1983, the reference year adopted by the Member State concerned.

The rules, thus construed, do not infringe the principle of the protection of legitimate expectations, since that principle does not require the grant of a reference quantity to be made available to a producer who did not, on the expiry of his conversion period, resume milk production as a result of 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.

Those rules likewise do not infringe the prohibition of discrimination, since the difference of treatment suffered by such a producer by virtue of his being unable to prove deliveries during 1981 and 1982 and therefore not being entitled to request that another reference year be taken into account, stems from the fact that 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. Such an exclusion is objectively 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.

REPORT FOR THE HEARING
in Case C-85/90 *

I — Facts and procedure

1. *Applicable Community provisions*

(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 (OJ 1977 L 131, p. 1) set up a system of conversion premiums, to be granted on request to milk producers who undertook not to dispose, whether for a consideration or free of charge, of milk or milk products from their holdings for a period of four years (Article 3).

(b) *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 (OJ 1984 L 90, p. 10) introduced an additional

* Language of the case: English.

levy payable on quantities on milk delivered in excess of a reference quantity to be determined. The scheme is implemented in every region of the territory of the Member States in accordance with one of the following formulas (Article 1):

Under Formula A, the levy is payable by milk producers on the quantities of milk delivered to a purchaser in excess of the reference quantity to be determined (the 'producer formula').

Under Formula B, the levy is payable by the purchasers of milk or other milk producers (the dairies) on the quantities of milk delivered by producers in excess of the reference quantity to be determined. The purchaser liable to the levy is required to pass on the burden to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (the 'purchaser formula').

(c) The general rules for the implementation of the additional levy are contained in 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). Regulation No 857/84 fixes the reference quantity to which the basic regulation, Regulation No 856/84, refers — that is, the quantity exempted from the additional levy. That quantity is basically equal to 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 is to 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 (Article 2(2)). Articles 3, 3a, 4 and 4a of Regulation No 857/84, as amended, enable the Member States to take account of certain special circumstances when fixing the reference quantities, or to award specific or additional reference quantities.

More specifically, Article 3 provides as follows:

'For the determination of the reference quantities referred to in Article 2 and in connection with the application of formulas A and B, certain special situations shall be taken into account as follows:

1. ...

2. ...

3. Producers whose milk production during the reference year referred to under Article 2 has been affected by exceptional events occurring before or during that year shall obtain, on request, reference to another calendar reference year within the 1981 to 1983 period.

The following situations may justify application of the first subparagraph:

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

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

— an epizootic affecting all or part of the milk herd.

Member States shall inform the Commission of cases of application of the first subparagraph. Additions to the list of situations referred to in the second subparagraph may be made according to the procedure laid down in Article 30 of Regulation (EEC) No 804/68'.

Article 3a, added by the *amending regulation, Council Regulation (EEC) No 764/89* of 20 March 1989 (OJ 1989 L 84, p. 2) as a result of the *Mulder* and *Von Deetzen* judgments (Case 120/86 [1988] ECR 2321 and Case 170/86 [1988] ECR 2355) provides as follows:

'1. Producers referred to in the third paragraph of Article 12(c):

— 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;

— who have not received a reference quantity under the terms laid down pursuant to Article 5(4)(b) and/or Article 9(2) of Regulation (EEC) No 1546/88 and/or, with regard to the person to whom the premium is transferred, pursuant to Article 2 of this regulation,

shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity ...

2. — 6. ...'.

(d) The detailed rules for giving effect to the additional levy were set out in 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).

Article 3 of Regulation No 1546/88 contains a further list of situations justifying the use of a different calendar year under Article 3(3) of Regulation No 857/84. The list runs as follows:

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

in a temporary reduction of the fodder area of the holding,

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

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

Article 5(4) of the Regulation No 1546/88 provides:

'4. Member States shall, within the limits of the quantities referred to in Article 6(2) of Regulation (EEC) No 857/84 and fixed in the Annex thereto, assign:

(a) ...

(b) to producers to whom paragraph 2 applies, a reference quantity corresponding to their sales in the last 12 months of operation before 1 April 1984, weighted by a percentage where appropriate. In the case of producers who have been conducting operations for less than 12 months, Member States shall determine an annual sales quantity on the basis of actual sales and assign to such producers a reference quantity in accordance with the provisions set out above.

... .'

Article 9(2) of the same regulation provides:

'2. In cases where persons liable to pay the levy have commenced operations after the beginning of the reference period, Member States may, for the purpose of applying formulas A and B, assign them reference quantities on the same basis as indicated in Article 5(4)(b).'

2. *Proceedings before the national court*

(a) Mr William Dowling, a farmer, gave an undertaking under Article 3 of the aforesaid Regulation No 1078/77 that he would not deliver milk or milk products for a period from 23 November 1978 to 22 November 1982; in return he received a conversion premium.

