REPORT FOR THE HEARING
in Case C-189/89 *

I — Facts and procedure

1. *The applicable Community legislation*

(a) 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) established *inter alia* a system of non-marketing premiums to be granted on request to any producer who undertook not to deliver milk or milk products from his holding either for a consideration or free of charge for a period of five years (Articles 1 and 2).

(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) provided for an additional levy payable on quantities of milk delivered in excess of a reference quantity to be determined. That scheme is implemented in each region of the territory of the Member States in accordance with one of the following formulas (Article 1):

(i) under Formula A, the levy is payable by every milk producer on the quantities of milk and/or milk equivalent which he has delivered to a purchaser in excess of a reference quantity to be determined (producer formula);

(ii) under Formula B, the levy is payable by every purchaser of milk or other milk products on the quantities thereof delivered to him in excess of a reference quantity to be determined. The purchaser liable to the levy is to pass on the burden in the price paid to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (purchaser formula).

(c) The general rules for the application of the additional levy are contained in Council Regulation (EEC) No 857/84 of 31 March 1984 laying down 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. That regulation fixes in particular the reference quantity referred to in the basic regulation (Regulation (EEC) No 856/84), that is to say the quantity exempted from the additional levy. The latter is in principle equal to the quantity of milk or milk equivalent delivered by a producer (Formula A) or purchased by a purchaser (formula B) in the 1981 calendar year, plus 1% (Article 2(1)). However, the Member States may provide that on their territory the reference

* Language of the case: German.

quantity is to be equal to the quantity or milk of 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 (Article 2(2)).

Articles 3, 3a, 4 and 4a of Regulation (EEC) No 857/84, as amended, enable the Member States to take account of certain special situations when fixing reference quantities or to allocate special or additional reference quantities. In the present case, Article 3a, inserted by the amending provision, Council Regulation (EEC) No 764/89 of 20 March 1989, is of particular importance:

'*Article 3a*

1. Producers referred to in the third paragraph of Article 12(c):

   (i) whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation (EEC) No 1078/77, expires after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to the March of the following year,

   (ii) who have not received a reference quantity under the terms laid down pursuant to Article 5(4)(b) and/or Article 9(2) of Regulation (EEC) No 1546/88 and/or, with regard to the person to whom the premium is transferred, pursuant to Article 2 of this regulation,

   shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity and provided that such producers:

   (a) did not cease farming within the meaning of Article 2(3) and (4) of Regulation (EEC) No 1078/77 or transfer the whole of their dairy enterprise before the end of the non-marketing or conversion period;

   (b) establish in support of their request, to the satisfaction of the competent authority, that they are able to produce on their holding up to the reference quantity requested;

   (c) undertake to sell milk or other products direct to the consumer and/or to deliver milk to a buyer;

   (d) undertake, as regards the special reference quantity, not to apply for assistance under any programme for the abandonment of reference quantities until the end of the additional levy scheme.

2. The special reference quantity shall 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.

Where the producer has obtained a reference quantity pursuant to Article 3, points 1 and 2, and/or Article 4(1)(b) and (c), the special reference quantity referred to in the first subparagraph of the paragraph shall be reduced by such quantity.

Where the producer has transferred part of his holding during the non-marketing or conversion period:

(i) the transferor's special reference quantity as established above shall be equal to 60% of the quantity for which entitlement to the premium has been retained,

(ii) the transferee's special reference quantity as established above shall be equal to 60% of the quantity for which entitlement to the premium has been acquired.

3. If, within two years from 29 March 1989, producers can prove to the satisfaction of the competent authority that they have actually resumed direct sales and/or deliveries, and that such direct sales and/or deliveries have attained during the previous 12 months a level equal to or greater than 80% of the provisional reference quantity, the special reference quantity shall be definitively allocated to the producers. Should this not prove to be the case, the provisional reference quantity shall be returned in its entirety to the Community reserve. The level of direct sales and/or actual deliveries shall be determined by taking into account production rate trends on the producer's holding, seasonal conditions and any exceptional circumstances.

4. . . .'

