JUDGMENT OF THE COURT (Fifth Chamber)
5 May 1994 *

In Case C-21/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Düsseldorf (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Marlies and Heinz-Bernd Kamp

and

Hauptzollamt Wuppertal

on the interpretation and the validity of Article 3a(2) 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), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (Official Journal 1991 L 150, p. 35),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg (Rapporteur), Judges,

* Language of the case: German.

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr and Mrs Kamp, by Mechtild Düsing, Rechtsanwalt, Münster,

— the German Government, by Claus-Dieter Quassowski, Regierungsdirektor, and Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agents,

— the United Kingdom, by Susan Cochrane of the Treasury Solicitor's Department, acting as Agent, and David Anderson, Barrister,

— the Council of the European Communities, by Bernhard Schloh and Arthur Bräutigam, Legal Advisers, acting as Agents,

— the Commission of the European Communities, by Dierk Booß, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicants in the main proceedings, the German Government, the United Kingdom, represented by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent, and Christopher Vajda, Barrister, the Council and the Commission at the hearing on 22 April 1993,

after hearing the Opinion of the Advocate General at the sitting on 30 June 1993,

gives the following

Judgment

1 By order of 8 January 1992, received at the Court on 28 January 1992, the Finanzgericht (Finance Court) Düsseldorf referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation and validity of Article 3a(2) 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), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (Official Journal 1991 L 150, p. 35).

2 Those questions were raised in the course of proceedings between Mr and Mrs Kamp, milk producers, and Hauptzollamt (Principal Customs Office) Wuppertal concerning their special reference quantity, set at 85% of the quantity of milk on the basis of which a non-marketing premium had been granted to them.

3 In 1981, Mr and Mrs Kamp gave, for the period running from 1981 to the end of 1985, a non-marketing undertaking under Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (Official Journal 1977 L 131, p. 1). In return for their undertaking they received a non-marketing premium corresponding to 118 201 kg of milk.

4 After their non-marketing undertaking had expired, they were unable to obtain a reference quantity under the additional milk levy scheme which had been introduced in the mean time 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) and Regulation No 857/84, cited above. After Regulation No 857/84 had been amended by Regulation No 1639/91, they were allocated a special delivery reference quantity of 100 471 kg, equivalent to 85% of the quantity on which the non-marketing premium had been based. The total reduction applied, 15%, was set in accordance with Article 3a(2) of Regulation No 857/84, as amended.

5 Mr and Mrs Kamp brought proceedings before the Finanzgericht Düsseldorf claiming that their special delivery reference quantity should be raised to 100% of the quantity on which the premium had been based. They are accordingly seeking an increase of 17 730 kg in their delivery reference quantity.

6 Considering that the decision to be given depended on the interpretation and validity of the relevant Community legislation, the national court stayed the proceedings and referred the following questions to the Court for a preliminary ruling in accordance with Article 177 of the Treaty:

'1. Must Article 3a(2) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, concerning the abatement to be applied to the special reference quantities be interpreted as meaning that the abatement is determined only by the percentage which is representative of all the abatements but contains at least the basic reduction or does the abatement result from the percentage which is representative of all the abatements, plus the basic reduction?

2. Is Article 3a(2) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, valid, although the calculation of the basic reduction cannot be reconstructed?

3. Is Article 3a(2) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, valid in so far as the quantity for which entitlement to premium under Regulation (EEC) No 1078/77 was obtained is based on production but the representative abatements were calculated on the basis of the production for 1983 and, because of the increase in production from 1981 to 1983, were correspondingly higher?

4. Is Article 3a(2) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, valid in so far as, as regards the calculation of the special reference quantities in respect of producers who entered into a non-marketing undertaking pursuant to Regulation (EEC) No 1078/77, the Member States were not granted a possibility of making graduated reductions corresponding to that provided in Article 2(2) of Regulation (EEC) No 857/84?'

The relevant legislation

7 The Community legislation on the additional levy on milk originally contained no specific provision for the grant of a reference quantity to producers who, pursuant to an undertaking given under Regulation No 1078/77, mentioned above, had not delivered milk during the reference year adopted by the Member State concerned. In its judgments in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 — *Mulder I*, paragraphs 27 and 28, and Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, paragraphs 16 and 17, the Court held that that legislation was invalid on the ground that it was in breach of the principle of the protection of legitimate expectations.

