JUDGMENT OF THE COURT (Third Chamber)
22 October 1992 *

In Case C-85/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Supreme Court of Ireland for a preliminary ruling in the proceedings pending before that court between

William Dowling

and

Ireland, the Attorney General and the Minister for Agriculture and Food

on the interpretation of, *inter alia*, Articles 3(3) and 3a of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 3), as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 (OJ 1989 L 84, p. 2),

THE COURT (Third Chamber),

composed of: M. Zuleeg, President of the Chamber, J. C. Moitinho de Almeida, and F. Grévisse, Judges,

* Language of the case: English.

Advocate General: F. G. Jacobs,
Registrar: D. Triantafyllou, Administrator,

after considering the written observations submitted on behalf of:

— W. Dowling, by Derrick Wyatt, Barrister, and Brian A. Carroll, Solicitor,

— Ireland, by Louis J. Dockery, Chief State Solicitor, acting as Agent,

— the Commission of the European Communities, by Patrick Hetch and Xavier Lewis, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations presented on behalf of W. Dowling by Derrick Wyatt and John McBratney, Barristers, on behalf of Ireland by Hugh Geoghegan SC and Brian Lenihan, Barrister, acting as Agents, and on behalf of the Commission of the European Communities, by Xavier Lewis, of its Legal Service, at the hearing on 27 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 8 April 1992,

gives the following

Judgment

1 By order of 2 March 1990, which was received at the Court Registry on 22 March 1990, the Supreme Court of Ireland referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 3(3) and 3a of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 (OJ 1989 L 84, p. 2) and supplemented by Commission Regulation No (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12).

2 The question was raised in proceedings brought by William Dowling against Ireland, the Attorney General and the Minister for Agriculture and Food concerning a reference quantity under the additional levy system.

3 Mr Dowling, a farmer established in Ireland, gave a conversion undertaking under 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 (OJ 1977 L 131, p. 1) for the period from 23 November 1978 to 22 November 1982. He suffered a heart attack in August 1980 as a result of which he was unable to undertake physical work until 1984, when he resumed work on a limited scale.

4 Since, in those circumstances, he could not produce evidence of milk deliveries in 1983, the year adopted by Ireland as the reference year for the application of Regulation No 857/84, Mr Dowling was unable to obtain a reference quantity when the additional levy system came into operation in 1984. Initially, the relevant rules made no provision for the allocation of a reference quantity to producers who had not, pursuant to an undertaking given under Regulation No 1078/77, delivered any milk during the reference year adopted by the Member State concerned.

5 After the entry into force of the amending regulation, No 764/89, which inserted Article 3a in Regulation No 857/84, Mr Dowling asked the competent national authorities to award him provisionally a special reference quantity under Article 3a(1). His request was refused on the ground that that provision did not allow the award of that reference quantity to producers whose conversion period had expired before 1 October 1983.

6 Following that refusal, Mr Dowling brought an action to establish his entitlement to a reference quantity. In the course of those proceedings, the Supreme Court of Ireland, dealing with the matter at last instance, stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Is a farmer entitled to a provisional special reference quantity under Article 3c of Regulation (EEC) No 857/84 as amended by Regulation (EEC) No 764/89 if

he ceased milk production in return for a conversion premium under Regulation (EEC) No 1078/77 for the period from 23rd November 1978 until 22nd November 1982;

he was incapacitated during 1983 and was accordingly unable to resume milk production in that year in circumstances in which the national authorities subsequently accepted that he would have been entitled to nominate either 1981 or 1982 as alternative reference years in accordance with the terms of Article 3(3) of Regulation (EEC) No 857/84;

he was unable to rely upon milk production during either 1981 or 1982 for the purposes of securing a reference quantity under Regulation (EEC) No 857/84 because both those years fell within the abovementioned four-year conversion period?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the Community provisions at issue and the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 In order to answer the question raised, it is first necessary to outline the applicable Community legislation.

9 The relevant provisions are in particular Articles 3 and 3a of Regulation No 857/84 and not Article 3c which does not exist and was mistakenly referred to by the national court in its question.

10 Pursuant to the first subparagraph of Article 3(3) of Regulation No 857/84, 'producers whose milk production during the reference year referred to under Article 2 has been affected by exceptional events occurring before or during that year shall obtain, on request, reference to another calendar reference year within the 1981 to 1983 period'. The second subparagraph of Article 3(3) gives a list of the situations where it may be justified to take another reference year into account; that list was supplemented by Article 3 of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12), which includes as one of those situations, 'if the producer runs the holding himself, occupational incapacity of long duration'.

11 Article 3a of Regulation No 857/84, as amended by Regulation No 764/89, provided that producers who, pursuant to an undertaking given under Regulation (EEC) No 1078/77, had not delivered milk during the reference year could, under certain conditions, obtain a special reference quantity. According to the first indent of Article 3a(1), however, that possibility was limited to producers 'whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation (EEC) No 1078/77, expires after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to March of the following year'.

12 That limitation was declared invalid by the Court in its judgment in Case C-189/89 *Karl Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539. In that judgment, the Court held the Community legislature entitled to validly establish a cut-off date by reference to the expiry of the period of non-marketing or conver-

sion of the persons concerned, with a view to excluding from the benefit of Article 3a those producers who had not delivered milk during all or part of the reference year in question for reasons unconnected with the non-marketing or conversion undertaking. On the other hand, by virtue of the principle of the protection of legitimate expectations, the cut-off date could be laid down in such a way that it had the effect of also excluding from the benefit of Article 3a producers whose failure to deliver milk for the whole or part of the reference year derived from the fulfilment of an undertaking given under Regulation No 1078/77 (paragraph 13).

