

OPINION OF ADVOCATE GENERAL  
 SIR GORDON SLYNN  
 delivered on 13 January 1988

*My Lords,*

The market in milk and milk products in the Community has been characterized for many years by problems of over-supply. In 1978, the Council introduced two regulations aimed at bringing the situation under control. The first, which provides the starting point for the present preliminary reference, was Council Regulation (EEC) No 1078/77, of 17 May 1977 (Official Journal 1977, L 131, p. 1). That Regulation introduced two types of premium — a non-marketing premium and a conversion premium — aimed at [encouraging] the trend noted among certain groups of holding in the Community to cease milk production or the marketing of milk and milk products' (recital 1). The non-marketing premium was conditional upon the giving by the producer of a written undertaking not to market milk or milk products for a five-year period. The conversion premium was to be paid where dairy herds were converted to meat production and no milk or milk products were disposed of. The second measure, introduced by Council Regulation (EEC) No 1079/77, also of 17 May 1977 (Official Journal 1977, L 131, p. 6), imposed a low 'co-responsibility levy' on virtually all supplies of milk for treating or processing.

In 1984, it became apparent that more stringent measures were required and the Council accordingly adopted two further

measures. These were Council Regulation (EEC) No 856/84 of 31 March 1984 (Official Journal 1984, L 90, p. 10), which imposed a 'super-levy', additional to the co-responsibility levy, on quantities of milk delivered beyond a guarantee threshold in five consecutive years beginning on 1 April 1984; and Council Regulation (EEC) No 857/84, also of 31 March 1984 (Official Journal 1984, L 90, p. 13), which laid down general rules for the determination of reference quantities and the amount of the levies. Detailed rules for the application of the additional levy were laid down in Commission Regulation (EEC) No 1371/84 of 16 May 1984 (Official Journal 1984, L 132, p. 11), as amended. The period during which the super-levy is payable has since been extended until 1991.

Under Article 2 of Regulation No 857/84, the reference quantity was fixed equal to the quantity of milk delivered by the producer (Formula A) or purchased by the purchaser (Formula B) during the 1981 calendar year save that Member States could, as an alternative, fix the reference quantities equal to the quantity of milk delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by an appropriate percentage so as not to exceed the overall guaranteed quantity for that Member State.

Article 3 provided that, 'certain special situations shall be taken into account' for the determination of reference quantities and in accordance with the application of Formulas A and B. These included, firstly, cases where milk production development plans under Directive 72/159/EEC (Official Journal English Special Edition 1972, p. 324) had been lodged before 1 March 1984 when reference quantities, it is said, may be obtained 'according to the Member State's decision'. Moreover, 'Investments carried out without a formal development plan can also be taken into account if the Member State has sufficient information'.

Secondly, specific reference quantities might be granted to young farmers and, thirdly, reference might be made to another calendar reference year within the 1981 to 1983 period where milk production was affected by exceptional events such as natural disaster or the accidental destruction of fodder or buildings. Article 3 of Commission Regulation No 1371/84 added three further situations of *force majeure* in which a different reference year might be taken. There are further provisions in Article 4 concerned with the restructuring of milk production by granting compensation payments to farmers undertaking to discontinue milk production definitively, or by granting an 'additional' reference quantity to producers realizing a milk production development plan under Directive 72/159/EEC and to producers undertaking farming as their main occupation. Under Article 4a (inserted by Council Regulation (EEC) No 590/85 of 26 February 1985, Official Journal 1985, L 68, p. 1, and subsequently extended) Member States were permitted to allocate non-utilized reference quantities of producers or purchasers to producers or purchasers in the same region and, if

necessary, in other regions. Any reference quantities freed are to be added to the national reserve constituted by Article 5, from which source alone additional reference quantities for the application of Articles 3 and 4 are to be drawn.

Article 7 authorizes the transfer of reference quantities upon sale, lease or inheritance of an undertaking to which a reference quantity has earlier been assigned.

Regulation No 1078/77 was implemented in the Netherlands by Administrative Order No 184 of the Stichting Ontwikkelings- en Saneringsfonds voor de Landbouw (the Agricultural Development and Restructuring Fund) (Staatscourant 126; modified by a further order dated 29 June 1978). That order empowers the Agricultural Fund to enter into non-marketing and conversion agreements with producers.

