

JUDGMENT OF THE COURT (Third Chamber)

15 July 2004*

In Case C-459/02,

REFERENCE to the Court under Article 234 EC by the Cour de Cassation (Luxembourg) for a preliminary ruling in the proceedings pending before that court between

Willy Gerekens,

Association agricole pour la promotion de la commercialisation laitière Procola

and

State of the Grand Duchy of Luxembourg

on the interpretation of the general principles of Community law of legal certainty and non-retroactivity in respect of national rules in the sphere of milk production quotas which were adopted in place of initial rules held by the Court of Justice to be discriminatory and which make it possible to penalise retroactively production in excess of those quotas after the entry into force of Council Regulation (EEC) No

* Language of the case: French.

856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10) and 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), but in accordance with the national rules which have been replaced,

THE COURT (Third Chamber),

composed of: A. Rosas, acting for the President of the Third Chamber, R. Schintgen and N. Colneric (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Gerekens and the association agricole pour la promotion de la commercialisation laitière Procola, by F. Entringer, avocat,

— the State of the Grand Duchy of Luxembourg, by F. Hoffstetter, acting as Agent, assisted by G. Pierret, avocat,

— the Commission of the European Communities, by G. Berscheid and C. Cattabriga, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By judgment of 14 November 2002, received at the Court on 19 December 2002, the Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the general principles of Community law of legal certainty and non-retroactivity of certain rules of national law on milk production quotas adopted in place of initial rules which were held by the Court of Justice to be discriminatory and under which sanctions could be imposed retroactively where those quotas had been exceeded after the entry into force of Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10) and 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), but under the regime of the national rules which had been replaced.

- 2 That question was raised in proceedings brought by Mr Gerekens, a milk producer, and the association agricole pour la promotion de la commercialisation laitière Procola ('Procola') against the State of the Grand Duchy of Luxembourg in respect of the harm which the State was alleged to have caused to the claimants as a result of errors in the application of the Community rules on the additional levy on milk.

Legal framework

Community rules

- 3 Regulations Nos 856/84 and 857/84 introduced, from 1 April 1984, an additional levy on quantities of cows' milk delivered in excess of a reference quantity to be determined, for each producer or each purchaser, within the limit of an overall quantity guaranteed to each Member State. The reference quantity exempt from the additional levy was equal to the quantity of milk or milk equivalent either delivered by a producer or purchased by a dairy, according to the formula chosen by the Member State concerned, during the reference year.
- 4 According to the second subparagraph of Article 5c(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), as amended by Regulation No 856/84 (hereinafter 'Regulation No 804/68'):

' ...

The levy system shall be implemented in each region of the territory of the Member States in accordance with one of the following formulas:

Formula A

- A levy shall be payable by every milk producer on the quantities of milk and/or milk equivalent which he has delivered to a purchaser and which for the 12 months concerned exceed a reference quantity to be determined.

Formula B

- A levy shall be payable by every purchaser of milk or other milk products on the quantities of milk or milk equivalent which have been delivered to him by a producer and which, during the 12 months concerned, exceed a reference quantity to be determined.
- The purchaser liable to the levy shall 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.'

5 Article 2 of Regulation No 857/84 provides:

'1. The reference quantity referred to in Article 5c(1) of ... Regulation [No 804/68] shall be equal to the quantity of milk or milk equivalent delivered by the producer

during the 1981 calendar year (formula A), or to the quantity of milk or milk equivalent purchased by a purchaser during the 1981 calendar year (formula B), plus 1 %.

2. However, Member States may provide that on their territory the reference quantity referred to in paragraph 1 shall be equal to the quantity of milk or milk equivalent 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 quantity defined in Article 5c of Regulation (EEC) No 804/68. This percentage may be varied on the basis of the level of deliveries of certain categories of persons liable for the levy, of the trend in deliveries in certain regions between 1981 and 1983 or of the trend in deliveries of certain categories of persons liable during this same period, under conditions to be determined according to procedures provided for in Article 30 of Regulation (EEC) No 804/68.

3. The percentages referred to in paragraphs 1 and 2 can be adapted by the Member States to ensure the application of Articles 3 and 4.'

6 Article 4(1)(a) and (2) of Regulation No 857/84 provides:

'1. In order to complete the restructuring of milk production at national or regional level or at the level of the collecting areas, the Member States may, in connection with the application of formulas A and B:

(a) grant to producers undertaking to discontinue milk production definitively compensation paid in one or more annual payments;

...