Having suffered a heart attack in August 1980, Mr Dowling underwent open-heart surgery in February 1981. As a result he was not able to undertake physical work until 1984, in which year he resumed work on a limited scale, gradually increasing his physical activity.

Since Ireland had chosen the 1983 calendar year as the reference year for the purposes of the additional levy scheme, Mr Dowling could not obtain a reference quantity under that scheme because he could not show evidence of milk deliveries in 1983.

On 21 June 1989 Mr Dowling requested the Ministry for Agriculture to allocate him a special reference quantity on the basis of the aforesaid Regulation No 764/89. His application was refused on the ground that his non-marketing period under the conversion premium scheme had expired before 1 October 1983. Mr Dowling brought proceedings before the High Court of Ireland to quash that refusal, but his application was dismissed by judgment of 18 January 1990.

The dispute was brought before the Supreme Court of Ireland, which, by order of 2 March 1990, 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?'

3. *Procedure before the Court of Justice*

The order making the reference was received at the Court Registry on 22 March 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by William Dowling, represented by Derrick Wyatt, Barrister and Brian A. Carroll, Solicitor, by the Irish Government, represented by Louis J. Dockery, Chief State Solicitor, and by the Commission of the European Communities, represented by Patrick Hetsch and Xavier Lewis, of its Legal Service, acting as Agents.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 12 December 1991 to assign the case to the Third Chamber in accordance with Article 95 of the Rules of Procedure and to open the oral procedure without any preparatory inquiry.

II — Written observations

1. *Mr Dowling* points out that the relevant provisions provide that a farmer managing

his own holding who was suffering from an occupational incapacity during the reference year 1983 is entitled to designate 1981 or 1982 as an alternative reference year. However, both of those years were covered by the conversion period, and accordingly Mr Dowling claims that he is entitled to substitute 1981 or 1982 for 1983 for all purposes regarding the reference year, including the purpose of qualifying for a special reference quantity under Regulation No 857/84 as amended by Regulation No 764/89.

Mr Dowling argues that it would, furthermore, be discriminatory to confine him to a single reference year, namely 1983, during which year he was incapacitated, while an ordinary quota holder suffering incapacity during 1983 would have been entitled to rely upon either 1981 or 1982 as alternative reference years. Such discrimination could not be justified on the basis that he had not produced milk during 1981 or 1982, since those years were covered by his conversion agreement, and to discount those years for that reason would be inconsistent with the principles laid down in the *Mulder* judgment of 28 April 1988 (mentioned above).

The reference to expiry of the non-marketing or conversion period after 1 October 1983 in Regulation No 764/89 has the aim of protecting producers whose reference year fell within the non-marketing or conversion period. Accordingly, the text should be construed as applying to expiry of the period after 1 October 1983 *or* after the last day of either of the two alternative reference years which might be applicable to the producer under the relevant regulations on quotas.

According to Mr Dowling it follows that, to the extent necessary, Article 3a of Regulation No 857/84 and Article 3 of Regulation No 1546/88 should be applied by analogy to a producer in the position of the plaintiff in the main proceedings.

Mr Dowling further submits that it would be discriminatory to grant a special reference quantity to a producer whose reference year of 1983 fell during a non-marketing or conversion period, but to deny it to a producer in the position of Mr Dowling, one of the 'special case' producers for whom the reference year was not 1983 but, at his own option, either 1981 or 1982.

Mr Dowling contends that Regulation No 764/89 is valid and should be construed so as to authorize a provisional reference quantity for the producers concerned. In any case, even if the regulation is held to be invalid, where the ground of invalidity is discrimination arising from the failure of the Community institutions to provide for a particular case, the Court should rule that the national authorities are obliged to continue applying the regulation, but on the basis that they will extend its application to persons hitherto disadvantaged by the discrimination found to exist (see judgment in Case 300/86 *Landschoot* v *Mera* [1988] ECR 3443, paragraphs 22 to 25).

In conclusion, Mr Dowling proposes the following answer to the question referred to the Court:

'1. A farmer is entitled to a provisional special reference quantity under Article 3c of Regulation 857/84 as amended by Regulation 764/89 if

— he ceased milk production in return for a conversion premium under Regulation 1978/77 for the period from 23 November 1978 until 22 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 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 857/84 because both those years fell within the abovementioned four-year conversion period.

2. In assessing compliance by the Plaintiff with the time-limits laid down in Regulations 764/89 and 1033/89 the competent national authorities must take into account the uncertain legal position of the Plaintiff in the period preceding the present ruling of the Court of Justice and shall relax the said time-limits to the extent necessary to allow the Plaintiff a reasonable opportunity to demonstrate his ability to produce the requisite quantities of milk on his holding.'