By Order No J 1731 of 18 April 1984 (the 'Beschikking superheffing' or Super-levy Decree, *Staatscourant* 79, as amended), provision was made for the implementation in the Netherlands of Regulation No 857/84 and accompanying provisions. Formula A was chosen (Article 2) and reference quantities established by reference to deliveries in 1983 (Article 5(1)). Articles 11, 12 and 13 of the Order implement the Community rules relating to the grant of a special quantity free of levy in specific cases and the application, in certain exceptional circumstances, of a reference year other

than 1983. Finally, Article 19 of the decree gives the Minister residual powers to grant reference quantities. That Article states:

'For quantities in respect of which claims are no longer accepted, the Minister shall admit such claims as shall be determined. He may admit claims in circumstances other than those referred to in this decree'.

Until October 1979, the applicant kept dairy cows and supplied about 500 000 kg of milk per year to the dairy. In October 1979, he entered into an agreement with the Agricultural Fund (in pursuance of Council Regulation No 1078/77) in which he undertook *inter alia* to supply no milk or milk products during the period from 1 October 1979 to 30 September 1984. In the reference year 1983 (as in 1981 and 1982) the applicant therefore delivered no milk. On 28 May 1984 he submitted an application under Article 19 of the decree, requesting a quota free of levy of 726 000 kg of milk.

The defendant rejected the application by decision issued on 24 September 1984. The applicant brought proceedings against that decision on 17 October 1984 before the College van Beroep voor het Bedrijfsleven, which stayed proceedings and referred three preliminary questions to the Court of Justice:

1. Having regard to the third recital in its preamble, must Council Regulation (EEC) No 857/84, as supplemented by Commission Regulation (EEC) No 1371/84, be interpreted as meaning that in establishing the reference quantities referred to in Article 2 Member States may not take into account situations which are not provided for in the Community regulations, in particular the situation of persons who in accordance with Council Regulation (EEC) No 1078/77 have delivered no milk in a reference year, and may not adopt measures permitting the grant to such persons of a specific quantity?

2. If the answer to the first question is in the affirmative, is Regulation No 857/84 invalid on the grounds that it is contrary to Community law as it now stands, in particular:

- a. the principle of legal certainty
- b. the principle of proportionality
- c. the right to enjoy property
- d. the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty
- e. the prohibition of the misuse of powers,

since the Regulation does not take into account persons who in accordance with Regulation (EEC) No 1078/77 have delivered no milk in a reference year?

3. If the answer to the first question is in the negative, does a Member State infringe Community law as it now stands when it fails to make provision as referred to in the first question for persons who in accordance with Regulation (EEC) No 1078/77 have delivered no milk in a reference year?

The third recital in the preamble to Council Regulation No 857/84 reads as follows:

'Whereas the Member States should be enabled to adapt the reference quantities to take into account the special situations of certain producers and to establish for this purpose, as necessary, a reserve within the abovementioned guaranteed quantity'

The first question, as I read it, postulates that there are no provisions in Regulation No 857/84 or in Regulation No 1371/84 dealing with the specific situation of persons who, as a result of an agreement made under Article 2 of Regulation No 1078/77, delivered no milk in the appropriate reference year. It accordingly asks whether, on that basis, Member States can under the regulation take such a situation into account and grant a reference quantity to a person in such a situation. The third question is linked and asks whether, if the Regulation is not to be read as giving such power, Community law generally requires a Member State to grant a reference quantity to a person in such a situation.

It seems to me that the premise upon which the first question is based is correct. The

normal scheme is that a reference quantity is equal to the quantity of milk delivered by the producer, or the quantity of milk purchased by a purchaser, as adjusted, during the reference year. *Ex hypothesi* someone who made an agreement for five years which includes the reference year has produced or purchased no milk in that year and it seems likely that a substantial number of agreements made would include the reference year in the five-year period. *Prima facie*, therefore, such a person is not entitled to a reference quantity and cannot avoid paying the additional levy in respect of milk produced or purchased as the case may be.

