REPORT FOR THE HEARING
in Case C-16/89 *

I — Facts and written procedure

1. *The relevant Community provisions*

(a) Article 1(1) of Council Directive 72/159/EEC of 17 April 1972 on the modernization of farms (Official Journal, English Special Edition 1972 (II), p. 324) provides that 'with a view to bringing about structural conditions conducive to a significant improvement of agricultural incomes and working and production conditions, Member States shall introduce a system of selective incentives to farms suitable for development, designed to encourage their operation and development under rational conditions'. Article 8(1)(b) of the directive mentions, amongst other possible incentives, 'aids in the form of interest-rate subsidies in respect of the investments necessary for carrying out the development plan'.

(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 (Official Journal 1984 L 90, p. 10) introduced, for a period of five years, an additional levy payable on quantities of milk delivered in excess of a reference quantity to be determined.

(c) The general rules for the application 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 (Official Journal 1984 L 90, p. 13), as amended.

Article 2(1) of Regulation No 857/84 lays down the reference quantity referred to in basic Regulation No 856/84, that is to say the quantity exempt from the supplementary levy. The reference quantity is in principle 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%. However, under Article 2(2), 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 or 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity. This percentage may be varied on the basis of the level of deliveries of certain categories of persons liable to pay the levy, the trend in deliveries in certain regions between 1981 and 1983 or the trend in deliveries of certain categories of persons liable during the same period.

Articles 3, 4 and 4a of Regulation No 857/84 enable Member States to take into account certain special situations when determining reference quantities or to grant

* Language of the case: Dutch.

special or additional reference quantities. In the present case, the relevant provision is Article 3, which is worded 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.'

Article 5 of Regulation No 857/84 provides that 'for the purpose of applying Articles 3 and 4, additional reference quantities may be guaranteed only within the guaranteed quantity limit referred to in Article 5c of Regulation No 804/68. These additional quantities shall be drawn from a reserve constituted by the Member States within the abovementioned guaranteed quantity'.

2. *The Netherlands rules implementing the Community rules*

The system of an additional levy on milk was implemented in the Netherlands by the Beschikking Superheffing (Super-Levy Decree) of the Minister van Landbouw en Visserij (Minister for Agriculture and Fisheries) of 18 April 1984 (*Staatscourant* 1984, p. 79), as amended. That decree adopts formula A (the producer formula) as defined in Regulation No 856/84 and fixes 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 11 of the decree is worded as follows:

'1. Persons who after 1 September 1981 but before 1 March 1984 incurred investment obligations may, on the basis of the provisions of this article, claim a special quantity differing from the quantity provided for in Article 5(1) or Article 5(2) as the case may be. Such a claim may also be made where another person with a substantive entitlement incurred the obligations on the land in question.

2. Investment obligations within the meaning of paragraph 1 shall mean obligations to invest or obligations under the Besluit Landbouwbedrijven met Ontwikkelingsmogelijkheden (Decision on farms suitable for development) (*Staatscourant* 1974, pp. 83 and 89) in connection with the implementation of an approved development plan:

(a) either to the amount of at least HFL 50 000 for the purpose of the replacement of no more than 60 stalls or the addition of stalls so that the total number is no more than 60 stalls, provided that the number of stalls replaced or added is more than 20% and not less than five stalls.

(b) or to the amount of at least HFL 100 000 for the purpose of the replacement of more than 60 stalls or the addition of stalls so that the total number is more than 60, provided that the number of stalls replaced or added is more than 25%.

"Investment obligations" shall also mean obligations incurred for an amount of at least 90% of that referred to in (a) or (b) if it can be shown that own work was performed with a value amounting to at least the difference between the sum referred to in (a) or (b) as the case may be and the amount for which obligations have been incurred.

3. The term "stalls" in paragraph 2 shall be understood as meaning stalls set up for dairy cows or cows in calf, including facilities directly connected therewith, which were put into actual use after 1 January 1982.

