OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 30 May 1989 *

Mr President,
Members of the Court,

1. In order to restore the balance in the dairy sector which was suffering from major structural surpluses, the Council adopted on 31 March 1984 Regulation Nos 856/84 and 857/84 which introduced for an initial period of five years a levy on quantities of milk delivered beyond a threshold guarantee. [1] The Court has already given several preliminary rulings on questions relating to various aspects of these stringent provisions. [2] In the present cases the cour d'appel, Rennes, raises a question on the specific provisions relating to producers having a development plan.

The relevant legislation

2. The questions submitted by the national court relate to the first two years in which the scheme for controlling milk production was implemented. Therefore, it is enough if I give an account of the legislation applicable at that time.

The Community provisions

3. Under the terms of Article 5c of Council Regulation 804/68, [3] as amended by the aforementioned Regulation No 856/84, a levy is imposed on quantities of milk delivered which exceed a predetermined reference quantity. This levy is payable either by milk producers (formula A) or by purchasers of milk (dairies) who pass it on exclusively to the producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (formula B).

The detailed rules for calculating the reference quantity, that is to say the quantity exempted from the levy, are laid down in Regulation No 857/84. It states that, if formula B is applied:

(i) the levy is to be fixed at 100% of the target price for milk; [4]

(ii) the reference quantity is in principle to be equal to the quantity of milk

* Original language: French.

1 — Council Regulation No 856/84/EEC of 31 March 1984 amending Regulation No 804/68/EEC on the common organization of the market in milk and milk products (OJ 1984, L 90, p. 10). Council Regulation No 857/84/EEC of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/64 in the milk and milk products sector (OJ 1984, L 90, p. 13).

2 — Judgment of 25 November 1986 in Joined Cases 201 and 202/85 *Klensch and Others* v *Secrétaire de l'Etat* [1986] ECR 3477; Judgment of 28 April 1988 in Case 102/86 *Mulder* [1988] ECR 2321; Judgment of 28 April 1988 in Case 107/86 *Von Deetzen* [1988] ECR 2355; Judgment of 28 April 1988 in Case 61/76 *Thevenot and Others* [1988] ECR 2375; Judgment of 17 May 1988 in Case 84/87 *Erpelding* [1988] ECR 2647.

3 — Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

4 — Article 1(1).

purchased by a purchaser during the 1981 calendar year, plus 1%;[5]

(iii) Member States may, however, base the reference quantity on the quantity of milk purchased during the calendar years 1982 or 1983, weighted by a percentage established so as not to exceed the reference quantity guaranteed in respect of the Member State concerned.[6]

The scheme for bringing milk production under control is therefore based on the allocation, to the persons subject to the scheme, of a reference quantity determined in accordance with actual deliveries made during the reference year used. In addition to the concept of individual reference quantity there is also the concept of the guaranteed total quantity per Member State. This quantity is equivalent to the sum of the individual reference quantities. It constitutes an absolute ceiling.[7]

4. Exceptions to this general scheme are provided for or may be provided for (see below at paragraph 15) in order to take into account certain specific situations, in particular the case of producers having a development plan.[8] Their Community status was defined by Council Directive 72/159/EEC.[9] This instrument required Member States to introduce a system of incentives for farms which are capable, through the adoption of rational methods of production, of assuring a fair income and satisfactory working conditions for persons working them.[10] Pursuant to the directive, persons wishing to benefit from incentive measures must enclose with their application a development plan projected over a maximum period of six years, in which the production objectives to be achieved must be stated together with the investment necessary for this purpose. When the development plan has been approved by the competent authority of the Member State, the holders of such plans may receive aid in the form of interest rate subsidies in respect of loans taken out in order to carry out the developments provided for.

5. The operative provisions adopted by the Council in order to take account of the specific situation of holders of a development plan are as follows.

At the heart of these provisions is the first subparagraph of Article 3(1) of Regulation No 857/84, which is worded as follows:

'Article 3

For the determination of the reference quantities referred to in Article 2 and in connection with the application of formulas

5 — Article 2(1).

6 — Article 2(2).

7 — Article 5c(3) of Regulation No 804/68.

8 — The other producers who are, or may be, entitled to exceptional treatment are
(i) those who have carried out investments without a development plan, if the Member State has sufficient information (second subparagraph of Article 3(1) of Regulation No 857/84);
(ii) young farmers setting up after 1980 (Article 3(2) of Regulation No 857/84),
(iii) producers whose milk production has been affected by exceptional events during the reference year (Article 3(3) of Regulation No 857/84);
(iv) producers operating under a development plan approval, after 1 April 1984, under Directive 72/159/EEC, on condition that the plan meets certain criteria (Article 4(1)(b) of Regulation No 857/84);
(v) other producers carrying on farming as their main occupation, provided that the benefit of the derogation is enjoyed within the context of the restructuring of their milk production (Article 4(1)(c) of Regulation No 857/84).