There are exceptions, as for young farmers or those producers who have lodged development plans before 1 March 1984, and those who can persuade Member States that they have made investment without a development plan before, as the Council argues, 1 March 1984. Assuming, contrary to the express language of Article 12 of Regulation No 857/84, that a person who before 1 April 1984 was not

— selling milk or milk products directly to the consumer, and/or

— supplying the purchaser'

is to be regarded as a producer for the purposes of Article 3 (1) of that regulation, then some persons who entered into non-marketing agreements may be able to benefit from this provision if they had the good fortune to lodge a plan before 1

March 1984 (i. e. a month before Regulation No 857/84 appeared in the Official Journal). The same may be true if they made investments before that date without a development plan, though the provision of the second paragraph of Article 3 (1) is to say the least, imprecise and hardly conducive to uniform application throughout the Community.

Article 3(3) of Regulation No 857/84 dealing with *force majeure* situations is not capable of applying to persons who are not producing during the relevant year and, in any event, permits reference only to another year in the 1981-83 period, during the whole of which many of such persons were not producing milk pursuant to the agreement which they had made.

The provisions in Article 4 or 4a dealing with the allocation or transfer of certain quantities do not help such a person as a general rule, since they provide for such an allocation or transfer only to a producer who has an existing reference quantity. The suggestion made that such a person can buy or lease or inherit a business having a reference quantity, under Article 7 of the regulation, seems to be capable of being relevant only to a limited number of persons and does not affect the general position.

Accordingly, it seems to me that the answer to the first question is that, although there are limited exceptions which may lead to a person who had entered into a

non-marketing agreement pursuant to Regulation No 1078/77 being given a reference quantity for the purposes of Regulation No 857/84, there is no general provision that such persons may be considered for such a reference quantity. Nor can I find that the regulation has any provisions which by necessary implication empower Member States to have regard to such persons, or to grant them reference quantities in respect of a relevant year during which they produced no milk. Even on the basis adopted by the Court in Joined Cases 201 & 202/85 *Marthe Kipgen (née Klensch) et al. v Secrétaire d'Etat à l'agriculture et à la viticulture* (judgment 25 November 1986, paragraph 21) that when it is necessary to interpret a provision of secondary Community law preference should be given to the interpretation which renders the provision consistent with the Treaty, I do not find it possible to read in such a power. To do so would in my view be to read in what is not there.

In my opinion, the first question falls to be answered in the affirmative and the third question does not accordingly arise.

The second question proceeds on the basis that persons who have produced no milk in a reference year, so that they must pay the additional levy on all milk which they produce during the period whilst the super-levy is to be imposed (it seems effectively for 10 years), are in effect barred

from returning to milk production. It is asked whether Regulation No 857/84 is to that extent void under general principles of Community law or as being contrary to the prohibition of discrimination found in Article 40 (3) of the EEC Treaty.

It is plain that when 'quantities of milk delivered are increasing at a rate such that disposal of surpluses is imposing financial burdens and market difficulties which are jeopardizing the very future of the common agricultural policy' (third recital to Regulation No 856/84) stringent measures may have to be adopted and that some producers may be precluded from increasing or may be obliged to cut back production. Others may be precluded from entering the market. It is no less plain that the appreciation of the necessary measures is for the Council and the Commission but subject always to compliance with overriding rules of Community law such as those referred to in the second question.

The starting point as I see it is whether those who have agreed not to market milk (in return for a premium) could be said to have accepted that they were leaving the market completely. Whatever the position of those who took the conversion premium, it does not seem to me that those who accepted the five-year non-marketing premium have done more than accept that they would not dispose of milk for a period of five years at a time when the Community wished to control milk production. They were suspending rather than terminating production. There was a mutual benefit — for the Community reduction in milk production, for the farmer an annual

cash payment. There was nothing in the arrangement to insist, even to signal, that if the non-marketing premium was accepted, they would at the end of the period be out of business. This does not mean that they could assume that at the end of the period they could resume business as before. In the absence of an obligation entered into by the authorities they must accept restrictions as to the way their business is to be conducted which are subsequently adopted (Case 84/78 *Tomadini v Amministrazione delle Finanze dello Stato* [1979] ECR 1801 at 1815 (paragraph 21)). It seems to me, however, that they could reasonably expect at the end of the non-marketing period that the arrangements made for the control of the market would take into account the fact that they had given up production in the common interest and would not ignore them, nor, in business terms, exclude them totally from resuming production, which they had temporarily stopped, for a much longer period.

