OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 7 July 1998 *

1. In the present case the Bundesfinanzhof has referred to the Court a question for a preliminary ruling on the validity of Regulation (EEC) No 3950/92 [1] and, in particular, the provision whereby the series of temporary withdrawals of a part of the individual reference quantities, free of levies, hitherto allocated to milk producers ('milk quotas') became definitive without compensation.

Facts and main proceedings

2. Stefan Demand, the plaintiff in the main proceedings, is a dairy farmer in Ravensbeuren, Rheinland-Pfalz.

3. In 1990/91 Mr Demand increased his initial quota to 67 784 kilograms of milk per annum. That increase came about in the context of a national scheme (see point 25 below) introduced with a view to reducing individual reference quantities. Any producer prepared to discontinue milk production on a permanent basis was offered compensation of DM 1.60 per kilograms of his guaranteed quantity. Since this scheme resulted in a higher quantity than had been envisaged, the German authorities offered the surplus to producers interested in increasing their quotas in return for payment of the compensation which the State had paid at the relevant time (DM 1.60 per kilogram).

4. In December 1993 the Hauptzollamt Trier, the national body competent for the implementation of the additional levy scheme, informed Mr Demand that his individual reference quantity at the dairy Erbeskopf eG, Thalfang, for the current marketing year had been reduced by 4.74% with effect from April of that year. That figure consisted of the rate of reduction provided for in Regulation No 3950/92 (4.5%) plus a further reduction (0.24%) governed by internal provisions (see point 22 below), which is not in issue. Mr Demand's quota thus fell from 165 503 kilograms to 157 658 kilograms per annum.

5. Mr Demand appealed against the Hauptzollamt's decision; he claimed, essentially, that

* Original language: Spanish.

1 — Council Regulation of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

there had been a breach of his fundamental right to property and also of the principles of non-discrimination and protection of legitimate expectations. The Finanzgericht Rheinland-Pfalz dismissed his appeal and at the same time rejected his request that it should refer a question to the Court of Justice for a preliminary ruling.

6. Stefan Demand then appealed, at last instance, to the Bundesfinanzhof, where the question arose whether Regulation No 3950/92 was compatible with Community law, in so far as, by virtue of that regulation, the suspension of part of the reference quantities allocated to producers was made definitive, without any provision for compensation.

7. Before examining that question it is first necessary to describe the rules on the additional levy scheme introduced in the common organisation of the market in milk and milk products in order to control excess production.

Applicable rules

Community legislation

8. In order to reduce the imbalance between supply and demand for milk and milk products and the resulting structural surpluses, Regulation (EEC) No 856/84 [2] modified the common organisation of the market in that sector by introducing an additional levy payable in certain circumstances in addition to the existing 'co-responsibility' levy. Under this new control mechanism, which was applicable with effect from 2 April 1984, Community milk producers were allocated individual reference quantities from the total quantity allocated to each Member State, not including the quantity intended for the Community reserve created in order to deal with the specific needs of some Member States and a number of producers.

9. Any producer exceeding the reference quantity was required to pay an additional levy of at least 75% of the reference price intended to finance the expenditure incurred in marketing the surplus production.

10. The general rules for the application of the additional levy scheme were established by the Council in Regulation (EEC) No 857/84. [3] That regulation allowed the Member

2 — Council Regulation of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10).

3 — Regulation 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 (OJ 1984 L 90, p. 64).

States to create national reserves of reference quantities in order to take account of the special situations of some of their producers.

11. The additional levy scheme was established for a period of five years. None the less, the measures initially laid down were not sufficient to balance supply and demand for milk and milk products. The Community institutions therefore adopted further measures to reinforce the scheme, including compensation for any producer definitively discontinuing production [4] and the reduction or temporary withdrawal of the total guaranteed quantities of milk. This last-mentioned measure, which is the subject of the present case, automatically entails a corresponding reduction or temporary withdrawal of producers' individual reference quantities.

12. Regulations (EEC) No 1335/86 and No 1343/86 [5] reduced the total guaranteed quantities by 2% for the period 1987/88 and 1% for the period 1988/89, without providing for payment of compensation to the producers. In addition to that definitive reduction, Regulation (EEC) No 775/87 [6] temporarily withdrew a proportion of the reference quantity, amounting to 4% of the guaranteed total quantities for the period 1987/88 and 5.5% for the period 1988/89. Compensation was granted for that temporary withdrawal of a percentage of the quotas at a rate of ECU 10 per 100 kilograms for each of those periods.