9 — Council Directive 72/159/EEC of 17 April 1972 on the modernization of farms (OJ, English Special Edition 1972 (II), p. 324).

10 — See the fifth recital in the preamble to the directive

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 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.'

Article 5 of Regulation No 857/84, however, provides that the additional reference quantities in favour of the producers referred to in Articles 3 and 4 [11] may be granted only within the limits of the guaranteed total quantity of the Member State concerned. It states also that such additional quantities are to be drawn from a reserve constituted by the Member State within the abovementioned guaranteed quantity.

The 'national reserve' may be supplied from several sources.

Article 2(3) of Regulation No 857/84 permits Member States to vary the percentage applied to the reference quantities in order to allocate additional reference quantities to the producers mentioned in Articles 3 and 4. This provision therefore enables a system of solidarity to be established in which abatements are imposed on all producers in order to grant supplementary reference quantities to certain producers who find themselves in a situation which justifies specific aid.

Article 4(1)(a) of Regulation No 857/84 enables Member States to grant compensation to producers undertaking to discontinue milk production definitively. Pursuant to paragraph (2) of that article, the reference quantities freed shall, as necessary, be added to the national reserve.

Finally, I should point out that Article 4a of Regulation No 857/84 [12] enables Member States to set up a system of further allocations on a regional, or national basis. Pursuant to this provision, Member States may transfer unused reference quantities to other producers or purchasers who have exceeded their own threshold of deliveries. Such transfers must be effected in order of priority within the same region. If any quantities remain available, they may then be allocated to other regions.

11 — See above (point 4 and footnote No 8) the list of categories of producers laid down in Articles 3 and 4 of Regulation No 857/84 who are, or may be, entitled to exceptional treatment.

12 — This provision was inserted into Regulation No 857/84 by Council Regulation (EEC) No 590/85 of 26 February 1985 (OJ 1985, L 68, p. 1). The provision was initially for a period of 12 months, but was then extended for a second period of 12 months by Council Regulation (EEC) No 1305/85 of 23 May 1985 (OJ 1985, L 137, p. 12).

The French rules

6. The measures adopted in France in order to implement the Community provisions are contained in Decree No 84-661 of 17 July 1984 [13] and, in respect of the first two years of implementation referred to by the national court, the decrees of 22 November 1984 [14] and 10 July 1985. [15]

7. As regards the implementation of the general scheme, it is enough to outline the two fundamental decisions taken by France.

As regards the choice of formula, France opted for formula B. [16] Purchasers, that is to say dairies, are therefore liable to pay the levy on the quantity of milk which has been delivered to them in excess of the reference quantity which has been allocated to them by the competent authority, in this case the Office national interprofessionel du lait et des produits laitiers (National Office for Milk and Milk and Dairy Products) (hereinafter referred to as 'the National Office').

As regards the reference year, France chose the year 1983. The reference quantities for that year's production are reduced as follows according to the period of implementation.

(i) In respect of the period from 2 April 1984 to 31 March 1985, the initial reference quantity of each purchaser is calculated on the basis of the quantity of milk delivered in 1983, reduced by 2% (1% in mountain areas). [17] Purchasers are subject to the obligation to allocate to producers supplying milk to them a basic reference quantity equal to not less than 98% (99% in mountain areas) of deliveries made in 1983. [18]

(ii) In respect of the period from 1 April 1985 to 31 March 1986, the reference quantities of the preceding period reduced by 1% (except in mountain areas) are taken into consideration as regards both purchasers and producers supplying milk to them. [19]

It is worth dwelling on the relatively small percentage weightings applying to deliveries in the year 1983 for the purpose of determining the reference quantities of purchasers. Although I do not have any figures in this connection, it seems to me that one is entitled to take the view that these percentages were fixed essentially in order not to exceed the total quantity guaranteed, in accordance with Article 2(2) of Regulation No 857/84. [20] The French Government therefore chose to make only very limited use of the possibility provided for in Article 2(3) of Regulation No 857/84, which enables producers' reference quantities to be generally adjusted in order to increase the volume of additional reference quantities in favour of priority

13 — Decree No 84-661 of 17 July 1984 on controlling the production of cow's milk and the means of recovery of an additional levy on purchasers and producers of cow's milk (JORF, 21. 7 1984, p 2373)

14 — Decree of 22 November 1984 on the determination of reference quantities for purchasers of milk for the period from 2 April 1984 to 31 March 1985 (JORF, 29 11 1984, p 3660)

15 — Decree of 10 July 1985 on the determination of reference quantities for purchasers of milk for the period from 1 April 1985 to 31 March 1986 (JORF, 14 7 1985, p. 7979)

16 — Article 2 of Decree No 84-661

17 — Article 17 of Decree No 84-661

18 — Article 3(1)(a) of the Decree of 22 November 1984

19 — Articles 2 and 3(1)(b) of the Decree of 10 July 1985.

20 — Thus it seems likely that the French Government used the following formula: 1983 -2% = 1981 + 1%.

producers.[21] The result of this is that in France the national reserve was essentially supplied by quantities freed following the definitive discontinuance of production by individual producers.

8. The position of producers having development plans was regulated by Decree No 83-442 of 1 June 1983[22] whose purpose is to implement Directive 72/159/EEC. This decree makes the receipt of investment aid subject in particular to a commitment by the farmer to carry out a modernization programme within the period provided for (normally six years) in his development plan.

9. Decree No 84-661 gives an outline of the general context in which purchasers grant, besides a basic reference quantity calculated as stated above, additional reference quantities to certain categories of producer who are in a special situation and which I may hereinafter designate by the expression 'priority producers'. Producers who adopt a development plan pursuant to the decree of 1 June 1983 form one of the categories of producer who may thus benefit from additional reference quantities.[23] Producers whose deliveries during the year 1983 were greater than 200 000 litres of milk are however excluded. Unless an exception is made in an individual case, such producers may not be allocated additional reference quantities before 1 April 1986. At the hearing, the representatives of the French Government stated that the fixing of such a ceiling enabled sufficient quantities to be made available in favour of the greatest number of priority producers, whilst at the same time observing the guaranteed total quantity.

Decree No 84-661 also states that reference quantities freed by producers who have received compensation by virtue of definitively discontinuing milk production are assigned wholly or in part to the national reserve subject to conditions to be determined by ministerial decree.[24]

10. In respect of the first period of implementation (April 1984 to March 1985), the decree of 22 November 1984 applied this enabling provision in the following manner.

It is provided that 90% of the reference quantities freed following the discontinuance of production are to be kept in the dairies and 10% of these quantities is to be assigned to the national reserve.[25]

Within the limit of the reference quantities available to them, purchasers are required to allocate additional reference quantities to priority producers. They must in particular allocate a single fixed amount of 9 500 litres to producers who have adopted a development plan and whose plan was approved

21 — At the hearing the representatives of the French Government stated that the reference quantity for purchasers was fixed, at the end of the 1984-85 marketing year, at a slightly lower level (-0.8%) than that provided for in Decree No 85-661 (1983 -2%), in order to enable increased reference quantities to be granted to producers who had endured climatic catastrophes and were entitled to request that a different reference year be taken into account.

22 — Decree No 83-442 of 1 June 1983 on the modernization of farm-holdings (JORF, 3. 6. 1983). This decree replaced the earlier regulations which went back to 1974.

23 — Article 5 of Decree No 84-661. The other priority producers provided for in that article are:
(i) producers entitled to aid in favour of farmers in difficulty and whose recovery programme provides for an increase in production;
(ii) young farmers setting up after 31 December 1980 who meet certain criteria;
(iii) producers who before 1 April 1984 committed investments in order to develop their milk production and who meet certain criteria.

24 — Article 4(6) of Decree No 84-661.

25 — Article 2 of the Decree of 22 November 1984.

after 1 April 1978 and before 31 March 1985.[26] However, additional reference quantities cannot be granted to producers whose basic reference exceeds 200 000 litres or 98% (99% in mountain areas) of the delivery objective laid down for the marketing year 1984 to 1985.[27]

This single fixed allocation may be supplemented by an additional reference quantity if there is a significant difference between the total reference granted and the delivery objective provided for in respect of the marketing year 1984/85.[28] A supplement may also be granted to holders of a development plan whose deliveries for the year 1983 were greater than 200 000 litres.[29] Those two supplementary amounts may, however, only be allocated if the purchasers have unused reference quantities available.

Apart from the case of purchasers, there are two other stages at which intervention is provided for.

In the first place, if the quantities available to the purchaser do not enable him to satisfy the needs of his affiliated priority producers, he may call upon the national reserve managed by the National Office.[30]

Secondly, pursuant to the provisions introduced by Article 4a of Regulation No 857/84, machinery for regional and national allocations enables surpluses of purchasers in excess of reference quantities to be set off by the unused reference quantities of purchasers who have not exhausted their quotas.

According to the representatives of the French Government at the hearing, the practical effect of all those measures in France was that a levy did not need to be imposed on producers and purchasers in respect of the 1984/85 marketing year.

11. As regards the second period of implementation (April 1985 to March 1986), the decree of 10 July 1985 makes provision for other detailed rules of implementation.