2. The *Irish Government* makes the preliminary observation that the question submitted to the Court refers in fact to Article 3a rather than Article 3c of Regulation No 857/84 as amended by Regulation No 764/89. The question should be answered in the negative.

According to the Irish Government it is the clear and expressed intention of the regulation that a producer in Mr Dowling's situation shall not be entitled to a provisional special reference quantity. In the *Mulder* judgment (Case 120/86 [1988] ECR 2321), the Court held that Articles 3 and 4 of Regulation No 857/84 list exhaustively the situations in which special or additional quantities may be allocated by the Member States. Since those provisions do not cover the situation of a producer who delivered no milk during the reference year because of a non-marketing undertaking entered into under Regulation No 1078/77, such a producer may claim a reference quantity only if he falls within one or more of the situations specifically envisaged for that purpose.

Consequently, the Irish Government contends that the legislative practice and the

jurisprudence of the Court suggest that the list of special situations referred to in Article 3 of Regulation No 857/84, as supplemented, is exhaustive and that a situation such as Mr Dowling's lies outside the express terms of that regulation. The Irish Government further submits that there is no scope for filling an omission by the application by analogy of another legal provision in the present instance, because such application by analogy is ruled out where the regulation in question is contrary to a general principle of law on account of the clear and express intention of the regulation rather than because of a mere omission.

In so far as the application of Article 3a of Regulation No 857/84, as amended, infringes general principles of Community law, the Irish Government contends that the specified time-limit ('on or after 30 September 1983') does not admit of an interpretation other than the plain meaning of the text. The use of specified dates or time-limits is a common feature of economic legislation, and it is an impermissible form of interpretation to invoke general principles of law to amend the clear intention of the legislature in such legislation.

3. The *Commission* points out that Article 3(3) of Council Regulation No 857/84, combined with Commission Regulation (EEC) No 1546/88, provides that reference to another calendar reference year within the period from 1981 to 1983 can be made in the event of the producer's suffering from an occupational incapacity. However, as there is no provision enabling producers to obtain reference to milk deliveries made by them outside the period from 1981 to 1983 the Court has held that such an option is excluded, even in cases where the persons concerned had no representative production throughout that period. The resultant difference in treatment between (a) producers whose milk production declined significantly throughout the period from 1981 to 1983 and who cannot obtain an individual quantity based on a representative production and (b) producers who are able to rely on a representative production is justified by the need to limit the number of years which may be taken as reference years. Such a limitation is in the interests of both legal certainty and the effectiveness of the additional levy scheme (judgment in Case 84/87 *Erpelding* v *Secrétaire d'Etat* [1988] ECR 2647).

According to the Commission a strict interpretation of the requirement to be fulfilled in Article 1(1) of Regulation No 764/89 is entirely consonant with the spirit of the scheme introduced. The scheme which it establishes is not designed to permit the allocation of a reference quantity to producers who have not produced milk because of exceptional circumstances within the meaning of Article 3(3) of Regulation No 857/84 and Article 3 of Regulation No 1546/88.

The Commission explains that it was necessary to appoint 31 December 1983 or 30 September 1983 — as applicable — as the expiry date for the non-marketing period or the conversion period conferring eligibility for a special reference quantity under Regulation

No 764/89, in order to avoid as far as possible the cumulative application of the general scheme under Article 5c of Regulation No 804/68 and the scheme under Regulation No 764/89. However, in order that the system could be applied favourably their concomitant application is possible for three months, and for six months in Ireland, given the way in which the dates of the two schemes apply.

The Commission further submits that, when a producer has been unable to produce milk during the 12 months of the reference year he may, by virtue of Articles 9(2) and 5(4)(b) of Regulation No 1456/88, seek the assignment of a reference quantity within the general quota scheme as introduced by Regulations No 856/84 and No 857/84 within the national reserve. That reference quantity is based on the producer's sales in his last 12 months of operation before 1 April 1984 or, if he has been conducting operations for less than 12 months, based on the actual sales. This possibility is expressly reserved in the second indent of Article 3a of Regulation No 857/84, inserted by Article 1 of Regulation No 764/89.

In conclusion, the Commission suggests that the following answer be given to the question referred by the Supreme Court:

'1. On the proper interpretation of Article 3a of Council Regulation (EEC) No 857/84 as amended by Council Regulation (EEC) No 764/89, a farmer is not entitled to a special reference quantity under that article when

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

2. When a producer did not produce milk during the twelve months of the reference year, he may, by virtue of Articles 9(2) and 5(4) point (b) of Commission Regulation (EEC) No 1546/88 have assigned to him a reference quantity.'

M. Zuleeg

Judge-Rapporteur