13. In 1988 it was agreed to extend the additional levy scheme until 31 March 1992. [7] At the same time, Article 1 of Regulation (EEC) No 1111/88 [8] maintained the temporary withdrawal of 5.5% of the total quantities provided for in Regulation No 775/87, and extended it over the subsequent three 12-month periods (1989/90, 1990/91 and 1991/92). Moreover, Article 1(2) of Regulation No 1111/88 continued to provide for compensation for withdrawal, albeit in the form of the direct payment of digressive compensation at the rate of ECU 8 per 100 kilograms for 1989/90, ECU 7 per 100 kilograms for 1990/91 and ECU 6 per 100 kilograms for 1991/92.

14. Regulation (EEC) No 3879/89 [9] laid down a further reduction of 1% of the guaranteed total quantities, without any compensation,

4 — This measure was introduced by Council Regulation (EEC) No 1336/86 of 6 May 1986 fixing compensation for the definitive discontinuation of milk production (OJ 1986 L 119, p. 21).

5 — Council Regulation of 6 May 1986 amending Regulation No 804/68 (OJ 1986 L 119, p. 19) and Council Regulation of 6 May 1986 amending Regulation No 857/84 (OJ 1986 L 119, p. 34).

6 — Council Regulation of 16 March 1987 temporarily withdrawing a proportion of the reference quantities mentioned in Article 5c(1) of Regulation No 804/68 (OJ 1987 L 78, p. 5).

7 — This extension was provided for in Council Regulation (EEC) No 1109/88 of 25 April 1988 amending Regulation (EEC) No 804/68 (OJ 1988 L 110, p. 27).

8 — Council Regulation of 25 April 1988 amending Regulation No 775/87 (OJ 1988 L 110, p. 30).

9 — Council Regulation of 11 December 1989 amending Regulation No 804/68 (OJ 1989 L 378, p. 1).

with the aim of increasing the Community reserve. At the same time, Regulation (EEC) No 3882/89 [10] reduced the proportion of the guaranteed total quantities temporarily withdrawn from 5.5% to 4.5%, in order to keep the non-withdrawn reference quantities unaltered. Regulation No 3882/89 also increased the compensation provided for in Regulation No 1111/88 to ECU 10 per 100 kilograms for 1989/90, ECU 8.5 per 100 kilograms for 1990/91 and ECU 7 per 100 kilograms for 1991/92, in order to continue to pay producers the amount resulting from the rate of withdrawal of 5.5%.

15. In 1991 the Community institutions adopted Regulation (EEC) No 1630/91, [11] which reduced the guaranteed total quantities by a further 2%. In this case compensation was provided for in Regulation (EEC) No 1637/91. [12]

16. The Council subsequently adopted Regulation (EEC) No 816/92 [13] for the purpose of extending the additional levy scheme for a further year (from 1 April 1992 to 31 March 1993), in anticipation of the adoption of measures reforming the Common Agricultural Policy ('CAP'). In order to continue to control production during that period, Regulation No 816/92 provided that the Commission might propose a reduction of the guaranteed total quantity, in return for compensation, so that the rationalisation efforts already begun could be continued. Furthermore, that regulation fixed the guaranteed total quantities without taking account of the 4.5% of the reference quantities temporarily withdrawn by Regulation No 775/87, whose future was to be definitively decided by the Council in the course of the reform of the CAP.

17. The transitional situation in 1992 ended with the adoption of Regulation No 3950/92, whose validity is at issue in the present case and which continued the application of the additional levy scheme for a further seven years and codified the existing provisions with the aim of simplifying and clarifying them. Article 4 of that regulation provided that the individual reference quantities were to be equal to those available on 31 March 1993, without prejudice to adjustments made at national level within the limits of the total quantity allocated to each Member State. Regulation No 3950/92 did not expressly resolve the problem of the 4.5% of the individual reference quantities which had been temporarily withdrawn. The total quantities allocated to the Member States for 1993/94 were fixed, albeit subject to subsequent adjust-

10 — Council Regulation of 11 December 1989 amending Regulation No 775/87 (OJ 1989 L 378, p. 6).

11 — Council Regulation of 13 June 1991 amending Regulation No 804/68 (OJ 1991 L 150, p. 19).

12 — Council Regulation of 13 June 1991 fixing compensation with regard to the reference quantities referred to in Article 5c of Regulation No 804/68 and compensation for the definitive discontinuation of milk production (OJ 1991 L 150, p. 30).

13 — Council Regulation of 31 March 1992 amending Regulation No 804/68 (OJ 1983 L 86, p. 83).

ment, by Regulation (EEC) No 748/93, [14] which opted to maintain the quantities in force on 31 March 1993, increased by the amounts from the Community reserve existing on that date. Regulation No 748/93 therefore excluded from the guaranteed total quantities for 1993/94 the reference quantities which had been temporarily withdrawn and which had not been maintained for 1992/93 by Regulation No 816/92.

