

OPINION OF ADVOCATE GENERAL  
COSMAS

delivered on 8 June 1995 \*

1. Some considerable time after its adoption the additional milk levy scheme continues to generate questions touching the validity and interpretation of the provisions governing it. The questions submitted by the Supreme Court, Ireland, specifically concern the first indent of Article 3(1) of Council Regulation (EEC) No 857/84 of 31 March 1984, a provision which the Court has already been called on to interpret. None the less, the legal and factual circumstances in which the questions are raised by the Supreme Court render them of particular interest.

Community legislation

2. Article 5c of Council Regulation (EEC) No 804/68 of 27 June 1968,<sup>1</sup> supplemented by Article 1 of Council Regulation (EEC) No 856/84 of 31 March 1984,<sup>2</sup> provided for an additional levy on the production of cow's milk. In accordance with Article 1(1) of Regulation No 856/84 that levy was intended to curb the increase in milk production and was initially imposed for five

consecutive periods of twelve months (the first period beginning on 1 April 1984), which were finally increased to nine.<sup>3</sup>

3. The additional levy scheme was implemented in the Member States on the basis of one of the two alternative formulas provided for in paragraph 1 of Article 5c, in the version in force at the material time for the purposes of the present case. In accordance with formula A the levy is payable by every milk *producer* on the quantities of milk which he has delivered for treating or processing to a purchaser and which for the twelve months concerned exceed a reference quantity to be determined. In accordance with formula B the levy is payable by every *purchaser* of milk on the quantities of milk which have been delivered to him by a producer for treating or processing and which exceed a reference quantity to be determined. Under formula B the levy payable by the purchaser is to be passed on to those producers who

\* Original language: Greek.

1 — Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

2 — 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 (OJ 1984 L 90, p. 10).

3 — See Article 1(1) of Council Regulation (EEC) 816/92 of 31 March 1992 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1992 L 86, p. 83). Thus the additional levy scheme continued to be governed by Article 5c of Regulation No 804/68, as amended and supplemented, until 31 March 1993. By Article 1(3) of Council Regulation (EEC) No 2071/92 of 30 June 1992 (OJ 1992 L 215, p. 64), which entered into force on 1 April 1993, Article 5c of Regulation 804/68 was replaced by a provision merely providing for the price system contained in Regulation No 804/68 'to be established without prejudice to the implementation of the additional levy.' The most recent scheme is governed as from 1 April 1993 for a period of seven years by the provisions of Council Regulation (EEC) No 3950/92 of 28 December 1992 (OJ 1992 L 405, p. 1).

have contributed to the purchaser's reference quantity being exceeded.<sup>4</sup>

4. Under Article 5c(3) the sum of the reference quantities granted to persons subject to the levy in a given Member State may not exceed a guaranteed total quantity different for each Member State and equal to the sum of quantities of milk delivered to undertakings treating or processing milk or other milk products in each Member State during the 1981 calendar year, plus 1%. In the specific case of Ireland the guaranteed total quantity was fixed by reference to 1983 deliveries for the reasons set out in the eighth recital to the preamble to Regulation No 856/84 (contribution of the dairy industry to the gross national product to an appreciably greater extent than the Community average; difficulties in developing alternative agricultural production).

Moreover, paragraph 4 of Article 5c provided for a 'Community reserve' to be constituted in order to supplement, at the beginning of each period of twelve months, the guaranteed quantities of the Member States in which implementation of the additional levy system raises particular difficulties liable

4 — The original provisions of Article 5c(1) of Regulation No 804/68 as regards the limits beyond which the levy may be passed on by the purchaser to the producers has subsequently been supplemented and amended in significant respects; see in particular Article 1(1) of Council Regulation (EEC) No 773/87 of 16 March 1987 (OJ 1987 L 78, p. 1) and Article 1 of Council Regulation (EEC) No 744/88 of 21 March 1988 (OJ 1988 L 78, p. 1).

to affect their supply or production structures. By Article 1 of Commission Regulation (EEC) No 1371/84 of 16 May 1984<sup>5</sup> the greater part of the Community reserve was distributed to Ireland on the same grounds as those which were invoked for the choice of 1983 as the reference year for that country (see the second recital in the preamble to Regulation No 1371/84).

5. The general rules for the application of the additional levy were adopted in Council Regulation No 857/84 of 31 March 1984.<sup>6</sup>

6. Under Article 1(1) of Regulation No 857/84 the amount of the levy was initially fixed at 75% of the target price for milk where formula A is applied, and at 100% of that target price where formula B is applied.<sup>7</sup> Article 2(1) provided that the reference quantity the exceeding of which gives rise to the obligation to pay the levy is to be equal to the quantity of milk delivered by the producer during the 1981 calendar year

5 — Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11). That provision referred to the first period of implementation of the levy system. Analogous provisions were adopted for subsequent periods.

6 — 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). That regulation was repealed as from 1 April 1993 by Articles 12 and 13 of Regulation No 3950/92 referred to in footnote 3 above.

7 — After successive increases those amounts finally reached 115% of the target price for milk (see Article 1(1) of Council Regulation (EEC) 3880/89 of 11 December 1989 (OJ 1989 L 378, p. 3)).

(formula A) or to the quantity of milk purchased by a purchaser during the 1981 calendar year (formula B), plus 1%. However, the opportunity is also afforded to Member States (see Article 2(2) of Regulation No 857/84) to provide that on their territory the reference quantity is to be equal to the quantity of milk delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed reference quantity for each Member State.

7. The basic rules contained in paragraphs 1 and 2 of Article 2 for determining the reference quantity are supplemented by a series of provisions contained in subsequent articles of Regulation No 857/84 in order, as stated in the third recital in the preamble to Regulation No 857/84, to enable 'the Member States to adapt the reference quantities to take into account the special situations of certain producers.'

8. Among the exceptional provisions concerning the grant of special (or additional) reference quantities to certain categories of producers the provision relevant to the present case is Article 3(1), which provides as follows:

'For the determination of the reference quantities referred to in Article 2 and in connection with the application of formulas A

and B, certain special situations shall be taken into account as follows:

1. Producers who have adopted milk production development plans under Directive 72/159/EEC lodged before 1 March 1984 may obtain, according to the Member State's decision:

— if the plan is still being implemented, a special reference quantity taking account of the milk and milk product quantities provided for in the development plan,

— if the plan has been implemented after 1 January 1981, a special reference quantity taking into account the milk and milk product quantities which they delivered in the year during which the plan was completed.

Investments carried out without a development plan can also be taken into account if the Member State has sufficient information.

2. (...)

9. As elucidated in Article 5 of Regulation No 857/84, special or additional reference quantities are to be granted only within the guaranteed quantity limit for each Member State, and are to be drawn from a reserve constituted by the Member State within the abovementioned guaranteed quantity. As may be inferred from Article 2(3) of Regulation No 857/84 the reserve quantity is constituted by the Member State principally by an appropriate adjustment of the quantities on the basis of which the reference quantities of the remaining producers (not operating in special situations) are determined. Reference quantities freed on the abandonment of production by certain milk producers may also be added to that reserve (Article 4(2)).

of Regulation No 857/84 (see the final provision in the chronological series in Article 1(1) of Council Regulation (EEC) No 817/92 of 31 March 1992 (OJ 1992 L 86, p. 85)).