As to quantities available to purchasers, the proportion of quantities freed which are retained in the dairies was reduced to 80% (previously 90%), the proportion accruing to the national reserve being increased to 20%.[31]

As in the previous period of implementation, purchasers are required to allocate, within the limits of the reference quantity available to them, additional quantities to certain priority producers including producers having a development plan.[32] However, the decree of 10 July 1985 no longer requires a single fixed quantity to be granted to them. It merely provides that the Commissioners of the Republic in each of the regions may lay down the criteria for allocating the additional reference quantities in question.[33] In the same way as the earlier decree, it

26 — Article 3(1)(c) of the Decree of 22 November 1984.

27 — Last paragraph of Article 3 of the Decree of 22 November 1984

28 — Article 4(3) of the Decree of 22 November 1984. Certain young farmers and producers in particularly difficult economic and social situations have prior entitlement to any such additional reference.

29 — Article 5(2) and (3) of the Decree of 22 November 1984.

30 — Article 7 of the Decree of 22 November 1984.

31 — Article 2(1) of the Decree of 10 July 1985.

32 — Article 3(1)(b) of the Decree of 10 July 1985.

33 — Article 3(2) of the Decree of 10 July 1985

excludes from the benefit of supplementary quantities producers whose reference quantities exceed 200 000 litres or 97% (99% in mountain areas) of the delivery objective laid down in their development plan. [34]

At the hearing, the representatives of the French Government stated that the instructions given to the regional authorities were not intended to bring about the allocation of a single fixed quantity to producers having a development plan. On the contrary, it was recommended that account should be taken of the production objective laid down in each development plan.

The decree of 10 July 1985 specifically governs the manner of allocation of quantities freed by producers who have received compensation for definitively discontinuing milk production. [35] Those quantities are to be used in order of priority by purchasers to bring the reference quantity of each producer up to 97% (99% in mountain areas) of the quantities delivered in 1983, starting with producers whose reference quantities are the smallest and excluding producers whose reference quantities exceed 200 000 litres. Any remainder is to be apportioned. The provisions are not, however, clear as to whether producers finding themselves in a special situation are to be the only ones to share in this apportionment.

The rules governing the functioning of the national reserve are also different in relation to those which applied in the previous period of implementation. It is provided that the National Office, after levying a given quantity for certain young farmers and for farmers who have submitted applications found to be admissible, is to attribute the balance to purchasers in mountain areas and to purchasers comprising a particularly large proportion of priority producers whose reference quantities allocated are in marked divergence to the delivery objectives laid down in the development plans. [36]

Finally, in accordance with Article 4a of Regulation No 857/84, machinery for regional and national allocation was again applied. [37]

The French Government observed that all these measures permitted a very wide exemption from the levy in favour of those priority producers who were able to maintain their deliveries within the limits of the quantities provided for by their objectives. It also observed that the measures enabled a situation to be avoided in which the distribution of additional reference quantities to priority producers depended on the greater or lesser extent of the availability of quantities freed within their respective dairies.

The main proceedings

12. In the main proceedings 15 milk producers from the *département* of the Côtes du Nord, who all have a development plan adopted between 1980 and 1983, are chal-

34 — Article 3(3) of the Decree of 10 July 1985.

35 — Article 4 of the Decree of 10 July 1985.

36 — Article 5 of the Decree of 10 July 1985.

37 — See the Decree of 4 July 1986 on the determination of the levy on producers and purchasers of milk who have exceeded their reference quantities (JORF, 23. 7. 1986, p. 9098).

lenging the levy imposed by their dairy in respect of the marketing year 1985/86. I should point out that none of the plaintiffs in the main proceedings had completely implemented his development plan in 1981 or 1982. I would also observe that, in the relevant period, all the plaintiffs produced a quantity of milk greater than 200 000 litres.

13. In the context of these proceedings, the cour d'appel, Rennes, referred the following questions to the Court of Justice for a preliminary ruling:

'(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 allocation 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?'

Analysis of the first question

14. The first question has two limbs. They seem to me to be as follows:

(1) Does Article 3 of Regulation No 857/84 permit a single fixed additional reference quantity to be allocated to producers having a development plan?

(2) Does that article allow 1983 only to be chosen for the determination of the reference quantity of a producer who completed his development plan in 1981 or 1982?

The allocation of a single fixed reference quantity

15. In replying to this question, it is first necessary to determine whether Article 3 of Regulation No 857/84 imposes on Member States a requirement to allocate an additional reference quantity to producers having a development plan or whether it merely grants the right to do so.

The pertinent provisions are as follows:

'For the determination of the reference quantities referred to in Article 2 . . . certain special situations *shall be taken into account* as follows:

(1) Producers who have adopted . . . development plans . . . *may* obtain, according to the Member State's decision:

. . .

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

(2) Member States *may* grant a specific reference quantity to young farmers . . .