4. The special quantity referred to in paragraph 1 shall be equal to the quantity delivered in a delivery period of 52 weeks, approximately corresponding to a calendar year, before the obligations referred to in paragraph 1 were incurred on the farm where the investment was implemented, plus the quantity of kilograms for which entitlement is recognized, calculated in accordance with the following formula: the total number of stalls added or the total number of stalls in the new situation less the number of dairy cows and cows in calf available on the farm in the year before the obligations were incurred if that figure is greater than the number of stalls before the addition of new stalls less 20% of the stalls added, multiplied by 5 500, the whole reduced by 8.65%, on the understanding that:

(a) where the stalls were actually put into use, within the meaning of paragraph 3, in 1983, two-thirds of the quantity calculated using the formula shall be taken into account without prejudice to Article 5(1) or (2) respectively, and where

(b) the stalls were actually put into use, within the meaning of paragraph 3, before 1 April 1985, half the quantity shall be taken into account, without prejudice to Article 5(1) or (2) respectively;

...'

3. *The main proceedings*

The dispute in the main proceedings is between G. Spronk, the operator of a dairy holding residing in Kamperveen, the Netherlands (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'). In 1983 the plaintiff was granted an interest rate

subsidy pursuant to Directive 72/159 in order to implement a development plan. In 1984, pursuant to Article 11 of the Super-Levy Decree, he was granted a special quantity of milk exempt from levy which was none the less lower than the estimated production in the development plan.

By letter of 1 April 1985, the Minister for Agriculture notified the plaintiff that his complaint against the decision of the Directeur voor de Landbouw en Voedselvoorziening (Director for Agriculture and Food Supply) of the province of Overijssel only partially upholding the plaintiff's claims for the allocation of a special quantity of milk to be delivered free of levy under Article 11 of the Super-Levy Decree was unfounded.

On 1 May 1985 the plaintiff brought an action against the aforesaid decision before the College van Beroep voor het Bedrijfsleven (administrative court of last instance in matters of trade and industry). In his application, he claimed that the court should annul the contested decision and order the defendant to recognize his claims to a special quantity of milk to be delivered free of levy, as requested.

In support of his conclusions the plaintiff claims essentially that the Netherlands rules adopted for the purpose of implementing the rules on an additional levy are incompatible with the Community provisions on the granting of an interest rate subsidy to farms suitable for development, and in particular Directive 72/159. On the one hand, he was granted an interest rate subsidy on the basis of the aforesaid rules in order to carry out an approved development plan, in which he is obliged to achieve a specified production, but on the other hand he is deprived by the Netherlands rules of the chance to obtain the milk production provided for in the plan.

In view of this line of argument, the College van Beroep voor het Bedrijfsleven 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) 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 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 — and in some cases substantially lower — than the quantity provided for in the plan?'

4. *Procedure before the Court*

The order of the national court was received at the Court Registry on 23 January 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the Netherlands Government, represented by B. R. Bot, Secretary-General in the Ministry for Foreign Affairs, the French Government, represented by Edwige Belliard, acting as Agent, and Géraud de Bergues, acting as Deputy Agent, and the Commission of the European Communities, represented by Robert Caspar Fischer, Legal Adviser, acting as Agent.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court, by decision of 21 February 1990, assigned the case to the Third Chamber pursuant to Article 95 of the Rules of Procedure and opened the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. *The first question*

All the parties which submitted written observations are agreed that Article 3(1) of Regulation (EEC) No 857/84 does not impose on the Member States an unconditional obligation to allocate a special reference quantity to producers who have lodged a milk production development plan under Directive 72/159 before 1 March 1984.

(a) The *Netherlands Government* considers that Article 3(1) of Regulation No 857/84 must be interpreted as empowering a Member State to allocate a special reference quantity in the cases referred to in that article, but not requiring it to do so, and considers that it is for the Member State concerned to assess whether and in what manner such power is to be used.

The words 'may obtain, according to the Member State's decision' refer to a power granted to the Member State without, however, implying any obligation. This interpretation is confirmed by the fact that Article 3(1) goes on to state that investments carried out without a development plan can also be taken into account if the Member State has sufficient information.

The Netherlands Government stresses that it is clear from the third recital in the preamble to Council Regulation No 857/84 that the Council considered that 'Member States should be enabled to adapt the reference quantities to take into account the

special situations of certain producers and to establish for this purpose, as necessary, a reserve within the abovementioned guaranteed quantity . . . '. Since this national reserve must be established within the Member State's guaranteed quantity, Member States can take into account the special situations referred to in Article 3 of the regulation only within the limits of the quantities available.

Consequently, the Netherlands Government considers that Article 3(1) of Regulation No 857/84 empowers the Member States to take into account a certain number of special situations of which an exhaustive list is set out. It is clear from the nature and extent of this power that it is for the Member State concerned to assess whether or not to use the power and, if so, in what manner, having regard to the margin available for that purpose within the national reserve.

(b) The *French Government* considers that the first question asks essentially whether the Member States are empowered or obliged to take into account, in determining individual reference quantities, the situation of producers with a development plan within the meaning of Directive 72/159 and whether the Member States have a discretion in implementing Article 3(1) of Regulation No 857/84.

The French Government considers that it is clear from the wording of Article 3(1) ('may obtain, according to the decision of the Member State') that the allocation of a special reference quantity is not a right of the persons concerned but merely a power granted to the Member States. Even if the opposite interpretation were accepted, it is in any event impossible to find in the provisions of that article a real obligation to attain all of the objectives provided for in the development plans, since the words used ('a special reference quantity taking account') do not imply that the special reference quantity must be calculated exclusively on an individual basis or that needs must be satisfied to a certain extent by the Community rules.

A contrario, the French Government considers that the general scheme of Article 3(1) does not require Member States to treat persons who have adopted a development plan in a particular way. Moreover, Article 3(1) does not lay down the conditions and special forms in which it should be implemented, in particular as regards the extent to which the plans adopted by producers have been implemented. It follows that Article 3(1) leaves the Member States to implement its provisions once they have decided to use this power.

The French Government states, however, that the fact that there is no obligation to achieve the objectives provided for in the development plans in their entirety does not mean that the Member States are not required to lay down objective criteria for allocating reference quantities or, within the limits of the reference quantities released, to endeavour to establish the closest possible link between the reference quantities allocated and the objectives of each development plan.

In conclusion, the French Government suggests that the Court should rule, in answer to the first question, that Article 3(1) of Regulation No 857/84 merely empowers the Member States to take account, when determining individual reference quantities,

of the situation of producers who lodged a development plan and requires the Member States, in exercising this power, to endeavour to establish the closest possible link between the additional reference quantities allocated and the objectives of each development plan, without thereby requiring that the needs of each producer should be satisfied to a specified extent.

(c) The *Commission* considers that the wording of Article 3(1) of Regulation No 857/84 provides no basis for interpreting that provision as obliging the Member States to allocate a special reference quantity to producers who have lodged a milk production development plan before 1 March 1984 under Directive 72/159.

The terms used, 'producers ... may obtain, according to the Member State's decision ...', do not unequivocally impose an unconditional obligation on the Member State concerned. This view is confirmed when Article 3(1) is compared to Article 3(3), which lays down a clear obligation ('Producers ... shall obtain, on request, ...'). Furthermore, the third recital in the preamble to Regulation No 857/84 states that the Member States should 'be enabled' to adapt the reference quantities to take into account the special situations of certain producers.

The Commission considers that this does not, however, mean that the Member States are not even required to take into account the special situation of this category of producers in deciding whether or not to use their power for the benefit of such producers. The first subparagraph of Article 3 states that, for the determination of the reference quantities referred to in Article 2, certain special situations 'shall be taken into account', as defined thereinafter. The Member States are therefore obliged to take into account the special situations of the producers referred to in paragraphs 1, 2 and 3, but are free to decide whether to allocate them special reference quantities.

In conclusion, the Commission proposes that the first question should be answered as follows:

'Article 3(1) of Council Regulation (EEC) No 857/84 permits the Member States to grant a special reference quantity to producers who lodged milk production development plans under Directive 72/159 before 1 March 1984 and requires the Member States, in deciding whether or not to use this power and, if so, in what manner to use it, to take into account the special situation of these producers.'

2. *The second question*

The Netherlands Government considers essentially that producers who have adopted a development plan under Directive 72/159 cannot expect to be able to achieve a specified production. The Commission stresses the wide discretion which the Member States enjoy in implementing Article 3(1) of Regulation No 857/84. The

French Government did not state its opinion on this question.

(a) The *Netherlands Government* states that under Directive 72/159 a development plan must show that, upon its completion, the farm undergoing modernization would be capable of attaining as a minimum a specified income for one man-work unit (Article 4). If that condition is satisfied, the public authorities may grant investment aid in the form of the provision of guarantees, the allocation of land or the granting of interest rate subsidies (Article 8). It is, however, the producer who himself, of his own accord, decides to make investments and, if he so wishes, to use the Community system of incentives implemented by the Member State. It is clear from the procedure followed and the requirements established in this context that the producer's obligations are not concerned with the attainment of a specified production but solely with the implementation over a specified period of investments which are a pre-condition for such production.

The Netherlands Government considers that producers cannot assume that, throughout the duration of the interest rate subsidy (in principle, 15 years), all the conditions will remain unchanged. Apart from changes in market conditions, they must take into account the fact that the rules on market policy or structural policy may be amended. This means that producers who implemented a development plan were not protected from subsequent measures restricting production and may therefore themselves be subject to reductions resulting from the additional levy system.

According to the Netherlands Government it follows that a number of factors, such as the total quota available, applications for additional quotas, the size of the reserve and the extent to which the quota has been used are relevant for purposes of determining the allocation of reference quantities. It is therefore within the very narrow limits of the national quota that the many demands for additional quotas, which altogether substantially exceed the reserve available, must be assessed.

(b) The *Commission* states that Article 3(1) of Regulation No 857/84 grants the Member States a wide discretion in exercising the power contained in that provision. However, since it is a delegated power in the framework of the common agricultural policy, the Member States must, in taking their decisions, act in accordance with this Community policy and with Community law. In particular, they must be guided by the purpose of the power and by the objective pursued by the additional levy, namely to combat the increase in milk production while at the same time promoting the necessary changes and structural adjustments.

The Commission considers that this wide discretion of the Member States is closely linked with the extensive responsibilities of the Member States in the field of the common agricultural policy on agricultural structures in general and also in the implementation of Directive 72/159.

Consequently, the Commission considers that judicial review under Community law of the power created by Article 3(1) can only be limited, in view of the fact that the Member States enjoy an extensive freedom

of assessment and choice in the management of this provision. For that reason, review under Community law will be concerned mainly with whether the conditions subject to which a special reference quantity may be granted are satisfied and whether the general principles of Community law are complied with, in particular the principle of equal treatment and non-discrimination, proportionality, legitimate expectation and the absence of abuse or misuse of powers.

In conclusion, the Commission proposes that the second question should be answered as follows:

'In assessing whether a Member State has adopted its decision on the use of the delegated power referred to in Question 1 in accordance with Community law, the court must review this decision with regard to the provision referred to in Question 1 and also, in view of the wide discretion provided for by that provision, with regard to the general principles of Community law and, in particular, the principles of equal treatment and non-discrimination between producers, proportionality, the protection of legitimate expectations and the absence of misuse of powers.'

3. *The third question*

The Netherlands Government and the Commission agree that Article 3(1) of Regulation No 857/84 does not preclude national rules of the type referred to in the third question. The French Government did not express a view on this question.

(a) The *Netherlands Government* states that Article 11 of the Super-Levy Decree does not lay down any distinction according to whether or not the investments carried out by the operator were part of a development plan. Article 3(1) of Regulation No 857/84 expressly mentions the possibility of taking into account producers who have carried out investments without a development plan, provided that the Member State has sufficient information.

