April 1984 a basic reference quantity equal to not more than 98% (99% in mountain areas) of the deliveries made in 1983. Purchasers are, moreover, under certain conditions to allocate supplementary references in addition to the basic reference quantity. These supplementary references are 9 500 litres for producers who have adopted a development plan which was approved after 1 April 1978 and before 31 March 1985, provided, however, that their basic reference does not exceed 200 000 litres or 98% (99% in mountain areas) of the delivery targets laid down for the year 1984/85 (Article 3).

(c) The decree of 10 July 1985, mentioned above, contains similar provisions for the 1985/86 marketing year, except that the reference quantities for purchasers and producers are subject to a general abatement of 1% (except in mountain areas).

3. *The main proceedings*

The main proceedings are between milk producers in the department of the Côtes du Nord and the Coopérative agricole laitière (Agricultural Dairy Cooperative) Loudéac and the Laiterie coopérative (Dairy Cooperative) Trieux respectively. The cooperatives imposed levies on the producers by reason of the fact that they had exceeded the reference quantities which had been allocated to them pursuant to the Community provisions relating to the additional levy on milk.

The milk producers challenge the levies imposed and maintain that the French rules pursuant to which their reference quantities were determined do not correctly apply the relevant Community provisions. More particularly, they argue that, by taking 1983 as the sole reference year for determining the reference quantities and by granting a uniform quantity of 9 500 litres of milk for all producers operating a development plan, France has infringed the aforementioned Council Regulation No 857/84, and in particular Article 3 thereof, regard being had to the principles of non-discrimination and the protection of legitimate expectations.

In order to enable it to assess those arguments, the Cour d'appel, Rennes, to which the milk producers had appealed after having their actions dismissed at first instance, stayed the proceedings and referred the following questions, which are identical in all three cases, to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Does Article 3 of Regulation No 857/84 allow a Member State to

allocate a fixed quota to all holders of current development plans without regard to the targets in each plan, and to choose 1983 as the only reference year without providing for any exceptions in the case of producers having a plan completed in 1981 and 1982?

(2) Does Article 40(3) of the Treaty establishing the European Economic Community preclude the Decrees of 22 November 1984 and 10 July 1985 from establishing an order of priority in the alllocation of supplementary reference quantities by reference to the quantities freed within each undertaking, the benefit granted thus depending on the quantities available to the purchaser?

(3) When the national authorities adopted in particular the Ministerial Decree of 10 July 1985 limiting the possible increase for the marketing year 1985/86 to 1% of the previous marketing year, did they infringe the principle of protection of legitimate expectations, inasmuch as the holders of development plans were entitled to rely on the stability of commitments which they had previously entered into in order to allow them to increase the productivity of their farms?'

4. *Procedure before the Court*

The judgments making the reference were received at the Court Registry on 20 July 1988.

By an order dated 27 October 1988, the Court decided to join the present cases for the purposes of the procedure and the judgment.

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 applicants in the three sets of national proceedings, represented by Mr Pitois-Sillard, Mr Olive, Mr Cabot and Mr Dohollou, of the Rennes Bar, by the French Government, represented by Mrs E. Belliard and Mr Géraud de Bergues, acting as Agents, and by the Commission of the European Communities, represented by G. Lawrence and P. Hetsch, members of its Legal Department, acting as Agents.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, on 1 February 1989, to assign the cases to the Third Chamber in accordance with Article 95 of the Rules of Procedure and to open the oral procedure without any preparatory enquiry.

II — Written observations

1. *The first question*

(a) The applicants in the main proceedings consider that the first question should be answered in the negative.

In their view, the Member States do not enjoy complete discretion in determining additional reference quantities to be granted to producers who have adopted development plans, regard being had to the mandatory nature of Article 3 of Regulation No 857/84. In the case of producers whose plans were completed after 1 January 1981 the reference quantities then granted ought

to be established on the basis of the year in which the plan was completed.

France was therefore not entitled, as it did by means of its decrees of 22 November 1984 and 10 July 1985, systematically to choose the year 1983 as the reference year without providing for derogations in respect of holders of plans completed during 1981 and 1982. Nor was it entitled to assess the objectives of each plan in a global manner; rather it ought to have taken into account individual situations. Therefore, to choose a uniform fixed allocation of 9 500 litres of milk in addition to an initial reference quantity for all producers holding development plans, whatever the production objectives laid down therein, was not in compliance with Regulation No 857/84.

(b) The French Government maintains, in the first place, that, as regards the fixed allocation granted to holders of development plans, it is clear from the actual wording of Article 3(1) of Regulation No 857/84 that it is not a right of the persons concerned but merely an option open to Member States ('may obtain'). However, even were the contrary interpretation to be upheld, there is no actual obligation contained therein regarding full accomplishment of the objectives laid down in the development plans, given that the formula used ('special reference quantity taking into account') does not imply that the quantities in question must be calculated on an individual basis.

Secondly, as regards the fact that 1983 could be used as the sole reference year for all producers operating a development plan completed in 1981 or 1982, the French Government considers that the provisions of Article 3 apply only during the currency of the plan: when the plan is completed, the process of expansion of the holding is at an end, and the producer who operated under a plan must be treated in the same way as other producers not so operating. Thus, if the plan was completed before the year taken by the Member State for calculating references (1983 in France), the holder's reference should be established on the basis of his 1983 deliveries, which would include the result of the process of programmed growth provided for in the completed development plan.

The reference to the deliveries of the last year of the plan is only meaningful in a case where the Member State has taken the year 1981 as the basis of its calculations. In fact, the references were established in 1984 at a time when the production figures for 1982 and 1983 were already known. In calculating the references in such a case, it seemed simpler to the legislature to substitute for the objectives defined at the outset the deliveries made at the end of the plan. In that way, a projection dating back several years was replaced by more up-to-date and properly recorded data.

(c) The Commission points out that the second indent of Article 3(1) of Regulation No 857/84 expressly provides that the additional quantity which may be granted is to take account of the level of deliveries 'in the year during which the plan was completed', that is 1981 or 1982, as the case may be. Therefore, the choice of the year 1983 for determining the reference quantity which the dairy may not exceed does not prejudice, as regards the allocation of additional quantities, the obligation to take account of deliveries made in 1981 and 1982 under the development plan. It should,

however, be borne in mind that, given the attempt to control production reflected in the overall quantity guaranteed, the entire quantities delivered in 1981 and 1982 under the development plan cannot always be allocated.

The allocation of a single fixed additional quantity to all holders of a development plan which is still being implemented, without having regard to the delivery objecrives laid down in each plan (in this case 9 500 litres), constitutes an infringement of Article 40(3) of the Treaty. Where Community rules leave it to the Member States to choose whether or not to allocate additional quantities in the cases mentioned in Article 3 of Regulation No 857/84, the Member States are obliged, if they decide to grant such quantities, to lay down the objective preconditions for the allocation. The allocation of additional quantities by the dairy should, consequently, be carried out in accordance with the delivery objectives laid down in each development plan.

On the other hand, the fixing of a single ceiling (in this case 200 000 litres) for the reference quantity per producer, beyond which no additional quantity may be allocated, is in keeping with the Member State's obligation to observe the total guaranteed quantity whilst building up a national reserve for the allocation of the additional quantities referred to in Articles 3 and 4 of Regulation No 857/84. Those constraints may lead it to lay down a maximum reference quantity to ensure control of the desired production level, at the same time as making available sufficient quantities to ensure the application of Articles 3 and 4.

In conclusion, the Commission proposes that the reply to the first question should be as follows:

'(a) The second subparagraph of Article 40(3) of the Treaty and Article 3(1) of Council Regulation No 857/84 of 31 March 1984 preclude a Member State from allocating to producers who have adopted a development plan under Directive 72/159/EEC which is still being implemented a single fixed additional quantity which is unrelated to the delivery objectives provided for in the plan.

(b) The second subparagraph of Article 40(3) of the Treaty does not preclude a Member State from choosing the year 1983 for determining the reference quantities and additional quantities which may be allocated to producers who have adopted a development plan under Directive 72/159/EEC, completed in 1981 or 1982.'

2. *The second question*

(a) The applicants in the main proceedings point out that the Court has given a wide interpretation of the principle of non-discrimination which precludes comparable situations from being treated differently. Thus, the Court considered that the establishment of a common organization of agricultural markets presupposed a proportionate distribution of advantages and disadvantage for producers (judgment of 2 July 1974 in Case 153/73 *Holtz & Willemsen* v *Council* [1974] ECR 675). The

principle of non-discrimination also applies to Member States in the sense that, if Community rules leave them to choose between various methods of implementation, they must comply with the principle laid down in Article 40(3) of the Treaty in making that choice (judgment of 25 November 1986 in Joined Cases 201 and 202/85 *Klensch* v *Secrétaire d'Etat à l'agriculture et à la viticulture* [1986] ECR 3477).

