JUDGMENT OF THE COURT (Second Chamber)
28 January 1999 *

In Case C-181/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Georg Wilkens

and

Landwirtschaftskammer Hanover,

third party: **Oberbundesanwalt beim Bundesverwaltungsgericht,**

on the interpretation and validity of the second subparagraph of Article 3a(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 (OJ 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35),

* Language of the case: German.

THE COURT (Second Chamber),

composed of: G. Hirsch (Rapporteur), President of the Chamber, G. F. Mancini and R. Schintgen, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Wilkens, by Frank Schulze, Rechtsanwalt, Münster,

— the Council of the European Union, by Jan-Peter Hix, of its Legal Service, acting as Agent,

— the Commission of the European Communities, by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Wilkens, represented by Mechtild Düsing, Rechtsanwalt, Münster, of the Council, represented by Jan-Peter Hix, and of the Commission, represented by Klaus-Dieter Borchardt, at the hearing on 18 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1998,

gives the following

Judgment

1 By an order of 21 March 1996, which was received at the Court on 29 May 1996, the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation and validity of the second subparagraph of Article 3a(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 (OJ 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35, hereinafter 'Regulation No 857/84').

2 The questions were raised in proceedings between Mr Wilkens, a milk producer, and the Landwirtschaftskammer (Chamber of Agriculture) Hanover concerning the retroactive annulment of a decision provisionally allocating a special reference quantity following the withdrawal of the conversion premium which had been granted to the plaintiff in the main action 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 (OJ 1977 L 131, p. 1).

3 Over-production in the milk and milk products sector, which is governed by Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176), led the Council to adopt on 17 May 1977 Regulation No 1078/77, the purpose of which was to encourage farmers to abandon milk production.

4 Under that regulation, any farmer who undertook for a period of five years not to market milk or milk products or who undertook for a period of four years to convert his dairy herd to beef production could obtain a non-marketing or conversion premium. The producer's written undertaking comprised an obligation not to market milk or milk products, together with other ancillary obligations connected with the non-marketing scheme.

5 In order to ensure that the rules were applied as uniformly as possible the Commission adopted Regulation (EEC) No 1307/77 of 15 June 1977 laying down rules for the application of the system of premiums for the non-marketing of milk and milk products and the conversion of dairy herds (OJ 1977 L 150, p. 24).

6 In 1984, in view of the persistent imbalance between supply and demand in the milk sector, an additional levy scheme was introduced by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation No 804/68 (OJ 1984 L 90, p. 10), and by Regulation No 857/84. Article 5c of Regulation No 804/68 provided for an additional levy to be payable on quantities of milk in excess of a reference quantity to be determined on the basis of either the quantity of milk or milk equivalent delivered by a producer or the same quantity purchased by a purchaser during a reference year. In Germany, it is the producer who is liable to pay the levy.

7 Producers who, under Regulation No 1078/77, had entered into a non-marketing or conversion undertaking covering the reference year could not obtain a reference

quantity under the additional levy scheme as initially provided for because they had not had any milk production during the reference year.

8 As a result of the judgments of the Court of Justice in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation No 857/84 (OJ 1989 L 84, p. 2) inserted a new provision, Article 3a, in Regulation No 857/84 to the effect that under certain conditions a special reference quantity would be granted to that category of producers.

9 Following the judgments of the Court of Justice in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585, paragraph 2 of Article 3a of Regulation No 857/84 was amended by Regulation No 1639/91. The second subparagraph of Article 3a(1) of Regulation No 857/84 provides:

'Producers:

— whose period of non-marketing or conversion in performance of the undertaking given under Regulation (EEC) No 1078/77 expired in 1983 ...

shall receive on a provisional basis, on application submitted within a time-limit of three months from 1 July 1991, a special reference quantity on the terms laid down in (a), (b) and (d) above.'

10 By decision of 30 June 1981 the Landwirtschaftskammer Hanover granted the plaintiff in the main action a premium for converting his milk herd to the production of beef.

11 In 1983, after an investigation revealed irregularities in the slaughtering of dairy cows, the local government authorities in Hanover annulled the decision awarding Mr Wilkens the conversion premium and asked at the same time that the first portion thereof be repaid, together with interest.

12 The action brought by the plaintiff in the main action challenging that decision was dismissed by judgment of the Verwaltungsgericht (Administrative Court) Hanover on 11 September 1985, as was the appeal against that judgment by judgment of the Oberverwaltungsgericht (Higher Administrative Court) Lüneburg on 26 April 1990. Those two judgments have now the force of *res judicata*.

13 In June 1989 the plaintiff in the main action applied for a provisional special reference quantity in order to be able to resume milk production. The Landwirtschaftskammer Hanover certified that the legal requirements for the grant of such a special reference quantity were met, but reserved the right to withdraw its certification if the action then pending before the Oberverwaltungsgericht Lüneburg led to a reduction of the premium or of the quantity of milk used to calculate the premium.

14 Following the judgment of the Oberverwaltungsgericht Lüneburg on 26 April 1990 confirming the decision to withdraw the conversion premium, therefore, the Landwirtschaftskammer Hanover withdrew the certificate by decision of 13 July 1992. In those circumstances no special reference quantity could be allocated to Mr Wilkens.