18. The total quantities for each Member State applicable in 1993/94 were adjusted by Regulation (EEC) No 1560/93. [15] Article 1 of that regulation alters the wording of Article 3 of Regulation No 3950/92, fixing the total quantities for each Member State, which in the case of Germany were 27 764 778 tonnes. The second recital in the preamble to Regulation No 1560/93 states that the temporary suspension in 1987 of 4.5% of the individual reference quantities is to be consolidated into a definitive reduction, for which no compensation is provided.

19. Under Article 6 of Regulation No 3950/92 Member States were to authorise, for 12-month periods, temporary transfers of individual reference quantities which producers entitled thereto did not intend to use. This requirement replaced the mere power to authorise such temporary transfers provided for in Regulation (EEC) No 2998/97. [16]

20. Article 8(1) of Regulation No 3950/92 provided that Member States might authorise, from 1 April 1993, 'the transfer of reference quantities between certain producer categories without transfer of the corresponding land'. These transfers were to be authorised on the basis of objective criteria and were to take place in defined regions.

National legislation

21. The Community rules described above were implemented in Germany by means of a series of amendments of the regulation on guaranteed milk quantities (Milch-Guarantiemengen-Verordnung, hereinafter 'the MGV'). Article 4(1) of the MGV (as amended on 24 March 1993) [17] provided that from 1 April 1993 individual reference quantities were to correspond to the quantities allocated to producers on 31 March 1993, less the quantities withdrawn up to that date.

14 — Council Regulation of 17 March 1993 amending Regulation No 3590/92 (OJ 1993 L 77, p. 16).

15 — Council Regulation of 14 June 1993 amending Regulation No 3950/92 (OJ 1993 L 154, p. 30).

16 — Council Regulation of 5 October 1987 amending Regulation No 804/68 (OJ 1987 L 285, p. 1).

17 — BGBl. 1993 I, p. 374.

22. Article 4(b)(6) of the MGV (as amended on 2 April 1992) [18] provided that from 1 April 1992 the 4.74% of the reference quantities hitherto guaranteed was to continue to be suspended. The reason why this amount was 0.24% higher than the amount withdrawn pursuant to Regulation No 3882/89 (see point 4 above) was that the German authorities had previously allocated special reference quantities in order to deal with particular situations. Since this reduction was effected by an internal measure it falls outside the scope of the present question.

23. In application of the Community legislation (see point 19 *in fine*, above), the MGV (as amended on 3 July 1990) [19] provided for the temporary transfer, for 12-month periods and subject to certain conditions, of the reference quantities not used by producers.

24. The MGV (as amended on 24 September 1993) [20] authorised the transfer of quotas without transfer of the holding, in accordance with the Community rules (see point 20 above).

25. The scheme introduced by the German authorities to reduce individual reference quantities (see point 3 above) was initiated by the Law of 17 July 1984 [21] and reiterated, in particular, by the Law of 24 July 1990. [22] The latter law — whose legal basis was Article 4(1)(a) of Regulation No 857/84 — provided that the *Länder* were authorised, subject to certain conditions, to grant compensation of up to DM 1.60 per kilogram to any dairy farmer prepared to discontinue milk production in whole or in part. The scheme proved to be more successful than the authorities had envisaged and a *Land* administrative regulation [23] was adopted which provided that the surplus quantities were to be offered to the remaining producers in return for payment of the same amount as that paid to those discontinuing up production (DM 1.60 per kilogram).

The question referred for a preliminary ruling

26. In the proceedings between Mr Demand and the Hauptzollamt Trier (see point 6 above) the Seventh Chamber of the Bundesfinanzhof decided on 19 March 1996 to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the combined provisions of Article 4(1) and the first paragraph of Article 3 of Regula-

18 — BGBl. 1992 I, p. 845.
19 — BGBl. 1990 I, p. 1334.
20 — BGBl. 1993 I, p. 1659.

21 — Gesetz über die Gewährung einer Vergütung für die Aufgabe der Milcherzeugung für den Markt, BGBl. 1984 I, p. 942.
22 — BGBl. 1990 I, p. 1470.
23 — Gewährung einer Vergütung für die endgültige Aufgabe der Milcherzeugung für den Markt und Zuweisung von zusätzlichen Anlieferungs-Referenzmengen, Verwaltungsvorschrift des Ministeriums für Lanwirtschaft, Weinbau und Forsten, MinBl. Rheinland-Pfalz 1991, p. 163.

tion (EEC) No 3950/92 — whereby the suspension, under Article 5c(3)(g) of Regulation (EEC) No 804/68 as amended by Regulation (EEC) No 816/92, of part of the reference quantities allocated to producers was transformed without compensation into a permanent reduction of those reference quantities, without exempting from that reduction at least additional quantities acquired by producers — compatible with Community law, and in particular with the right to the protection of property and the principles of equal treatment and protection of legitimate expectations?'

