OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 8 March 1988 *

Mr President,
Members of the Court,

1. As in Case 61/87, Article 3 (3) of Council Regulation (EEC) No 857/84 [1] of 31 March 1984 is the provision [2] which the Court is called upon to examine. That provision authorizes, in certain exceptional situations, producers to choose from within the 1981 to 1983 period a different reference year from that chosen at national level; the question here is to what extent any other option, such as a notional year calculated by extrapolation or a year earlier than that period is thereby precluded.

2. In support of his argument the applicant in the main proceedings (hereinafter referred to as 'the applicant') claims that the concept of *force majeure* applies in his case. The Commission disagrees, observing that the list of possibilities in the abovementioned provision is exhaustive. The Council shares the Commission's view but stresses that other provisions of the Community rules may allow additional quantities to be allocated to a producer in a situation like that of the applicant.

3. It should first be noted that there is no ambiguity in the aforementioned Article 3 (3) which provides that 'Producers . . . shall obtain, on request, reference to another calendar reference year within the 1981 to 1983 period'. It excludes the choice by analogy of a reference year prior to the specified period or a calculation by extrapolation on the basis of the trend of the producer's production. Furthermore, since it contains a derogation from the normal rules for determining the reference quantities, the provision must be interpreted restrictively. Nor do I think that the concept of *force majeure* can here make possible something that is categorically ruled out by the clear and precise wording.

4. In the first place, the solution advocated by the applicant is technically distinct from the traditional effects of *force majeure*, which are to free a party from the consequences of failure to perform or non-compliance with an obligation. Mr Advocate General Capotorti drew attention to this point in his Opinion in *IFG* v *Commission* [3] where the Court was to adopt his analysis. [4]

'Under national legal systems *force majeure* is, of course, generally recognized as a factor which may exonerate an individual from the effect of non-observance of a positive obligation or of a prohibition by which he is bound.'

* Translated from the French.

1 — 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).

2 — The question also refers to Article 3 of Regulation (EEC) No 1371/84; however, this provision merely supplements the list of situations in which another reference year may be taken into account. As such it does not appear to require interpretation.

3 — Judgment of 14 February 1978 in Case 68/77 [1978] ECR 353.

4 — At paragraph 11.

However, this case is not concerned with excusing the failure to perform an obligation but obtaining a different reference year from that resulting from the system provided for by the rules.

5. It should be noted that the applicant is requesting not the application by analogy of the provision in question but a solution which is the only way of taking into account, in his view, the specific features of his situation. Thus, in a manner of speaking he is seeking from the Court an 'invented' provision which is quite independent of the expressed will of the legislature.

6. Irrespective of the method of interpretation employed, the course thus proposed cannot be followed. Although the rule of law is flexible it is not so plastic as to permit such an interpretation which could be explained but not legitimized on the grounds of fairness.

7. During the written procedure and at the hearing reference was made to various provisions of Articles 3 and 4 of Regulation No 857/84 which might permit the grant of additional or specific quantities, as well as the interregional compensation provided for in Article 4a.

8. There is no gainsaying the practical interest of such possibilities with regard to a situation like that of the applicant, particularly since they bear witness to the Council's concern to 'take into account the special situation of certain producers' [5] and even that 'the Community mechanisms should be made less rigorous'. [6] It is clearly not the role of the Court to investigate to what extent the party concerned fulfils the conditions for benefiting from those provisions. However, such an examination, which is a matter for the national court, must take account of the judgment in *Klensch* v *Secrétaire d'État,* [7] in which the Court stated that when Member States may choose various methods of implementing the rules concerned, they must comply with the principle of non-discrimination. It is true that *Klensch* concerned a measure of a general nature, namely the choice of the reference year. However, a different solution cannot be adopted where individual measures are concerned. In this respect the Court has stated in its judgment in *Eridania* v *Minister for Agriculture and Forestry* that 'the general principles of Community law [...] are binding on all authorities entrusted with the implementation of Community provisions'. [8] Therefore, I would agree with the Council's observation that the fact that Member States may choose between several methods for the adjustment of individual quotas does not release them from their obligation to observe the principle of non-discrimination. In my opinion the national court should apply that principle if the circumstances so warrant.

9. However, in view of the reply required by the actual wording of the first question it is necessary to examine the validity of the provision with regard to Article 39 (a) and (b) of the Treaty. The judgments in *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [9] and *Roquette* v *France* [10] set out the principles to be taken into account in this respect.

5 — Third recital in the preamble to Regulation No 857/84.

6 — Second recital in the preamble to Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 (Official Journal 1985, L 68, p. 1).

7 — Judgment of 25 November 1986 in Joined Cases 201 and 202/85 [1986] ECR 3477.

8 — Judgment of 27 September 1979 in Case 230/78 [1979] ECR 2749, at paragraph 31.

9 — Judgment of 24 October 1973 in Case 5/73 [1973] ECR 1091, at paragraph 24.