(3) Producers whose milk production . . . has been affected by exceptional events . . . *shall obtain, on request, reference* to another calendar reference year . . . ' (emphasis added).

The plaintiffs in the main proceedings rely on the words 'shall be taken into account' in the first sentence of Article 3 in order to argue that Member States are obliged to establish a special regime for holders of development plans. I do not share that opinion.

In my view, the first sentence of Article 3 must be interpreted as taking account of the fact that the system for controlling production introduced in 1984 confers a wide margin of appreciation on Member States, both as regards the determination of the volume of additional reference quantities which may be allocated to priority producers and as regards the definition of categories of priority producers which may benefit therefrom, provided that the measures adopted do not have the effect of causing the threshold of the guaranteed total quantity to be exceeded. This discretion left to Member States is clearly expressed in Article 2(3) of Regulation No 857/84, which states that:

'The percentages referred to in paragraphs 1 and 2 *can* be adapted by the Member States to ensure the application of Articles 3 and 4.' (emphasis added)

It is also expressed in the third recital of the preamble to Regulation No 857/84, according to which

'Member States should be *enabled* to adapt the reference quantities to take into account the special situations of certain producers . . . ' (emphasis added).

In the light of the foregoing considerations, the first sentence of Article 3 should, in my view, be understood to mean that it merely permits Member States to adapt the reference quantities so as to ensure the application of paragraphs (1) to (3) of Article 3, without indicating whether that application is mandatory or optional. The reply to the latter question is given in paragraphs (1) to (3) of Article 3 in which a distinction is drawn between four situations: (1) that of the holders of a development

plan (the first subparagraph of paragraph (1); (2) the situation of producers who have made investments without a development plan (second subparagraph of paragraph (1); (3) the case of young farmers (paragraph 2); and (4) producers affected by exceptional events (paragraph 3). As the Court confirmed in its judgment of 28 April 1988 in Case 61/87 *Thevenot and Others* [1988] ECR 2375, at paragraph 18, the terms used in paragraph (3) require Member States to take account of the situation of the producers referred to therein. On the other hand, the terms used in paragraphs (1) and (2) (see above the words underlined) clearly indicate that Member States have the right to lay down specific measures in order to take account of the situation of the three other categories of producers who are in a special situation.

16. Having thus given the reply that the measures provided for in Article 3(1) of Regulation No 857/84 are adopted under a power left to the Member States, I think it may be inferred that the Member States may also fix a ceiling beyond which no additional reference quantity may be allocated. The fixing of such a ceiling may be necessary in the context of the adjudications to be carried out by the Member States between priority and non-priority producers, or between categories of priority producers, in order to observe the threshold of the guaranteed total quantity.

In this connection, I would point out that the French Government chose to make only very limited use of the option open to Member States generally to adapt the reference quantities of producers in order to increase the volume of additional reference quantities in favour of priority producers (see paragraph 7). Having exercised that option it was obliged to adjudicate between priority producers taking account of the available reference quantities. In this context, it excluded holders of a development plan whose production was greater than 200 000 litres; this was done in order to make it possible to allocate significant additional quantities to a maximum number of smaller priority producers. In doing so, the French Government in my opinion observed the Community provisions: the criterion used for drawing a distinction between priority producers is an objective criterion whose validity has been expressly acknowledged in the context of Article 2(2) of Regulation No 857/84.[38] Moreover, the objective thus pursued is in conformity with the Community rules.

17. It seems to me that the foregoing considerations provide the reply which should be given to the national court to assist it in resolving the disputes in the main proceedings. In fact, I would recall that all the plaintiffs in the main proceedings produced, during the marketing year 1985/86, quantities greater than 200 000 litres of milk. To the extent to which the exclusion of this category of producer from the benefit of the special regime for holders of a development plan is in conformity with the Community provisions, the question as to the validity of the allocation of a single fixed reference quantity is no longer relevant to the plaintiffs in the main proceedings. Moreover, I think it is open to question whether the French rules for the marketing year 1985/86 do in fact provide for such a single fixed allocation in favour of holders of a development plan. Although it is true that the decree of 22 November 1984 provided for a single fixed allocation

38 — Pursuant to Article 2(2) of Regulation No 857/84, Member States may vary the percentage weighting applied to the production of the reference year chosen, in accordance with the level of deliveries of certain categories of producers.

of 9 500 litres to be given to all persons concerned whose production was lower than 200 000 litres, that single fixed allocation is not contained in the decree of 10 July 1985 which lays down the rules pursuant to which dairies imposed a levy on the plaintiffs in the main proceedings. The representatives of the French Government stated at the hearing that the single fixed figure of 9 500 litres was discontinued for the marketing year 1985/86 and replaced by a recommendation to take account of the production objectives laid down in each development plan (see paragraph 11 above).

18. Should the Court deem it necessary, however, to reply to the question relating to the allocation of a single fixed reference quantity, I set out my opinion below.

In the situation under examination, the Member States chose to make use of the option provided for in Article 3(1) of Regulation No 857/84 in favour of a certain category of producers who had adopted development plans which were still being implemented and whose level of production was lower than the limits referred to above. In this case, the operative provisions adopted must evidently comply with the conditions laid down in the regulation.

I refer again to the relevant wording:

'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' (emphasis added).

The wording of this provision, in my view, precludes a single fixed additional reference quantity from being allocated to holders of a development plan which is still being implemented. As soon as a Member State chooses to establish a special scheme for such producers, it must therefore take account of individual situations, for example by ensuring that there is a relationship between the additional reference quantity to be allocated and the production target provided for in each development plan.

That does not, however, mean that Member States are required to fix the reference quantity to be allocated to the producers concerned at the level of the milk production provided for in each development plan. Member States may, in my view, freely but objectively determine the level or levels of the additional reference quantity to be granted in addition to the basic reference quantity, provided that such levels are based on, or in relation to, the production targets provided for in the development plans on the one hand, and that the additional quantities to be granted remain within the limits of the guaranteed total quantity, on the other hand.

The choice of 1983 as the sole reference year

19. I also wonder whether the question relating to the choice of 1983 as the reference year, with no provision for derogation for holders of a development plan completed in 1981 or 1982, is necessary in the context of the main proceedings. In fact, none of the plaintiffs in the main proceedings are in the position of having completed their development plan in 1981 or 1982.

Should the Court nevertheless deem it necessary to reply to this second limb of the first question, I set out my opinion below.

20. The second indent of Article 3(1) of Regulation No 857/84 seems to me to have been intended, in the first place, to deal with the situation of certain holders of development plans whose farm is situated in a Member State which has chosen 1981 as the reference year. In this case, it is logical to permit the Member State concerned to grant additional reference quantities to producers who have completed their development plan after 1 January 1981, given that their basic reference quantity was fixed at that time on the basis of milk production which was destined to grow and takes no account of the consistent production rate to be achieved at the end of the development plan.

How should that provision be construed in a case where a Member State has chosen 1983 as the reference year? In such a case, the provision seems to me no longer relevant as regards holders of a development plan completed in 1981 or 1982. In fact, the basic reference quantity for the persons concerned is then fixed at a time when they have been able to achieve the production objectives laid down in their development plan. That basic reference quantity thus necessarily takes account of the production of the persons concerned during the course of the year in which the plan was completed.

21. In any event, Regulation No 857/84, in my view, precludes a different reference year from that chosen by the Member State for producers in general from being taken into account in favour of holders of a development plan. Article 2 of the regulation requires Member States to choose a reference year from amongst the calendar years 1981 to 1983. Once that choice has been made, a different reference year may still be taken into account in favour of producers affected by exceptional events (Article 3(3)). On the other hand, Regulation No 857/84 does not permit the reference year chosen by the Member State to be derogated from in favour of holders of a development plan. The Court expressly so held in its judgment of 17 May 1988 in Case 84/87 *Erpelding* [1988] ECR 2647:

'Article 3(3) of Council Regulation No 857/84 . . . is the only provision that enables producers to choose a reference year other than that selected by the Member State concerned within the 1981 to 1983 period . . . ' (paragraph 19 of the judgment).

Examination of the second question

22. In its second question, as I construe it, the Rennes Court of Appeal asks the Court whether the Community provisions preclude the retention within dairies of a proportion of the individual reference quantities which are freed by affiliated producers who have definitively discontinued production (90% pursuant to the decree of 22 November 1984, 80% pursuant to the decree of 10 July 1985), only the balance being assigned to the national reserve.

23. The reply to this question may be derived, in my view, from Article 4(2) of Regulation No 857/84:

'The reference quantities freed shall, *as necessary*, be added to the reserve referred to in Article 5.' (emphasis added)

In its judgment of 25 November 1986 in Joined Cases 201 and 202/85 *Klensch and Others* v *Secrétaire d'Etat* [1986] ECR 3477; the Court ruled that:

'Council Regulation No 857/84 of 31 March 1984 precludes a Member State which has opted for formula B from adding the individual reference quantity of a producer who has ceased production to the reference quantity of the purchaser to whom that producer was supplying milk at the time when he ceased production, instead of adding it to the national reserve.'