27. What falls to be determined, therefore, is whether certain provisions of Regulation No 3950/92 [24] to the effect that the 4.5% of the individual reference quantities hitherto temporarily withdrawn are not included in Member States' overall quantities are compatible with the fundamental principles protected by Community law. That regulation meant in practice that producers' quotas were definitively reduced without any compensation being payable.

28. The grounds on which it is argued both in the order for reference and in the observations submitted to the Court that the regulation is invalid are a breach of the right to property and of the principles of equal treatment and protection of legitimate expectations.

29. Expressed in those terms, the substantive question finds an adequate answer in the Court's judgment of 15 April 1997 in *Irish Farmers Association and Others* v *Minister for Agriculture, Food and Forestry, Ireland and the Attorney General* [25] (hereinafter 'the *Irish Farmers* judgment'). In that judgment the compatibility with Community law of the definitive withdrawal of 4.5% of the individual quotas at issue in this case was clarified. The Court then made a detailed examination of the measure in question from the point of view of the fundamental right to property and the principles of the protection of legitimate expectations, proportionality and equal treatment and concluded that consideration of those principles had disclosed no factor capable of affecting the validity of the measure.

30. The Seventh Chamber of the Bundesfinanzhof none the less preferred to maintain its question for a preliminary ruling. In its letter of 30 July 1997 it stated, *inter alia*:

'In its reference for a preliminary ruling the Chamber also asked whether the transformation, without compensation, of the suspension of part of the reference quantities into a permanent reduction should not have exempted from that reduction at least reference quantities which producers had acquired in return for payment (on the basis of allocations by the *Land*). The Court of Justice did not address that problem in its judgment of 15 April 1997 in Case C-22/94. ... Having regard, in particular, to the principles of the protection of property and of legitimate expec-

24 — As amended by Regulation No 1560/93.

25 — Case C-22/94 [1997] ECR I-1809.

tations which the applicant invokes in respect of the 67 000 kilograms of additional milk quota acquired on the basis of allocations by the *Land*, the Chamber considers it necessary to maintain its reference for a preliminary ruling.'

31. In this way, then, the national court limits the scope of the original question to the content of the parenthetical qualification ('without exempting from that reduction at least additional quantities acquired by producers') and thus by implication acknowledges that the remainder of its question was given an adequate answer in the *Irish Farmers* judgment.

32. The question referred to the Court might therefore be worded as follows: Does the fact that a proportion of the reference quantities definitively reduced was acquired in return for payment have any effect on the principle established in the *Irish Farmers* judgment? To my mind it must be answered in the negative.

33. First, the fact that in Mr Demand's case a proportion of the quota in question was acquired subsequent to the initial allocation does not in itself constitute a new material fact. It is apparent upon examining the judgment of reference of the High Court of Ireland in the *Irish Farmers* case that for the purpose of calculating the reference quantities of each of the producers and plaintiffs in the main proceedings to whom the 4.5% reduction applied account was taken not only of the quantities initially allocated (in 1984/85) but also of those subsequently 'purchased' by the producer. Thus between 1988 and 1992 Michael Slattery had purchased a quota of 2 862 gallons of milk under a national milk restructuring programme. The reduction also applied, for example, to the 2 000 gallons of quota allocated by the Milk Quota Appeals Tribunal to John Corbett, an intervener in the main proceedings, with effect from 1992/93. On the other hand, the reduction did not affect the quantities 'taken on lease' by various producers, since in that case the reduction was applied to the lessors' quotas.

34. Second, as I explained earlier (see point 3 above), Mr Demand cannot be considered to have *purchased* the 67 000 kilograms or so of additional quota from the State. He merely took advantage of the opportunity which the *Land* gave him to secure the transfer of a certain reference quantity originating in the quotas surrendered by other producers who preferred to discontinue production in return for payment of compensation, in exchange for which he was required to refund the State the specific amount which it had been required to pay to producers ceasing production, namely DM 1.60 per kilogram. In those circumstances it is clear that, as regards that additional reference quantity, Mr Demand enjoyed the same prerogatives and was subject to the same restrictions as those producers who ceased production. Accordingly, there is no reason for which a different set of rules

should apply to the quantities by which Mr Demand increased his initial quota in 1990/91.

35. In the light of the foregoing observations, it would be legitimate, for the purpose of deciding the present case, to adopt in its entirety the Court's reasoning in the *Irish Farmers* judgment, which, in the absence of any distinction between the various means of acquiring reference quantities, should apply to all of them. I consider, however, that it might be useful to take the opportunity provided by the question referred to the Court to examine the legal nature of individual reference quantities or quotas.

The nature of milk quotas

36. We have come a long way since classical Roman times, when property signified a power over a thing that was so direct and complete as to be indistinguishable from the thing itself. Nowadays a large proportion of transactions relate to things which, strictly speaking, are not things at all. They have been created in order to satisfy a specific socio-economic function and, more than any other good, depend on the legislative framework within which they are created and sustained. Take, for example, industrial patents. In order to protect industrial products and thus encourage invention, the legislature creates a new legal instrument and defines its content primarily according to its aims. In doing so the legislature is fully aware that economic dynamism will be sure to bring to light legal aspects of the new instrument which were not foreseen and probably not foreseeable. It will again be for the legislature or, as the case may be, the courts to define its limits and to adapt this foreign body to the workings of the law.

37. To my mind that is the situation as regards the so-called milk quotas. The Community legislature must have believed that it could simply regulate these instruments according to their purpose, namely to control milk production within the Community, and leave it to each Member State to resolve the complex private-law issues which the introduction of the new scheme would inevitably raise. Mindful of the significance of the new arrangement, however, it laid down two important conditions: the quota scheme was introduced on a temporary basis and the quotas were linked with dairy holdings. Both of these conditions have been gradually weakened, the first because the quota scheme has been consistently extended between 1984 and the present time and the second because the Member States have been given increasingly wider opportunities to authorise the transfer of reference quantities independently of the holding. Since 1 April 1993 Member States have even been able to authorise, subject to certain conditions, 'the transfer of reference

quantities between certain producer categories without transfer of the corresponding land' (see point 20 above).

38. The national legislatures have used those opportunities in very different ways. While in England a veritable 'quota market' has flourished since the introduction of the scheme, the French rules do not even permit the temporary transfers provided for in Article 6 of Regulation No 3950/92. [26] In the absence of a coherent and stable legislative approach, it comes as no surprise that the characterisation of milk quotas by national courts has ranged from 'valuable intangible asset', [27] or even 'intangible asset susceptible of being leased or transferred, ownership of which constitutes a subjective right', [28] to the more modest 'administrative restriction of production' [29] or 'fiscal advantage akin to a subsidy'. [30] Legal writers have already expressed doubts as to whether the quota is an immovable asset or a movable asset [31] or whether it is possible to provide real securities over the actual quota rather than the milk production effected thereunder. [32]

The justification for the indecisive and case-by-case approach which the Court of Justice tends to take in defining the criteria for protecting property interests is based, at least in part, on this wide range of views which the Community legislation has spawned within the legal orders of the Member States, in particular in the field of private law. [33]

39. While the relative stability of the quota scheme over a given period helps to create a degree of legal certainty, the relaxation of the conditions governing the transfer of quotas reinforces the concept which traders legitimately have of the quota as an autonomous valuable asset. In those circumstances, and in spite of the great differences in regard to this matter between the individual national legal orders, I believe that milk quotas must currently be regarded as authentic intangible assets. However, since they were introduced

26 — See, in that regard, H. Gehrke, 'Wie gemeinsam ist die Gemeinsame Agrarpolitik? — Zur Ausführung der EG-Regeln für die Übertragung von Milchquoten in England und Wales, Frankreich und Deutschland', *European Review of Private Law*, 1995, pp. 21-52.

27 — 'Valuable intangible asset', *per* Justice Murphy in *Lawlor* v *The Minister for Agriculture and Others*, ILRM, 1988, p. 400.

28 — 'Bene immateriale, succettibile di affitto o cessione, la cui titolarità costituisce posizione di diritto soggettivo', Tribunale di Parma, judgment of 16 December 1993, reported in *Dir. e giur. agr. e dell'amb.*, 1994, p. 112.

29 — 'Contingentement administratif de la production'; H. Savoie: 'Quotas laitiers, procédures administratives et droit de propriété: trois décisions récentes du Conseil d'État', *Revue de Droit Rural*, No 231, March 1995, p. 113 et seq.

30 — 'Subventionsähnliche abgabenrechtliche Bevorzugung'; Bundesgerichtshof, order of 19 July 1991, reported in *Agrarrecht*, 1991, p. 344.

31 — See, in that regard, A. Bernard: 'Les quotas laitiers, meubles ou immeubles?', *Revue de Droit Rural*, No 150, February 1987, p. 49 et seq.

32 — See, for example, J. M. De la Cuesta: 'Aspectos jurídico-privados de la llamada cuota lechera', *Revista de Derecho Privado*, 1988, p. 1067 et seq.

33 — The result of this has been certain structural deficiencies in the case-law of the Court of Justice as compared with that of the national courts (for the German case, see T. Schilling: 'Eigentum und Marktordnung nach Gemeinschafts- und nach deutschem Recht', EuGRZ, 1998, p. 189).

for the purpose of regulating the market in milk, their content should be defined according to that purpose, which continues to be their *raison d'être*.

40. For those reasons I consider that examination of the validity of the measures adopted within the framework of the regulation of the market in milk must be centred on their necessity and proportionality in the light of the aim which they were intended to pursue. The conclusions drawn from that examination will have to be applied to every holder of a reference quantity, irrespective of the means whereby those quantities were allocated (or, if one prefers, acquired).