## II — The application of the additional levy scheme in Ireland

11. During the initial period of application of the additional levy scheme, its implementation in Ireland was effected basically by decisions of the Minister for Agriculture and Food notified to the interested parties principally by means of press notices.

10. It should be noted, finally, that under Article 4a of Regulation No 857/84, added by Article 1(1) of Council Regulation (EEC) No 590/85,<sup>8</sup> Member States were given the opportunity of allocating producers' or purchasers' non-utilized reference quantities to other producers or purchasers in the same region and (in so far as there is an excess of quantities remaining unutilized) in other regions. That possibility afforded to Member States was intended initially as a transitional provision for the first period of twelve months of the application of the additional levy scheme, but was finally maintained in force for the whole duration of the validity

It appears from the evidence adduced by the appellants in the main proceedings (Annex 2 to the appellants' observations), whose accuracy was not called in question at the hearing, that:

- (a) Ireland implemented the additional levy scheme by adopting formula B. A reference quantity was granted to each dairy cooperative (or dairy) corresponding to the quantities of milk purchased from milk producers in 1983 plus a certain fixed quantity for producers who had delivered quantities below a certain level

<sup>8</sup> — Council Regulation (EEC) No 590/85 of 26 February 1985 (OJ 1985 L 68, p. 1).

and a certain amount in respect of producers who had delivered quantities above that level.

- (b) No provision was made for the permanent grant (in pursuance of Article 3(1) of Regulation No 857/84) of a special reference quantity to milk producers who had adopted milk production development plans under Directive 72/159/EEC. It was merely provided that producers who had made investments in dairy production could under certain terms and conditions be granted by purchasers (cooperatives or companies) non-utilized reference quantities freed as a result of cessation or reduction of milk deliveries by certain producers. However, those reference quantities were granted, only on a *provisional* basis for the relevant twelve-month period of application of the additional levy scheme.

granted, provision was also made for producers implementing a milk production development plan to be granted, under certain terms and conditions and against payment, reference quantities available as a result of the temporary transfers referred to above. Moreover, the possibility of acquiring reference quantities, against payment, by producers who had carried out investments in milk production was provided for in the case of reference quantities being freed by certain producers delivering to the same dairy or company and who undertook to discontinue milk production definitively in return for compensation (see Article 4(1)(c) of Regulation No 857/84).<sup>10</sup>

12. Moreover, on 12 December 1985, the Minister for Agriculture made the European Communities (Milk Levy Regulations 1985)<sup>11</sup> in order, as stated in the preamble, to give effect to the Community legislation imposing an additional levy on milk production.

At a later stage, evidently under the provision in Regulation (EEC) No 2998/87<sup>9</sup> enabling Member States to authorize, at the beginning of each twelve-month period and for the duration thereof, temporary transfers of part of the individual reference quantity

Under Section 16(1) thereof the Minister for Agriculture and Food may, by notice published in a national newspaper, specify the manner in which reference quantities are to be reallocated where producers have ceased

9 — See Article 1 of Council Regulation (EEC) No 2998/87 of 5 October 1987 (OJ 1987 L 285, p. 1) which added Article 1(a) to Article 5(c) of Regulation (EEC) No 804/68.

10 — That paragraph was added by Article 1(1) of Council Regulation (EEC) No 1899/87 of 2 July 1987 (OJ 1987 L 182, p. 39).

11 — S.1. No 416 of 1985.

to deliver milk to purchasers or have reduced their delivery of milk. Under Section 16(2) the provisions of Articles 3 and 4 of Regulation No 857/84 are to apply to any reallocation of reference quantities.

### III — The main proceedings — the questions submitted for a preliminary ruling

13. Fintan Duff, Liam Finlay, Thomas Julian, James Lyons, Catherine Moloney, Michael and Patrick McCarthy, James O'Regan and Patrick O'Donovan (hereinafter the 'appellants in the main proceedings') are milk producers who, as is apparent from the documents before the Court, are owners of the land on which they carry on their activity. Those producers had adopted milk production plans under Directive 72/159/EEC and the relevant provisions of Irish legislation. According to the national court the plans were lodged prior to 1 March 1984<sup>12</sup> and were approved by the Minister for Agriculture and Food, the competent administrative authority.

12 — It is therefore not significant that, as is apparent from the schedules produced at the hearing by the appellants in the main proceedings, the plan adopted by Michael and Patrick McCarthy came into effect on 12 March 1984.

14. From the replies given at the hearing by both the appellants in the main proceedings and the Minister for Agriculture and Food and the Attorney General (hereinafter the 'respondents in the main proceedings') to a written question put to them by the Court it appears that none of the abovementioned plans had been completed by 1983 which was, I would remind the Court, the reference year for the implementation in Ireland of the additional levy scheme. Thus the reference quantities granted to the appellants in the main proceedings<sup>13</sup> for the first period of application of the scheme were calculated solely on the basis of the quantities of milk produced by them in 1983, no account being taken of the quantities of milk due to be produced after completion of the development plans and which would far exceed the level of production achieved by them in 1983.<sup>14</sup>

15. On 20 February 1990 the abovementioned producers brought proceedings before the High Court principally for a declaration that the Minister for Agriculture and Food

13 — According to the order for reference, reference quantities were granted on the initial application of the scheme to all the appellants in the main proceedings except Thomas Julian. However, it would appear from the schedule mentioned in the previous footnote that no reference quantity was granted to James O'Regan either, on account of nil production in 1983.

14 — From the schedule mentioned in the two previous footnotes the following information is apparent (the first figure after the producer's name reflects the level of production in litres after completion of the plan, the second figure refers to the reference quantity granted to him on the initial application of the additional levy scheme): Fintan Duff (145 802 — 47 179), Liam Finlay (188 663 — 78 284), Thomas Julian (299 560 — 0), James Lyons (288 780 — 212 834), Catherine Moloney (117 180 — 27 886), Michael and Patrick McCarthy (161 150 — 39 033), James O'Regan (57 553 — 0) and Patrick O'Donovan (150 930 — 2 814).

was obliged to grant to them under the provisions of Article 3(1) of Regulation No 857/84 special reference quantities to be determined in the light of the quantities of milk which they would produce on completion of the plans which they were applying.

16. The action was dismissed by a judgment of the High Court against which an appeal was then lodged with the Supreme Court. Considering that the outcome of the dispute pending before it depended on the resolution of questions touching the validity and interpretation of the first indent of Article 3(1) of Regulation No 857/84, the Supreme Court stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Having regard to the third paragraph in the preamble to Council Regulation (EEC) No 857/84 and to Article 40(3) of the Treaty establishing the European Economic Community, is the first indent of Article 3(1) of the said Council Regulation (EEC) No 857/84 to be construed in Community law as imposing on Member States, in allocating reference quantities, an obligation to grant a special reference quantity to producers who had adopted milk production development plans under Council Directive 72/159/EEC and had invested substantial sums of borrowed monies in furtherance of such plans?