15 The action he brought challenging the decision to withdraw certification was dismissed by the Verwaltungsgericht Hanover, as was the appeal lodged before the Oberverwaltungsgericht Lüneburg.

16 The plaintiff in the main action then brought an appeal on a point of law against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court).

17 Since that court was in doubt as to the true construction of the second subparagraph of Article 3a(1) of Regulation No 857/84, in particular as regards the phrase 'in performance of the undertaking given under Regulation (EEC) No 1078/77', as well as the validity of that provision in view of the fact that the withdrawal of the premium and the refusal to grant a special reference quantity might amount to a double penalty, the Bundesverwaltungsgericht stayed the proceedings and referred the following two questions to the Court of Justice for a preliminary ruling:

'1. Does the second subparagraph of Article 3a(1) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, preclude granting a provisional special reference quantity to producers who have been asked to repay a non-marketing or conversion premium on account of breach of the undertaking given by them?

2. If so, is that rule compatible with the Community law principles of the protection of legitimate expectations and proportionality?'

18 By those two questions, which should be considered together, the national court is asking, in essence, whether the second subparagraph of Article 3a(1) of Regulation

No 857/84 is to be interpreted as meaning that a milk producer who has had his entitlement to a non-marketing or conversion premium granted under Regulation No 1078/77 withdrawn on the grounds of an alleged failure to fulfil his undertaking not to market milk or milk products for a period of five years may be given a special reference quantity, and whether, if the answer is no, that refusal to grant a special reference quantity is compatible with the principles of the protection of legitimate expectations and proportionality.

19 Before those questions are addressed, it should be noted that the Court has consistently held that where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law, and, more particularly as regards Article 3a of Regulation No 857/84, with the principle of the protection of legitimate expectations (Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 9).

20 In the case of the second subparagraph of Article 3a(1) of Regulation No 857/84, it is not possible to elicit a clear and unambiguous interpretation from the wording of the provision. The requirement that the conversion period have been completed 'in performance of the undertaking given under Regulation (EEC) No 1078/77' may be understood as meaning either that the producer must have complied with the various obligations entailed by the undertaking given under the conversion scheme, or that entitlement to a special reference quantity accrues to the producer automatically once the period covered by the undertaking has been completed.

21 As regards the purpose of the scheme for premiums and special reference quantities, both the rules introduced by Regulation No 1078/77 and those governing the additional levy laid down by Regulation No 857/84 are intended to reduce the surplus of milk and milk products and to restore balance on the milk market by

encouraging farmers to abandon the marketing of milk and milk products for a certain period (see, as regards the rules on premiums, Case 119/87 *Jensen* v *Landbrugsministeriet* [1988] ECR 5045, paragraph 30, and Case C-127/94 *R.* v *MAFF, ex parte Ecroyd* [1996] ECR I-2731, paragraph 47).

22 However, Article 3a of Regulation No 857/84, which was inserted into Regulation No 764/89 as a result of the judgment in *Mulder* and *Von Deetzen*, cited above, does not reflect that purpose. Since it permits producers who have given an undertaking under Regulation No 1078/77 to resume production under the additional levy scheme that provision does not, in fact, contribute to reducing milk production.

23 Nevertheless, the resumption of milk production by that category of producers was envisaged only inasmuch as excluding them had constituted a breach of their legitimate expectation of being able to resume deliveries once their non-marketing or conversion undertaking had come to an end (*Mulder* and *Von Deetzen*, paragraphs 26 and 15 respectively).

24 Moreover, the Court has held that only producers who were induced by the rules introduced by Regulation No 1078/77 to suspend milk marketing for a certain period in the general interest and who for that reason made no deliveries during the period of the undertaking may rely on the principle of the protection of legitimate expectations in order to claim a special reference quantity under the second subparagraph of Article 3a(1) of Regulation No 857/84 (*Mulder* and *Von Deetzen*, paragraphs 24 and 13 respectively).

25 If non-marketing is therefore an essential requirement of the second subparagraph of Article 3a(1) of Regulation No 857/84 in order to be eligible for a special reference quantity, it is also the essential condition for the grant of a conversion pre-

mium and the actual observance of the undertaking given fulfils both the condition and the aim of the rules instituted by Regulation No 1078/77 (*Ecroyd*, paragraphs 48 and 49).

26 Consequently, breach of the obligation not to market milk and milk products during the period covered by the undertaking entails the loss of the premium granted under Regulation No 1078/77 (*Jensen*, paragraphs 27 and 30) and also precludes allocation of a special reference quantity under the second subparagraph of Article 3a(1) of Regulation No 857/84.

27 However, loss of the premium is not always the result exclusively of breach of the obligation not to market during the conversation period. Since its purpose is to ensure that the premium scheme is effective, withdrawal of premiums may be attributable not only to failure to comply with the obligation not to market milk or milk products, but also to failure to fulfil other obligations arising from the undertaking given under those rules (*Jensen*, paragraph 30, and *Ecroyd*, paragraph 50).

