# JUDGMENT OF THE COURT (Third Chamber)
12 July 1990 *

In Case C-16/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven (administrative court of last instance in matters of trade and industry), The Hague, for a preliminary ruling in the proceedings pending before that court between

**G. Spronk**

and

**Minister van Landbouw en Visserij** (Minister for Agriculture and Fisheries),

on the interpretation of Article 3(1) 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 (Official Journal 1984 L 90, p. 13),

THE COURT (Third Chamber)

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

Advocate General: W. Van Gerven
Registrar: J. A. Pompe, Deputy Registrar,

after considering the observations submitted on behalf of

the Netherlands Government, by B. R. Bot, Secretary-General in the Ministry of Foreign Affairs, acting as Agent,

* Language of the case: Dutch.

the French Government, by Edwige Belliard, Deputy Director for Trade Law in the Ministry of Foreign Affairs, acting as Agent, and Géraud de Bergues, Principal Deputy Secretary of Foreign Affairs in the same ministry, acting as Deputy Agent,

the Commission of the European Communities, by Robert C. Fischer, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral argument presented by the Netherlands Government, represented by J. W. De Zwaan, acting as Agent, and by the Commission of the European Communities, at the hearing on 27 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 May 1990,

gives the following

## Judgment

1 By order of 21 December 1988, which was received at the Court on 23 January 1989, the College van Beroep voor het Bedrijfsleven (administrative court of last instance in matters of trade and industry), The Hague, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of the first subparagraph of Article 3(1) 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 (Official Journal 1984 L 90, p. 13).

2 The questions were raised in proceedings between Mr Spronk, who operates a dairy holding (hereinafter referred to as 'the plaintiff'), and the Netherlands Minister van Landbouw en Visserij (Minister for Agriculture and Fisheries, hereinafter referred to as 'the Minister for Agriculture').

3 It is clear from the documents before the Court that, by letter of 1 April 1985, the Minister for Agriculture rejected the plaintiff's complaint against the decision by which the Directeur voor de Landbouw en Voedselvoorziening (Director for Agriculture and Food Supply) of the province of Overijssel only partially recognized his claim to a reference quantity, that is to say to deliver a quantity of milk free of the additional levy on milk introduced 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). The contested decision was taken on the basis of Article 11 of the Decree of the Minister for Agriculture of 18 April 1984 by which the additional levy was introduced in the Netherlands.

4 In support of the application for the annulment of that decision which he submitted to the College van Beroep voor het Bedrijfsleven, The Hague, the plaintiff claims that by granting him an interest rate subsidy in 1983 in respect of the investments necessary for carrying out the development plan which he had submitted to them for his farm, in accordance with the provisions of Council Directive 72/159/EEC of 17 April 1972 on the modernization of farms (Official Journal, English Special Edition 1972 (II), p. 324), the competent national authorities had accepted a proportionate increase in his milk production. He therefore considers that the abovementioned Netherlands Decree of 18 April 1984, which enables the competent national authorities to grant a reference quantity lower than the production attained under the development plan for the farm, is incompatible with Council Regulation No 857/84, Article 3 of which expressly empowers the Member States to take into account, in calculating individual reference quantities, the situation of producers who have adopted a development plan under Directive 72/159.

5 Consequently, the College van Beroep voor het Bedrijfsleven stayed the proceedings and referred to the Court the following questions for a preliminary ruling:

'(1) Must Article 3(1) of Council Regulation (EEC) No 857/84 be understood and interpreted as merely empowering the Member States, when determining individual reference quantities to take account of the situation of producers who lodged milk production development plans under Directive 72/159 before 1 March 1984, it being left completely to the discretion of the relevant Member State whether, and if so in what manner, the power is exercised?

(2) If Question 1 is answered in the negative and the Member States must be taken to be under an obligation in some way or another to take account when determining individual reference quantities of the position of the producers concerned, can the scope and nature of that obligation be specified on the basis of the fair application of Article 3(1)?

(3) Is it compatible with Article 3(1) of the aforesaid regulation as interpreted by the Court in answering Questions 1 and 2 for a Member State to lay down for producers who have incurred investment obligations rules of the type described in this judgment even if the limitations and conditions contained in the rules result in a number of the producers referred to in Question 1 being granted no special reference quantity or a special reference quantity which is lower — in some cases substantially lower — than the quantity provided for in the plan?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the relevant Community rules and national legislation, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

**The first and second questions**

7 In view of the facts of the main proceedings, the first and second questions, which should be examined together, must be understood as asking whether the second indent of the first subparagraph of Article 3(1) of Regulation No 857/84 imposes on the Member States an obligation to allocate specific reference quantities to the producers referred to in that provision or whether it confers on the Member States a discretion in this regard and, if so, what are the limits of this discretion.

8 It should be recalled at the outset that by Regulation No 856/84 of 31 March 1984 the Council introduced an additional levy which is imposed on quantities of milk delivered in excess of a reference quantity determined for each Member

State; it is payable either by milk producers (formula A) or by purchasers of milk or other milk products who pass on the levy to producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (formula B).

9 The detailed rules for calculating the reference quantity were laid down in Council Regulation No 857/84. Pursuant to Article 2(1) of this regulation, the reference quantity is to be equal to the quantity of milk or milk equivalent delivered or purchased during the 1981 calendar year, plus 1%. However, under Article 2(2) 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 or 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity laid down for the Member State concerned.

10 Derogations from those rules are envisaged, to take account of certain special situations, in Articles 3, 4 and 4a of Regulation No 857/84. It should be noted in particular that Article 3(1) 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) producers who have adopted milk production development plans under Directive 72/159 lodged before 1 March 1984 may obtain, according to the Member State's decision:

(i) if the plan is still being implemented, a special reference quantity taking account of the milk and milk product quantities provided for in the development plan,

(ii) if the plan has been implemented after 1 January 1981, a special reference quantity taking into account the milk and milk product quantities which they delivered in the year during which the plan was completed.

Investments carried out without a development plan can also be taken into account if the Member State has sufficient information.'

11 Article 3(1) has already been interpreted by the Court in its judgment in Joined Cases 196/88 to 198/88 *Cornée and Others* v *Copall and Others* [1989] ECR 2309. In that judgment the Court interpreted the first indent of the first subparagraph of Article 3(1) of Regulation No 857/84, which applies where the development plan is still being implemented, as granting to the Member States a discretionary power to decide whether or not special reference quantities should be allocated to the producers mentioned in that provision and, if so, to determine their size (paragraph 13 of the judgment).

12 It must be recognized that the Member States have an identical discretionary power in the situation referred to in the second indent of the first subparagraph of Article 3(1) in which, as in the main proceedings, the development plan has been implemented after 1 January 1981.

13 However, where a Member State chooses to make use of the power to allocate special reference quantities pursuant to this provision, its discretionary power to determine the size of the individual quantities is restricted by requirements which result from the wording of the provision in question, the objective which it is designed to attain and the principle of non-discrimination.

14 In this regard it should be noted first of all that under the second indent of the first subparagraph of Article 3(1) the Member States must 'take into account' the milk and milk product quantities which the producers concerned delivered in the year during which their development plan was completed, that is to say the special reference quantities they allocate must bear some relation to those deliveries. As the Court stated in paragraph 16 of its judgment in *Cornée* (cited above), the requirement 'to take account' of the objective of the development plan does not, however, mean that there must be a relationship of strict proportionality between the quantities delivered and the reference quantities to be granted, so that it is permissible for Member States, whilst applying the level of the deliveries as the main criterion, to take account of other objective criteria as well.

15 Secondly, it should be noted that, as the Court also stated in its judgment in *Cornée* (paragraph 12), the first indent of the first subparagraph of Article 3(1) of Regulation No 857/84 is intended to enable producers holding a milk production development plan approved under Directive 72/159 to enjoy the fruits of the

investments which they have made in the implementation of such a plan. Consequently where, as in the main proceedings, the quantities of milk and milk products which the producers concerned have delivered in the year during which the development plan was completed are not representative of the production capacity acquired as a result of the investments carried out, the Member States, who are responsible for implementing the Community rules, are required to ensure that the special reference quantities granted bear some relation to this new production capacity.

16 In such a case it seems justified to calculate the special reference quantities on the basis not of the level of deliveries actually attained in the year during which the plan was completed but of the production capacity of the farm after the plan was completed, by, for example, taking into account for the whole of the calendar year in question the level of deliveries attained after the plan was completed. It should, however, be added that the implementation of a milk production development plan in no circumstances confers on the producer concerned the right to obtain reference quantities corresponding to the production capacity acquired by implementing the plan, without being subject to any reductions, provided that the reference quantities are fixed on the basis of objective criteria and in accordance with the aims of the Community rules applicable.

17 Lastly, it should be recalled that the Court has consistently held, most recently in its judgment in *Cornée* (paragraph 14) that the Member States are under a duty, when implementing a common organization of agricultural markets, to observe the prohibition of discrimination between Community producers, laid down in Article 40(3) of the EEC Treaty. Consequently, where a Member State allocates special reference quantities under the Community rules at issue, the allocations must be made in such a way that they do not give rise to discrimination between Community producers.

18 It follows from all the foregoing considerations that the answer to the first and second questions must be that the second indent of the first subparagraph of Article 3(1) of Council Regulation No 857/84 of 31 March 1984 must be interpreted as conferring a discretionary power on the Member States for the purpose

of determining the allocation of special reference quantities to the producers covered by that provision. However, where a Member State decides to take account of the situation of certain producers referred to in that provision, it must take into consideration:

(i) the level of milk and milk product quantities delivered by the producers in question in the year during which their development plan was completed, provided that where those quantities are not representative of the production capacity acquired after the plan was completed, the Member States must ensure that the quantities bear some relation to the resultant production capacity, and

(ii) the principle of non-discrimination between the producers concerned.

**The third question**

19 By the third question the national court is seeking criteria which will enable it to assess whether the Netherlands rules adopted in order to implement the first subparagraph of Article 3(1) of Regulation No 857/84 are compatible with that provision.

20 It is clear from the documents before the Court that the Netherlands rules in question, namely Article 11 of the Decree of the Minister for Agriculture of 18 April 1984, as amended, provide essentially that a special quantity may be allocated both to producers who have incurred investment obligations as part of a development plan and to those who have incurred such obligations without such a plan. In both cases, the special quantity is calculated as an addition to the deliveries of milk in the calendar year preceding that in which the investment obligations were incurred, so that in principle a fixed quantity of 5 500 kg of milk is allocated for each new stall constructed. For purposes of this calculation, the number of stalls actually constructed is reduced by 20%, except in the case of producers commencing milk production, for whom a 10% reduction is applied. A factor of a half or two-thirds, depending on the date on which the new stalls were put into service, is applied to the resultant quantity.

21 In those circumstances, the question must be understood as essentially seeking to establish whether the first subparagraph of Article 3(1) of Regulation No 857/84 precludes national implementing rules whereby:

(i) producers who have incurred investment obligations may obtain a special reference quantity whether or not the obligations were entered into as part of a development plan;

(ii) this quantity is calculated on the basis of a fixed quantity allocated for each new stall constructed;

(iii) for purposes of this calculation, the number of stalls actually constructed is reduced by 10 or 20%, according to whether or not the producer is commencing milk production;

and

(iv) the quantity calculated by the application of the aforesaid criteria is reduced by one-third or a half, depending on the date on which the new stalls were put into service.

22 It should be noted first of all that the second subparagraph of Article 3(1) of Regulation No 857/84 expressly empowers the Member States to take into account investments carried out without a development plan, provided that the Member State in question has sufficient information.

23 This provision therefore does not preclude national rules which, for purposes of the allocation of a special reference quantity, treats producers who have carried out investments without a development plan in the same way as those who have invested as part of such a plan, provided that the grant of a special reference quantity to the first category of producers rests on sufficient data.

24 Secondly, it must be accepted that the number of stalls may be regarded as representative of the production capacity of a given holding. Member States therefore cannot be prohibited from linking, on grounds of administrative simplification, the volume of special quantities allocated to the number of stalls, without taking into account the production actually attained, provided however that the fixed quantity for each stall is determined on the basis of objective criteria such as, for example, the average national production per stall.

25 Thirdly, it should be stressed that, in the course of the procedure before the Court, the Netherlands Government stated that the reductions of 10% applicable to producers commencing milk production and 20% for other producers were provided for in view of the need to freeze production at the level attained in 1983 and at the same time to take into account the limited volume of the national reserve constituted within the total national quota.