To substitute a quota system (from which they were excluded because they had entered into a non-marketing arrangement limited to a five-year period) for such a non-marketing arrangement seems to me to be contrary to the legitimate business expectation of the farmers who took part in the non-marketing arrangements. It crosses the line between what is merely 'hard business luck' and what is unreasonable treatment.

Such persons were, in my view, in a different position from those who had never produced milk or who had given up production for reasons wholly unconnected with schemes adopted under the common

organization of the market like the non-marketing premium scheme. It was in my view discriminatory to treat them all as if they were in the same position.

Moreover, the system adopted does not seem to me to treat with an even hand those in a similar position. Thus a producer who signed a non-marketing undertaking in 1977, whose Member State adopted 1983 as the reference year, could have resumed production in 1983 so as to have a reference quantity. A producer who had signed the same undertaking in 1977 would fail if the Member State had taken 1981 as the reference year. If a producer had signed the same undertaking in 1979 or even late in 1978 he would not have been able to have a reference quantity whichever reference year was taken by the Member State. Moreover, the fixing of 1 March 1984 (by a regulation published in the Official Journal on 1 April 1984) as the cut-off date for the lodging of a development plan or the making of investment without a plan (if there is such a temporal limitation as the institutions contend) is capable of discriminating between persons in a like position. To give prior warning 'unless you invest by 'x' you are excluded' is quite different from saying that those who did not invest by 'x' (when the starting dates of the five-year period can be widely scattered) are *post hoc* excluded.

In any event it seems to me that, even if there were power to give some reference quantities to persons who had accepted the

non-marketing premium, these would have come out of the national reserve referred to in Article 5 of Regulation No 857/84. Assuming that there was something in such a reserve for such applicants, it seems probable that balancing out conflicting claims against variable available quantities could lead to very divergent grants in different Member States.

It seems to me, accordingly, that the provisions of Regulation No 857/84 are void in so far as they do not make any provision for the resumption of milk production by those who had contracted to give up production for a period of five years in return for a non-marketing premium and effectively exclude them from business, either on the ground that their legitimate expectations were not respected or that the scheme adopted was discriminatory.

In these circumstances it is unnecessary to consider the other grounds referred to in the second question. I do not, however, consider that what has been done is to be categorized as misuse of powers or that there was a violation of the right to enjoy property in the sense explained by the Court in Case 44/79 *Hauer* [1979] ECR 3727, in the absence of any discrimination or breach of legitimate expectations. Although the general scheme has not been shown to be more than was needed to achieve the objective sought to be achieved, it might be said that to leave out persons of the kind now being considered was itself disproportionate.

That, however, seems to me to be another way, and perhaps a more artificial way, of saying that what was done took away what such persons could reasonably have expected to receive on a non-discriminatory basis.

Accordingly in my opinion the questions referred fall to be answered along the following lines.

- (1) Council Regulation (EEC) No 857/84, as supplemented by Commission Regulation (EEC) No 1371/84, must be interpreted as meaning that, in establishing the reference quantities referred to in Article 2 Member States may not take into account situations which are not provided for in the Community regulations, in particular the situation of persons who in accordance with Council Regulation (EEC) No 1078/77 have delivered no milk in a reference year.
- (2) Council Regulation (EEC) No 857/84 is void insofar as it contains no explicit provision taking into account the position of former milk producers who had no milk production in the reference years specified in Article 2 (1) and (2) of the regulation because those producers had given undertakings not to market milk during that period pursuant to Article 2 (2) of Council Regulation (EEC) No 1078/77.
- (3) Given that the answer to the first question is in the affirmative, the third question referred by the national court no longer requires an answer.

The costs on the reference of the parties to the main proceedings fall to be dealt with by the national court. The costs of the Netherlands Government and of the Council and the Commission are not recoverable.