8 In those judgments, the Court stated that a producer who had voluntarily ceased production for a certain period could not legitimately expect to resume production under the same conditions as those which had previously applied and not to be subject to any rules of market or structural policy adopted in the mean time (*Mulder I*, paragraph 23, and *Von Deetzen*, paragraph 12). The Court considered how-

ever that where such a producer had been encouraged by a Community measure to suspend marketing his products for a limited period in the general interest and against payment of a premium he could legitimately expect not to be subject, on the expiry of his undertaking, to restrictions which specifically affected him for the very reason that he had availed himself of the possibilities offered by the Community provisions (*Mulder I*, paragraph 24, and *Von Deetzen*, paragraph 13).

9 In consequence of those judgments, the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 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 1989 L 84, p. 2). That regulation added a new Article 3a to Regulation No 857/84, providing essentially that producers who, pursuant to an undertaking given under Regulation No 1078/77, had not delivered milk during the reference year were to receive, in certain circumstances, a special reference quantity. Article 3a(2) provided that that quantity was to be equal to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 months preceding the month in which the application for the non-marketing or conversion premium was made.

10 That 60% rule was also held to be invalid by the Court on the ground of breach of the principle of the protection of legitimate expectations, since the application to producers covered by Article 3a of Regulation No 857/84 as amended of a reduction of 40% which, far from being representative of the rates applicable to the producers covered by Article 2, was more than double the highest total of such rates was to be regarded as a restriction which specifically affected the first-mentioned category of producers by very reason of their undertaking as to non-marketing or conversion (Case C-189/89 *Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539, paragraphs 24 and 29, and Case C-217/89 *Pastätter* v *Hauptzollamt Bad Reichenhall* [1990] ECR I-4585, paragraphs 15 and 20).

11 Following the judgments in *Spagl* and *Pastätter*, Regulation No 1639/91 introduced a new Article 3a(2) concerning the method for calculating the special reference quantity. It provides:

'The special reference quantity shall be determined by the Member State in accordance with objective criteria, by deducting from the quantity in respect of which the premium entitlement under Regulation (EEC) No 1078/77 has been preserved or acquired a percentage representative of all the abatements applied to the reference quantities established in accordance with Article 2, including in any case a basic reduction of 4.5%, or Article 6.'

12 Pursuant to that provision, the Federal Republic of Germany fixed the reduction at 15% in total for the relevant period.

13 The rate of 15% is the equivalent of the total of the percentage representative of all the abatements, namely 10.5%, and the rate of 4.5% set as the basic reduction.

14 According to the explanation of how the 15% is calculated given to the referring court by the Federal Minister for Food, Agriculture and Forestry, the percentage representative of all the abatements, which he referred to as the 'abatement rate', represents the difference between deliveries in Germany in 1983 and Germany's guaranteed total quantity for the 12-month period 1990/1991.

15 The 'basic reduction' mentioned in Article 3a(2) of Regulation No 857/84 derives from Council Regulation (EEC) No 775/87 of 16 March 1987 temporarily with-

drawing a proportion of the reference quantities mentioned in Article 5c(1) of Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal 1987 L 78, p. 5). It represents the proportion of the reference quantities allocated to each Member State which is temporarily withdrawn at a uniform rate. Amended several times, the relevant rate for the period in question was set at 4.5% by Council Regulation (EEC) No 3882/89 of 11 December 1989 (Official Journal 1989 L 378, p. 6).

The first question

16 The grounds of the order for reference indicate that the national court believes that Article 3a(2) of Regulation No 857/84 must be interpreted as meaning that the basic reduction is not to be added to the percentage representative of all the abatements but is on the contrary an integral part of it. The national court relies on the wording of the provision in question, which in its view is not in conflict with the preamble to Regulation No 1639/91. It considers that aggregating the representative percentage and the basic reduction, as the Hauptzollamt did, complies with neither the principle of non-discrimination set out in the second subparagraph of Article 40(3) of the Treaty nor the principle of the protection of legitimate expectations.

