JUDGMENT OF THE COURT (Fifth Chamber)
11 December 1990 *

In Case C-189/89,

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

Karl Spagl

and

Hauptzollamt (Principal Customs Office) **Rosenheim,**

on the validity 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 764/89 of 20 March 1989 (Official Journal 1989 L 84, p. 2),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, G. C. Rodríguez Iglesias, Sir Gordon Slynn, F. Grévisse, M. Zuleeg, Judges,

Advocate General: F. G. Jacobs
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Mr Spagl, the plaintiff in the main proceedings, represented by U. Numberger, a Rechtsanwalt in Munich,

* Language of the case: German.

the Irish Government, represented by L. J. Dockery, Chief State Solicitor, acting as Agent,

the Council of the European Communities, represented by A. Brautigam, Principal Administrator in the Council's Legal Department, acting as Agent,

the Commission of the European Communities, represented by D. Booß, and by K.-D. Borchardt, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing

after hearing oral argument presented by the plaintiff in the main proceedings, represented by E. H. Pijnacker Hordijk, the Irish Government, represented by H. Whelehan, SC, and E. Honohan, barrister, the Council and the Commission, at the sitting on 26 June 1990,

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

gives the following

Judgment

1 By judgment of 27 April 1989, which was received at the Court Registry on 30 May 1989, the Finanzgericht München referred to the Court for a preliminary ruling two questions on the validity of the first indent of Article 3a(1) and 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 764/89 of 20 March 1989 (Official Journal 1989 L 84, p. 2).

2 The questions were raised in proceedings brought by Karl Spagl, a farmer, against Hauptzollamt Rosenheim concerning a reference quantity under the additional levy scheme applicable to milk.

3 Mr Spagl was granted a non-marketing premium 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). The non-marketing period for which he had to undertake not to dispose of milk or milk products from his farm ended on 31 March 1983.

4 Mr Spagl then asked the competent German authorities to grant him a reference quantity, under the additional levy scheme for milk, based on the quantity of milk he had produced before the non-marketing period. His request was refused on the ground that he had delivered no milk in 1983, the reference year adopted by the Federal Republic of Germany, and that his circumstances did not justify his being granted a reference quantity on an exceptional basis. Mr Spagl lodged a complaint against that decision, without success, and then commenced proceedings before the Finanzgericht München.

5 Considering that the decision to be given depended on the validity of the applicable Community provisions, the Finanzgericht München stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Is Council Regulation (EEC) No 857/84 of 31 March 1984 as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 valid

(1) in so far as producers whose period of non-marketing pursuant to the undertaking given under Regulation (EEC) No 1078/77 expired before 31 December 1983 or before 30 September 1983, as the case may be, but who in the relevant reference period had not yet produced any milk, receive no special reference quantities under the milk quota system pursuant to the first indent of Article 3a(1);

(2) in the event that Question 1 is answered in the negative, in so far as the special reference quantity is equal, under Article 3a(2), to only 60% of the quantity of milk or milk equivalent used as the basis for the non-marketing or conversion premium?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community provisions, the course of the procedure and the 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 question

7 The first question is essentially whether the first indent of Article 3a(1) of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of 20 March 1989, is valid in so far as it excludes from the grant of a special reference quantity under that provision producers whose period of non-marketing or conversion, pursuant to an undertaking given under Council Regulation No 1078/77 of 17 May 1977, expires before 31 December 1983 or, as the case may be, before 30 September 1983.

8 It must first be noted that the Community legislation on the additional levy on milk did not originally contain any specific provision for the grant of a reference quantity to producers who had not, pursuant to an undertaking given under Regulation No 1078/77, delivered milk during the reference year adopted by the Member State concerned. However, in its judgments in Case 120/86 *Mulder* [1988] ECR 2321, paragraph 28, and Case 170/86 *von Deetzen* [1988] ECR 2355, paragraph 17, the Court declared those provisions invalid for breach of the principle of legitimate expectations in so far as they did not provide for the allocation of such a reference quantity.

9 In those judgments, the Court stated, on the one hand, 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 previously applied and not to be subject to any rules of market or structural policy adopted in the

mean time (*Mulder*, paragraph 23; *von Deetzen*, paragraph 12), but, on the other hand, that where such a producer had been encouraged by a Community measure to suspend marketing 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*, paragraph 24; *von Deetzen*, paragraph 13).