26 Such rules cannot be regarded as exceeding the limits of the discretionary power which the Member States enjoy in this sphere. As was stated in the course of the examination of the first and second questions, the Member States have a discretionary power not only to decide whether or not quantities should be allocated under the first subparagraph of Article 3(1) of Regulation No 857/84 but also to determine the size of such quantities within the framework of their guaranteed total quantity.

27 Lastly, in so far as these national rules provide that the quantity resulting from the application of the calculation criteria set out above is subject to a reduction of one-third or a half, depending upon the date at which the new stalls were put into service, the Netherlands Government informed the Court that such reductions had been provided for by the Netherlands rules on the ground that the introduction of the additional levy became more and more foreseeable, and at the same time to take into account the limited volume of the special reference quantities which could be allocated.

28 In this regard, it must be stated that national rules such as those described above which provide for reductions to vary according to the time which has elapsed

between the carrying-out of the investments which give rise to the allocation of a special reference quantity and the entry into force of the additional levy system and, therefore, according to the extent to which the introduction of this system could be foreseen, must be regarded as compatible with the principle of proportionality which requires that the aim in view, in this case to combat the increase in milk production in a market characterized by substantial structural surpluses, should be attained by exercising as little constraint as possible.

29 This view is not altered by the fact that such national rules may mean that no special reference quantity is allocated to a number of producers who have carried out investments or, at least, that the special reference quantity allocated to them is substantially lower than the production capacity acquired as a result of the investments made. Producers who have carried out investments, even as part of a development plan, cannot rely on any alleged legitimate expectation based on the investments carried out in order to claim a special reference quantity allocated precisely because of such investments (see judgment in *Cornée*, paragraph 27).

30 It follows from the foregoing considerations that the reply to the third question must be that the first subparagraph of Article 3(1) of Council Regulation (EEC) No 857/84 of 31 March 1984 does not preclude national rules, adopted for the purpose of implementing that regulation, which are drawn up in such a way that:

(i) producers who have incurred investment obligations may obtain a special reference quantity whether or not such obligations were entered into as part of a development plan;

(ii) that quantity is calculated on the basis of a fixed quantity allocated for each new stall constructed;

(iii) for the purposes of that calculation, the number of stalls actually constructed is reduced by 10 or 20%, depending on whether or not the producer concerned is commencing milk production; and

(iv) the quantity which results from the application of the calculation criteria referred to above is reduced by one-third or a half, depending upon the date on which the new stalls were put into service.

## Costs

31 The costs incurred by the Netherlands Government, the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings 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 questions referred to it by the College van Beroep voor het Bedrijfsleven, The Hague, by order of 21 December 1988, hereby rules:

**(1) The second indent of the first subparagraph of Article 3(1) 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 must be interpreted as conferring a discretionary power on the Member States for the purpose of determining the allocation of special reference quantities to the producers covered by that provision. However, where a Member State decides to take account of the situation of certain producers referred to in that provision, it must take into consideration:**

**(i) the level of milk and milk product quantities delivered by the producers in question in the year during which their development plan was completed, provided that where those quantities are not representative of the production capacity acquired after the plan was completed, the Member States must ensure that the quantities bear some relation to the resultant production capacity; and**

**(ii) the principle of non-discrimination between the producers concerned.**

**(2) The first subparagraph of Article 3(1) of Council Regulation (EEC) No 857/84 of 31 March 1984 does not preclude national rules, adopted for the purpose of implementing that regulation, which are drawn up in such a way that:**

**(i) producers who have incurred investment obligations may obtain a special reference quantity whether or not such obligations were entered into as part of a development plan;**

**(ii) that quantity is calculated on the basis of a fixed quantity allocated for each new stall constructed;**

**(iii) for the purposes of that calculation, the number of stalls actually constructed is reduced by 10 or 20%, depending on whether or not the producer concerned is commencing milk production; and**

**(iv) the quantity which results from the application of the calculation criteria referred to above is reduced by one-third or a half, depending upon the date on which the new stalls were put into service.**

Zuleeg Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 12 July 1990.

J.-G. Giraud
Registrar

M. Zuleeg
President of the Third Chamber