17 Contrary to the view of the national court, neither the wording of Article 3a(2) of Regulation No 857/84 nor the sixth recital in the preamble to Regulation No 1639/91 support the proposed interpretation since both are ambiguous. Accordingly, reference is to be made only to the meaning and purpose of Article 3a(2) of Regulation No 857/84.

18 Under that provision, the special reference quantity to be allocated to each producer individually is to be calculated by reference to a basic quantity reflecting the level of production before the non-marketing period. The basic quantity is to be reduced initially by a percentage representative of all the abatements applied in the Member State in question, which is 10.5% for the Federal Republic of Germany.

The fact that the 'basic reduction' of 4.5% is mentioned explicitly and separately would not be justified if that reduction were already an integral part of the representative percentage.

19 The objectives pursued by the two methods of reducing the reference quantities are different. The reduction by application of a representative percentage was simply a first attempt to reduce milk deliveries. The basic reduction of 4.5%, laid down by Regulation No 775/87 as amended, is the result of a temporary withdrawal of a uniform proportion of each reference quantity. According to the first recital in the preamble to Regulation No 775/87, that measure is intended to reinforce the measures already taken under Article 5c of Regulation No 804/68, namely the measures which have already resulted in the reduction expressed by the percentage representative of all the abatements. By the temporary suspension, the Community made a further attempt to curb persistent excess production of milk.

20 Aggregating the representative percentage and the basic reduction does not conflict with the principle of the protection of legitimate expectations.

21 In *Spagl* and *Pastätter*, cited above, the Court set out two principles according to which producers resuming production on the one hand must not be subject to restrictions which specifically affect them by reason of their non-marketing undertakings and on the other hand must not be accorded an undue advantage by comparison with other producers. Accordingly, the Court accepted that the Council was entitled to apply a rate of reduction corresponding to a figure representative of

the rates applicable to producers who had continued production. Article 3a(2), providing for the deduction of a percentage representative of all the abatements applied, complied with the principles set out in those cases.

22 Moreover, producers resuming production could not, at the expiry of their non-marketing period, legitimately expect to be excluded from the application of the provisions which were necessary for reducing milk production, even by temporary withdrawal of part of the reference quantity, such as that imposed by Regulation No 775/87 on all other producers and set at 4.5% for the relevant period.

23 An interpretation reflecting the principle of aggregating the representative percentage and the basic reduction does not conflict with the principle of non-discrimination either.

24 It is apparent from the documents before the Court that, contrary to the view taken by the national court, aggregating the representative percentage and the basic reduction does not result in the reduction of 4.5% being taken into account twice. Because those two types of deduction are different in nature, the representative percentage was determined on the basis of real abatements, excluding the basic reduction.

25 The basic reduction of 4.5% simply reflects a temporary withdrawal of a proportion of the guaranteed total quantity of each Member State for the relevant period. Since the rate of that basic reduction was the same in all the Member States, the reduction was in the nature of a uniform abatement. Moreover, the rate of 4.5% applicable to all milk producers for the period in question has the same economic purpose, namely to reduce production.

26 Accordingly, Article 3a(2) of Regulation No 857/84, as amended by Regulation No 1639/91, must be interpreted as meaning that the basic reduction is to be added to the percentage representative of all the abatements applied to the reference quantities established in accordance with Article 2.

The second question

27 In this question, read in the light of the grounds of the order for reference, the national court raises the issue of the validity of Article 3a(2) of Regulation No 857/84 in so far as it refers to a basic reduction of 4.5%. It notes that according to the seventh recital in the preamble to Regulation No 1639/91 that rate is based on Regulation No 775/87, although the latter did not provide for such a rate.

28 The rate of 4.5% was in fact laid down by Regulation No 775/87: that regulation has been amended several times; the 4.5% withdrawal rate which applied when Regulation No 1639/91 was adopted was set by amending Regulation No 3882/89.

29 Accordingly, the method of setting the basic reduction laid down in Article 3a(2) of Regulation No 857/84 may be objectively determined and does not affect the validity of that provision as amended by Regulation No 1639/91.