10 It was in consequence of those judgments that the Council adopted Regulation No 764/89 on 20 March 1989. It added a new Article 3a to Regulation No 857/84, providing essentially that producers who have not, pursuant to an undertaking given under Regulation No 1078/77, delivered milk during the reference year are to receive, in certain circumstances, a special reference quantity 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. The right to receive a special reference quantity is, however, limited by the first indent of Article 3a(1) to producers 'whose period of non-marketing or conversion, pursuant to an undertaking given under Council Regulation No 1078/77, expires after 31 December 1983 or after 30 September 1983 in Member States where the milk collection in the months of April and September is at least twice that of the months October to March of the following year'.

11 Since Regulation No 764/89 was adopted in order to bring the provisions at issue into line with the *Mulder* and *von Deetzen* judgments cited above, the validity of the first indent of Article 3a(1) must first be considered having regard to the principles applied in those judgments and in particular the principle of the protection of legitimate expectations.

12 The cut-off date laid down in the first indent of Article 3a(1) of Regulation No 857/84, as amended, excludes from the grant of a special reference quantity all producers whose period of non-marketing or conversion expired before 31 December 1983 or 30 September 1983, as the case may be. The category of producers thus excluded includes *inter alios* those whose period of non-marketing or conversion expired during the period 1981 to 1983, comprising the three

calendar years which the Member States were entitled to choose as reference years.

13 In that regard, the Community legislature was able validly to set a cut-off date by reference to the expiry of the period of non-marketing or conversion of the persons concerned, with a view to excluding from the benefit of Article 3a those producers who had not delivered milk during the whole or part of the reference year for reasons unconnected with the undertaking as to non-marketing or conversion. On the other hand, by virtue of the principle of the protection of legitimate expectations, as interpreted in the cases cited above, the cut-off date cannot be set in such a way that it has the effect of also excluding from the benefit of Article 3a producers whose failure to deliver milk for the whole or part of the reference year derives from the fulfilment of an undertaking given under Regulation No 1078/77.

14 As the Court pointed out in its judgment in *Mulder* (paragraphs 15 and 16), the applicable Community legislation does not in all cases ensure that the producers thus excluded from the grant of a representative reference quantity under Article 2 are able to obtain a special or additional reference quantity under other provisions of that legislation, since the grant of such quantities is subject to specific conditions and, moreover, can be envisaged only within the limit of the quantities available for that purpose.

15 In those circumstances, it must be concluded that the first indent of Article 3a(1) of Regulation No 857/84, in so far as it is capable of excluding from the benefit of Article 3a producers who did not deliver milk for the whole or part of the reference year in fulfilment of an undertaking given under Regulation No 1078/77, subjects the producers thus excluded to restrictions which affect them specifically by very reason of that undertaking. Such specific restrictions cannot be justified by reasons relating to the general interest since that interest could be safeguarded by measures of a general nature. The provisions thus infringe the legitimate expectations which the producers concerned were entitled to entertain as to the limited nature of the undertakings given by them prior to the entry into force of the additional levy scheme for milk.

16 It follows that the provision at issue must be declared void for breach of the principle of the protection of legitimate expectations.

17 For those reasons, it must be stated in reply to the first question that the first indent of Article 3a(1) of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of 20 March 1989, is invalid in so far as it excludes from the grant of a special reference quantity under that provision producers whose period of non-marketing or conversion, pursuant to the undertaking given under Council Regulation No 1078/77 of 17 May 1977, expires before 31 December 1983 or, in some cases, before 30 September 1983.

The second question

18 The second question is essentially whether Article 3a(2) of Council Regulation No 857/84 of 31 March 1984, as amended, is valid in so far as it restricts the special reference quantity provided for in that provision to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the twelf calendar months preceding the month in which the application for the non-marketing or conversion premium was made.

19 Article 3a(2) of Regulation No 857/84 provides that the special reference quantity referred to in Article 3a(1) is to be 'equal to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made, as determined by the competent authority concerned pursuant to Article 5(1)(e) of Regulation (EEC) No 1391/78, as last amended by Regulation (EEC) No 84/83, and for which the producer has not lost his entitlement to the premium'.

20 As in the case of the first question, it is necessary, with regard to the second, to refer in the first place to the principle of the protection of legitimate expectations, as applied in *Mulder* and *von Deetzen.*

21 It must be emphasized in the first place that the producers referred to by Article 3a of Regulation No 857/84, as amended, did not, by contrast with the producers referred to by Article 2 of the same regulation, deliver any milk during the reference year adopted by the Member State concerned. The Community legislature could not therefore calculate their special reference quantities according to the volume of deliveries made by them during that year but was obliged to use, and did use, other factors, such as the volume of their deliveries during a representative period preceding the period of non-marketing or conversion. By following that course, it was able validly to apply to such quantities a reduction coefficient designed to ensure that the category of producers concerned was not accorded an undue advantage by comparison with the producers who continued to deliver milk during the reference year.