The Netherlands Government then states that under Article 11 of the Super-Levy Decree the investment obligations incurred on or before 1 September 1981 are not taken into account. The reason for this provision is that, where investments were made before 1 September 1981, the producer had sufficient time to carry out the investment before 1983, the reference year, and in 1983 the full stable capacity could be used.

As regards the need to invest in stalls for dairy cows or cows in calf up to certain minimum amounts, the Netherlands Government states that Article 11 of the Super-Levy Decree was designed to cover producers who had made a financial investment of a specified minimum amount and who as a result of the additional levy were in danger of no longer being able to meet their investment commitments. The investments on equipment other than those directly related to stalls are not eligible, since only investments in stalls cannot be used in any way other than for milk production.

An increase is required in the number of stalls reserved for milk cows and cows in calf up to certain minimum percentages of the number of stalls of the undertaking concerned because only investments resulting in a structural expansion and of a certain size are taken into account for purposes of the special measure contained in Article 11. On the other hand, in cases in which the expansion carried out was of a lower percentage, production in 1983 may be regarded as representative of the normal production of the holding concerned after expansion.

With regard to the 20% reduction in the number of stalls resulting from the expansion, the Netherlands Government states that this reduction must be imposed because of the need to freeze production at 1983 levels and because of the necessarily limited volume of the national reserve, established within the national quota, which compelled the Netherlands authorities to adopt a restrictive policy for the allocation of additional reference quantities.

As regards the fixed quantity of milk of 5 500 kg which is awarded for each stall resulting from an expansion, the Netherlands Government considers that it should be stressed that, in the case of holdings being developed, the average future production may only give rise to an estimate, and the producer is not under any obligation to achieve the estimated production. In the case of holdings which invested without a development plan, it is impossible to establish average future production.

The provision whereby the special reference quantity exempt from levy granted depends upon the date on which the stalls resulting from the expansion were actually put into service is based on the idea that during the first milk year following the expansion all the stalls will not yet be actually used.

In conclusion, the Netherlands Government considers that the reply to the third question should be that Article 3(1) of Regulation No 857/84 permits national rules such as those at issue in this case, in view of the power which it confers on the Member State and in view of the need, where this power is used in relation to certain special situations, to remain within the limits of the national reserve.

(b) The *Commission* considers that the Member States are empowered to determine the extent to which and the restriction and limits subject to which account is to be taken of the special situation of those who have carried out investments on the basis of a development plan. The Member States are permitted, but not bound, to apply a general reduction expressed in percentage terms to the reference quantity calculated for 1982 or 1983, in order to create a national reserve which will enable them to allocate special quantities exempt from levy to certain producers who are in a special situation.

According to the Commission, this national reserve for special reference quantities which may be granted must be established principally by reducing the general reference quantities applicable to all producers. That is why each Member State concerned must in this case balance the interests of 'normal' producers against the interests of producers

in one of the special situations referred to in Articles 3 and 4 of Regulation No 857/84.

This balancing of their respective interests, which must take into account the objectives of the additional levy, may mean that none of the producers who have lodged a development plan will receive a reference quantity corresponding to the volume of production provided for in the plan in question.

The Commission further states that there is no reason why it should be contrary to Community law to draw a distinction, in the allocation of special reference quantities to producers who have lodged a development plan, based on the year during which the plan was carried out. Nor does it appear in principle contrary to Community law that this balancing of interests could mean that certain producers who lodged development plans will not obtain any special reference quantity.

In conclusion, the Commission proposes the following reply to the third question:

'Where a Member State adopts rules of the type referred to in Question 3 in respect of producers who have incurred investment obligations, and the restrictions and conditions provided for in these rules mean that no special reference quantity is allocated to a number of producers referred to in Question 1 or at least that the special reference quantity allocated to them is lower — or substantially lower — than the quantity provided for in the plan, this consequence does not in itself, without prejudice to the reply to Question 2, mean that these rules are necessarily contrary to Community law.'

M. Zuleeg
Judge-Rapporteur