(d) Article 9(2) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (Official Journal 1988 L 139, p. 12) provides that:

'In cases where the persons liable to pay the levy have commenced operations after the beginning of the reference period, Member States may, for the purpose of applying Formulas A and B, assign them reference quantities on the same basis as indicated in Article 5(4)(b).'

2. *The dispute in the main proceedings*

The plaintiff in the main proceedings, Karl Spagl, farms a holding in Bavaria with a usable area of 36 'Tagwerk' (about 12 hectares) of grassland. When he acquired the holding in 1976 it was stocked with 12 dairy cows and five calves.

On 23 December 1977 Mr Spagl applied for a non-marketing premium for milk and milk

products for a period of five years with a view to reorganizing his holding. Whilst production was suspended from 1 April 1978 to 31 March 1983, he carried out maintenance work on his buildings and machinery. In August 1984 there were 12 cows housed on the land.

On expiry of the non-marketing period, Mr Spagl took steps to obtain a reference quantity under the additional premium scheme for milk. By letter of 4 September 1984, the purchasing agency fixed the reference quantity for delivery as zero on the ground, *inter alia*, that his was not a special case under the applicable legislation. For the same reason, the competent authorities refused, in a series of decisions, to acknowledge that exceptional circumstances existed or to assign an additional reference quantity to Mr Spagl.

By decision of 4 April 1986, the defendant in the main proceedings, the Hauptzollamt (Principal Customs Office) Rosenheim, dismissed a complaint from Mr Spagl against that determination of reference quantity on the ground that the competent professional organizations had not issued a certificate to the effect that exceptional circumstances existed. An action against that decision was brought before the Finanzgericht München (Finance Court, Munich).

Considering that the decision to be given depended on the validity of the applicable Community rules, 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?'

In the grounds of its order for reference, the national court expresses doubts as to the compatibility of Article 3a of Regulation No 857/84, as amended, with the principle of the protection of legitimate expectations, the principle of equal treatment, the guarantee of the right to property and the provisions of the Treaty concerning the common agricultural policy. It considers in particular that, as a result of the imposition of a time-limit relating to the expiry of the non-marketing period, that provision affects above all the owners of small and

medium-sized agricultural undertakings which — by contrast with large operators — were not able to buy the additional dairy cattle necessary for the immediate resumption of deliveries, owing to the size of their holdings and their limited financial resources. Those undertakings thus bear a burden such that their existence is seriously threatened by the refusal to grant them a reference quantity.

The national court also expresses doubts concerning the validity of the provisions in question in so far as the level of the special reference quantity, calculated in accordance with Article 3a of Regulation No 857/84, is fixed as 60% of the quantity of milk or milk equivalent delivered by the producer during the period of 12 months preceding the month in which the application for the non-marketing premium was lodged.

3. *Procedure before the Court*

The order for reference was received at the Court Registry on 30 May 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Mr Spagl, represented by U. Numberger, a Rechtsanwalt in Munich, 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, and by the Commission of the European Communities, represented by its Legal Adviser D. Booß, and by K.-D. Borchardt, a member of its Legal Department, acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 14 March 1990 to assign the case to the Fifth Chamber, pursuant to Article 95 of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry.

II — Written observations

1. *The first question*

Mr Spagl and the Irish Government maintain that the regulations at issue are invalid. The Council and the Commission, on the other hand, contend that they are valid.

(a) *Mr Spagl* observes that Article 3a(1) of Regulation No 857/84, as amended, provides, according to previous decisions of the Court, for the allocation of a special reference quantity to producers who gave a non-marketing undertaking under Regulation No 1078/77. However, that provision excludes farmers whose period of non-marketing or conversion expired before 31 December 1983. That means that a farmer whose non-marketing period ended, for example, on 1 December 1983 receives no reference quantity.

Mr Spagl states that, within the framework of the objectives referred to in Article 39 of the EEC Treaty, the Community institutions are required to resolve any contradictions which might arise between any of those various objectives. In his view, the Community institutions did not succeed in reconciling those objectives in the present context. There is no apparent justification for prohibiting the production of milk by farmers who, after the expiry of their obligation not to market, started to build up a herd in 1983 but, because of the transitional period, were not able in 1983 to produce in 1983 as large a quantity of milk as they did before the start of their non-marketing period.