The Court based its reply on the following reasoning:

'To interpret the regulation as meaning that the individual reference quantity of a producer who ceased trading spontaneously should remain at the proposal of the purchaser would create discrimination between producers. The purchaser would be able to re-allocate that quantity to his producers and thus favour the latter unjustifiably by comparison with producers supplying other purchasers. Furthermore, that interpretation would have the result of binding to his previous purchaser a producer who had discontinued production but wished to start up again and would not allow him to choose another purchaser in that event. However, such an effect can be avoided by interpreting the aforementioned provisions of Regulation No 857/84 as meaning that the system of adjusting reference quantities applies, *mutatis mutandis*, where a producer has ceased production spontaneously.' (paragraph 22 of the judgment)

24. Pursuant to Article 4(2), as interpreted by the judgment in the Klensch case, all individual reference quantities belonging to producers who have discontinued production must therefore be assigned to the national reserve. I see only one exception to that rule, namely in the case where quantities available in the national reserve, other than those coming from the discontinuance of production, would be sufficient to satisfy the needs of priority producers as defined by the Member State in pursuance of Articles 3 and 4 of Regulation No 857/84 (see the words 'as necessary' appearing in Article 4(2)). Apart from this situation, the quantities freed (in respect of which, I would recall, the farmers who abandon production may be granted compensation) must be re-allocated solely to producers who, in accordance with the decision of the Member State, may receive additional reference quantities. Moreover, this re-allocation may not create discrimination between priority producers by making the additional reference quantity to be allocated to them dependent on the volume of quantities freed at the level of the purchasers to whom they are affiliated.

25. That interpretation based on the judgment in the *Klensch* case does not, however, appear to me to be incompatible with the decentralized management of reference quantities freed in a Member State which has opted for formula B. In particular, the operative arrangements which were introduced in France for the marketing year 1985/86, which consist in keeping 80% of the reference quantities freed within the dairies and transferring the balance to the national reserve, do not appear to me to

conflict with the Community provisions providing that the following conditions are satisfied. In the first place, purchasers must re-allocate the quantities freed that are not transferred to the national reserve only to producers entitled to receive additional reference quantities. Secondly, the maintenance of a proportion of the freed quantities with the purchasers must provisionally be in the nature of an advance deduction. In other words, if that proportion exceeds the quantities which are necessary for granting, in accordance with the decision of the Member State, additional reference quantities to the producers concerned, the balance must be transferred to the national reserve. Conversely, if that proportion is insufficient for granting, in accordance with the decision of the Member State, the additional reference quantities provided for in favour of the affiliated priority producers and the national reserve also proves inadequate in that respect, the decentralized management system must allow for a subsequent reduction of the percentage of freed quantities retained with purchasers who have been able to satisfy the needs of priority producers affiliated to them, in such a way as retroactively to neutralize the differences in treatment as between producers according to the purchaser to whom they are affiliated.

It is for the national court to determine whether the conditions referred to above have been observed in the national arrangements. If that is the case, those arrangements appear to me neither to conflict with Regulation No 857/84 nor to infringe the principle of non-discrimination.

Examination of the third question

26. Article 5c of Regulation No 804/68 fixed the total quantity guaranteed to Member States which had to be taken into consideration as from the second year of implementation at a level lower than that fixed for the first year of implementation. That is the reason why the French Government, in respect of the 1985/86 marketing year, fixed the reference quantity for purchasers and affiliated producers at the level fixed for the preceding year less 1% (except in mountain areas) (see paragraph 7 above).[39] In this context, I interpret the third question submitted by the national court as raising the problem whether the Community provisions themselves have not infringed the principle of the protection of legitimate expectation.

Also underlying the third question is the national court's consideration that the holders of a development plan must be able to reckon 'on the stability of commitments entered into previously in order to enable them to increase the productivity of their holding'. This consideration suggests that there exist, between the national authority and the holders of a development plan, commitments pursuant to which the latter have a kind of contractual right to achieve the production objectives provided for in their plan. Before replying to the question relating to the principle of the protection of legitimate expectation, it is therefore necessary to examine whether holders of a development plan may rely on an acquired right with a view to fulfilling the production objectives provided for in their plan. Certainly, it is not for the Court to interpret Decree No 83-442 of 1 June 1983 which governs the position of holders of a development plan in France. This question must be examined in the light of Directive

39 — The national court's statement that the Decree of 10 July 1985 permitted an increase in production limited to 1% for the marketing year 1985/86 seems to me to be incorrect.

72/159/EEC, which defined the position in Community law of holders of a development plan.

27. Although it is true that Directive 72/159/EEC requires Member States to have development plans approved by their competent authorities, such approval does not confer upon the persons concerned the right to achieve the production objectives laid down in those plans.[40] Approval is limited, in my view, to conferring on holders of a development plan the right to received certain aid, *inter alia* in the form of interest rate subsidies, whilst leaving economic and financial responsibility for the farm in the hands of the farmers concerned.[41]

In those circumstances, I consider that holders of a development plan cannot expect not to be subject to some rules which may be adopted during the implementation of their plans in the framework of the common organization of the markets,[42] especially when the imbalance in the dairy sector requires the Council to introduce a scheme for controlling production which necessarily entails a halt to its expansion.