2. The reference quantities freed shall, as necessary, be added to the reserve referred to in Article 5.'

7 Article 6(1) of 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) provides:

'1. Where formula B is applied, purchasers' reference quantities shall be adjusted to take account of:

...

(d) replacements as referred to in Article 7(2) of Regulation (EEC) No 857/84, including changes by producers from one purchaser to another.'

National rules

8 The Community rules were implemented in Luxembourg, inter alia, for the first period of their application, 1 April 1984 to 31 March 1985, by the Grand-Ducal Regulation of 3 October 1984 concerning the application, in the Grand Duchy of

Luxembourg, of the arrangements for the additional levy on milk (*Mémorial* 1984, p. 1486; 'the 1984 Grand-Ducal Regulation') and, for the following periods, by the Grand-Ducal Regulation of 12 November 1985, bearing the same title (*Mémorial* 1985, p. 1256; 'the 1985 Grand-Ducal Regulation').

9 Of the two implementing formulas available under Article 5c of Regulation No 804/68, the Grand Duchy of Luxembourg had chosen formula B.

10 In accordance with Article 2(1) of Regulation No 857/84, Luxembourg had taken 1981 as the reference year. The basic quantities thus determined were then weighted by certain coefficients which took account of the trend in quantities of milk delivered to the various purchasers between 1981 and 1983 by comparison with the average trend in deliveries in Luxembourg.

11 Under the Luxembourg rules, the individual reference quotas of producers who had voluntarily ceased production could be allocated to the dairies, regarded as purchasers, to which the deliveries had been made rather than to the national reserve, although that possibility was not provided for, in the context of formula B, by Article 7(2) of Regulation No 857/84, read with Article 6(1)(d) of Regulation No 1371/84 and Article 4(1)(a) and (2) of Regulation No 857/84.

12 With regard to that legislation ('the old legislation'), the Court of Justice, in its judgment of 25 November 1986 in Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, ruled as follows:

(1) The prohibition of discrimination laid down in Article 40(3) of the Treaty precludes a Member State from choosing 1981 as the reference year pursuant to Article 2 of Council Regulation No 857/84 of 31 March 1984 if, owing to the particular conditions on the market of that State, the implementation of the option in its territory leads to discrimination between producers within the Community.

(2) Article 2 of Council Regulation No 857/84 of 31 March 1984 precludes, except for those cases expressly provided for in the rules, a Member State which has chosen 1981 as the reference year pursuant to that provision from determining purchasers' reference quantities by weighting the quantity of milk purchased by them during 1981 by a percentage which varies on the basis of the level of deliveries of certain categories of persons liable for the levy.

(3) Council Regulation No 857/84 of 31 March 1984 precludes a Member State which has opted for formula B from adding the individual reference quantity of a producer who has ceased production to the reference quantity of the purchaser to whom that producer was supplying milk at the time when he ceased production, instead of adding it to the national reserve.'

13 Following the judgment in *Klensch and Others*, the Conseil d'État (Council of State) (Luxembourg), by judgment of 26 February 1987, annulled the ministerial decisions fixing the individual quotas on the basis of the national rules in the cases pending before it.

14 As regards the legislative provisions, the Grand-Ducal Regulation of 1985 and other earlier provisions were repealed by Article 17 of the Grand-Ducal Regulation of 7 July 1987 concerning the application, in the Grand Duchy of Luxembourg, of the

arrangements for the additional levy on milk (*Mémorial* 1987, p. 850; 'the 1987 Grand-Ducal Regulation', which introduced new arrangements for the levy ('the new legislation')).

- 15 The 1987 Grand-Ducal Regulation was given retroactive effect by the Law of 27 August 1987 making applicable to the milk years before the 1987/88 milk year the provisions of the Grand-Ducal Regulation of 7 July 1987 concerning the application, in the Grand Duchy of Luxembourg, of the arrangements for the additional levy on milk (*Mémorial* 1987, p. 1698). The single article of that law provides that that regulation is to apply to the 12-month periods of application of the additional levy on milk commencing on 2 April 1984, 1 April 1985 and 1 April 1986, respectively, and provides for a new allocation of reference quantities on the basis of that regulation.
- 16 Article 1 of the 1987 Grand-Ducal Regulation maintains the choice previously made by the Luxembourg authorities, namely formula B. However, according to Article 3 (1) of that regulation the reference year chosen is no longer 1981 but 1983, for which the reference quantities are reduced by a total percentage representing the sum of two components, one of which is determined according to the volume of deliveries of milk to a purchaser by the supplier concerned during 1983 and the other according to the increase, during that year, of milk deliveries to a purchaser compared with those made in 1981 from the same holding. The regulation no longer provides that the individual reference quantities of producers who have ceased their activity are to be allocated to the purchasers of those quantities.
- 17 Following the implementation of those new rules, the Luxembourg Ministry of Agriculture fixed the quotas for the various purchasers for each milk year from 2 April 1984. The Luxembourg authorities did not apply to any of the producers concerned an imposition greater than that which would have been applied by the 1984 and 1985 Grand-Ducal Regulations. The most favourable situation was applied.

Main proceedings and question referred to the Court

- 18 Mr Gerekens is one of the 64 Luxembourg milk producers affiliated to Procola who were required to pay an additional levy on milk for the milk periods 1985/86 and 1986/87. It follows from a letter sent to Procola by the Luxembourg Ministry of Agriculture on 15 March 1988 that the levy payable by Mr Gerekens under the old rules would have been LUF 297 298, whereas the levy payable under the new rules came to LUF 114 860. On the basis of the situation most favourable to the producer, the latter amount was chosen, but it was increased by LUF 14 334 by way of default interest. Mr Gerekens and Procola sought reimbursement of that sum from the State of the Grand Duchy of Luxembourg, relying on the unlawful retroactivity of the applicable national rules. That claim is based on the harm which they claim to have suffered owing to errors committed by the State in the national rules and in the application of the Community provisions on the additional levy on milk.
- 19 Mr Gerekens and Procola were unsuccessful at first instance and on appeal and appealed to the Cour de Cassation.
- 20 Taking the view that the dispute before it raised a question of the interpretation of Community law which had not been the subject-matter of a preliminary ruling in a similar case, the Cour de Cassation decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the general principles of Community law of legal certainty and non-retroactivity mean that, for the application of Community rules establishing production quotas of the type introduced by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market

in milk and milk products ... and 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 ..., a Member State is precluded from adopting, in place of initial rules held by the Court of Justice of the European Communities to be discriminatory, new rules which make it possible to penalise retroactively production in excess of production quotas introduced after the entry into force of the Community regulations but under the aegis of the national rules which have been replaced?’

The question referred to the Court

- 21 The requirements flowing from the protection of the general principles recognised in the Community legal order are also binding on the Member States when they implement Community regulations.
- 22 Those general principles include legal certainty (see Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 24).
- 23 Although, as a general rule, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected (see Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 49, and Case C-110/97 *Netherlands v Council* [2001] ECR I-8763, paragraph 151).

- 24 Likewise, the principle of legal certainty is not infringed by national rules which are applicable retroactively, when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected.
- 25 The aim pursued by the national rules in issue in the main proceedings is to implement the arrangements for the additional levy on milk, in accordance with the obligation placed on Member States by Article 5c(1) of Regulation No 804/68. The purpose of those arrangements is to re-establish, by limiting milk production, the balance between supply and demand in the milk market, which is characterised by structural surpluses (see, in particular, Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 26). Their objective can be attained only if all the quantities produced and coming into the market in one way or another, and thus influencing supply and demand, are taken into account from the first 12-month period beginning 1 April 1984.
- 26 Therefore a Member State would compromise that objective and jeopardise the effectiveness of the arrangements for the additional levy on milk if it did not replace national rules intended to implement those arrangements which proved to be incompatible with Community law by new rules having retroactive effect. There can be no exception to the obligation to implement regulations which introduced the arrangements for the levy on milk, which are mandatory in every aspect from the time when they entered into force.
- 27 Consequently, the aim pursued by national rules such as those in issue in the main proceedings requires that, for the purpose of implementing the arrangements for the additional levy on milk properly and effectively, the arrangements be applied retroactively.
- 28 As regards the possible breach of the legitimate expectations of those concerned, it must be borne in mind that any trader in regard to whom an institution has given

rise to justified hopes may rely on the principle of the protection of legitimate expectations (Case C-22/94 *Irish Farmers Association and Others* [1997]. ECR I-1809, paragraph 25).

29 The principle of the protection of legitimate expectations may be invoked as against particular rules only to the extent that the public authorities themselves have previously created a situation which could give rise to a legitimate expectation (see, to that effect, Case C-179/00 *Weidacher* [2002] ECR I-501, paragraph 31). Furthermore, where a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted (see, to that effect, *Irish Farmers Association and Others*, cited above, paragraph 25).

30 In the present case, the applicants do not invoke an expectation that the 1984 and 1985 Grand-Ducal Regulations would apply permanently. They rely only on their expectation that the new rules would not be retroactive.

31 There is nothing in the history of that legislation, as described by the claimants in the main proceedings themselves in the observations which they have submitted to the Court, from which it might be concluded that traders were able to place their legitimate expectation in the fact that the period between 1 April 1984 and the date on which the 1987 Grand-Ducal Regulation entered into force would not be covered by national rules designed to implement the Community arrangements for the additional levy on milk.

32 It is clear from those observations that the competent national authorities never allowed the slightest doubt to subsist as regards the fact that the 1984 and 1985 Grand-Ducal Regulations would be replaced by new rules having retroactive effect. Only the means whereby such effect would be given to those rules was discussed at national level, in order to ensure that such retroactivity would be consistent with Luxembourg law.

- 33 Thus, traders such as the claimants in the main proceedings must have expected that the 1987 Grand-Ducal Regulation would be implemented with retroactive effect. Furthermore, they would have been able to foresee the adoption of such a measure owing to the continuing production surpluses on the milk market and the obligation placed on Member States to implement the arrangements for the additional levy on milk as soon as they entered into force, on 1 April 1984. Therefore, with effect from the date of entry into force of Regulations Nos 856/84 and 857/84 they could not expect that producers would not be subject to an additional levy on quantities of cows' milk produced in excess of the quotas allocated to those producers.
- 34 Nor is the retroactive effect of the 1987 Grand-Ducal Regulation called into question by the arguments of the claimants in the main proceedings that in economic terms the additional levy has all the effects of a penal measure in so far as it penalises producers who have exceeded their quotas in precise proportion to that surplus production.
- 35 The principle that penal provisions may not have retroactive effect is indeed one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right which takes its place among the general principles of law whose observance is ensured by the Court of Justice (Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22, and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 42).
- 36 However, the Court has held that the additional levy is not to be regarded as a penalty analogous to those provided for under Articles 3 and 4 of Regulation No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1993 L 57, p. 12) (see Joined Cases C-231/00, C-303/00 and C-451/00 *Cooperativa Lattepiù and Others* [2004] ECR I-2869, paragraph 74, and Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 58).

- 37 The additional levy on milk amounts to a restriction arising from market policy rules or structural policy. It is to be considered to be intervention to stabilise agricultural markets and is to be used to finance expenditure in the milk sector. It follows that, apart from its obvious aim of requiring milk producers to observe the reference quantities allocated to them, the additional levy has an economic objective too, in that it is intended to bring to the Community the funds necessary for disposal of milk produced by producers in excess of their quotas (see *Cooperativa Lattepiù and Others*, paragraphs 74 and 75, and *Azienda Agricola Ettore Ribaldi and Others*, paragraphs 58 and 59).
- 38 It follows from all of the foregoing considerations that the answer to the question referred to the Court must be that the general principles of Community law of legal certainty and non-retroactivity do not mean that, for the application of Community rules establishing production quotas of the type introduced by Regulations Nos 856/84 and 857/84, a Member State is precluded from adopting, in place of initial rules held by the Court of Justice to be discriminatory, new rules applying retroactively to production in excess of the production quotas introduced after the entry into force of those regulations, but in accordance with the national rules which have been replaced.

Costs

- 39 The costs incurred by the Luxembourg Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Cour de Cassation by judgment of 14 November 2002, hereby rules:

The general principles of Community law of legal certainty and non-retroactivity do not mean that, for the application of Community rules establishing production quotas of the type introduced by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products and 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, a Member State is precluded from adopting, in place of initial rules held by the Court of Justice to be discriminatory, new rules applying retroactively to production in excess of the production quotas introduced following the entry into force of those regulations, but in accordance with the national rules which have been replaced.

Rosas

Schintgen

Colneric

Delivered in open court in Luxembourg on 15 July 2004.

R. Grass

A. Rosas

Registrar

President of the Third Chamber