As regards the prohibition of discrimination in agriculture contained in Article 40 of the EEC Treaty, there is no objective justification for the unequal treatment accorded to the plaintiff in the main proceedings as compared with those producers who refrained from marketing but whose non-marketing obligation expired not during the course of 1983 but only at the end of that year.

According to Mr Spagl, the only possible criterion is the classification of the farmer as a producer or non-producer of milk, in other words the question is whether the non-marketing premium scheme has prevented the person concerned, as a milk producer, from actually delivering milk for a limited period of time. As a result of the failure to take account of that situation, the limited, voluntary abandonment of milk production is transformed into permanent exclusion of the producer from the milk market.

Mr Spagl also maintains that the failure to take account of a situation such as his is contrary to the guaranteed right to property, which is upheld by Community law as a fundamental right embodied in the general principles of law. In the case of the plaintiff in the main proceedings, his right to enjoy the ownership of land, embodied in the German Basic Law, has been impaired since the application to all the milk delivered by him of an additional levy at a rate of 100% will force him to abandon milk production and take away his livelihood. According to the case-law of the Bundesverwaltungsgericht (Federal Administrative Court), the right of milk producers to own their means of production deserves full protection; it is incompatible with a constitutional guarantee for a productive holding, which required substantial investments in order to be brought into operation, to be rendered inactive suddenly and without a transitional period by the effect of a law. Mr Spagl considers that the right to property guaranteed by Community law is no less than that right under the German Basic Law.

Finally, according to Mr Spagl, the failure to take account of the milk delivered before the non-marketing undertaking or of the quantity of milk which served as a basis for the premium infringes, in a case such as his, the principle of the protection of legitimate expectations, which is one of the general principles upheld in a State governed by the rule of law. The non-marketing premium is expressly limited to a period of five years and the prohibition of delivery of milk linked with the grant of the premium also relates only to that period, at the expiry of which it must be possible for milk production to be resumed. In those circumstances, Community law should have provided for a 'transitional regime for

adjustment', at least for those who refrained from marketing and were not able to resume milk deliveries immediately after the end of the prohibition of marketing.

(b) The *Irish Government* maintains that producers whose non-marketing period expired before 31 December 1983 or before 30 September 1983, as the case may be, were legitimately entitled to expect, when they gave their non-marketing undertakings, that the provisions adopted for control of the market would not overlook the fact that they would not be in a position immediately to resume production at the level at which they had operated before the non-marketing period. With the exception of large producers, with a solid financial foundation, no producer would be in a position to resume production at a significant level shortly after the expiry of the non-marketing period. The fact that such producers cannot obtain a reference quantity based on their production before the non-marketing period thus means that their legitimate expectation as to the limited effects of the non-marketing regime for a period of five years is frustrated.

As regards the principle of equal treatment, the Irish Government points out that the plaintiff in the main proceedings was in a situation similar to that of all the other milk producers who had given a non-marketing undertaking under Regulation No 1078/77 and whose undertakings expired on 31 December 1983, 30 September 1983 or at a later date, as the case may be. Pursuant to Article 3a of Regulation No 857/84, as amended, those other milk producers whose undertakings expired after the relevant date in 1983 were granted a period of two years as from 29 March 1989 to prove that they actually resumed direct sales and/or deliveries and that the same had, during the period of 12 months within that two-year period, reached a level equal to or higher than 80% of the provisional reference quantity attributed to them.

Moreover, the fact that the Council granted to milk producers whose non-marketing period expired after 31 December 1983 or 30 September 1983, as the case may be, a period in which to resume production at an annual level equal to 80% of their provisional reference quantity shows that consideration of their situation led to the conclusion that they needed time in order to carry out the necessary preparations on their holdings and buy and/or raise a diary herd with a view to resuming significant milk production. Persons in circumstances like those of the plaintiff in the main proceedings were not granted the same time to make the necessary preparations for the resumption of milk production. That difference of treatment is in breach of the prohibition of discrimination between producers laid down in Article 40(3) of the EEC Treaty.