28. It is nevertheless true that Directive 72/159/EEC undeniably did encourage a large number of farmers to invest in the modernization of their farms with a view to achieving sufficient levels of income in the future. When a limitation on the production of such farmers is imposed on the basis of a reference year prior to the year of completion of their development plan, that is to say at a time when production will not normally have reached the level of profitability forecast for the time of the plan's expiry, it is clear that this limitation produces effects which are harsher for them than for producers whose production has remained constant. Therefore, observance of the principle of legitimate expectation was particularly necessary, which the Council was aware of, as we will see below.

29. In its judgment of 16 May 1979 in Case 84/78 *Tomadini* v *Amministrazione delle finanze dello Stato* [1979] ECR 1801, the Court reiterated the scope of the principle of legitimate expectation:

'In the context of economic rules such as those governing the common organization of agricultural markets, ... the principle of respect for legitimate expectations prohibits (Community) institutions from amending those rules without laying down transitional measures unless the adoption of such a measure is contrary to an overriding public interest' (paragraph 20 of the judgment).

In the present case, the Council stated in the last recital to Regulation No 857/84:

'Whereas the scheme must, as a matter of overwhelming public interest, enter into force on 2 April 1984'

In other words, the Council considered that the conditions justifying a decision not to

40 — The objective underlying such approval is set out in the ninth recital in the preamble to Directive 72/159/EEC which states that it is 'to ensure that public money allocated for the development of farms is indeed used for the benefits of farms which satisfy the required conditions ...'.

41 — See the 11th recital in the preamble to Directive 72/159/EEC.

42 — See the judgment of 27 September 1979 in Case 230/78 *Eridania* [1979] ECR 2749, at paragraph 22.

adopt transitional measures in accordance with the Court's case-law were met in this case and I have no reason to doubt the soundness of this judgment made by the Council in the exercise of its political discretion.

Nevertheless, even if it is true that Regulations Nos 856/84 and 857/84 do not include transitional provisions as such, the Council did adopt several provisions which have equivalent effect to a transitional measure:

(i) the taking into consideration, during the first year of implementation of the additional levy, of a guaranteed total quantity fixed for the Community at 98.2 million tonnes (97.2 million tonnes with effect from the second year) (see the fifth and sixth recitals of the preamble to Regulation No 856/84);

(ii) the right conferred on Member States to allocate additional reference quantities to producers in a special situation and in particular to holders of a development plan (Articles 2 to 5 of Regulation No 857/84);

(iii) the right conferred on Member States to introduce a system of regional and national allocations (Article 4a of Regulation No 857/84).

Those provisions, and the use which was made of them in France, have had the effect in practice of enabling the imposition of a levy on French producers and purchasers to be avoided as regards the 1984/85 marketing year.

In those circumstances, it seems to me that, neither in principle nor in their implementation, have the Community provisions infringed the principle of the protection of legitimate expectation.

30. In conclusion, I suggest that the Court reply to the questions referred for a preliminary ruling in the following manner:

(1) (a) Article 3(1) of Council Regulation No 857/84 of 31 March 1984 does not preclude a Member State from excluding producers whose milk production exceeds a level fixed in absolute figures from the benefit of an additional reference quantity in favour of producers who have adopted, pursuant to Directive 72/159/EEC, a development plan which is still being implemented.

(b) That provision does preclude a Member State from allocating to holders of a development plan which is being implemented, referred to at (a) above, a single fixed additional reference quantity which bears no relationship to the production objectives laid down in the plan.

(c) That provision does not permit Member States which have chosen 1983 as the reference year, to choose another reference year in order to determine the individual reference quantities to be allocated to the producers referred to at paragraph (a) above who completed their development plan in 1981 or 1982.

(2) Neither Council Regulation No 857/84 of 31 March 1984 nor the prohibition on discrimination laid down in the second subparagraph of Article 40(3) of the Treaty precludes a Member State which has opted for formula B from entrusting purchasers with the task of provisionally allocating a proportion of the quantities freed by affiliated producers to other affiliated producers who are in a special situation, if such allocations are capable of being adjusted subsequently in such a way as to neutralize the difference of treatment between producers depending on the purchaser to whom they are affiliated.

(3) Council Regulations Nos 856/84 and 857/84 of 31 March 1984, by requiring Member States to apply the scheme for controlling milk production to producers who have adopted a development plan under Directive 72/159/EEC whilst permitting them to take account of the situation of such producers by means of the allocation of an additional reference quantity, do not infringe the principle of the protection of legitimate expectations.