22 It must be made clear, however, that where a reduction of that kind is applied, the principle of the protection of legitimate expectations precludes the rate of reduction from being fixed at such a high level, by comparison with those applicable to producers whose reference quantities are fixed pursuant to Article 2 of Regulation No 857/84, that its application amounts to a restriction which specifically affects them by very reason of the undertaking given by them under Regulation No 1078/77.

23 The reduction of 40% provided for in Article 3a(2) of Regulation No 857/84 does not satisfy those requirements. It appears from the information produced by the Commission at the request of the Court that the rates of reduction applicable to producers whose reference quantities are fixed on the basis of the milk deliveries made during the reference year vary in the different Member States, pursuant to Article 2(2) and (3) of Regulation No 857/84, according to categories of producer or the regions. However, it also appears from that information that in no case does the total of the reductions applicable to the producers referred to by Article 2, including those resulting from a reduction of the aggregate guaranteed quantities and the suspension of part of the reference quantities during the implementation of the scheme, exceed 17.5%.

24 In those circumstances, the application to the producers covered by Article 3a of a reduction of 40% which, far from being representative of the rates applicable to the producers covered by Article 2, is more than double the highest total of such

rates, must be regarded as a restriction which specifically affects the first-mentioned category of producers by very reason of their undertaking as to non-marketing or conversion.

25 The Council and the Commission objected that the reduction applicable pursuant to Article 3a(2) cannot be compared with the reductions applicable to those producers who continued to deliver milk during the reference year. The reference quantities of the latter category are calculated on the basis of the deliveries made during a calendar year comprised within the period from 1981 to 1983, that is to say relatively recent figures, whereas the special reference quantities for the first-mentioned category are based on the volumes of deliveries made before an undertaking was given pursuant to Regulation No 1078/77, that is to say figures which date back many years.

26 That argument cannot justify the difference in the contested rates of reduction. It is apparent from a table produced by the Commission during the proceedings that milk deliveries, both in the Community in general and on individual holdings, increased constantly between 1977, the year in which Regulation No 1078/77 came into force, and 1983, the last calendar year available as a reference year.

27 The Council and the Commission also objected that it was not possible to attribute to the category of producers in question special reference quantities of more than 60% of milk deliveries made prior to the period of non-marketing or conversion without undermining the objective of the additional levy scheme for milk, which is to deal with structural surpluses in the market in milk and milk products. The Commission stated that, according to its estimates, it was foreseeable that the volume of milk covered by the requests for the grant of a special reference quantity made by the producers who had given an undertaking under Regulation No 1078/77 was approximately one million tonnes. Since the Community legislature considered that an additional quantity of milk of 600 000 tonnes was the largest quantity compatible with the objective of the scheme, it had increased the Community reserve by that quantity, whilst at the same time keeping the reference quantity of the other producers unchanged.

28 That argument likewise cannot justify the contested provisions. Even if an increase larger than the Community reserve could not be contemplated without the risk of disturbing the balance of the milk market, the fact remains that it would have been sufficient to reduce the reference quantities of the other producers proportionally by a corresponding amount, so as to be able to allocate larger reference quantities to the producers who gave an undertaking under Regulation No 1078/77.

29 It follows that the contested 60% rule likewise infringes the legitimate expectations which the producers concerned were entitled to entertain as to the limited nature of their undertakings. The contested provision must therefore be declared void for breach of the principle of the protection of legitimate expectations, and it is unnecessary therefore to consider the other arguments concerning its validity made in the course of the proceedings.

30 For those reasons it must be stated in reply to the second question that Article 3a(2) of Council Regulation No 857/84 of 31 March 1984, as amended by Council Regulation No 764/89 of 20 March 1989, is invalid in so far as it restricts the special reference quantity provided for in that provision to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made.

Costs

31 The costs incurred by the Irish Government, the Council of the European Communities and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, so far as the parties to the main proceedings are concerned, in the nature of 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 (Fifth Chamber),

in reply to the questions referred to it by the Finanzgericht München, by order of 27 April 1989, hereby rules:

(1) **The first indent of Article 3a(1) of Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, is invalid in so far as it excludes from the grant of a special reference quantity under that provision producers whose period of non-marketing or conversion, pursuant to an undertaking given under Council Regulation (EEC) No 1078/77 of 17 May 1977, expires before 31 December 1983 or, in some cases, before 30 September 1983.**

2. **Article 3a(2) of Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 is invalid in so far as it restricts the special reference quantity provided for in that provision to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made.**

Moitinho de Almeida Rodríguez Iglesias

Slynn Grévisse Zuleeg

Delivered in open court in Luxembourg on 11 December 1990.

J.-G. Giraud
Registrar

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