Regard being had to those criteria, the implementation of the system introduced by the decrees of 22 November 1984 and 10 July 1985 give rise to discrimination in three respects, namely within the Community itself (between holders of French development plans and holders of such plans in other Member States), between holders of development plans and non-holders, and between holders of development plans amongst themselves. This discrimination is all the more serious since the abandonment of production in certain cases enables dairies to avail themselves of quotas which have not been used. Finally, the choice of the year 1983 as the sole reference year together with the single fixed allocation of 9 500 litres of milk, in addition to the initial reference quantity, also constitute discrimination.

(b) The French Government states that, under the Court's case-law, most recently reaffirmed by the judgment of 25 November 1986 in the *Klensch* case, mentioned above, Article 40(3) of the Treaty is a specific enunciation of the general principle of equality which is also binding on the Member States when they are implementing the common organization of a market.

In this case, the development plans provided for by Directive 72/159 are intended to ensure that certain farm holdings are adapted to economic developments and thus, by applying rational production methods, to guarantee farm producers who are holders of a plan a fair income and satisfactory working conditions, in accordance with Article 39(1)(a) and (b) of the Treaty.

Consequently, the 'priority' treatment accorded to certain producers including those holding a development plan is attributable precisely to the fact that their situation is not comparable with that of other producers and that the specific treatment which is accorded to them is intended to put them on an equal footing with other producers. On the introduction of milk quotas, there can therefore be no question of jeopardising the development of holdings subject to development plans by not according to those producers specific treatment which Articles 3 and 4 of Regulation No 857/84 in any event provide for.

On the other hand, it is not correct to say that, within the category of 'priority' producers treatment differed according to the greater or lesser extent of the availability of quantities freed in their respective dairies by discontinuance grants. Two procedures ensured that holders of development plans were treated uniformly at national level, as required by the Community rules:

(i) the introduction of an 'appeal procedure' enabled dairies in which the needs of this category of producer were greater than the availability of references freed to receive an additional amount drawn from the

national reserve managed by the Office national interprofessionel du lait et des produits laitiers (Onilait);

(ii) the year-end set-off provisions introduced by Article 4a of Regulation No 857/84 were used for making 'loans of quotas' to those producers within the limit of the specific treatment reserved for them.

The available resources were therefore able to be distributed equitably according to the needs of 'priority' producers, whatever may have been the situation of their respective dairies.

(c) The Commission submits in substance that the priority given to the allocation of additional quantities to producers having a development plan affiliated to the same dairy, depending on quantities freed by other producers of that dairy, is not, subject to certain conditions, discriminatory.

As the Court emphasized in its *Klensch* judgment, mentioned above, there would be discrimination between producers affiliated to different dairies if the purchaser had available quantities freed by producers affiliated to him, whether by spontaneous discontinuance or in consideration of compensation. In such a case the producer could favour his own producers to the detriment of the producers of other dairies where lesser quantities had been freed.

The French rules provide that a proportion amounting to 20% of the quantities freed during the relevant period by producers who have received compensation for them (Article 4(1)(a) of Regulation No 857/84) are to be allocated to the national reserve and deducted from each purchaser's reference quantity. This proportion is intended to compensate for possible inequalities of treatment accorded to producers affiliated to different purchasers.

In making calculations under this system, two situations may arise in the case of a producer having a development plan:

(i) either the quantities freed in a dairy exceed the specific quantity required and the difference should go into the national reserve, or

(ii) the quantities freed are insufficient and the proportion of 20% allocated to the national reserve must be drawn on to make up the shortfall.

The portion of the reserve equal to 20% thus enables differences in situation which may exist as between one dairy and another to be covered. Should the reserve of 20% be insufficient, it is for the national authorities either to reduce the reference quantities of other producers or to buy up fresh quantities of milk, thus reconstituting a reserve of available quantities. Such a system, based on the decentralized management by dairies of a proportion of the quantities released and the centralized management of the remainder, does not appear to conflict with the principle of non-discrimination since it enables corrections to be made to the varia-

bility of situations arising from the variable level of quantities released by the purchasers.

In conclusion, the Commission proposes that the reply to be given to the second question should be as follows:

'For the purpose of determining the additional quantities to be allocated to producers who have adopted a development plan under Directive 72/159/EEC, the prohibition of discrimination laid down in the second subparagraph of Article 40(3) of the Treaty does not preclude the measures taken by a Member State opting for formula B in pursuance of Council Regulation No 857/84 of 31 March 1984 from entailing the re-allocation by purchasers of a part of the quantities freed by producers affiliated to them, if the non-utilized proportion of those quantities is intended to make up for inequalities existing between different purchasers.'