The third question

30 In this question, read in the light of the grounds of the order for reference, the national court raises the issue of the validity of Article 3a(2) of Regulation No 857/84 in so far as it may be considered to infringe the principle of non-discrimination set out in the second subparagraph of Article 40(3) of the Treaty. According to that view, Article 3a(2) adversely affects producers who gave a non-marketing undertaking, because their last year of production was before 1981. Since in Germany the percentage representative of the abatements is calculated on the basis of milk production in 1983, its rate reflects the increase in production between 1981 and 1983, to which however producers in Mr and Mrs Kamp's position did not contribute.

31 Admittedly, the higher production in 1983, which is taken into account in determining the representative percentage, may place the producers concerned in the main proceedings at a disadvantage.

32 However, because of the hypothetical nature of the likely trend in milk production of producers who participated in the non-marketing scheme during the relevant period, the Council had to resort to a global comparison by categories of producers in order to adopt legislation on the allocation of a special reference quantity for producers resuming production.

33 The Council was entitled to assume that the category of producers who have given a non-marketing undertaking cannot be compared with the limited group of producers who continued production and managed to increase it during the period from 1981 to 1983. The comparison had to be with all producers who continued

production. Since the increase in production could be due to various factors, the Community legislature was not required to proceed on the assumption that producers resuming production would have participated in that increase had they not interrupted their activity. In those circumstances, the Council was entitled to assimilate the situation of the category of producers in question and that of producers who had continued to produce, irrespective of whether the latter had contributed to any increase.

34 At the hearing, the applicants submitted that the method chosen by the Council differed, to their disadvantage, from that applied by the Court in its judgment in Joined Cases C-104/89 and C-37/90 *Mulder* v *Council and Commission* [1992] ECR I-3061 — *Mulder II*.

35 However, the calculation of the hypothetical reference quantity which a producer should have been granted in the past, made by a court in the context of proceedings relating to the non-contractual liability of the Community in order to determine the quantum of damages, cannot be compared with the calculation made by the Council in the exercise of a wide discretion in order to determine a producer's future reference quantity.

36 Accordingly, Article 3a(2) of the regulation is not invalid by virtue of the fact that the quantity for which entitlement to premium under Regulation No 1078/77 was obtained is based on the production for a year before 1981, the reference year, while the percentage representative of all the abatements was calculated on the basis of the higher production for another reference year, namely 1983.

The fourth question

37 In this question, read in the light of the grounds of the order for reference, the national court raises the issue of the validity of Article 3a(2) of Regulation No 857/84 in so far as it may be considered to infringe the principle of non-discrimination set out in the second subparagraph of Article 40(3) of the Treaty for a reason other than that given in the previous question. It emphasizes that Article 2(2) of Regulation No 857/84 enables the rate of abatement to be varied, for certain categories of producers who have continued production, by reference to particular features specific to them. According to the interpretation put forward by the national court, but disputed by the United Kingdom, the Council, and, at the hearing, also by the Commission, Article 3a(2) precludes such variation for all producers who resumed production after a non-marketing period. Thus small producers, such as those concerned in the main proceedings, are at least in part placed at a disadvantage. They must bear an additional burden since they do not benefit from the abatement rates provided for in the German legislation implementing Article 2(2) in relation to small producers who have not interrupted their production pursuant to a non-marketing undertaking.

38 As the Advocate General pointed out in his Opinion, Article 3a(2) of Regulation No 857/84 does permit the representative percentage to be varied in the circumstances set out in Article 2(2) because it is to be determined in accordance with objective criteria. It is however difficult to apply the variation because the trend in production of the category of producers who at any time gave non-marketing undertakings is hypothetical. The representative percentage can in practice be varied only on the basis of the level of deliveries of certain categories of persons liable for the levy, that is to say on the basis of the size of the holding.

39 Accordingly, Article 3a(2) permits the representative percentage to be varied on the basis of the size of the holding. The validity of that provision cannot therefore be called in question because variation for the benefit of small producers is claimed to be impossible.

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht Düsseldorf by order of 8 January 1992, hereby rules:

1. Article 3a(2) 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, as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991, must be interpreted as meaning that the basic reduction is to be added to the percentage representative of all the abatements applied to the reference quantities established in accordance with Article 2;

2. Consideration of the other questions raised has disclosed no factor of such a kind as to affect the validity of Article 3a(2) of Regulation No 857/84, as amended by Regulation No 1639/91.

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 5 May 1994.

R. Grass
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber