OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 26 September 1991 *

Mr President,
Members of the Court,

1. Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal 1984 L 90, p. 10) introduced an 'additional levy' on quantities of milk delivered in excess of a reference quantity. The latter is determined in accordance with 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).

2. The plaintiff in the main proceedings, Mr Kühn, is the owner of a holding which had been leased to Mr Roolfs. The lease was terminated by judicial decision with effect from 30 April 1981 but the lessee obtained security of tenure until 30 April 1983. He had delivered 220 489 kg of milk in 1981, 200 626 kg in 1982 and 55 621 kg in 1983. His successor, Mr Cremer, delivered another 32 666 kg in 1983 which was the reference year chosen by Germany and in the course of which there had therefore been a considerable fall in production on the holding owned by Mr Kühn.

3. After Mr Kühn's application that the reference quantity for his holding be calculated on the basis of its production in 1981 or 1982 had been rejected by the competent authorities, Mr Kühn brought an action before the Administrative Court which was also dismissed. The Oberverwaltungsgericht für die Länder Niedersachsen und Schleswig-Holstein (Higher Administrative Court for Lower Saxony and Schleswig-Holstein), before which the matter was brought, has referred two questions to this Court for a preliminary ruling which I will examine later. Before doing so, I would however like to make a preliminary observation.

Preliminary Observation

4. The questions which have been referred to the Court for a preliminary ruling were raised in proceedings between the owner of a farm and the national authority empowered to fix reference quantities, and in its order for reference the national court refers to a possible infringement of the fundamental right to property and the principle of non-discrimination between lessors.

5. On the other hand, however, Regulation No 857/84 provides for the grant of reference quantities only to *producers* of milk. Article 2 of that regulation provides that

* Original language: French.

'The reference quantity ... shall be equal to the quantity of milk ... delivered by the producer during the ... calendar year ...'.

Article 12 of the same regulation defines the producer as being

'a ... person ... farming a holding ... :

— selling milk or other milk products directly to the consumer, and/or

— supplying the purchaser.'

6. Moreover, the relevant legislation expressly authorizes the Member States to place at the disposal of the departing lessee all or part of the reference quantity corresponding to the holding which he is leaving. I refer here to Regulation No 590/85 [1] which amended Article 7 of Regulation No 857/84. In the sixth recital in the preamble to that regulation it is explained that the application of Article 7 (in its original version) might, in certain cases, result in difficult situations at an economic and social level and that it was therefore appropriate to introduce the right in question to permit a lessee whose lease on a holding is due to expire to continue milk production elsewhere.

7. In its judgment in *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft*[2] the Court had to consider the case of a lessor of a farm who had never himself engaged in milk production on the leased farm, on which, moreover, the essential elements of a milk-production unit, namely the dairy herd and the technical facilities necessary for milk production, had always remained the property of the lessee. In that particular context, the Court held in substance that it would be contrary to the requirements of the protection of the *lessee's* fundamental rights if he were prevented from keeping, upon the expiry of his lease, a part of the reference quantities, because that would deprive him, without compensation, of the fruits of his labour and of his investments in the tenanted holding.

8. I consider it important to recall those matters in order to make the point that under the system of quotas the relationship between owners and lessees is far from simple and to propose that in the present case the Court should not go deeply into the problems associated with that relationship. This case, moreover, does not raise the question of the reference quantities which the previous lessee can take with him, because it became apparent at the hearing that Mr Roolfs had not obtained any reference quantity. On the other hand, if your judgment is eventually to the effect that a larger reference quantity must be assigned to the new lessee, Mr Cremer, the owner of the holding, Mr Kühn will indirectly benefit from that. I will accordingly limit myself to examining the questions referred from the point of view of the rights of milk producers.

The first question

9. The first question is worded as follows:

1 — Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 (OJ 1985 L 68, p. 1).

2 — Judgment in Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609.

'Were the Council or the Commission of the European Communities under an obligation, when adopting the provisions governing guaranteed milk quantities, to make allowance (in Article 3(3) of Regulation (EEC) No 857/84) for a change of lessee on an agricultural holding occurring in the reference year chosen by the Member States, by means of a provision for cases of hardship (for example, the option of appointing a different year as the reference year)?'

10. Article 3(3) of Regulation (EEC) No 857/84 provides that

'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 reference year within the 1981 to 1983 period.