Another difference in treatment as between producers inherent in the situation of the plaintiff in the main proceedings as compared with that of those producers who were granted, pursuant to Regulation No 764/89, a period of two years as from 29 March 1989 for them to fulfil the requirement of delivering during a 12-month period 80% of their provisional reference quantity lies in the fact that the latter producers have the advantage of

knowing what the consequences would be of not achieving that level of milk deliveries within that period, namely loss of a reference quantity, whereas producers in the situation of the plaintiff in the main proceedings did not know what would happen if they did not resume milk deliveries of a substantial level because Regulation No 857/84 had not yet been adopted.

Moreover, according to the Irish Government, Regulation No 764/89 prevents all producers whose non-marketing period expired before 30 September 1983 or before 31 December 1983 from obtaining a special reference quantity, regardless of whether that period expired days, weeks, months or years before that date. It is clear that producers whose non-marketing period expired some weeks before the relevant date could only resume production at a very low level whereas those whose non-marketing period expired in 1982 manifestly experienced much less difficulty in going back into production and thus less difficulty in obtaining a reference quantity in 1983. Since those different categories of producers are treated as if their circumstances were the same, the result is an infringement of the principle of equal treatment.

In conclusion, the Irish Government considers that Regulation No 857/84, as amended by Regulation No 764/89, is invalid in so far as producers whose non-marketing period, by virtue of the undertaking given pursuant to Regulation No 1078/77, expired before 31 December 1983 or before 30 September 1983, but who did not resume production during the prescribed reference period or produced a quantity of milk lower than the special reference quantity to which they would have been entitled if the first indent of Article 3a(1) of Regulation No 857/84, as amended, had been applicable to them do not receive a special reference quantity or, in the case of the latter category of producers, do not receive a special reference quantity which, added to their existing reference quantity, would give them a reference quantity equal to the special reference quantity to which they would have been entitled in the situation described above.

(c) The *Council* points out that Article 3a of Regulation No 857/84 provides for the grant, with effect from 29 March 1989, of a reference quantity to the producers concerned whose non-marketing period or conversion period expired after 31 December 1983 or, as the case may be, after 30 September 1983, if those producers meet certain qualifying conditions establishing their intention and their genuine ability to resume milk production and the impossibility of their obtaining a reference quantity under Article 2 of Regulation No 857/84.

On the other hand, producers whose non-marketing period expired before 31 December 1983 or, as the case may be, 30 September 1983 cannot invoke Article 3a. Nothing in the relevant legislation prevented them from resuming milk production either in the reference year itself or, at least, before 1 April 1984, that is to say before the

entry into force of the additional levy scheme. Similarly, producers whose non-marketing period expired after 31 December 1983 and who received a reference quantity in respect of production commenced after the start of the reference period but before 1 April 1984 are also prevented from invoking Article 3a.

As regards the legitimate expectations of producers whose non-marketing period expired before 31 December 1983 or before 30 September 1983, the Council considers that their situation is not comparable with that of producers whose non-marketing period did not end until after 31 December 1983. The latter could not lawfully deliver milk during the reference year whereas the former could lawfully resume deliveries before the cut-off date but made their own choice not to do so.

As regards the comparison drawn with producers whose non-marketing period expired before 31 December 1983 and who resumed their deliveries before that date, the Council contends that imperative considerations of legal certainty and efficiency of the scheme justify the cut-off date applied. If no final date were laid down, new producers could go into milk production and thus negate the effect of the decrease in production imposed on existing producers. The same situation would have arisen if an excessively long period had been laid down for the resumption of production. It was therefore imperative to prescribe that, in principle, only those producers with existing production when the additional levy scheme came into operation would be entitled to the grant of a reference quantity.

As far as observance of the right to property is concerned, the Council states in the first place that the Court has held (Case 113/88 *Leukhardt* v *Hauptzollamt Reutlingen* [1989] ECR 1991) that the Community legislature enjoys a wide discretion regarding the common agricultural policy. Moveover, it has likewise held that limitations on the use of immovable property are permissible if they are dictated by the Community public interest in ensuring that surpluses on the market in question are not increased as a result of fresh production capacity being brought into operation.

As far as the principle of non-discrimination is concerned, the Council contends that the different treatment of producers whose non-marketing period expired before the cut-off date, depending on whether or not they resumed their milk deliveries before 1 April 1984 — an objective criterion — is not discriminatory. It is objectively justified since a final date for the resumption of milk production is necessary in the interests both of legal certainty and the efficiency of the additional levy scheme.

