1. Regulation No 857/84 adopting general rules for the application of the additional levy on milk, as supplemented by Regulation No 1371/84, must be interpreted as meaning that for the purpose of fixing the reference quantities referred to in Article 2 of that regulation the Member States may take into account the circumstances of producers who, pursuant to an undertaking entered into under Regulation No 1078/77, did not deliver milk during the reference year adopted only in so far as each producer fulfils the specific conditions laid down in Regulation No 857/84 and if the Member States have reference quantities available for that purpose.

2. Since there is nothing in the provisions of Regulation No 1078/77 or in its preamble to show that the undertaking not to market milk entered into under that regulation might, upon its expiry, entail a bar to resumption of milk deliveries by the producers concerned, the fact that those producers may, for the entire period of application of new regulations introducing an additional levy on milk, be denied any reference quantity whatsoever under those regulations frustrates the legitimate expectations of those producers that the effects of the system of non-marketing premiums to which they had rendered themselves subject would be limited.

Consequently, Regulation No 857/84, as supplemented by Regulation No 1371/84, is invalid in so far as it does not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking entered into under Regulation No 1078/77, did not deliver milk during the reference year adopted by the Member State concerned.

REPORT FOR THE HEARING
delivered in Case 120/86 *

I — Facts and written procedure

1. *The applicable Community legislation*

(a) Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (Official Journal 1977, L 131, p. 1) established *inter alia* a system of non-marketing premiums to be granted on demand to any milk producer who undertook not to dispose of milk or milk products, for a consideration or free of charge, from his holding for a period of five years (Articles 1 and 2). According to the sixth recital in the preamble, Regulation No 1078/77 was intended on the one hand to

* Language of the Case: Dutch.

restore the balance on the market in the products concerned and on the other to make the changes necessary for the proper functioning of the common market.

That regulation was part of a set of measures intended to restore stability on the market for milk products, including in particular the co-responsibility levy introduced by Council Regulation (EEC) No 1079/77 of 17 May 1977 on a co-responsibility levy and on measures for expanding the markets in milk and milk products (Official Journal 1977, L 131, p. 6) and the additional levy introduced, for a period of five years, by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal 1984, L 90, p. 10). It is this last measure that is in issue in this case.

(b) Under Article 1 of Regulation No 856/84 the additional levy is to be charged on quantities of milk delivered by a producer in excess of a reference quantity to be determined. This system was to be implemented in each region of the territory of the Member States in accordance with one of the following formulas (paragraph 1):

Under formula A, the levy is payable by every milk producer on quantities of milk which he has delivered to a purchaser and which exceed a reference quantity to be determined (producer formula);

Under formula B, the levy is payable by every purchaser of milk or other milk products on the quantities of milk which have been delivered to him by a producer and which exceed a reference quantity to be determined. The purchaser liable to the levy is to pass on the burden in the price paid to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (purchaser formula).

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

Regulation No 857/84 also fixes the reference quantity referred to in the basic regulation, Regulation No 856/84, that is to say the quantity exempt from the additional levy. In principle it is the quantity of milk or milk equivalent delivered by a producer (formula A) or purchased by a purchaser (formula B) during the 1981 calendar year, plus 1% (Article 2 (1)). However, Member States may provide that on their territory the reference quantity shall be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity. That percentage may be varied on the basis of the level of deliveries of certain categories of persons liable for the levy, of the trend in deliveries in certain regions between 1981 and 1983 or of the trend in deliveries of certain categories of persons liable during the same period (Article 2 (2)).

Mention should also be made of Articles 3, 4 and 4a of Regulation No 857/84, which allow the Member States to take into account certain special circumstances in fixing reference quantities or to allocate special or additional reference quantities.

Article 3 authorizes Member States to grant special reference quantities to producers who have adopted milk production development plans lodged before 1 March 1984 or have carried out investments without a development plan (Article 3 (1)), and to young farmers setting up after 31 December 1980 (Article 3 (2)). Producers whose milk production during the reference year was significantly affected by exceptional events (natural disaster; accidental destruction of fodder or buildings; epizootic;) are to obtain, on request, reference to another calendar reference year within the 1981 to 1983 period (Article 3 (3)).