3. *The third question*

(a) The applicants in the main proceedings consider that the Community provisions and, consequently, the Ministerial Decree of 10 July 1985 limiting to 1% the possibility of growth for the marketing year 1985/86, infringed the principles of legitimate expectation and legal certainty.

On this point they explain that the development plans were intended to enable farmers to achieve, on completion of the plan, a working income per unit of labour comparable to the income received for non-agricultural activities in the region, at the same time as making lasting improvements in working and production conditions. Development plans are in a certain sense both of a regulatory nature as regards their legal basis and contractual as regards their implementation. Their holders are therefore legitimately entitled to expect that commitments undertaken previously will continue to be met, to enable them to be in a position to increase the productivity of their holding in order to earn a fair income and have a standard of living comparable to those in other occupations.

The rules in question also infringe the principle of proportionality because in this case the measures were not adopted progressively with provision for transitional periods, when it was necessary to introduce the appropriate adjustments gradually.

(b) The French Government considers that by reducing the reference quantities for the 1985/86 marketing year to 1% in relation to the previous marketing year whilst providing for specific treatment for holders of a plan, the French rules comply with the Community provisions and do not infringe the principle of the protection of legitimate expectation.

In accordance with the Court's case-law, the principle of the protection of legitimate expectation does not in general preclude new rules from applying to the future effects of situations arising under the earlier rules, in the absence of obligations entered into with the public authorities (see the judgment of 5 May 1981 in Case 112/80 *Dürbeck* [1981] ECR 1095). As regards the specific case of development plans whilst the inducement measures which the holders benefited from were related to the objectives

laid down in the plans, those measures were not called in question in the case of a failure to complete within the period provided for. There cannot therefore be any question of those holders having definitive or irrevocable commitments.

In any event, although the new Community provisions introduced as from 1984 in the dairy sector did not really provide for any transitional arrangements, in regard to certain producers they did nevertheless establish a compensatory system which specifically underlies these proceedings. It should be remembered in this context that Article 3 of Regulation No 857/84 does not institute a system of individual production quotas properly so-called, but a levy whose purpose is not to penalize a failure to observe a prohibition on producing in excess of the guaranteed threshold, but is based on the idea that the financial responsibility for dairy surpluses should be shared between producers in proportion to their contribution to those surpluses.

(c) The Commission points out that in the context of formula B chosen by France the levy is only payable if the dairy's quantity is exceeded after any set-off has been made as between the quantities delivered by the different producers affiliated to it (see the judgment of 28 April 1988 in Case 61/87 *Thevenot* [1988] ECR 2375).

As regards the second period of application of the milk quota system, Article 5c(3) of Regulation No 804/68 fixed the total guaranteed quantity at a level lower than that initially fixed. It was in the context of that reduced quota that the French Government fixed the reference quantity of each purchaser at the level determined for the preceding period less 1% (except in mountain regions).

In that context the third question should be interpreted as raising the problem of whether that reduction runs counter to the legitimate expectation which producers who had adopted a development plan might have had in the maintenance of the objectives laid down in that plan. The reply to that question should be in the negative.

As the Court stated in its judgment of 28 April 1988 in Case 120/86 *Mulder* [1988] ECR 2321, Member States may allocate additional quantities in respect of the specific situations referred to in Article 3 of Regulation 857/84 only within the limit of the total quantity guaranteed. The guaranteed total quantity was fixed by Regulation No 856/84 at 97.2 million tonnes of milk and, in order to allow for transition, was increased to 98.2 million tonnes for the first year of application.

Regard being had to the reduction of the guaranteed total quantity and the freedom left to national authorities to decide whether to allocate additional quantities, in particular to holders of a development plan, such holders may not infer from the Community provisions any guarantee that their deliveries will be maintained, much less increased, in accordance with the objective laid down in the plan.

In conclusion, the Commission suggests that the reply to the third question should be as follows:

'Article 5c(3) of Council Regulation No 804/68 of 27 June 1968 and Article 2 of Council Regulation No 857/84 of 31 March 1984, by requiring Member States to reduce the reference quantity in such a way as not to exceed the guaranteed total quantity fixed for the second period of application of the system of milk quotas and consequently to determine the additional quantities which may be allocated to producers who have adopted a development plan pursuant to Directive 72/159/EEC, do not contravene the principle of the protection of legitimate expectation.'

M. Zuleeg
Judge-Rapporteur