With respect to the alleged disregard of the aims of the common agricultural policy, the Council rejects the claim that the cut-off date applied in this case has the effect of favouring large undertakings which engage in intensive production using bought-in fodder, to the detriment of small holdings which employ traditional production methods using fodder grown on the holding itself. All producers who resumed or commenced milk production are treated in the same way, according to the objective criterion of whether or not they resumed or commenced such production before 1 April 1984.

Moreover, the Council states that the objectives of the common agricultural policy do not require that in all circumstances small traditional holdings should be protected. The aim of safeguarding agricultural income must in the first place be achieved by increasing productivity through rational development of agricultural production and the optimum utilization of the factors of production (Article 39(1)(a) of the EEC Treaty).

In conclusion, the Council suggests that the Court reply as follows to the questions submitted:

'Consideration of the questions submitted has disclosed no factor of such a kind as to call in question the validity of Council Regulation No 857/84, as amended by Council Regulation No 764/89.'

(d) The *Commission* states that Article 3a of Regulation No 857/84 is intended to fill a lacuna — to which attention was drawn by the judgment of the Court in Case 120/86 *Mulder* [1988] ECR 2321 — in the scheme for the grant of special reference quantities in those cases where producers had not been able to deliver milk in the reference year under consideration because of the undertaking they had given under Regulation No 1078/77. Since that special provision was intended to fill a lacuna, its application was limited to producers whose period of non-marketing or conversion had expired after 31 December 1983 or after 30 September 1983.

On the other hand, according to the Commission, producers who had undertaken not to market milk but whose non-marketing period had expired before 31 December 1983 or 30 September 1983 were already entitled to ask for a reference quantity under Article 9(2) of Regulation No 1546/88. That provision applies to producers who resumed production after 1 January 1983 (the beginning of the reference year chosen by Germany) but before 1 April 1984. In such a case, the reference quantity is, in principle, calculated on the basis of sales made in the course of the last 12 months' activity prior to 1 April 1984, subject, if appropriate, to the application of a coefficient. For producers who have not completed 12 months' activity by 1 April 1984, the Member States determine an annual sale quantity on the basis of their actual sales and grant them a reference quantity calculated on that basis. It is sufficient for the producer concerned to have sold milk for at least one month prior to 1 April 1984.

The Commission states that that provision is intended in particular to take account of the fact that the return to milk production, particularly for small holdings, cannot be achieved immediately but requires some time. Thus, the transitional period allowed by the rules may be as much as 14 months (expiry of the non-marketing period in January 1983; resumption of milk production in March 1984).

By contrast, the grant of a reference quantity on the basis of Article 9(2) of Regulation No 1546/88 to producers whose non-marketing period did not expire until after 31 December 1983 or 30 September

1983 was not possible, or at least was possible only for a very short period. Thus, only producers whose non-marketing period had come to an end in January or February 1984 and who could resume milk production in March 1984 were entitled to receive a reference quantity under Article 9(2). On the other hand, for all other producers, whose non-marketing period did not end until March 1984 or later or who could not resume milk production until after 1 April 1984, no Community provision allowing a special reference quantity to be granted to them existed until the adoption of Regulation No 764/89.

According to the Commission, it is thus to be inferred from the context as a whole that the situation and interests of producers whose non-marketing period came to an end before 31 December 1983 or before 30 September 1983 had already been sufficiently taken into account by Regulation No 1546/88, so that it was not necessary to include them in Regulation No 764/89.

In conclusion, the Commission suggests that the Court reply as follows to the first question submitted:

'Consideration of the questions submitted has disclosed no factor of such a kind as to call in question the validity of Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, in so far as producers whose non-marketing period pursuant to the undertaking given by them under Regulation (EEC) No 1078/77 expired before 31 December 1983 or before 30 September 1983 and who had not yet produced milk during the relevant reference period do not receive a special reference quantity under the milk quota system, pursuant to the first indent of Article 3a(1).'

The second question

(a) The *Council* contends that the limitation of the reference quantity to 60% of the reference production of the persons concerned is compatible with the principle of the protection of legitimate expectations, the right of property and the principle of equal treatment.

By virtue of the principle of the protection of legitimate expectations, according to the judgment in *Mulder, supra*, only total and permanent withholding of a reference quantity from the producers concerned is precluded. Moreover, Article 3a of Regulation No 857/84 does not in itself preclude the application of the other provisions of that regulation which allow adjustment of the reference quantities of producers in difficult circumstances. Thus, it is always possible for a producer who has received a reference quantity of only 60% of his reference production on the basis of Article 3a to be granted a transfer of an unused reference quantity on the basis of Article 4a. Similarly, producers who have been granted a special or additional reference quantity on the basis of Articles 3 and 4 of Regulation No 857/84 which exceeds 60% of their reference production retain that larger quantity.

The right to property is observed, since the limitation which is imposed does not affect that right in such a way as to undermine its substance.

Finally, the Council considers that the contested limitation is not discriminatory: firstly, the producers concerned are objectively in a different situation, as regards their reference production, from producers who made deliveries of milk during the reference year (1981 to 1983); secondly, the limitation is necessary, in view of the delicate balance of the milk market. The producers concerned thus occupy an intermediate position between those who delivered milk during the reference year and those who are entitled, if appropriate, to the benefit of the discretionary provisions of Articles 3 and 4 of Regulation No 857/84.

(b) *Mr Spagl, the Irish Government* and the *Commission* did not express views on the second question.

III — Answers to the questions put by the Court

1. The *Council* stated in reply to a question put to it by the Court that, in determining the special reference quantities referred to in Article 3a of Regulation No 857/84, it had relied on the following considerations:

(i) in its judgments in Case 120/86 *Mulder* [1988] ECR 2321 and Case 170/86 *von Deetzen* [1988] ECR 2355, the Court held that the producers concerned were entitled to be granted a reference quantity not subject to the additional levy;

(ii) the situation of the producers concerned is not comparable with that of producers who delivered milk during the reference period (1981 to 1983) since they were unable to deliver milk during that period because of the non-marketing undertaking given by them pursuant to Regulation No 1078/77 and thus did not contribute to the aggregate quantities guaranteed by the Member State.

The practical consequences of those objective differences between the situations of the various categories of producers are as follows:

(i) the need to have recourse for the reference production of the producers concerned to the production taken into account for the purposes of Regulation No 1078/77 (production for the year 1976 and subsequent years, as appropriate) and not that of 1983 (no production);

(ii) the impossibility of the producers concerned being granted, in appropriate cases, an increase in their production quotas to a level higher than that reference production by reason of an increase in their level of production which they would have been able to achieve, if they had not given a non-marketing undertaking, between the starting date of that undertaking and the reference year (normally 1983).

In those circumstances, the Community legislature was, on the one hand, required to recognize the right of the producers concerned to the grant of a certain reference quantity but, on the other hand, was not required to treat those producers in all respects in exactly the same way as the producers who had delivered milk during the reference period. Similarly, the Community legislature considered it necessary to limit the special quantity to be granted under Regulation No 764/89 to 60% of the production taken into account for the purposes of Regulation No 1078/77.

In view of the fragility of the milk market, it was not possible to fix the production quotas to be granted to the producers concerned as 100% of their production taken into account for the purposes of Regulation No 1078/77. The Commission officials estimated as one million tonnes the quantity of milk which would probably be involved to ensure 100% satisfaction for those producers who probably, after the judgments of the Court, would have wished to be granted a reference quantity. The Community legislature considered that quantity excessive since it threatened to jeopardize disproportionately the delicate balance achieved in the milk market. In those circumstances, it was decided to limit the quantity to be allocated to 600 000 tonnes and accordingly to limit the individual quantities which the producers concerned might ask for to 60% of their reference production. The Council thus acted within the limits of the wide discretion which, as the Court has held, it enjoys in this matter.

2. At the Court's request, the *Commission* furnished statistical details of the trend in the volume of milk production and deliveries in the Community by holding. It also stated, in reply to a question put to it by the Court, that, in most of the Member States, there was more than one rate for the various groups of products of which production was 'normal'. On that point too it provided more detailed statistics.

M. Zuleeg
Judge-Rapporteur