13 After the order for reference was submitted to the Court in the present case on 2 March 1990, the Council, in order to comply with the judgment in *Spagl*, adopted on 13 June 1991 Regulation No 1639/91 (OJ 1991 L 150, p. 35) which amended Article 3a(1) of Regulation No 857/84 so as to render it permissible to allocate a special reference quantity to producers 'whose period of non-marketing or conversion in performance of the undertaking given under Regulation (EEC) No 1078/77 expired in 1983 or ... during the period 1 January to 30 September 1983 ...' provided that they submitted an application within a time-limit of three months from 1 July 1991.

14 It is clear from an analysis of all of the abovementioned rules mentioned above that they do not contain any provision on which producers in circumstances like those of the plaintiff in the main proceedings may rely in order to obtain a reference quantity.

15 Article 3(3) of Regulation No 857/84, as supplemented by Article 3 of Regulation No 1546/88, allows producers, in certain exceptional circumstances, to choose a reference year other than that adopted by the Member State concerned within the period 1981 to 1983. However, that choice is expressly limited to one of the other two years within that period, with the result that milk deliveries outside that period cannot be taken into account (see the judgment in Case 84/87 *Marcel Erpelding* v *Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1988] ECR 2647, paragraphs 18 and 19).

16 Article 3a of Regulation No 857/84, as amended by Regulation No 1639/91, makes it possible to award a special reference quantity to producers whose non-

-marketing or conversion period, in performance of the undertaking given under Regulation (EEC) No 1078/77, expired during 1983. However, that provision does not make it possible for producers whose non-marketing or conversion period expired before 1 January 1983 to obtain such a reference quantity.

17 As the Court held in *Erpelding* (above, paragraph 18), the structure and purpose of the rules indicate that they contain an exhaustive list of the situations in which reference quantities or individual quantities may be granted and that they set out precise rules as to how those quantities are to be determined. Even in the factual circumstances described by the national court in its question, none of the applicable Community provisions provides for the possibility of granting a reference quantity to producers whose period of non-marketing or conversion expired before 1 January 1983 and who did not deliver milk in 1981 or 1982.

18 Contrary to the contention of the plaintiff in the main proceedings, the principles of the protection of legitimate expectations and non-discrimination cannot be invoked to challenge that interpretation.

19 As far as the principle of the protection of legitimate expectations is concerned, it must be remembered that, as the Court has held (see in particular the judgment in Case C-177/90 *Kühn* v *Landwirtschaftkammer Weser-Ems* [1992] ECR I-35, paragraph 15), where a producer has been encouraged by a Community measure to suspend the marketing of milk for a limited period in the general interest and against payment of a premium, he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions. On the other hand, the principle of the protection of legitimate expectations does not preclude the imposition of restrictions on a producer under a system like the additional levy system by reason of the fact that he did not market milk during a given period prior to the entry into force of that system for reasons unconnected with his non-marketing or conversion undertaking.

20 It follows that the principle of the protection of legitimate expectations does not require the grant of a reference quantity to be made available to a producer who, as in this case, did not, on the expiry of his conversion period, resume milk production due to an occupational incapacity and consequently did not make any milk deliveries during the reference year adopted by the Member State concerned. Nor can such a producer rely, for the purpose of obtaining a reference quantity, on the quantity of milk that he would have delivered during either of the remaining two years within the period 1981 to 1983 if, during those years, he had not been bound by his undertaking.

21 The rules, thus construed, likewise do not infringe the prohibition of discrimination laid down in Article 40(3) of the Treaty, which is a specific expression of the general principle of equality. That principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified (see *Erpelding*, paragraph 29).

22 In the present case, it appears that the difference of treatment of which the plaintiff in the main proceedings complains lies in the fact that, unlike the producers who were not bound by a non-marketing or conversion undertaking and were thus at liberty to market milk during 1981 and 1982, producers in his situation cannot produce evidence of milk deliveries made during that period and cannot therefore apply, with any success, for another reference year to be taken into account pursuant to Article 3(3) of Regulation No 857/84, as supplemented by Article 3 of Regulation No 1546/88.

23 That result is arrived at because the rules in question do not allow account to be taken of a reference year outside the period 1981 to 1983 or of a theoretical quantity calculated on the basis of milk deliveries made during a period prior to 1981. As the Court held in *Erpelding* (paragraph 30), such an exclusion is justified by the need to limit the number of years which may be taken as reference years, in the interests of both legal certainty and the effectiveness of the additional levy system.

24 The difference of treatment at issue is therefore objectively justified and thus cannot be held to be discriminatory.

25 In view of the foregoing considerations, the reply to the question submitted to the Court must be that the combined provisions of Articles 3(3) and 3a of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of 20 March 1989 and subsequently by Council Regulation No 1639/91 of 13 June 1991, do not provide for any possibility of granting a reference quantity to a producer whose conversion period, in performance of an undertaking given under Council Regulation (EEC) No 1078/77, expired before 1 January 1983, even though that producer was prevented by an occupational incapacity from delivering milk between the expiry of his undertaking and the end of 1983, the reference year adopted by the Member State concerned.

Costs

26 The costs incurred by Ireland and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber)

in answer to the question referred to it by the Supreme Court of Ireland by order of 2 March 1990, hereby rules:

The combined provisions of Articles 3(3) and 3a of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of

20 March 1989 and subsequently by Council Regulation No 1639/91 of 13 June 1991, do not provide for any possibility of granting a reference quantity to a producer whose conversion period, in performance of the undertaking given under Council Regulation (EEC) No 1078/77, expired before 1 January 1983, even though that producer was prevented by an occupational incapacity from delivering milk between the expiry of his undertaking and the end of 1983, the reference year adopted by the Member State concerned.

Zuleeg Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 22 October 1992.

J.-G. Giraud
Registrar

M. Zuleeg
President of the Third Chamber