Article 4 (1) allows the Member States, in order to complete the restructuring of milk production *inter alia* to grant additional reference quantities to producers realizing a milk production development plan approved after the entry into force of Regulation No 857/84 (1 April 1984) (Article 4 (1) (b)), and to producers who undertake farming as their main occupation (Article 4 (1) (c)).

Under Article 4a, inserted by an amending regulation, Council Regulation No 590/85 of 26 February 1985 (Official Journal 1985, L 68, p. 1), Member States may, initially for a period of 12 months (1 April 1984 to 31 March 1985), allocate the non-utilized reference quantities of producers or purchasers to producers or purchasers in the same region and, if necessary, in other regions. That authorization has been extended on two occasions, most recently until 31 March 1987, by Article 1 (3) of Council Regulation (EEC) No 1343/86 of 6 May 1986 (Official Journal 1986, L 119, p. 34).

Finally, it should be added that Article 7 (1) of Regulation No 857/84, as amended by Regulation No 590/85, lays down rules regarding the transfer of reference quantities in the event of the sale, lease, transfer by inheritance or expropriation of a holding.

(d) Detailed rules for the application of the additional levy were laid down in Commission Regulation No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (Official Journal 1984, L 132, p. 11), as amended.

2. *Dutch legislation implementing the Community legislation*

Council Regulation No 1078/77 was implemented in the Netherlands by Administrative Order No 184 of the Stichting Ontwikkelings- en Saneringsfonds voor de Landbouw (Agricultural Development and Restructuring Fund) (*Staatscourant* 126). That order empowers the Stichting to enter into agreements with producers of cows' milk under which producers, in return for a premium, give an undertaking to the Netherlands authorities either to convert their holding from a dairy to a beef operation or to refrain from marketing milk for a period of five years.

The additional levy on milk was implemented in the Netherlands by the 'Beschikking superheffing' (Super-levy Decree) of 18 April 1984 of the Minister for Agriculture and Fisheries (*Staatscourant* 79), as amended. That decree adopts formula A (the producer formula) for the purposes of Council Regulation No 856/84, and sets reference quantities for producers on the basis of their deliveries in 1983, with the proviso that a different reference year may be taken into account in certain restricted circumstances. Article 19 of the decree, at issue in the main proceedings, is worded as follows:

'1. For quantities in respect of which claims are no longer accepted, the Minister may admit such claims as shall be determined. He may admit claims in circumstances other than those referred to in this decree.

2. A claim as referred to in paragraph (1) may be admitted only on the basis of an application, supported by reasons, made to the Minister.

3. An application as referred to in paragraph (2) must be submitted before 1 September 1984 in so far as the circumstances on which the application is based occurred before 1 April 1984 or were already known on that date.'

3. *The main proceedings*

The applicant in the main proceedings, J. Mulder, runs a farm on leased land. Until October 1979 he kept a dairy herd and delivered 500 000 kg of milk per year to the dairy.

In October 1979 he undertook, pursuant to an agreement entered into with the Stichting Ontwikkelings- en Saneringsfonds voor de Landbouw, to deliver no milk or milk products during the period from 1 October 1979 to 30 September 1984. In return for that undertaking he received a non-marketing premium in a total amount of HFL 193 418 (HFL 38 684 per year), which constituted his principal source of income during the period of validity of the agreement.

Beginning in August 1983 he made a number of investments with a view to resuming dairy production upon the termination of the agreement, and on 28 May 1984 he submitted an application for a quota of milk to be delivered free of levy of 726 000 kg (132 cows x 5 500 kg). In support of his application he relied on Article 19 of the Beschikking superheffing.

That application was rejected by a decision of 24 September 1984 of the Minister for Agriculture and Fisheries, on the ground that the provision relied on was applicable only in cases of *force majeure*, and Mr Mulder thereupon brought proceedings before the College van Beroep voor het Bedrijfsleven.

By a decision of 14 March 1986 that court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

'1. Having regard to the third recital in its preamble, must Council Regulation (EEC) No 857/84, as supplemented by Commission Regulation (EEC) No 1371/84, be interpreted as meaning that in establishing the reference quantities referred to in Article 2 Member States may not take into account situations which are not provided for in the Community regulations, in particular the situation of persons who in accordance

with Council Regulation (EEC) No 1078/77 have delivered no milk in a reference year, and may not adopt measures permitting the grant to such persons of a special quantity?

2. If the answer to the first question is in the affirmative, is Regulation No 857/84 invalid on the ground that it is contrary to Community law as it now stands, in particular:

   a. the principle of legal certainty

   b. the principle of proportionality

   c. the right to enjoy property

   d. the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty

   e. the prohibition of the misuse of powers,

   since the regulation does not take into account persons who in accordance with Regulation (EEC) No 1078/77 have delivered no milk in a reference year?

3. If the answer to the first question is in the negative, does a Member State infringe Community law as it now stands when it fails to make provision as referred to in the first question for persons who in accordance with Regulation (EEC) No 1078/77 have delivered no milk in a reference year?'

4. *Procedure before the Court of Justice*

The order of the national court was received at the Court Registry on 23 May 1986.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by Mr Mulder, represented by H. J. Bronkhorst, of the Bar of The Hague, the Netherlands Government, represented by I. Verkade, Secretary-General at the Ministry for Foreign Affairs, the Council of the European Communities, represented by A. Brautigam, a principal administrator in its Legal Department, and the Commission of the European Communities, represented by its Legal Adviser R. C. Fischer, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations

1. *The first question*

All the parties are agreed that the answer to the first question should be in the affirmative, inasmuch as Regulations Nos 857/84 and 1371/84 do not permit circumstances other than those referred to therein to be taken into account in fixing reference quantities. The Council and the Commission, however, point out that

certain provisions of the legislation in question, while not referring expressly to the situation put forward by the national court, may nevertheless apply in such circumstances.

(a) Mr Mulder submits that Article 3 of Regulation No 857/84 contains an exhaustive list of the special circumstances which may be taken into account for the purpose of fixing special reference quantities; those circumstances include in particular a number of cases of *force majeure*. Article 4 of that regulation contains an exhaustive list of circumstances which may be taken into account for the fixing of an additional reference quantity.

Consequently, Mr Mulder proposes that the following reply should be given to the first question:

'Regulation No 857/84, on a true construction, does not empower Member States to take into account, in fixing reference quantities under that regulation, circumstances other than those provided for in that regulation'.

(b) Like Mr Mulder, the Netherlands Government considers that the legislation in question contains an exhaustive list of the circumstances in which Member States may grant a special or additional reference quantity or use a different reference year as a basis.

Article 3 (3) of Regulation No 857/84 refers to exceptional events occurring before or during the reference year chosen. It has no bearing on the situation of a producer who freely chose to take advantage of the scheme provided for in Regulation No 1078/77 and received a premium in return. Furthermore, under the scheme established by Regulation No 1078/77 it was envisaged that participants would permanently give up milk production.

Moreover, the previous milk production of persons who took advantage of the premium scheme was not included in the total guaranteed quantity for the Netherlands. Consequently, where such producers wish to resume milk production after an interruption of five years they claim a portion of the national guaranteed quantity to which they did not contribute.

Similar remarks may be made with regard to Article 4 of Regulation No 857/84. That article is intended to assist in the restructuring of dairy production (for example in the event of the consolidation of farms or the transfer of farming operations to a new location). Furthermore, the very notion of an additional quantity implies that the person concerned already has an initial quantity free of levy, which is not the case of producers who have taken advantage of Regulation No 1078/77 in so far as their undertakings under that regulation come to an end only after the reference year.

Similarly, Article 4a of Regulation No 857/84 (re-allocation of unused reference quantities) refers only to producers or purchasers who already have a basic reference quantity. That provision should not be regarded as a qualitative extension to Articles 3 and 4 but rather as a temporary corrective provision to be applied, where necessary, at the end of a production year.

(c) The Council considers that Article 3 of Regulation No 857/84 provides only for the adjustment of the quotas of producers who were engaged in the supply of milk at the

time when the additional levy was introduced, but does not in principle make it possible to grant special reference quantities to new producers commencing dairy production. That, it says, is clear from the description of the particular circumstances of producers to which that article applies.

It is true that Article 4 of Regulation No 857/84 does not refer to any actual production during the reference year and could therefore also be applied to producers commencing dairy production after that year. However, since it provides for the allocation of additional quantities, that provision can by definition apply only to producers who already have a certain reference quantity.

Finally, Article 4a of Regulation No 857/84 may also be applied to new producers commencing dairy production. That follows both from the wording of the provision and from the definition of the term 'milk producer' in Article 12 of that regulation, which does not refer to any actual production during the reference year. Indeed, it was given such a wide scope precisely in order to diminish the severity of the Community measures in question.

The Council adds that the legislation under consideration leaves the Member States a certain discretion. However, in making use of these possibilities the Member States must have regard to the limits implied by the objective of the Community legislation and to the general principles of Community law.

In conclusion, the Council proposes the following reply to the first question:

'Regulation No 857/84, as amended, provides for a number of ways in which Member States may grant reference quantities free of the super-levy to producers who, pursuant to Regulation No 1078/77, delivered no milk in the reference year taken into account for the application of the super-levy.

Under the second subparagraph of Article 3 (1) such producers may be granted a special reference quantity where they show that they have invested in a dairy operation before 1 March 1984.

In Article 4a of the regulation it is further provided that during the period from 1 April 1984 to 1 April 1987 such producers may be granted the unused reference quantities of other producers.

Under Article 4 (1) (b) and (c) an additional reference quantity may be granted to such producers where they already have a certain reference quantity, for example by the lease or purchase of a dairy operation.

Finally, nothing in Article 4 (1) (a) prevents Member States from redistributing reference quantities which become available under that article to such producers.'

(d) The Commission observes that in fixing reference quantities Member States may depart from the provisions of Article 2 of Regulation No 857/84 only in the cases provided for in that regulation and in Regulation No 1371/84. Since the case of a producer who undertook pursuant to Regulation No 1078/77 not to deliver milk or milk products for a period of five years and thus did not deliver milk during the

reference year chosen is not provided for as such by those regulations, such a producer may receive a reference quantity only if he falls within one or more of the cases provided for by the Community legislation.

The resumption of milk deliveries by such a producer will normally require preliminary investments in respect of which the Member States may, under certain circumstances, allocate special or additional reference quantities (Article 3 (1) and, possibly, Article 4 (1) (b) of Regulation No 857/84). They are thus able to grant a special or additional reference quantity to most if not all the producers concerned who wish to resume milk deliveries after the end of the five-year period.

The Commission therefore proposes that the Court reply to the first question in the following terms:

'Member States may allocate a special or additional reference quantity to persons who have not delivered milk during the reference period by virtue of an obligation entered into under Regulation No 1078/77, where such persons fulfil the conditions laid down for the allocation of such reference quantities by Regulations Nos 857/84 and 1371/84, in particular those laid down in Article 3 (1) and (3) and Article 4 (1) of Regulation No 857/84.'

2. *The second question*

Mr Mulder submits that Regulation No 857/84 is invalid on the ground that it is contrary to the general principles of Community law. The Netherlands Government, the Council and the Commission consider the regulation to be valid.

(a) Mr Mulder argues that Regulation No 857/84 is contrary to the principles of legal certainty and proportionality, the right to enjoy property, the prohibition of discrimination and the prohibition on the misuse of power.

With regard to the principle of legal certainty, he submits that Regulation No 1078/77 has both an objective of market policy, in so far as the premium for the (temporary) non-marketing of milk is concerned, and an objective of structural policy, in so far as the premium for the (permanent) conversion of dairy herds to meat production is concerned. The system of non-marketing premiums was thus a measure of market policy intended to achieve a price level which would take into account the interests both of all Community producers in the sector concerned and of consumers, and would also ensure adequate supplies without encouraging overproduction.

In adopting Regulation No 857/84 the Council disregarded the market policy aspect of that regulation. In 1984 owners of dairy herds were confronted with a Community scheme which had the effect of definitively barring them from their occupation, since they were unable to produce for a further period of at least five years without, however, being entitled to compensation, as was the case before 1984. Such action on the part of the Council was contrary to the legitimate expectations of dairymen who decided in 1979 to take advantage of the scheme provided for in Regulation No 1078/77 and were entitled to expect that upon the expiry of their undertaking they would, if they so desired, be able to resume production.

Regulation No 857/84 is also contrary to the principle of proportionality, since for the operators concerned the limitation of milk production, the objective of the additional levy system, has in fact become a permanent bar.

With regard to the alleged breach of the right to hold property, Mr Mulder refers to the judgment of the Court of 13 December 1979 (Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727), according to which the right to property is guaranteed in the Community legal order. Regulation No 857/84 results in *de facto* expropriation, since the right to property is subjected to such restrictions that the right itself disappears. The effect of the system brought into force is that the persons concerned are no longer able to carry on their dairy operation or transfer it profitably. Such a restriction on the use of property goes beyond what is necessary in order to attain the objective of the legislation, that is to say the restriction of milk production.

With regard to the prohibition of discrimination, Mr Mulder asserts that the legislation results in identical treatment for situations which are different and different treatment for situations which are identical or at least comparable, contrary to Article 40 (3) of the Treaty.

Milk producers who did not deliver milk during the reference year, because of undertakings entered into pursuant to Regulation No 1078/77, are discriminated against in comparison with producers who did not participate in such programmes and producers who did participate but whose contracts terminated during the reference year and who were therefore able to resume production. They are also discriminated against in comparison with producers whose production, because of exceptional events, was not representative during the reference year, to whom a special or additional reference quantity may be granted pursuant to Article 3 (3) of Regulation No 857/84.

Finally, Mr Mulder alleges a misuse of powers inasmuch as Regulation No 1078/77 was intended to constitute a market policy measure but, owing to the additional levy, has become essentially a structural measure.

In conclusion, Mr Mulder suggests that the answer to the second question should be as follows:

'Regulation No 857/84 is invalid because it is incompatible with the general principles of Community law inasmuch as it does not provide for the granting of a reference quantity to owners of dairy herds who, on the basis of Regulation No 1078/77, took part in the system of non-marketing premiums for milk.'

(b) The Netherlands Government denies that there is any breach of general principles of law.

There is no breach of legal certainty since Regulation No 1078/77 could not arouse hopes, on the part of those who took part in the scheme, of such a nature as to be entitled to the protection of the law. That measure, which was intended to promote the termination of milk production by certain operations, did not encourage the notion that persons who did not deliver milk for a period of five years could simply resume production.

Nor can it be accepted that there is a breach of the principle of proportionality, since persons who benefited from Regulation No 1078/77 are not excessively affected in comparison with other potential producers who may not have a reference quantity. The principle underlying the additional levy, that is to say that producers who produced a certain quantity of milk during the reference year do not pay any additional levy on that quantity, is applied in a uniform manner to all persons concerned. Furthermore, Article 3 of Regulation No 857/84, on the possibility of obtaining a special reference quantity, applies to persons who benefited from Regulation No 1078/77 just as it does to all other producers. A number of cases did in fact qualify for the granting of a reference quantity in this manner.

The argument of discrimination cannot be accepted, since persons who benefited from Regulation No 1078/77 are not in a position fundamentally different from that of milk producers who did not deliver milk during the reference year for other reasons; the establishment of the additional levy constituted an economic risk for all producers wishing to commence or increase production. The same is true of the comparison between persons who benefited from Regulation No 1078/77 and had already finished their period of five years without production during the reference year and had resumed production, and those who were in the middle of the five-year period and thus could not show any deliveries. In that respect Regulation No 857/84 drew a line applicable without distinction to all producers.

The Netherlands Government also considers that the legislation in question does not constitute an unacceptable infringement of the right to property, since the enjoyment of that right is subject to certain restrictions on grounds of general Community interest. Here restrictions on the exercise of the right to property are imposed on all producers; they are justified by overriding considerations of general interest, that is to say the objective of dealing with surpluses in the dairy sector; furthermore, the measure in question has a limited duration of five years. With certain exceptions, the restrictions are applicable without distinction and cannot be regarded as an excessive disadvantage for certain categories of producers or potential producers.

On the question of misuse of powers, the Netherlands Government considers that there is no indication that in this case the Community legislature exercised its powers for a purpose other than that for which they were conferred on it. In particular it cannot be argued that by adopting a measure supplementing the organization of the market in the dairy sector the legislature in fact sought to achieve an objective of structural policy. The additional levy scheme is intended solely to prevent surpluses by means of a system of individual production quotas. Although that scheme may indeed have the temporary effect of a structural freeze, such a possible secondary effect must not be confused with the principle objective of the additional levy, that is to say the reduction of costly and politically undesirable surpluses.

(c) The Council considers that it follows from its observations submitted in regard to the first question that Regulation No

857/84 cannot be declared invalid for the reasons set out in the judgment of the national court.

(d) The Commission observes that the allocation of reference quantities to producers who delivered no or relatively little milk during the reference year is subject to certain conditions which fall primarily within the domain of structural policy. Those conditions must therefore also be taken into account in the allocation of reference quantities to producers having entered into the undertaking provided for under the premiums scheme set up by Regulation No 1078/77. It does not follow, however, that Member States may not adopt provisions for the allocation to such producers of a special reference quantity, taking into account those conditions of structural policy. The Commission therefore considers that it is not necessary to reply to the second question.

It goes on to set out, in the alternative, the reasons for which the Community legislature did not formally authorize the Member States simply to allocate a reference quantity to the category of producers in question without additional conditions. Regulation No 857/84 does provide for such a formal scheme for producers who before 1 March 1984 adopted a milk production development plan, but the justification for that is that the development plans in question are established on the basis of Community criteria and may be subsidized by Community aids. Their objective would be endangered if the operations concerned could not receive reference quantities corresponding to the production volume provided for in the plan. The system of premiums introduced by Regulation No 1078/77, on the other hand, was intended to encourage such operations to discontinue milk production definitively. That is true not only of the conversion premium but also of the non-marketing premium.

With regard to the submissions made by the applicant in the main proceedings, the Commission denies that there has been any infringement of the principle of legal certainty, since the producers concerned were not entitled to expect that on the expiry of their undertaking they would have an unrestricted right simply to resume production and delivery of milk on the previous basis, without being subject to any restrictions of market or structural policy which the Community might have adopted in the mean time.

Nor can it be asserted that there is a breach of the principle of proportionality on the ground that Regulation No 857/84 in fact prevents the persons concerned from producing milk not merely for a period of five years but for a period of 10 years. Aside from the fact that the exclusion from milk production during the first five years was voluntarily accepted by the applicant under Regulation No 1078/77, it must be emphasized that during the second five-year period (which may, moreover, overlap with the first) the Member States may allocate a special reference quantity to producers who did not deliver milk during the reference year adopted so long as they fulfil certain conditions of structural policy.

With regard to the alleged infringement of the right to property, the Commission observes that there is no basis for the conclusion that the applicant in the main

proceedings could not carry on other economically profitable activities, for example the production of livestock for slaughter or of forage crops.

Nor does the Community legislation in question result in discrimination within the meaning of Article 40 (3) of the Treaty against producers who did not deliver milk for a five-year period pursuant to Regulation No 1078/77. Had such producers been treated in a more favourable manner than other producers who did not deliver milk during the reference year, the question might arise whether the latter producers were not the object of discrimination. Furthermore, the fact that producers who in 1983 were already free from their five-year obligation are in a more favourable position than those who were still bound by the undertaking is the inevitable consequence of the fact that the introduction of the additional levy altered the previous situation.

Finally, the submission of misuse of powers is based on the incorrect hypothesis that Regulation No 1078/77 and the regulations on the additional levy each constitute simple measures of market regulation which, taken together, have the effect of a structural measure. The function of the two categories of measures was however not only regulation of the market and of production but also improvement of structures.

Consequently, the Commission concludes that examination of the second question has disclosed no facts or circumstances of such a kind as to affect the validity of Regulation No 857/84.

3. *The third question*

Mr Mulder submits that the reply to the third question should be in the affirmative, while the Netherlands Government proposes a negative reply. The Council and the Commission consider that this question calls for a qualified reply inasmuch as the Member States, in the exercise of their discretion, are required to observe the objectives of the legislation in question and the general principles of Community law.