2. Alternatively, having regard to the fundamental principles of Community law, in particular the principles of respect for legitimate expectations, non-discrimination, proportionality, legal certainty and respect for fundamental rights, should the discretion vested in the competent authority in Ireland by the first indent of the said Article 3(1) of Council Regulation (EEC) No 857/84 be construed as an obligation to grant a special reference quantity to the appellants in view of the fact that their milk production development plans were approved by the competent authority in Ireland?

3. If the answers to Questions 1 and 2 are in the negative, is Council Regulation (EEC) No 857/84 invalid on the ground that it is contrary to Community law, in particular to one or more of the following principles:

(a) Proportionality;

(b) Legitimate expectations;

(c) Non-discrimination laid down in Article 40(3) of the Treaty establishing the European Economic Community;

(d) Legal certainty, and

plan') or did it merely confer a discretion on Member States to do so?

(e) Respect of fundamental rights,

(b) If, on a literal construction of the provision at issue, the Member States are simply given discretion, is a purposive view of the provision, as may be inferred from the recitals in the preamble to Regulation No 857/84, sufficient to warrant the interpretation that the obligation referred to in paragraph (a) above is imposed on the Member States?

in so far as it fails to require Member States, in allocating reference quantities, to take into account the special situation of producers who had adopted milk production development plans under Council Directive 72/157/EEC?

(c) If neither the letter nor the intendment of the provision is sufficient to support the view that the Member States are obliged to grant special reference quantities to producers who before 1 March 1984 submitted a development plan, may such an interpretation nevertheless be warranted by the need to ensure that the interpretation of the provision at issue is as far as possible consistent with the higher-ranking general principles of Community law mentioned in the order for reference? <sup>15</sup> In other words, did those general principles (that is to say the principles of legal certainty, of the protection of legitimate expectations, of the prohibition of discrimination laid down in the second subparagraph of Article 40(3) of the Treaty, the principle of proportionality

17. The formulation of the questions submitted for a preliminary ruling makes it difficult not to embark on a discursive discussion of the issues. However, in order to enable all the points raised by the Supreme Court to be covered and a constructive reply to be given to the questions referred to the Court, the following issues must be examined:

(a) On a literal construction did the first indent of Article 3(1) of Regulation No 857/84, as it applied at the material time, impose on Member States the obligation to grant special reference quantities to producers who before 1 March 1984 lodged milk production development plans (hereinafter a 'development

<sup>15</sup> — With regard to that canon of interpretation see, *inter alia* judgments in Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 9, C-81/91 *Tuijnstra* [1993] ECR 0000, paragraph 24 (not yet published in the Reports of cases before the Court), and in Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 17.



and, finally, the principle of the protection of fundamental rights) require the Community legislature to make mandatory provision for the grant by Member States of the abovementioned special reference quantities, so that in other words the provision at issue must, in order for it to be valid, in any event be interpreted as imposing such an obligation on the Member States?

- (d) If the abovementioned general principles did not impose any such obligation on the Community legislature, is it nevertheless possible for an obligation on the part of the Member States to grant special reference quantities to the abovementioned producers to be founded on those same principles?

#### IV — Reply to the preliminary questions

##### A — *The letter and intendment of the first indent of Article 3(1) of Regulation No 857/84*

18. In its judgment in Joined Cases 196/88 to 198/88 *Cornée and Others v Copall and Others*,<sup>16</sup> the Court held (paragraph 13) that from the wording of the first indent of Article 3(1) of Regulation No 857/84 it is clear that it 'grants to the Member States a discretionary power to decide whether special reference quantities

should be allocated to the producers mentioned in that provision and, if so, to determine their size.'<sup>17</sup>

19. I would recall that under the provision at issue, whereby producers who adopted a development plan lodged before 1 March 1984, *may* obtain, if the plan is still being implemented, a special reference quantity taking account of the milk and milk product quantities provided for in the development plan, the terms of that provision could not in fact in themselves be capable of justifying many uncertainties particularly in view of the fact that under paragraph 3 of Article 3 producers whose milk production during the reference year taken into account for the determination of the reference quantity has been affected by exceptional events 'shall obtain, on request' (not merely *may* obtain) reference to another calendar reference year.

20. A purposive view of the provision could lead to a different conclusion: the Supreme Court points in this connection to the third recital in the preamble to Regulation No 857/84 which states that 'the Member States should be enabled to adapt the reference quantities to take into account the special situation of certain producers and to

17 — In its judgment in Case C-16/89 *Spronk* [1990] ECR I-3185, paragraph 12, the Court held that the Member States have an identical discretionary power in the situation referred to in the second indent of the first subparagraph of Article 3(1) in which the development plan has been implemented after 1 January 1981.

16 — Joined Cases 196/88 to 198/88 [1989] ECR 2309.

establish for this purpose, as necessary, a reserve within the abovementioned guaranteed quantity.’

thus constitutes the cornerstone of the arguments developed in the observations submitted to the Court.

B — *The contested provision in the light of the general principles of Community law*

21. In my opinion that recital, which merely states that Member States *should be enabled* to take into account special situations, provides no interpretative aid capable of leading to a different conclusion than that which is demanded by a literal construction of the provision.<sup>18</sup> Moreover, the mere fact that Article 3(1) requires the situations of certain producers to be taken into account is not sufficient, in itself, to warrant the view that the Member States are obliged to grant special reference quantities to such producers.

a) The principles of legal certainty and of the protection of legitimate expectations

22. Under those circumstances, it would be otherwise only if it were adjudged that in furtherance of the abovementioned objective the Community legislature, and the authorities of the Member States applying the relevant Community legislation, were bound by the general principles of Community law in the light of which the provision in question falls to be interpreted. That is the central question raised by the Supreme Court which

23. The linkage made in the order for reference between the principle of legal certainty and the principle of the protection of legal expectations renders it necessary for me to give a cursory elucidation of the connection between the two principles. It is certainly true that the principles are so closely connected as frequently to give the impression that the two principles are absolutely interchangeable. However, I consider that the Court’s case-law provides sufficient elements to enable certain demarcation lines to be drawn between the two notions.

24. Evidently, both principles are a corollary of the principle of legality. The latter principle would remain a dead letter if the principles of Community law (and the specific rules adopted in implementation thereof) did not have sufficient clarity to enable the Community institutions (or the national authorities acting in pursuance of Community provisions) to know precisely the limits of their competences, and individuals to act in full

18 — Characteristically, Advocate General Van Gerven in his Opinion in *Cornée and Others*, cited above, relies on the third recital in the preamble to Regulation No 857/84 as an argument in support of the view that the provision in question confers a wide margin of appreciation on Member States (see paragraph 15 of the Opinion). It is moreover apparent from the whole of the *Cornée* judgment (see in particular paragraph 12) that the Court’s view as to whether the provision at issue merely grants a discretion is expressed in full awareness of the objective pursued.

knowledge of the extent of their rights and obligations in the Community legal order. Particularly for the individual the principle of legality would in many ways lose its significance as a guarantee of a sphere of freedom, if the temporal succession of legal provisions concerning him was not governed by an elementary consistency and coherence sufficient to enable him to discern the consequences (legal and financial) of his activities.

25. Thus the principle of legal certainty calls for clarity and accuracy in framing the rules of law, and the individual provisions giving effect to them, which *at a given moment in time* constitute the legal framework within which the competences of the institutions are exercised and the activities of individuals are carried on.<sup>19</sup> The principle of the protection of legitimate expectations requires the Community legislature and the other Community organs (or the national authorities operating under provisions of Community law) to exercise their powers *over a period of time* in such a way that situations and relationships lawfully created under Community law are not affected in a manner which could not have been foreseen by a diligent person.

19 — The consistency underpinning that principle is reflected in the idea often repeated in judgments of the Court according to which 'the principles of legal certainty and the protection of individuals require, in the areas covered by Community law, an unequivocal wording which gives the persons concerned a clear and precise understanding of their rights and obligations' (see for instance the judgment in Case C-119/92 *Commission v Italy* [1994] ECR I-393, paragraph 17).

26. If the distinction which I have drawn is correct the principle of legal certainty, as defined above, cannot of itself found an obligation on the part of the Community legislature to make mandatory provision for the grant by the Member States of special reference quantities to producers such as those referred to in the first indent of Article 3(1) of Regulation No 857/84. Certainly, the question whether the principle of the protection of legitimate expectations imposes such an obligation on the Community legislature is a much more difficult question.

27. It should be pointed out, even at this juncture that in the *Cornée and Others* case cited above (paragraph 18) the question before the Court for a preliminary ruling was whether the principle of the protection of legitimate expectations precluded national rules from implementing the additional levy scheme on milk in such a way that producers implementing a development plan under Directive 72/159/EEC approved before the entry into force of the levy scheme were granted for the 1985-1986 marketing period smaller reference quantities than those for the preceding period.

28. In answering that question the Court first observed (paragraph 26) that 'the implementation of a milk production development plan which has been approved by the competent national authorities does not confer on the producer concerned the right to produce the quantity of milk corresponding to the plan's objective without being subject to

any restrictions stemming from Community rules adopted after the plan was approved, in particular in the context of market or structural policy, unless those restrictions affect the producers having such a plan in a specific way, owing precisely to the implementation of their plan.' Consequently, the Court went on to say (paragraph 27 of the judgment) that 'when a common organization of the agricultural markets provides for the imposition of a levy on deliveries of products which exceed certain reference quantities, in order to reduce structural surpluses on the market in question, producers having a development plan, even one approved prior to the entry into force of the levy scheme, cannot rely on any alleged legitimate expectation based on the implementation of their plan in order to oppose any reductions in such reference quantities, provided that the reductions are permitted under the relevant Community rules and do not relate specifically to the reference quantities of that category of producer.'

29. There then followed the judgment in *Spronk* (already referred to in footnote 17) in which the Court first made clear (paragraph 16) that 'the implementation of a milk production development plan in no circumstances confers on the producer concerned the right to obtain reference quantities corresponding to the production capacity acquired by implementing the plan, without being subject to any reductions.' It then went on to hold (paragraph 28) that national rules which provide for reductions in the reference quantities granted to producers (whether under a development plan or not) to vary according to the time which has elapsed between the carrying out of the investments and the entry into force of the

additional levy system is compatible with the principle of proportionality. Finally, (paragraph 29), the Court held that 'this view is not altered by the fact that such national rules may mean that no special reference quantity is allocated to a number of producers who have carried out investments or, at least, that the special reference quantity allocated to them is substantially lower than the production capacity acquired as a result of the investments made', given that 'producers who have carried out investments, even as part of a development plan, cannot rely on any alleged legitimate expectation based on the investments carried out in order to claim a special reference quantity allocated precisely because of such investments.'

30. An initial reading of the judgments in *Cornée* and *Spronk* could lead one to believe that the question raised by the Supreme Court as to the significance of the principle of the protection of legitimate expectations as regards the treatment, in the context of the additional levy scheme, of producers who had signed a development plan has already been answered by the Court. Against that view it might be concluded that:

- (1) *Cornée* merely stated that the principle of the protection of legitimate expectations does not in principle preclude national rules which provide for *reductions* in the special reference quantities to be granted

to the abovementioned producers under national legislation;

(2) in *Spronk* the Court merely held that the principle of the protection of legitimate expectations does not preclude national rules which provide for the grant of special reference quantities even if the implementation of such rules may in the result lead to a situation in which no reference quantity is granted to certain producers who have adopted a development plan; and

(3) consequently, it remains an open question whether the principle of the protection of legitimate expectations requires the Community legislature to direct that special mandatory provisions binding on the Member States be enacted which, irrespective of the other terms and conditions which they lay down, would as a matter of course enshrine the principle that special reference quantities are to be granted to the producers in question.

31. Accordingly, in the light of the rulings in *Cornée* and *Spronk*, the question arising in the present case formulated in another way is whether the adoption of a development plan under Directive 72/159/EEC and the national provisions transposing the directive into national law, although not capable of justifying a belief that it would confer a right, irrespective of any limits imposed by

subsequent Community legislation, to produce the quantity of milk corresponding to the objectives of the development plan, might nevertheless have led a prudent producer to believe that on any amendment of the rules governing the common organization of the market in milk, the Community legislature (or the national legislature acting under Community legislation) *would not in any event completely ignore*, the quantities which might be appropriately granted after completion of the development plan?

32. In order to reply to that question it is of course essential to examine the content and objectives of the Community legislation under which the development plans were implemented in order to verify whether 'the Community itself has previously created a situation which can give rise to a legitimate expectation'.<sup>20</sup>

33. Council Directive 72/159/EEC of 17 April 1972<sup>21</sup> provided in Article 1(1) that, with a view to bringing about structural conditions conducive to a significant improvement in agricultural incomes and working and production conditions in agriculture,

20 — See judgment in Case C-177/90 *Kühn v Landwirtschaftskammer Weser Ems* [1992] ECR I-35, paragraph 14.

21 — Council Directive 72/159/EEC of 17 April 1972 on the modernization of farms (OJ, English Special Edition 1972 (II), p. 324). That directive was repealed by Article 33(2) of Council Regulation No 797/85 of 12 March 1985 on improving the efficiency of agricultural structures (OJ 1985 L 93, p. 1). See also Council Regulation (EEC) No 2328/91 of 15 July 1991 which bears the same title (OJ 1991 L 218, p. 1).

Member States were to introduce a system of selective incentives to farms suitable for development, designed to encourage their operation and development under rational conditions. In order to benefit from the incentive scheme, the persons concerned were required to submit applications to the competent authorities of the Member States accompanied by the development plan for the business which had to show that on completion of the plan the holding would be able to obtain a level of earned income comparable to that received for non-agricultural work in the region in question (see Article 2(1)(d), Article 4(1) and Article 5(1)). Producers whose development plans were approved entered the incentive scheme which included, *inter alia*, aids in the form of interest rate subsidies for the investments necessary for carrying out the development plan (Article 1(1)).<sup>22</sup>

34. Moreover, the preamble to the directive states that:

(1) 'Agricultural structure within the Community is typified by the existence of a large number of farms which lack the structural conditions necessary to provide a fair income and living conditions comparable with those of other occupations' (fourth recital);

(2) 'In the future, the only farms capable of adjusting to economic developments will

be those on which the farmer has adequate occupational skill and competence, on which profitability is verified by accounts and which are capable, through the adoption of rational methods of production, of assuring a fair income and satisfactory working conditions for persons working thereon; ... therefore, reform of the structure of agricultural production should be directed towards the formation and development of such farms' (fifth recital);

(3) 'With a view to providing a guideline for the development of such farms, the objective which a development plan must attain both as regards the farm's profitability and as regards the working hours of those employed thereon should be specified' (seventh recital);

(4) 'In order to ensure that public money allocated for the development of farms is indeed used for the benefits of farms which satisfy the required conditions, development plans should be subject to approval by the competent authorities' (ninth recital); and

(5) 'Aids for investment should be granted mainly in the form of interest rate

<sup>22</sup> — The directive was transposed into national law in Ireland by the adoption on 1 February 1974 of the Farm Modernization Scheme.

subsidies, in order to leave economic and financial responsibility for the farm in the hands of the farmer' (eleventh recital).

35. The abovementioned elements suffice, I think, to bring out clearly that the incentive measures for the development of farm businesses provided for in Directive 72/159/EEC sought to ensure a level of agricultural income comparable to that achieved in other occupations, principally by the adoption of rational methods of production on agricultural holdings.<sup>23</sup> The *quantitative increase* in production of an agricultural holding subject to the incentive scheme did not constitute an aim in itself for the system introduced by Directive 72/159/EEC. The Community legislature was therefore not obliged to have regard to the fact that in order to ensure continuity of Community policies the level of production to be attained under the application of a development plan lodged under the abovementioned directive had at all events to be taken into consideration on the subsequent adoption of measures in the relevant sector. Nor is any different conclusion justified by the mere fact that the development plan submitted was adopted after approval by the competent national authority, given moreover the fact that approval was intended to ensure, as may be inferred from the ninth recital in the preamble to the directive, the quite specific function of the proper use of public money allocated under a development plan.

36. If the submission and approval of a development plan in respect of a farm business under the incentive scheme introduced by Directive 72/159/EEC cannot be regarded as creating a reasonable expectation on the part of interested persons that the Community legislature, in the exercise of its wide discretionary power in the field of the common agricultural policy, would in some way take into account the production quantities resulting from the completion of the development plan, that applies *a fortiori* in a sector such as that of milk production which is characterized by structural surpluses owing to the continuous increase in production and stagnation of demand.<sup>24</sup>

37. Any prudent and informed producer<sup>25</sup> ought in fact, to have known at least at the time when the appellants in the main proceedings adopted their development plans and, in particular, in the light of the series of

23 — Cf. judgment in Case 107/80 *Cattaneo Adorno v Commission* [1981] ECR 1469, paragraphs 18 and 19).

24 — According to paragraph 1.1 of Special Report No 2/87 by the Court of Auditors on the additional levy system in the milk sector (OJ 1987 C 266, p. 1) the Community reached 100% self-sufficiency in 1974, whilst between 1973 and 1981 milk deliveries grew at 2.5% per annum. In the same period internal consumption grew at only 0.5% per annum.

25 — Under settled case-law (see judgments in Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 37, Case 246/87 *Continentrale Produkten-Gesellschaft* [1989] ECR 1151, paragraph 17, Case 265/85 *Van den Bergh en Jurgens* [1987] ECR 1155, paragraphs 44 et seq., and Case 78/77 *Lührs* [1978] ECR 71, paragraph 6), the question whether the activity of the Community bodies is compatible with the principle of the protection of legitimate expectations must always be examined regard being had to the knowledge and information which is or should be available to a prudent and informed businessman (and thus the expectations which he was entitled to entertain) (see in that connection Eleanor Sharpston, *Legitimate Expectations and Economic Reality*, *European Law Review* 1990, p. 103, in particular, p. 150).

measures with which the Community legislature, prior to the introduction of the additional levy scheme, sought to confront the situation,<sup>26</sup> (1) that the development plan lodged for approval was going to be implemented in a sector in which, owing to the continued increase in production, the balance between supply and demand had been seriously affected and that (2) for that reason possible legislative intervention in order to curb production could not be excluded.

38. In sum, there could be no solid foundation for expecting that the adoption of a milk development plan whose provisions did not in themselves seek to bring about an increase in production would ensure a minimum level of special treatment by the Community legislature for the producer adopting such a plan based on the idea that the level of production sought to be attained on completion of the plan should be taken into account, when the plan was to be implemented in a sector in which the legislature had already

intervened in order to limit production. The Community legislature, in the context of subsequent intervention in that sector, was not *obliged* to make provision for special treatment for that category of producers as opposed to other milk producers.

39. The appellants in the main proceedings refer on a number of occasions to the judgments in *Mulder I* and *Van Deetzen I*.<sup>27</sup> In their view the factors which in those cases led the Court to hold that there had been an infringement of the principle of the protection of legitimate expectations also apply in the present case.

40. In those judgments it was held that Regulation No 857/84, as supplemented by Commission Regulation No 1371/84 was invalid for breach of the principle of the protection of legitimate expectations, in so far as it did not provide for the allocation of a reference quantity to producers (known as 'SLOM producers') who, pursuant to an undertaking entered into under Regulation No 1078/77, did not deliver milk during the reference year adopted by the Member State concerned.<sup>28</sup>

26 — See in particular Council Regulation (EEC) No 1079/77 of 17 May 1977 (OJ 1977 L 131, p. 6) introducing a co-responsibility levy on all milk producers intended to reduce the structural surpluses on the market and in order to establish 'a more direct link ... between production and outlets for milk products' (see second recital in the preamble to the regulation) (see judgments in Case 138/78 *Stöltzing* [1971] ECR 367 and Case 179/84 *Bozzetti v Invernizzi* [1985] ECR 2301). That levy originally imposed until the end of the 1979 to 1980 marketing period was finally maintained in force after successive extensions until 1 April 1993 (see Article 1 of Council Regulation No 1029/93 of 27 April 1993, OJ 1993 L 108, p. 4).

In connection with structural surpluses on the market for milk and in order to curb production the following rules were also adopted: (1) Council Regulation (EEC) No 1078/77 of 17 May 1977 (OJ 1977 L 131, p. 1) introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (2) Council Regulation (EEC) No 1081/77 of 17 May 1977 (OJ 1977 L 131, p. 10) suspending the aid granted under Directive 72/159/EEC for the purchase of dairy cows and (3) Council Regulation (EEC) No 1946/81 of 30 June 1981 (OJ 1981 L 197, p. 32) imposing restrictions on investment aid in the field of milk production.

27 — Judgments in Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321 and *Von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355.

28 — See also judgments in Case C-189/89 *Spagl* [1990] ECR I-4539 and C-217/89 *Pastätter* [1990] ECR I-4585.



41. I would remind the Court of the reasoning in support of that view (paragraphs 23 to 26 of the *Mulder I* judgment and paragraphs 12 to 15 of *Van Deetzen I*:

(1) SLOM producers could not legitimately expect to be able to resume production under the same conditions as those which previously applied and not to be subject to any rules of commercial or structural policy adopted in the meantime;

(2) however, inasmuch as those producers were encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of premiums, they could legitimately expect on expiry of their undertakings not to be subject to restrictions specifically affecting them because they availed themselves of the possibilities offered by the Community provisions;

(3) under the additional levy scheme those producers could in fact be denied a reference quantity precisely because of that undertaking;

(4) total and continuous exclusion for the entire period of application of the scheme preventing the producers concerned from resuming the marketing of milk was not foreseeable at the time when they gave their undertaking provisionally not to deliver milk, either on the basis of the provisions of Regulation No 1078/77 or from the recitals in its preamble.

42. The differences between the situation of SLOM producers and that of the producers referred to in the first indent of Article 3(1) of Regulation No 857/84 would appear therefore to be appreciable. SLOM producers were excluded from the grant of reference quantities precisely because they gave an undertaking under the relevant Community provisions not to deliver milk for a certain period. That absolute exclusion from a scheme to which in principle all other milk producers are subject<sup>29</sup> could not have been foreseen when those producers gave the provisional undertaking referred to above. On the other hand, by not making mandatory provision for the grant of special reference quantities to producers who had adopted a development plan, the Community legislature imposed on them no specific restriction

<sup>29</sup> — See also the further clarification given particularly in this connection in the judgments in Case C-44/89 *Van Deetzen II* [1991] ECR I-5119, paragraph 21, and the *Herbrink* judgment (already cited above in footnote 15), paragraph 15.

inherent in the application of the plan,<sup>30</sup> but made it possible for those producers to be made subject to precisely the same restrictions as all milk producers, save where a Member State made use of its discretionary power. However, as stated, there is nothing to allow producers belonging to the latter category reasonably to entertain the conviction that the adoption by them of a development plan would secure for them special treatment in contrast to other producers, should measures to curb milk production be introduced.

b) The principle of the prohibition of discrimination

43. According to settled case-law<sup>31</sup> the prohibition of discrimination as between producers or consumers in the Community laid down in the second subparagraph of Article 40(3) of the Treaty is a specific enunciation of the principle of equality which prohibits not only similar situations from being treated differently but also different situations from being treated identically (unless such differentiation is objectively justifi-

fied).<sup>32</sup> It may be directly inferred from the order for reference as a whole, read in conjunction with the submissions made by the appellants in the main proceedings in their observations to the Court (see page 27) that the national court is raising the question of the validity and interpretation of the provision in question in regard to the second aspect of the principle of equality referred to above: Was the Community legislature required, in order to observe that principle, to provide, as against other milk producers, for special treatment to be accorded to those milk producers who had adopted a development plan, by making it obligatory for special reference quantities to be granted to them?

44. A *sine qua non* of such an obligation would be a finding that those producers were differentiated to such a degree from other milk producers as to require the Community legislature on the introduction of the additional levy scheme to take care to make special provision for them by adopting the requisite derogations from the general principles of the scheme.

45. However, the mere fact that those producers differ from the other producers subject to the additional levy scheme, inasmuch as they adopted a development plan under Directive 72/159/EEC (and, as stated in the

30 — See in that connection paragraph 27 of the oft-referred to *Cornée* judgment: 'Producers having a development plan, even one approved prior to the entry into force of the levy scheme, cannot rely on any alleged legitimate expectation based on the implementation of their plan in order to oppose any reductions in such reference quantities, provided that the reductions are permitted under the relevant Community rules and do not relate specifically to the reference quantities of that category of producer' (emphasis added).

31 — See, *inter alia*, judgments in Case 245/81 *Edeka v Germany* [1982] ECR 2745, paragraph 11; Joined Cases 201/85 and 202/85 *Klensch v Secrétaire d'Etat* [1986] ECR 3477, paragraph 9; Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 13, and Case C-351/92 *Graff v Hauptzollamt Köln-Rheinau* [1994] ECR 3361, paragraph 15.

32 — See for example judgments in Case 13/63 *Italy v Commission* [1963] ECR 165, paragraph III(4)(a); Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25; and Case C-306/93 *S.M.W. Winzersekt* [1994] ECR I-5555, paragraph 30.

first question submitted by the Supreme Court 'had invested substantial sums of borrowed monies in furtherance of such plans') is not sufficient in itself to establish any such obligation on the part of the legislature. It is further necessary to examine whether those factual circumstances were of significance in the present case, *in the light of the objective pursued by the measures in question and the means chosen for its attainment*.<sup>33</sup>

46. Viewed in that light the conditions under which the above producers operated did not demand any special treatment in the manner described above. As the Court has repeatedly held<sup>34</sup> the introduction of the additional levy scheme sought to restore equilibrium in the market in milk which was characterized by structural surpluses, by means of limits on production. Consistently with that objective of curbing milk production<sup>35</sup> the Community legislature placed at the heart of the system the obligation to pay additional levy whenever it was found that a certain quantity of milk production had been exceeded (reference quantity) representative of the quantity delivered by the producer or purchased by the purchaser during the relevant reference year. Thus, because the specific conditions under which milk production is

carried on, for example under a development plan adopted by certain producers (whose approval by the competent administrative authority, I would recall, did not guarantee that production levels on completion of the plan would be taken into account in subsequent legislation) or in the context of financial investments, had no direct impact on the quantities of milk offered in the reference year, they cannot constitute a criterion bringing such producers into a special category for which the Community legislature was required, in order to restore observance of the principle of equality, to introduce derogations from the additional levy scheme.<sup>36</sup>

c) The principle of proportionality

47. The question also arises as to whether an obligation on the part of the Community legislature to make mandatory provision for

33 — See in that connection the judgments in Case 6/71 *Rheinmühlen v Einfuhr-und Vorratsstelle Getreide* [1971] ECR 951, paragraph 14; Joined Cases 31/82, 138/82 and 204/82 *Metallurgiki Halyps v Commission* [1983] ECR 4193, paragraph 12; and Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraphs 69 et seq. and, in particular, 74. See also in that connection K. Lenaerts, *L'égalité de traitement en droit communautaire: Un principe unique aux apparences multiples*, Cahiers de droit européen 1991, p. 3 et seq. and, in particular paragraph II A7.

34 — See for example judgments in Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 26, and Case C-290/91 *Peter* [1993] ECR I-0000, paragraph 13 (not yet published in the Reports of cases before the Court); and the judgment in *Graff*, already cited above in footnote 31, paragraph 26.

35 — That objective has been held (see the *Erpelding* judgment referred to in the previous footnote, paragraph 26) to be consistent with Article 39(1) of the Treaty.

36 — See in that connection *Bozzetti v Invernizzi* already mentioned above (footnote 26). According to paragraph 34 of that judgment (which was delivered on a request for a preliminary ruling concerning the meaning and validity of Regulation No 1079/77 on a co-responsibility levy in the milk sector): 'The fact that the introduction of the co-responsibility levy under the common organization of the market may affect producers in different ways, depending upon the particular nature of their production or on local conditions, cannot be regarded as discrimination prohibited by Article 40(3) of the Treaty if the levy is determined on the basis of objective rules, formulated to meet the needs of the general common organization of the market, for all the products concerned by it.'

the grant by the Member States of special reference quantities to producers who have adopted a development plan may be founded on the principle of proportionality.

48. The observations of the appellants in the main proceedings lodged with the Court (see page 28) convey the impression that they entertain doubts concerning the extent to which the discretionary power conferred on the Member States as to the grant of special reference quantities to the abovementioned producers was appropriate for the purpose of attaining the objective of the additional levy scheme. However, it may, I think, clearly be inferred from the observations as a whole that the appellants in the main proceedings principally have doubts as to the extent to which the discretion in that regard conferred on the Member States was necessary in order to attain the objective of the scheme, given that, in their view, the failure to grant special reference quantities merely resulted in an insignificant increase in the reference quantities of other producers disproportionate to the extent of the damage suffered by producers who had adopted a milk production development plan.

49. However, it is clear from the Court's settled case-law that its review in the light of the principle of proportionality of measures adopted by the Community legislature, especially in the sphere of the common agricultural policy, is particularly circumscribed.

Indeed, a measure imposing a financial burden on individuals must under that principle be appropriate and necessary for the attainment of an objective in keeping with the Community legal order and it must constitute the least burdensome solution amongst several measures appropriate for the attainment of the objective and, finally, must not impose a burden which is disproportionate to the objective pursued. Review of the extent to which the regulatory activity of the Community legislature in matters concerning the common agricultural policy satisfies those preconditions is always conducted in the light of the wide discretion enjoyed by the Community legislature in that sphere. Thus, the lawfulness of a measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate*, having regard to the objective pursued.<sup>37</sup>

50. I have already recalled (see paragraph 46 above) that the Court has repeatedly held that the additional levy scheme seeks to restore equilibrium as between supply and demand in the market for milk by means of curbs on production. It has also been held<sup>38</sup> that the additional levy system corresponds to the objectives of the rational development of milk production and the maintenance of a fair standard of living for the agricultural community, contributes to the stability of agricultural income and, accordingly, is in keeping with subparagraphs (a) and (b) of

37 — See *inter alia* the *SMW Winzersekt* judgment (already cited above in footnote 32), paragraph 21, also *Germany v Council*, paragraphs 89 et seq. (also cited above in footnote 33) and judgments in Case C-331/88 *FEDESA* [1990] ECR I-4023, paragraph 14 and in Case 265/87 *Schröder* [1989] ECR 2237, paragraphs 21 and 22.

38 — See the judgment in *Erpelding*, paragraph 26, (cited above in footnote 34) and the judgment in *Kühn* also cited above (footnote 20), paragraph 17.

Article 39(1) of the Treaty. I do not consider that the absence of provision (or the merely discretionary provision) for the grant by the Member States of special reference quantities to producers who had adopted a development plan may be deemed to be a manifestly inappropriate measure for the purpose of attaining the abovementioned objective of the scheme. In order to deal with the various surpluses in the market for milk, the solution chosen, which as I have explained, was in keeping with the relevant Treaty provisions, was a curb on milk production. The absence of provision (or the merely discretionary provision) for the grant of special reference quantities not corresponding to quantities of milk actually delivered in the years prior to the enactment of the levy is in principle consistent with the logic of the scheme.

d) The principle of the protection of fundamental rights

51. Finally, the Supreme Court requests the Court to assess the first indent of Article 3(1) of Regulation No 857/84 in the light of the principle of the protection of fundamental rights.

52. The order for reference does not expressly mention fundamental rights though the need for their protection arises in

connection with the question touching the validity and interpretation of the provision in question. In the light, however, of the observations lodged by the appellants in the main proceedings, on the one hand, and the need to give the national court the fullest possible answer, on the other, it must be acknowledged that those fundamental rights are the right to property and the right to the untrammelled exercise of an economic activity.

53. I would recall in this connection that the Court made a written request to the appellants and the respondents in the main proceedings, the Council and the Commission, to give their view at the hearing on the possible relevance to the present case of the judgment in Case C-2/92 *Bostock*.<sup>39</sup> In that case the question arose whether, under the provisions of the additional levy scheme providing for the transfer of the reference quantity to the landlord on expiry of a lease, the right to property required the Member State to make provision for compensation to be paid to the outgoing tenant by the landlord or to confer on the tenant a direct right of action to make such a claim before the courts. The Court answered in the negative, holding (paragraph 19) that 'the right to property safeguarded by the Community legal order does not include the right to dispose, for profit, of an advantage such as the reference quantities allocated in the context of the common organization of a market, which does not derive from the assets or occupational activity of the person concerned (judgment in Case C-44/89 *Von*

<sup>39</sup> — *Bostock* [1994] ECR I-955.

*Deetzen v Hauptzollamt Hamburg-Jonas (Von Deetzen II)* [1991] ECR I-5119, paragraph 27).<sup>3</sup>

54. I do not consider that that judgment concerning the extent of the right of property has any real relevance to the present case. The question concerning the right of property raised in the present case is not about whether a reference quantity granted under the additional levy scheme constitutes an asset covered by the right of property such that its removal may confer entitlement to compensation,<sup>40</sup> the question is rather whether the right of unimpeded use and enjoyment of the assets of a milk producer is infringed to an unacceptable degree by a restriction consisting in the grant of a reference quantity determined without account being taken of the fact that that producer is in the course of implementing a development plan which will subsequently result in production levels higher than those achieved in the year in which the scheme was introduced.

55. Of central importance in the examination of this question is the Court's settled

40 — In that respect the facts of the present case also differ from those in regard to which a preliminary ruling was given in the judgment in Case 5/88 *Wachauf* [1989] ECR 2609.

case-law,<sup>41</sup> according to which the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law, but are not absolute values since they must be viewed in relation to their social function. Thus, the exercise of those rights may be restricted, particularly in the context of the common organization of a market. Those restrictions must nevertheless correspond in fact to objectives of general interest pursued by the Community and may not, viewed in relation to their objectives, constitute a disproportionate and intolerable interference, impairing the very substance of the abovementioned rights guaranteed by the Community legal order.

56. Certainly, it cannot be doubted that the additional levy scheme constitutes a severe abridgement of the right of milk producers to exploit their assets but also of their right freely to pursue their trade. Nor may it be doubted that those restrictions must have been acutely felt from a financial point of view by milk producers, such as the appellants in the main proceedings, who had adopted development plans which had not been completed at the time when the levy scheme was introduced. Viewed in that light does the absence of provision (or the merely discretionary provision) for the grant of special reference quantities to those producers constitute an abridgement of the abovementioned

41 — See amongst recent decisions the judgment in *SMW Winzerzeit*, paragraph 22, already cited above (footnote 32) and *Germany v Council*, paragraph 78, also cited above (footnote 33). See also the judgment in *Kühn*, paragraph 16 (cited above in footnote 20), the judgment in *Deetzen II*, paragraph 28, (cited above in footnote 29), the judgment in *Wachauf*, paragraph 18, (cited above in footnote 40), the judgment in *Schröder*, paragraph 15, (cited above in footnote 37), and, finally, the judgment in *44/79 Hauer* [1979] ECR 749, in particular paragraphs 23 and 32.

tioned fundamental rights which cannot be tolerated by the Community legal order?

the substance of the appellants' property rights is left intact.<sup>44</sup>

*C — The application of the provision in question by the Member States*

57. It is undeniable that the set of provisions which constitute the additional levy scheme and seek to deal with the problem of structural surpluses in the market for milk accord with objectives pursued by the Community in the general interest.<sup>42</sup> Moreover, as already stated (see paragraph 50 above), the refusal to grant special reference quantities to producers who had adopted development plans cannot, in the light of the wide discretionary power enjoyed by the Community legislature in that sphere, be regarded as disproportionate to the scheme's objective. Furthermore, the failure to grant such special reference quantities is capable certainly of having an effect on the financial returns of the agricultural holdings in question or indeed may seriously jeopardize their financial position.<sup>43</sup> However, in my view, that refusal cannot itself be regarded as directly leading to a definitive and complete bar on the use and enjoyment of the assets belonging to the milk producers concerned (either in the context of milk production or in the context of any other business) or as debarring them from the possibility of actually carrying on their livelihood. Consequently

58. It follows from the foregoing that the principles of legal certainty, the protection of legitimate expectations, the prohibition of discrimination, of proportionality and the protection of fundamental rights do not require the Community legislature to make mandatory provision for the grant by the Member States of special reference quantities to producers who had adopted development plans under Directive 72/159/EEC.

59. The Community legislature thus had the possibility either of making no provision at all for the grant of special reference quantities to the abovementioned category of producers or of conferring a discretion in that respect on the Member States (as it in fact did in the first indent of Article 3(1) of Regulation No 857/84) in order to give the Member States a choice between two solutions, both legitimate in the light of the general principles of Community law: that is to

42 — See in particular the judgment in *Kühn*, paragraph 17 (cited in footnote 20).

43 — In their observations to the Court the appellants in the main proceedings stated that that in fact is what is happening to at least seven of them (see in particular pages 2 and 3 of those observations).

44 — See the judgment in *Kühn* (footnote 20), paragraph 17. See also judgment in Case 258/81 *Metallurgiki Halyps v Commission* [1982] ECR 4261, paragraph 13, and the judgment in Joined Cases 172/83 and 226/83 *Hoogovens Groep* [1985] ECR 2831, paragraph 29, according to which restrictions on production imposed owing to the economic situation cannot be regarded as constituting an infringement of the right of property on the ground that they may harm the profitability or the existence of certain undertakings.

say the adoption of provisions granting special reference quantities to those producers or the non-adoption of any such provisions at all. Under those circumstances, the choice of the latter of the two solutions cannot in my view (having regard for example to the particular situation prevailing in a Member State) constitute an infringement of the general principles of Community law in a situation in which those principles are binding not only on the Community bodies but also on the authorities of the Member States when they are exercising competences conferred by Community legislation.<sup>45</sup> However, that binding effect is *exactly the same* for both national and Community authorities. If the general principles mentioned above impose no obligation on the Community legislature to provide for the grant by the Member State of the abovementioned special reference quantities, then nor is it possible for any such obligation on the part of the authorities of the Member States to be founded on those same principles.<sup>46</sup>

60. It is, I think, useful to add that, although the abovementioned general principles of

Community law can provide no basis for a requirement on the part of Member States to provide for the grant of special reference quantities to the producers referred to in the first indent of Article 3(1) of Regulation No 857/84, there is nothing to prevent such a requirement from being founded *on principles of national law* which, in an appropriate case, may ensure greater protection in this respect than that afforded by the general principles applicable in the Community legal order.

61. That possibility in no way jeopardizes the uniform application of Community legislation since the first indent of Article 3(1) of Regulation No 857/84 specifically gave the Member States the possibility of adopting different solutions as regards the grant or otherwise of special reference quantities. It should, however, be emphasized that the application of a principle of national law in order to found such an obligation on the part of the relevant Member State is subject to exactly the same restrictions as those to which national law is in any event subject when it gives effect to provisions of Community law. Thus, that principle will have to be applied in exactly the same manner as it is applied in areas unconnected with Community law, whilst, furthermore, the application thereof must not lead to any substantive alteration of the rules governing the additional levy scheme on milk, jeopardize the effectiveness of the scheme or compromise

45 — See the judgment in *Wachauf* (footnote 40), paragraph 19, the *Cornée* judgment, particularly paragraph 14, (referred to in footnote 16), the judgment in *Spronk*, in particular paragraphs 13, 17 and 28 (referred to in footnote 17) and the *Klensch* judgment, in particular paragraphs 8 and 9 (referred to in footnote 31).

46 — It is of course entirely different if the Member States avail themselves of the discretion conferred on them by the Community legislation to introduce a scheme for the grant of special reference quantities to producers who had adopted a development plan. The provisions governing that scheme, even if *the introduction thereof* is not required by general principles of Community law, must (just as any other legislative or individual provision enacted by a Community body or by a national authority in the exercise of its competences under Community law) remain within the limits laid down by the abovementioned general principles. That is in any event the logical thread running through the frequent references to the judgments in *Cornée* (see in particular paragraphs 13 to 16, 21, 22 and 25 et seq.) and *Spronk* (see in particular paragraphs 13 to 17, 28 and 29).



the successful attainment of its objectives.<sup>47</sup> It goes without saying that it is not for the Court but for the national court to examine whether there are any principles of *national law* capable of imposing on the relevant

Member State an obligation to grant special reference quantities to the producers to whom the contested provision of Regulation No 857/84 refers.

## Conclusion

62. In the light of all the foregoing I propose that the Court should give the following reply to the questions submitted by the Supreme Court:

- '(1) The first indent of Article 3(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 confers on Member States a discretionary power whether or not to provide for the grant of special reference quantities to the producers referred to in that provision. The matters referred to in the third recital in the preamble to Council Regulation (EEC) No 857/84 are not sufficient to support an interpretation of the abovementioned provision to the effect that the Member States should be required to make mandatory provision for the grant of the special reference quantities referred to.
  
- (2) The general principles of Community law and, in particular, the principles of legal certainty, the protection of legitimate expectations, proportionality and the protection of fundamental rights and the principle of equality, of which the

<sup>47</sup> — See in that connection the judgment in Joined Case 205/82 to 215/82 *Deutsche Milchkontor v Germany* [1983] ECR 2633, paragraphs 30 et seq., in particular paragraph 33, and in the sphere of Community legislation on the additional levy scheme on milk the judgment in *Peter* (cited above in footnote 34), paragraphs 8 et seq. See also points 20 et seq. of the Opinion of Advocate General Jacobs in the last mentioned case and points 38 and 39 of the Opinion of Advocate General Van Gerven in Case C-371/92 *Ellinika Dimitriaka* [1994] ECR I-2391.

second subparagraph of Article 40(3) of the EC Treaty constitutes a specific enunciation, did not require the Community legislature to make mandatory provision for the grant by the Member States of special reference quantities to the producers referred to in the first indent of Article 3(1) of Council Regulation (EEC) No 857/84 of 31 March 1984.

- (3) An examination of the first indent of Article 3(1) of Council Regulation (EEC) No 857/84 of 31 March 1988 has disclosed no factors of such a nature as to affect its validity.'