28 Breach of one or more of those other obligations connected with the non-marketing or conversion scheme and entailing loss of the premium cannot, however, affect a producer's entitlement to a special reference quantity under Article 3a(1), second subparagraph, of Regulation No 857/84.

29 If it could, a milk producer would be deprived of the possibility of obtaining a special reference quantity even if he did in fact cease marketing milk and milk products, thereby contributing, in the general interest, to achievement of the aim of the premium scheme, namely to reduce surpluses.

30 Excluding producers who had lost entitlement to the premium after breaching one or more of those other obligations would be incompatible with the purpose of the rules in Article 3a of Regulation No 857/84. The sole purpose of that provision is to enable a producer to resume deliveries if he may legitimately expect to be able to do so because he did in fact suspend marketing under the non-marketing and conversion scheme.

31 Consequently, producers retain entitlement to a special reference quantity if, despite having breached one or more of the other obligations under the non-marketing or conversion scheme and having therefore forfeited the premium, the purpose of the scheme introduced by Regulation No 1078/77 has been achieved.

32 In this instance, as far as the nature of the obligation or obligations which the plaintiff in the main action failed to fulfil is concerned, the Council and Commission have pointed to a contradiction regarding the facts as between the judgment of 26 April 1990 whereby the Oberverwaltungsgericht Lüneburg terminated the proceedings regarding withdrawal of the decision to grant the premium, and the order made by the national court which referred the questions for a preliminary ruling.

33 Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (see, *inter alia*, Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16, and Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 26).

34 In that context, it is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (Case 17/81 *Pabst & Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331, paragraph 12, and *AC-ATEL Electronics Vertriebs*, paragraph 17).

35 Consequently, it is for the national court to determine what obligations connected with the non-marketing and conversion scheme the plaintiff in the main action has in fact failed to fulfil.

36 If only some of the milk was marketed in breach of the undertaking made under Regulation No 1078/77, the producer retains entitlement to a special reference quantity under the second subparagraph of Article 3a(1) of Regulation No 857/84 if he may rely on a legitimate expectation, that is to say, only in so far as he has complied with the undertaking not to market milk or milk products, thereby contributing to the achievement of the aims of the non-marketing and conversion programme.

37 Unlike the conversion premium scheme, therefore, under which even partial failure to comply with an undertaking makes the grant and continued enjoyment of the premium unjustified and deprives it of its legal basis (*Jensen*, paragraph 30), partial failure to comply with the undertaking not to market milk has the result of excluding a milk producer from allocation of a special reference quantity only in due proportion to the extent of the breach of the undertaking. Consequently, the producer may still claim a special reference quantity to the extent that he has complied with his undertaking not to market.

38 As the Advocate General stated in point 46 of his Opinion, that refusal to grant part of the special reference quantity, reflecting the partial failure to fulfil the obligation to cease marketing milk and milk product. , cannot be regarded as a penalty: it

is merely the logical consequence of the rules on special reference quantities under which eligibility for such a quantity accrues only to the extent that a producer may legitimately expect to receive it.

39 Consequently, the argument put forward by the plaintiff in the main action that he has been a victim of a double penalty, in the form of repayment of the premium and refusal to grant a special reference quantity, cannot be accepted.

40 Finally, it should be noted that that interpretation of the second subparagraph of Article 3a(1) of Regulation No 857/84 also satisfies the principle of proportionality. Calculating the special reference quantity, and the portion thereof to be forfeited, on the basis of the quantity of milk marketed in breach of the undertaking given by the producer does not appear to be manifestly inappropriate in view of the purpose of the relevant provision, which is to enable farmers who have suspended marketing in accordance with such an undertaking to resume production. In so far as reduction of the special reference quantity is strictly proportionate to the extent of the breach of that undertaking, it cannot be regarded as capable of prejudicing that objective.

41 In view of the fact that that interpretation of the second subparagraph of Article 3a(1) of Regulation No 857/84 is founded on the requirements of the principles of the protection of legitimate expectations and proportionality, there is no need to consider whether refusal to grant a special reference quantity is compatible with those principles.

42 The result of all the considerations set out above is that the reply to be given to the questions which have been referred for a preliminary ruling is that the second sub-

paragraph of Article 3a(1) of Regulation No 857/84 is to be interpreted as meaning that a producer who has had entitlement to the non-marketing or conversion premium granted under Regulation No 1078/77 withdrawn as a result of an alleged failure to comply with his undertaking not to market milk or milk products is to receive a special reference quantity in due proportion to his compliance with and performance of that undertaking.

Costs

43 The costs incurred by the Council and the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 21 March 1996, hereby rules:

The second subparagraph of Article 3a(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, as amended by Council Regulation (EEC) No 1639/91 of 13

June 1991, is to be interpreted as meaning that a producer who has had entitlement to the non-marketing or conversion premium granted 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 withdrawn as a result of an alleged failure to comply with his undertaking not to market milk or milk products is to receive a special reference quantity in due proportion to his compliance with and performance of that undertaking.

Hirsch Mancini Schintgen

Delivered in open court in Luxembourg on 28 January 1999.

R. Grass G. Hirsch

Registrar President of the Second Chamber