(a) According to Mr Mulder, in accordance with the general principles of Community law the Member States are obliged, pursuant to Article 5 of the Treaty, to take into account a situation such as that referred to by the national court. They must therefore either adopt specific legislation covering persons who took advantage of the non-marketing scheme provided for by Regulation No 1078/77 or apply to such cases, in so far as is possible, the Community provisions in force which provide for the granting of special or additional reference quantities in particular circumstances (in particular Article 3 and Article 4 (1) (b) and (c) of Regulation No 857/84). That point of view was moreover expressed in a resolution of the European Parliament of 11 October 1985 on the implementation of the dairy quota arrangements (Official Journal 1985 C 288, p. 148).

In conclusion, Mr Mulder proposes the following reply to the third question:

'A Member State acts contrary to the general principles of Community law where it fails to adopt specific measures for persons who pursuant to Regulation No 1078/77 did not deliver milk during a reference year and also where, in granting

an individual quota, it fails to take into account the interests of that category of farmers by making use of all the possibilities available for that purpose under the Community legislation.'

(b) The Netherlands Government observes that even if the Community legislation permits the Member States to grant special reference quantities to persons who took advantage of Regulation No 1078/77 (which the Netherlands Government disputes) that does not mean that the Member States are obliged to take such action.

(c) The Council points out that under Regulation No 857/84 there are a number of ways in which Member States may grant quotas free of additional levy to producers who during the reference year received non-marketing premium under Regulation No 1078/77. However, the legislation in question does not impose any precise obligation on them.

The Council does however accept that a certain obligation might follow from general principles of Community law, in particular the prohibition of discrimination and the principle of proportionality. The objective pursued, that of stabilization of the dairy market, requires neither the systematic refusal of all requests of the kind in question nor the granting, in cases such as this one, of production quotas in accordance with the quantities requested.

Consequently, the Council proposes the following reply to the third question:

'Regulation No 857/84 lays down no specific obligation for the Member States in the matter, but allows them a certain discretion in the application of the possibilities provided for in Articles 3, 4 and 4a. It is for the Court to determine to what extent the Member States are obliged, in the exercise of that discretion, to observe the general principles of Community law, in particular the prohibition of discrimination and the principle of proportionality, without acting contrary to the objectives of the Community provisions concerning the stabilization and restructuring of dairy production.'

(d) The Commission observes that the possibilities of allocating reference quantities to producers who did not deliver milk during the reference year adopted are defined by Regulation No 857/84 as powers of the Member States, not obligations.

However, as a measure of common agricultural policy, the additional levy must comply with the objectives laid down in Articles 39 and 40 of the Treaty. Consequently, where the Community transfers certain tasks in the implementation of that levy to the Member States, the Member States must, in carrying out those tasks, observe not only the specific definition of their powers but also the objective of the additional levy, that is to say to curb the increase in milk production while at the same time permitting the structural developments and adjustments required, as well as the objectives and principles of the common agricultural policy and the general principles of Community law.

The Commission points out in that regard that the power to allocate special reference

quantities to producers who submitted a milk production development plan before 1 March 1984 (Article 3 (1), first paragraph) was granted in order to promote the development of farming operations. It must therefore be concluded that the Member States cannot refrain from exercising that power; their discretion relates instead to the volume of the special reference quantity to be allocated. Similar considerations apply with regard to investments carried out without a development plan (Article 3 (1), second subparagraph), although the Member States have wider discretion in that respect.

Similarly, the powers conferred by Article 4 (1) (b) and (c), which relate to agricultural restructuring measures adopted by the Member State itself, must be exercised in the light of the objective of the additional levy, the objectives and general principles of the common agricultural policy, and the general principles of Community law.

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

'In deciding whether or not to allocate a specific reference quantity to persons who did not deliver milk during the reference year pursuant to an undertaking entered into under Regulation No 1078/77, the Member States must be guided by the objective of the powers provided for in Regulation No 857/84 and referred to in the reply to the first question, the objective of the additional levy (to curb the increase in milk production while at the same time permitting the structural developments and adjustments required) and the general objectives and principles of the common agricultural policy and the general principles of Community law, in particular the prohibition of discrimination and the principle of proportionality.'

U. Everling
Judge-Rapporteur