The following situations may justify application of the first subparagraph:

— a serious natural disaster affecting the producers' farm to a substantial extent,

— the accidental destruction of the producers' fodder resources or buildings used for dairy livestock,

— 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.'

11. Applying that procedure the Commission added to the list of situations, to which I have just referred, by means of Article 3 of Commission Regulation No 1371/84 laying down detailed rules for the application of milk quotas [3] and added the following cases:

'— compulsory appropriation of a considerable part of the utilizable agricultural area of the producer's holding, resulting in a temporary reduction of the fodder area of the holding,

— if the producer runs the holding himself, occupational incapacity of long duration,

— theft or accidental loss of all or part of the dairy herd, where this has had a significant effect on the milk production of the holding.'

12. The Landwirtschaftskammer (Chamber of Agriculture), Weser-Ems, the defendant in the main proceedings, the Council and the Commission of the European Communities propose that the Court should reply in the negative to the first question. In

3 — Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11).

support of their argument they refer to the consistent case-law of the Court [4] according to which

'when a situation necessitates the evaluation of a complex economic situation, as is the case concerning the Common Agricultural Policy, the Community legislature enjoys a wide discretion as to the nature and scope of the measures to be taken'.

13. They also refer to the Court's judgment in Case C-67/89 *Berkenheide* v *Hauptzollamt Münster* [1990] ECR 2615, paragraph 14, in which the Court, after referring to the same provisions as those concerned in this case, stated that

'the structure and purpose of the regulations on the additional levy indicate that they contain an exhaustive list of the situations in which reference quantities or individual quantities may be granted and set out precise rules concerning the determination of those quantities'.

14. However, that statement is not sufficient to dispose of the matter. The problem is whether the Community institutions have infringed the principles of legal certainty or of the protection of legitimate expectations by not providing a derogation in situations such as those in dispute in the main proceedings. It should be recalled that in the judgment in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 the limiting nature of the derogating clauses did not prevent the Court from holding that the regulations on the additional levy on milk were adopted in breach of the principle of the protection of legitimate expectations and that it was invalid in so far as it did not provide for the allocation of a reference quantity to producers who had not delivered milk during the reference year because they had entered into an undertaking to cease production temporarily.

15. It should first be noted that the last subparagraph of Article 3 of Regulation No 857/84 provides expressly that additions to the list of situations referred to in the second subparagraph may be made according to the Management Committee procedure. The Council has therefore recognized that other exceptional events, worthy of inclusion, might exist. Even after Article 3 of Commission Regulation No 1374/84 added three other cases to the list of situations which could justify the adoption of another calendar reference year, the Commission kept and still keeps open the possibility of making further additions to that list.

16. In the case in point there is no doubt that the production of milk on the property owned by Mr Kühn

'has been affected ... during the reference year'.

However, what may be disputed is whether that reduction in production was due to 'exceptional events'.

17. In that respect, it is clearly apparent from Article 3 of Regulation No 857/84

4 — See in particular the judgment in Case 84/87 *Erpelding* v *Secrétaire d'État à l'Agriculture et à la Viticulture* [1988] ECR 2647 at p. 2673.

that the 'exceptional events' which may be taken into consideration must exist with respect to the milk producer and not to the owner of the land and buildings.

18. I therefore consider that the Council, the Commission and the Landwirtschaftskammer Weser-Ems are wrong to view matters from the point of view of the lessor and to state that the change of lessee during the reference year and the fall in production liable to result from it constitute obvious and inherent risks in connection with the lease of a farm which are entirely foreseeable by the lessor. For the same reason, it is not appropriate to argue, as does the Landwirtschaftskammer Weser-Ems, that the lessor could have guarded against those risks by inserting appropriate clauses into the lease. Moreover, even if Mr Kühn had stipulated in the leases entered into with Mr Roolfs, and then with Mr Cremer, that they were required to produce a certain quantity of milk per month, the failure to comply with that stipulation might have given him a right to obtain compensation for breach of contract, but would not have led to a reference quantity being fixed which was higher than the quantity of milk actually delivered. It is that reference quantity which is in dispute in this case.