10 — Judgment of 20 October 1977 in Case 29/77 [1977] ECR 1835, at paragraphs 29 and 30.

'Article 39 of the Treaty sets out various objectives of the common agricultural policy.

In pursuing these objectives, the Community institutions must secure the permanent harmonization made necessary by any conflicts between these aims taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.'

10. Certainly, the additional levy system, which is intended to re-establish a balance between supply and demand in the milk sector, is based on limiting production, which entails a stabilization of the income of the farmers concerned. But it is clear that the objectives of rational development of dairy production and even the maintenance of a fair standard of living for the agricultural community are also being pursued within this system. The provision in question must be assessed in the light of this general context and it would appear paradoxical to regard it as invalid even though, for the producer's benefit, it introduces great flexibility in the determination of the reference years.

11. Although the national court did not specifically refer to them, the applicant claimed that the principles of proportionality and non-discrimination had been breached. For its part, the Commission suggests that the provisions should be examined in the light of Article 40 (3) of the Treaty on which basis, moreover, it argues that the regulation is valid.

12. In order that the Court's answer in this respect should be of practical use, bearing in mind the underlying logic of the national court's questions, I suggest that the provision be analysed in the light of Article 40 (3) of the Treaty which prohibits discrimination between producers within the Community and provides for the adoption of measures required to attain the objectives of the common agricultural policy. It is accepted that that wording is the embodiment of the principle of proportionality in the sector in question.

13. In that respect it must first be pointed out that by adopting the provision in question the Council intended precisely to avoid the unjustified rigidity inherent in a system which would not have allowed another reference year to be taken into account under any circumstances. It will be agreed that this is clearly an embodiment of the principle of proportionality. Admittedly, other solutions would have been conceivable. One example is the proposal put forward at one stage by the Commission, that the period from which the producer's reference year was to be chosen should be extended to include 1980. However, it must be borne in mind that any widening of the choice of the persons affected involves major disadvantages. First, there is a risk that producers would choose a reference year which was not merely unrepresentative but which would ultimately reveal a truly remarkable yield. Given the number of Community producers such a consequence could not be regarded as negligible.

14. The Community legislature must strike a balance between the interests at stake. The specific situation of one producer cannot of itself affect the validity of the disputed provision, whereas it is intended precisely to meet the requirements of the principle of proportionality. The Court held in the judgment in *Balkan-Import*[11] that:

11 — Case 5/73, *supra*.

'In exercising their powers, the institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation *to the individual situation of any one particular group of operators*'. [12]

15. As regards any breach of the principle of non-discrimination, that would presuppose unequal treatment based on arbitrary criteria. In allowing the producers a choice within the 1981 to 1983 period the Council was entitled to consider that such an option was statistically likely to guarantee producers a representative quantity. In any event, it appears that such an option in no way exceeds the guidelines set out in the judgment in *Roquette frères* v *Council*[13] where the Court stated:

'When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation, the discretion which it has does not apply exclusively to the nature and the scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings.'

The Court then stated that in reviewing the exercise of such a power it would confine itself to cases of manifest error, a misuse of power or where the authority in question had clearly exceeded the bounds of its discretion.

16. In the light of the foregoing it is impossible to require the Community legislature to have covered every fortuity and individual case. That, moreover, is implicit in the judgment in *Maizena* v *Council*[14] in which the applicant pleaded that quotas had been fixed in a discriminatory manner which failed to take into account investment limits voluntarily agreed to by certain isoglucose producers. The Court stated:

'The Council is not to blame for failing to take into account the commercial choices and internal policy of each particular undertaking when it adopts measures of general interest to prevent the uncontrolled isoglucose production from jeopardizing the sugar policy of the Community'.

I propose that an analogous solution should be applied here and would endorse the Opinion of Mr Advocate General Roemer in the *Oehlmann* v *Hauptzollamt Münster* case: [15]

'it must be observed that there is no principle of law that requires that rules issued in the exercise of sovereign powers should always place those concerned in the position in which they would have been if the case of *force majeure* had not arisen'.

12 — At paragraph 22, emphasis added.

13 — Judgment of 29 October 1980 in Case 138/78 [1980] ECR 3333, at paragraph 25.

14 — Judgment of 29 October 1980 in Case 139/79 [1980] ECR 3393, at paragraph 30.

15 — Judgment of 24 June 1970 in Case 73/69 [1970] ECR 467.

17. I therefore propose that the Court should rule as follows:

'Where a producer's production has been affected throughout the 1981-83 period because of an exceptional situation, Article 3 (3) of Regulation No 857/84 does not allow reference to be made to the production of a year prior to that period or a notional production calculated by extrapolation; this solution in no way precludes the specific examination of the producer's situation with regard to provisions of Community rules for which he does meet the conditions.

Consideration of the abovementioned provision has disclosed no factor of such a kind as to affect its validity'.