41. Put another way, although the fact that milk quotas are in the nature of property may enhance their role in transactions to the point of protecting the subjective rights of those holding them, that aspect must not prevail over the paramount objective of regulating the market. Traders who deal in quotas (by means of the various transactions permitted under national law) must never lose sight of the fact that in the final analysis quotas are, in their essence and by virtue of their purpose, instruments for regulating the market on a temporary basis and that this entails risks and uncertainty. That clearly does not mean that the legislature is completely free to dispose of those reference quantities as it pleases. It does mean, however, that when analysing the validity of any regulatory measure, such as the 4.5% reduction of the quantities free from levy, one must take into account the inherently regulatory nature of milk quotas before classifying those measures as expropriations. In economic terms, one might perhaps say that for a trader who holds a quota the intervention measures which affect that quota represent one more operating risk, closely linked with the situation on the market. That is a risk which the operator will have to bear, although only in consideration of the protection which the system affords him by guaranteeing a minimum price.

42. Milk quotas thus constitute instruments of market intervention which, through the process of the law, have become an item of property. The content of that item of property/instrument will clearly vary according to the various national legal systems. Some will require a closer link between the quota and a holding or will subject the transfer of the quota to various conditions. The quota is not thereby deprived of its character as an item or property, just as firearms or enriched uranium are not deprived of their character as items of property by the restrictions on transferring them. Those conditions will only provide a means of preventing, to some extent, the creation of 'quota markets'.

43. The solution which I propose is, to my mind, not only the one which best reflects economic reality; it is the one which permits a more satisfactory protection of subjective rights. It is now less true than ever that 'the right to property thus safeguarded within the Community legal order does not comprehend

the right to dispose, for profit, of an advantage, such as the reference quantities allocated in the framework of the common organisation of a market, which *does not derive from the assets* or occupational activity of the person concerned'. [34] That is what the Court appears to have meant by omitting that passage from the more recent *Irish Farmers* judgment. Unlike the approach it took in earlier cases, in that judgment the Court did not reject the allegation of violation of the right to property on the ground that quotas did not constitute assets. On the other hand, the Court stated that 'conversion into a definitive reduction without compensation *does not affect the actual substance of that right* [to property] inasmuch as the Irish producers were able to continue to pursue their trade as milk producers'. [35] That statement shows that the Court decided to approach the legal impact of intervention measures — which is what milk quotas are — on their own particular ground, that of the right to property. It only remains, therefore, to say so clearly.

44. Before concluding these preliminary observations, I should point out that the milk quota system not only serves as a useful instrument for the stabilisation of the market but also plays an important part in the restructuring of the market.

34 — Case C-44/89 *Von Deetzen* v *Hauptzollamt Oldenburg* [1991] ECR I-5119, paragraph 27, and Case C-2/92 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Bostock* [1994] ECR I-955, paragraph 19 (emphasis added).

35 — Paragraph 29 (emphasis added).

Preliminary question: validity of the national rules on the reallocation of quotas

45. At the hearing the Commission for the first time expressed its doubts as to the compatibility with Community law of the German provisions, in so far as they permitted the acquisition of specific quotas previously released over and above the objectives fixed (see point 25 above). In the Commission's opinion, although the promotion of the definitive discontinuance of milk production in return for payment of compensation was based on Article 4(1)(a) of Regulation No 857/84, the reallocation of quotas in return for payment of the same amount — established by ministerial regulation — never had any basis in law. That provision was formally based on Article 4(1)(c) of Regulation No 857/84, which provided that Member States could allocate quotas to producers with a view to restructuring the milk sector. The Commission considers that requiring payment by the beneficiaries of restructuring objectives is no way to pursue those objectives. In those circumstances, Mr Demand cannot rely as against the Community institutions on arguments based on the operation of acquiring quotas in return for payment, since this clearly falls outside the scope of Community law.

46. My own view is that even if the above-mentioned redistribution measures are invalid they are not so obviously invalid that the

Court should make a declaration to that effect in these proceedings without giving the parties concerned, in particular the Federal Republic of Germany, the opportunity to be heard on this matter. I consider, rather, that an absolute ban on the allocation, in return for payment, of milk quotas previously transferred to the national reserve pursuant to Article 4(1)(a) of Regulation No 857/84, that is to say, within the framework of an operation intended to enable producers wishing to do so to discontinue milk production definitively, is not to be inferred from Article 4(1)(c) of that regulation. In any event, since the solution which I recommend (see point 40 above) consists specifically in applying the same legal regime to quotas which have been acquired as to those initially allocated, for the purposes of the following examination, I shall, in the following analysis, proceed on the plausible assumption that the national provisions under which the quotas were acquired are compatible with the Community rules then in force.