19. One must therefore put oneself in the position of the lessee and examine, from his point of view, whether he has been the victim of 'exceptional events'. The Council argues that only cases of *force majeure* could be considered as such and that this is proved in particular by the six cases appearing in the list. However, like the Commission, I consider that most of those cases do not display all the characteristics of *force majeure*, as defined by the Court, namely unusual and unforeseeable circumstances, beyond the control of the person concerned, the consequences of which could not have been avoided even if all due care had been exercised. [5]

20. Accordingly, if the second and third situations referred to in Article 3 of Regulation No 857/84 are considered, it will be seen that they are not concerned with unforeseeable events. On the contrary, it may be considered that 'the accidental destruction of the producer's fodder resources or buildings', as indeed 'an epizootic affecting all or part of the milk herd', are part of the inherent risks involved in a milk producer's business. Similarly, the producer's 'occupational incapacity of long duration' or 'the theft or accidental loss of part of the dairy herd' could not be regarded as *force majeure*.

21. The Council, the Commission and the Landwirtschaftskammer Weser-Ems are however correct in stating that the situations specified all concern 'circumstances beyond the producer's control', that is to say events over which he has no control.

22. When seen from this point of view, what is the position of farmers who, like Mr Cremer, have begun their production during the year which was subsequently chosen as reference year by the Member State concerned?

5 — See in particular the judgement in Case 266/84 *Denkavit France* v *Forma* [1986] ECR 170, paragraph 27.

23. If one considers the problem in the abstract, one is led to conclude that any producer of milk has control over his production: he alone decides whether to acquire a greater or lesser number of dairy cows. Moreover, if on a particular holding the previous farmer has been able to keep 90 cows and produce up to 220 000 kg of milk per year, there is, at first sight, no reason why the subsequent farmer could not also do the same.

24. However, if one leaves aside this level of abstraction, one finds that the reality is much more complex and all depends upon the actual situation of each individual farmer. If he had previously already produced milk on another holding with a large herd owned by him, he will be able to transfer that herd without difficulty to the new holding and to achieve immediately a high monthly rate of production on it.

25. If, however, the new farmer has at the outset no dairy cows and if his finances are limited, he will only be able to acquire gradually (by purchase or breeding) a dairy herd similar to that owned by his predecessor.

26. It is apparent from the file relating to the main proceedings and the explanations given at the hearing that Mr Cremer, the new lessee, found himself in the latter situation. The former lessee had sold all his cows and all his fodder. Accordingly, Mr Cremer had only been able to build up his dairy herd gradually. Therefore, the milk production on the holding had only been 32 666 kg between 1 May and 31 December 1983, that is to say a monthly average of 4 083 kg. During the first four months of the same year the previous lessee, Mr Roolfs, had still produced 55 621 kg, that is to say 13 905 kg per month. During the course of the whole of 1992, Mr Roolfs had produced 200 625 kg, a monthly average of 16 718 kg.

27. The reference quantity allocated to Mr Cremer amounted to 41 700 kg, to which were added 5 000 kg under a provision of a German law which permits an additional quantity to be allocated to farmers in danger of having to cease their activities. Mr Cremer therefore obtained a reference quantity much lower than the quantity of milk actually produced on Mr Kühn's holding by Mr Roolfs, and by Mr Cremer himself, during the course of the reference year 1983 (namely 88 287 kg).

28. As the Commission points out, we are entitled to presume that the 41 700 kg have been calculated on the basis of Article 6(2), in conjunction with Article 4(4), of Regulation No 1371/84, the result of which is that, where there is a change of lessee after the beginning of the reference period, the Member States may allocate to the new lessee a reference quantity corresponding to his sales in his 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 are to determine an annual sales quantity on the basis of actual sales.

29. The case of Mr Cremer shows that this rule can have dramatic results for the producer concerned. From a legal point of

view, one might ask first of all whether the *material impossibility* for a new lessee to achieve, during the reference period laid down by the provisions which I have quoted, milk production corresponding even approximately to the average level achieved by the previous lessee, ought not to have been considered by the Council or by the Commission as an exceptional event within the meaning of Article 3(3) of Regulation No 857/84.

30. However, in fact it is not the slow start-up in production which is exceptional, but the fact that the unusually low production, which is often typical of the beginning of an agricultural lease, was nevertheless adopted as the basis for fixing the reference quantity allocated to such a producer. This problem does not therefore really fall within the logic of the scheme underlying Article 3(3) of the Council's regulation. I therefore propose that the Court hold that the Council, by not providing *ad hoc* for the particular situation of that category of farmers to be taken into account, has infringed the principle of the protection of legitimate expectations.

31. I am certainly aware that the Court has consistently held that

'whilst the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained (see paragraph 27 of the judgment in Case 245/81 *Edeka Zentrale AG* v *Germany* [1982] ECR 2745, paragraph 27 of the judgment in Case 52/81 *Offene Handelsgesellschaft in Firma Werner Faust* v *Commission* [1982] ECR 3745, and paragraph 33 of the judgment in Joined Cases 424/85 and 425/85 *Coöperative Melkproducentenbedrijven Noord-Nederland BA (Frico) and Others* v *Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755). This is particularly true in an area such as the common organization of the markets whose purpose involves constant adjustments to meet changes in the economic situation (see paragraph 22 of the judgment in Case 84/78 *Angelo Tomadini* v *Amministrazione delle finanze dello Stato* [1979] ECR 1801, paragraph 48 of the judgment in Case 112/80 *Firma Anton Dürbeck* v *Hauptzollamt Frankfurt am Main/Flughafen* [1981] ECR 1095, and paragraph 33 of the judgment in *Frico*, cited above).' 'It follows that traders cannot claim a vested right to the maintenance of an advantage which they derive from the establishment of the common organization of the markets and which they enjoyed at a given time (see paragraph 22 of the judgment in Case 230/78 *Eridania-Zuccherifici Nazionali and Another* v *Minister for Agriculture and Forestry and Others* [1979] ECR 2749, and paragraph 18 of the judgment in Joined Cases 133/85 to 136/85 *Walter Rau Lebensmittelwerke* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2289).' [6]

32. I recognize also that in 1983 milk producers had to expect that production quotas would be fixed which would impose a ceiling on their production or even reduce it when compared with their previous production. But no producer could have expected to have imposed on him a reference quantity equivalent only to one-fifth of the milk produced on the same holding during the previous years. In particular, no German farmer taking on a holding during 1983 could have expected that 1983 would have been chosen,

6 — Judgment in Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 33 and 34.

subsequently, as the reference year and that the unusually low production during his starting period would also be taken as the basis for fixing his reference quantity. If he had been aware of that, it is virtually certain that he would not have agreed to enter into a lease.

33. By not adopting an appropriate derogating provision to take account of this type of case, the Council has accordingly violated the legitimate expectations of that category of producers.

34. Secondarily, the Council's conduct constitutes a disproportionate breach of the principle of the freedom to pursue an occupation. Fixing a producer's reference quantity at such a low level is not justified by the need to ensure that the quantities of milk and milk products placed on the market do not exceed the total quantity guaranteed by the Community (see, by analogy, paragraphs 13 and 14 of the judgment in Joined Cases C-90/90 and C-91/90 *Neu* v *Secrétaire d'État à l'Agriculture et à la Viticulture* [1991] ECR I-3617, paragraphs 13 and 14). Accordingly, the Council has wrongly invoked the principle of legal certainty and of the effectiveness of the additional levy.

35. I therefore propose that the reply to the first question referred to the Court by the Oberverwaltungsgericht should be that, when adopting the provisions governing guaranteed milk quantities, the Council of the European Communities was under an obligation to adopt a provision making it possible to allocate, to new lessees commencing milk production during the reference year adopted by a Member State, at their request, another calendar reference year within the period from 1981 to 1983.

The second question

36. The second question is worded as follows:

'Is a reference quantity transferred, by virtue of Article 7(1) of Regulation (EEC) No 857/84 in conjunction with subparagraphs 1 and 3 of Article 5 of Regulation (EEC) No 1371/84, to a producer who takes over the holding when an entire holding used for milk production changes hands between 1 January 1983 and 2 April 1984?'

37. Under Article 7(1) of Council Regulation No 857/84:[7]

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

38. Subparagraph 1 of Article 5 of Commission Regulation No 1371/84[8] provides that where an entire holding is sold, leased or transferred by inheritance, the corresponding reference quantity is to be transferred in full to the producer who takes over the holding. Subparagraph 2 of Article 5 lays down rules applicable where one or several parts of a holding is leased.

7 — In the version in force following Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 (OJ 1985 L 68, p. 1).

8 — As amended by Commission Regulation (EEC) No 1043/85 of 24 April 1985 amending for the ninth time Regulation (EEC) No 1371/84 (OJ 1985 L 112, p. 18).

39. Finally, subparagraph 3 of Article 5 states that the provisions of subparagraphs 1 and 2 of Article 5 are applicable in other cases of transfer which, under the various national rules, have comparable legal effects as far as producers are concerned.

40. Regulation No 1371/84 has in the mean time been replaced by Regulation (EEC) No 1546/88.[9] The provisions which I have just cited appear thereafter, without amendment, in Article 7 of that new regulation.

41. In paragraph 13 of its judgment in *Wachauf*, cited above, the Court held:

'According to Article 7(1) of Regulation No 857/84, as amended by Council Regulation No 590/85 of 26 February 1985 (Official Journal 1985 L 68, p. 1), "where a holding is sold, leased or transferred by inheritance, all or part of the corresponding reference quantity (that is to say the quantity exempt from the additional levy) shall be transferred to the purchaser, tenant or heir according to procedures to be determined". However, paragraph 4 of that article provides that "in the case of rural leases due to expire, where the lessee is not entitled to an extension of the lease on similar terms, Member States may provide that all or part of the reference quantity corresponding to the holding or the part thereof which forms the subject of the lease shall be put at the disposal of the departing lessee if he intends to continue milk production". It is apparent from the provisions quoted, considered as a whole, that the Community legislature intended *that at the end of the lease the reference quantity should in principle return to the lessor* who retakes possession of that holding, subject, however, to the Member States' power to allocate all or part of the reference quantity to the departing lessee.'

42. In paragraph 15 of the same judgment the Court stated that:

'The surrender of a tenanted holding upon the expiry of a lease has comparable legal effects, within the meaning of subparagraph 3 of Article 5 of Regulation No 1371/84, to those brought about by the transfer of the holding upon the grant of the lease, for both transactions entail a change in the possession of the production units in question within the contractual relations created by the lease. Consequently, the surrender, upon the expiry of the lease, of leased agricultural production units is a case covered by subparagraph 3 of Article 5 of Regulation No 1371/84, provided that upon the grant of the lease their transfer falls under subparagraph 1 of Article 5, which is the case when a "holding" within the meaning of Article 12(d) of Regulation No 857/84 ... is involved.'

43. When a farmer leaves a holding, the reference quantities allocated to him therefore returned in principle to the owner who, by entering into a lease with another farmer, transfers them to the latter unless it has been expressly agreed to allow the departing lessee to retain a part.

9 — Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down general rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12).

44. But what is the situation where the change of lessee has taken place during the reference year, that is to say at a time when a reference quantity had not yet been allocated?

45. In my opinion, it follows on logically from the foregoing that the quantity produced during the first part of the reference year by a lessee whose lease expires must also revert, at least for a 'legal second', to the owner of the holding before being transferred to the new lessee. The production which the latter achieves during the rest of the reference year will accordingly be added to the quantity produced by the previous lessee and both together will constitute the reference quantity for the new lessee.

46. In view of the interpretation given by the Court, in paragraph 13 of its judgment in *Wachauf*, to Article 7 of Regulation No 857/84, which takes precedence over the Commission Regulations No 1371/84 and No 1546/88, it cannot be objected that the second sentence of subparagraph 3 of Article 5 of Regulation No 1371/84 or the second paragraph of Article 7 of Regulation No 1546/88 provide that

'Member States *may* apply the provisions of points 1, 2 and 4 in respect of transfers taking place during and after the reference period'.

Those regulations wrongly provided the Member States only with an option to do so.

47. I therefore propose that the Court should reply in the affirmative to the second question.

48. It is clear that if the Court replies to the first question in the manner which I have just proposed, a new lessee whose average monthly production during the reference year has been lower than that of the previous lessee, will be more interested in asking for one of the other reference years within the period 1981 to 1983 to be taken into consideration.

Conclusion

49. I therefore propose that the Court give the following replies to the questions submitted by the national court:

'1. When adopting the provisions governing guaranteed milk quantities, the Council of the European Communities was under an obligation to adopt a provision making it possible to allocate to new lessees commencing milk

production during the reference year adopted by a Member State, at their request, another calendar reference year within the period from 1981 to 1983.

2. Article 7(1) of Regulation (EEC) No 857/84 in conjunction with subparagraphs 1 and 3 of Article 5 of Regulation (EEC) No 1371/84 are to be interpreted as meaning that a reference quantity is transferred to a producer who takes over a holding used for milk production when that entire holding has been transferred between 1 January 1983 and 2 April 1984.'