47. I shall now examine the principles which, in the view of the national court and the plaintiff in the main proceedings, may have been infringed as a result of the definitive reduction in the present case.

Infringement of the right to property

48. As the Court of Justice has consistently held, property is not an absolute prerogative, if only because it must be considered in relation to its function in society. Consequently, restrictions may be imposed on it, in particular under a common organisation of a market, provided that those restrictions correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the objective pursued, a disproportionate and intolerable interference affecting the very substance of the rights thus guaranteed. [36]

49. There can be no doubt that the definitive reduction of 4.5%, without compensation, of the reference quantities, irrespective of their origin, effected under Regulation No 3950/92 corresponds to objectives of general interest pursued by the Community institutions in the context of the common organisation of the market in milk and milk products, in particular the stabilisation of the market and the reduction of structural surplus. That is reiterated in the 17th recital in the preamble to Regulation No 3950/92. Moreover, no one has denied before this Court that the purpose pursued by the contested measure is in fact one of general interest.

50. It remains to ascertain whether the reduction adopted may constitute a disproportionate

36 — Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15; Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paragraph 18; Case C-177/90 *Kühn* v *Landwirtshaftskammer Weser-Ems* [1992] ECR I-35, paragraphs 16 and 17; and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 78.

tionate and intolerable interference affecting the very substance of the right to property, having regard to the objectives already referred to, namely the stabilisation of the market and the reduction of structural surpluses. Mr Demand claims that the price of milk has been falling in Germany since 1990 and produces private statistics to support his claim. The official data provided by the Commission show, however, [37] that between 1987 and 1996 the structural surpluses of milk and milk products were maintained, both in the Community as a whole and in the Federal Republic of Germany, despite the reduction at issue. As a result of that reduction the proportion of consumption to production in the Community rose from 84% to 90% and the subsidised quantities of butter and skimmed milk powder (products suitable for storage) fell by 10% and 16% respectively. In spite of the endeavours to limit production, in 1993 60% of the butter and 92% of the skimmed milk powder produced in the Community only found a market because of Community assistance. Similarly, from the marketing year 1992/93, when the definitive reduction in the present case was introduced, to 1995, the last year for which figures are available, [38] the net total income of farms in Germany (as in the Community as a whole), far from falling, has consistently risen. In those circumstances, I consider that by adopting a reduction affecting a small percentage of producers' quotas (4.5%), which does not threaten the viability of farms, the Council acted within the wide discretion which it enjoys when regulating the common organisation of the markets. That conclusion is reinforced by the fact that the various measures adopted by the Community institutions since 1987 have not adversely affected the level of milk producers' income.

51. The same conclusion is valid for those producers who made use of the opportunity afforded by the relevant provisions to increase their reference quantities in return for the corresponding payment. Those producers derive greater benefit from the advantages of the common organisation of the market, in particular the guaranteed prices, while at the same time increasing their proportional contribution to the structural surplus in that sector. It is therefore right that they should be obliged to participate in reductions of the guaranteed total quantities in the same proportions as other producers. [39]

52. For all those reasons, I conclude that in the present circumstances the definitive reduction of 4.5% of the producers' quotas, without compensation, does not infringe the right to property.

37 — Taken from Cronos, Eurostat.

38 — Taken from RICA, DG IV of the Commission.

39 — Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 127.

Breach of the principle of protection of legitimate expectations

53. The Court of Justice has consistently held that 'while 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 ... This is particularly true in an area such as the common organisation of the markets whose purpose involves constant adjustments to meet changes in the economic situation'. [40] In a similar context, 'the field of application of the principle of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules'. [41]

54. In this case I consider that the withdrawal of the reference quantities, without compensation, for 1992/93 and the permanent reduction effected by Regulation No 1560/93 (see point 18 above) were foreseeable by a prudent and diligent trader. At the end of the five-year period established for the temporary withdrawal by Regulation No 775/87 the Council, following the proposal of the Commission, adopted Regulation No 816/92, which did not extend the digressive compensation. The reference quantities which had been withdrawn were deducted from the guaranteed total quantities, leading to a reduction in individual quotas, while the Council reserved the right to decide what was to happen to those quantities in the light of market developments. Consequently, all that producers were promised was that the future of that 4.5% of their reference quantities would be reconsidered, which in fact happened when the Council adopted Regulation No 1560/93 and decided to reduce the reference quantities definitively without compensation.

55. I consider that a prudent and diligent milk producer was in a position to foresee in good time that the reference quantities would be reduced without compensation, [42] given the concurrent existence of the following factors:

— equivalent reference quantities had been withdrawn during the previous five years;

— producers had benefited from digressive compensation amounting to ECU 45.5 per 100 kilograms;

40 — Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33.

41 — Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 19.

42 — The same conclusion is found in the *O'Dwyer* judgment, cited above, paragraph 54.

— surplus milk production persisted in the Community;

— the Commission's proposal, set out in document COM(91) 409 final of 31 October 1991, [43] recommended the solution adopted by the Council.

If that conclusion definitely applies to the quotas initially allocated, there is no reason why it should not also apply to reference quantities acquired in return for payment in the marketing year 1990/91. As I have already explained (points 3 and 34), the scheme entailed not the acquisition of newly-established reference quantities but the transfer of existing reference quantities which had been released in favour of the State in return for payment of compensation. In acquiring those quotas the new holder could not expect anything other than to be placed in the same legal situation as the producers discontinuing milk production, nor had he any reason to think that a quota acquired by transfer would be subject to a different regime from that applied to a quota initially allocated.

In any event, the additional levy system ceased to be applicable, in principle, on 31 March 1992 (see point 13 above). In renewing the system the Council therefore enjoyed a particularly wide discretion, so that no trader could be certain that the existing system would continue to apply after 31 March 1992.

Breach of the principle of equal treatment

56. Accordingly, I consider that Regulation No 3950/92, as amended by Regulation No 1560/93, does not breach the principle of protection of legitimate expectations by making definitive the temporary withdrawal of 4.5% of the individual reference quantities without making provision for compensation.

57. The plaintiff in the main proceedings maintains that the reduction in the present case is comparable, as regards its effects, to the partial discontinuation of production without compensation. In that regard, the producers concerned, especially those who increased their quota in return for payment, were treated less favourably than those who received compensation for agreeing to discontinue production.

43 — OJ 1991 C 337, p. 35.

58. The principle of non-discrimination between producers or consumers of the Community laid down in the second paragraph of Article 40(3) of the Treaty requires that different situations are not to be treated in the same way unless that treatment is objectively justified. [44] In that sense, the situation which Mr Demand assumed on acquiring the additional quota must be compared with the situation of which the said new quota takes account, that is to say, with the situation of the holders who discontinued production immediately before they did so. That situation was distinguished, first, by the fact that those quota-holders were able, on a temporary basis, to produce a specific quantity of milk exempt from the additional levy and indirectly enjoy a guaranteed price and, second, by the need to adjust the market intervention system in order to avoid, in particular, situations of surplus supply. I shall merely point out that there is nothing to distinguish those opportunities and obligations from those which the plaintiff now raises in connection with his new quota, which, moreover, are the same as those which the reference quantities initially allocated entail. In applying the reduction in the present case to every reference quantity, irrespective of how it was acquired, the Community legislature therefore scrupulously observed the principle of equal treatment.

59. The decision whether, in commercial terms, it would have been preferable to discontinue production and accept the compensation offered by the German authorities, or to keep, or even to increase, the reference quantities, with the attendant advantages and obligations, was eminently a matter for individual judgment. It was for each producer to weigh up the economic advantage associated with discontinuing production with the commercial prospects offered within the framework of the common organisation of the market in milk, which should have included the matters to which I referred above in connection with the protection of legitimate expectations: in other words, producers should have contemplated the possibility that the guaranteed quantities would be reduced in the near future.

60. To sum up, I consider that the allegation of breach of the principle of non-discrimination cannot be upheld.

Other principles invoked

61. Mr Demand also alleges breach of the principle of proportionality and of the obligation to state the reasons on which certain acts of the institutions are based (Article 190 of the Treaty) and also misuse of powers. As formulated, the first and third of those allegations are covered, as regards the protection which they claim, by the arguments I have already examined in connection with the prin-

44 — See, among many other judgments, Case C-311/90 *Hierl* v *Hauptzollamt Regensburg* [1992] ECR I-2061, paragraph 18.

ciples of the right to property and the protection of legitimate expectations. As regards those three allegations, I would, for the rest, refer to my Opinion in the *Irish Farmers* case, cited above. I consider, therefore, that — analysed in its context — the lack of express justification for the measure of reduction without compensation does not deprive the applicant of the effective possibility of asserting his rights, nor does it prevent the Court of Justice from exercising its power of review. Let me say, nevertheless, that the peculiar features of the Community legislative process and the requirements of the principle of transparency appear more and more to demand very close attention and great meticulousness in giving reasons for legislative measures which have a direct impact on the terms under which the ownership of property can be vested in individuals.

Conclusion

62. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Bundesfinanzhof as follows:

These proceedings have not disclosed any factor capable of affecting the validity of Article 4(1) in conjunction with Article 3 of Council Regulation (EEC) No 3950/92 of 28 December 1992, even though that provision does not include in the reference quantities the 4.5% temporarily withdrawn pursuant to Council Regulation (EEC) No 775/87 as amended, and even though it makes no provision for compensating producers and draws no distinction between the various possible ways of obtaining those reference quantities.