

JUDGMENT OF THE COURT (Sixth Chamber)

13 April 2000 *

In Case C-292/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Regeringsrätten, Sweden, for a preliminary ruling in the proceedings brought before that court by

Kjell Karlsson and Others

on the interpretation of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1), Article 5 of the EC Treaty (now Article 10 EC), Article 40(3) of the EC Treaty (now, after amendment, Article 34(2) EC) and the principle of equal treatment,

* Language of the case: Swedish.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, acting for the President of the Sixth Chamber,
G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Karlsson and Mr Gustafsson, by J. Borgström and C.M. von Quitzow,
Advocate, Jönköping,

- the Swedish Government, by L. Nordling, Rättschef in the Ministry of
Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by A.M. Alves Vieira and
K. Simonsson, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Karlsson, Mr Gustafsson and Mr Torarp, represented by J. Borgström and C.M. von Quitzow, and also by P. Bentley QC; of the Swedish Government, represented by L. Nordling; and of the Commission, represented by A.M. Alves Vieira and K. Simonsson, at the hearing on 10 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 January 1999,

gives the following

Judgment

- 1 By decision of 27 May 1997, received at the Court on 8 August 1997, the Regeringsrätten (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1), Article 5 of the EC Treaty (now Article 10 EC), Article 40(3) of the EC Treaty (now, after amendment, Article 34(2) EC) and the principle of equal treatment.
- 2 The question was raised in three actions brought by Mr Karlsson and Mr Gustafsson, milk producers, and Mr Torarp, a former milk producer,

respectively, challenging decisions whereby the Jordbruksverket (the Swedish Agricultural Office) allocated reduced milk quotas or reduced the quotas already allocated to Mr Karlsson and Mr Gustafsson and refused to allocate a milk quota to Mr Torarp.

Legislation

Community legislation

- 3 In order to deal with structural surpluses on the milk market, 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 (OJ 1984 L 90, p. 13) introduced an additional levy to be paid by all producers and purchasers of milk on the quantities of milk exceeding an annual reference quantity.

- 4 Article 5c (inserted by Regulation (EEC) No 856/84) of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) provided that the sum of the milk quotas allocated in each Member State to the operators concerned was not to exceed a guaranteed total quantity equal to the sum of quantities of milk delivered to undertakings treating or processing milk during the reference year. If the quota which had been allocated was exceeded then either the producer or the purchaser, depending on the formula chosen by the Member State, had to pay an additional levy. Where that obligation fell on the purchaser

he was bound, after paying the levy, to recover it from the producers who had exceeded their milk quota and thus contributed to the purchaser's having exceeded his milk quota.

- 5 Member States were to determine the milk quota for each producer on the basis of the quantity of milk or milk equivalent produced by the producer during a reference year, being 1981, 1982 or 1983, as chosen by the Member State.

- 6 Article 3 of Regulation No 857/84 required the Member States, who had been authorised to create national reserves of milk quotas in order to cater for the special situations of some of their producers without having to exceed the total quantity, to take into account in determining the milk quotas certain special situations such as those of producers who had adopted a development plan, young producers or producers whose production had been appreciably affected by exceptional events (specified exhaustively) occurring during the reference year.

- 7 Article 4 of Regulation No 857/84 provided that Member States could also grant an additional reference quantity to producers realising a milk production development plan meeting certain criteria and to producers undertaking farming as their main occupation.

- 8 The additional levy scheme, introduced initially for the five years from 1 April 1984 to 31 March 1989 and extended subsequently to 31 March 1993, was re-introduced for seven new consecutive periods of 12 months by Regulation No 3950/92. That regulation, which repealed Regulation No 857/84, laid down

the basic rules governing the extended scheme and introduced a number of amendments primarily designed to simplify it.

- 9 Article 4(1) of Regulation No 3950/92 provides that the individual reference quantity available on the holding ('the milk quota') is in principle equal to the quantity available on 31 March 1993 and adjusted, where appropriate, for each of the 12-month periods concerned in order to ensure that the total quantity is not exceeded. In the case of the Kingdom of Sweden, which joined the European Communities on 1 January 1995, the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, hereinafter 'the Act of Accession') added a second paragraph to that provision substituting 31 March 1996 for 31 March 1993.
- 10 The Act of Accession also established a guaranteed total quantity for the Kingdom of Sweden of 3.3 million tonnes for deliveries and 3 000 tonnes for direct sales. Article 3(1) of Regulation No 3950/92, as amended by the Act of Accession, provides that that total quantity may not be exceeded.
- 11 The first paragraph of Article 5 of Regulation No 3950/92, as amended by the Act of Accession, authorises Member States to replenish the national reserve following an across-the-board reduction in all the individual reference quantities in order to grant additional or specific quantities to producers determined in accordance with objective criteria agreed with the Commission.

Swedish legislation

- 12 In order to make the initial allocation of milk quotas to Swedish producers the Kingdom of Sweden adopted Förordning (1994:1714) om mjölkkvoter m.m. (Regulation No 1714 of 1994 on milk quotas etc.), amended with effect from 8 February 1995 by Regulation 1995:119 (hereinafter 'Swedish Regulation No 1714'). Under that regulation milk quotas for deliveries were granted for the period running from 1 April 1995 to 31 March 1996.
- 13 For a milk producer to qualify for a milk quota for that period the first paragraph of Article 5 of Swedish Regulation No 1714 required him to have actually delivered milk without interruption from 1 March 1994 to 1 January 1995 and to comply with certain requirements relating to the protection of the environment.
- 14 If supplies had been interrupted during that period, the Agricultural Office, which is responsible for ensuring compliance with the milk quota rules, could allocate a milk quota under the second paragraph of Article 5 of Swedish Regulation No 1714 provided that the interruption was attributable to circumstances outside the control of the producer and there were special grounds for allocating him a quota in spite of the interruption.
- 15 Article 6 of Swedish Regulation No 1714 provides that the delivery quota for milk is fixed on the basis of the average quantity of milk delivered during the reference years 1991, 1992 and 1993 (hereinafter 'the general method'). However, although the general method applied automatically to producers who had not increased their production between 1 January 1991 and 31 December 1994 (hereinafter 'normal producers'), there were additional, or special, rules for

three special categories of producers: new producers, producers who had increased their production and 'ecological' producers.

- 16 New producers were those who had commenced deliveries only after 1 January 1991. Under Article 10 of Swedish Regulation No 1714, their milk quota was determined on the basis of 7 398 kg of milk per cow and per year, to which was applied a reduction 'for own risk' of 15%. However, the producer could request that his milk quota be fixed on the basis of the average quantities delivered for the years 1991 to 1993, taking into account the quantities of milk delivered in the months during which he had delivered milk.
- 17 Producers who had increased their production were those who, after 1 January 1991, had made a property investment in order to increase milk production or who, without having made such an investment, had increased their herd. Under Article 10a of Swedish Regulation No 1714 they were entitled to a basic quota and an additional quota. The basic quota was calculated by the general method, disregarding any increases which had occurred during the reference period. The increases themselves gave entitlement to an additional milk quota calculated, as the producer chose, either on the basis of 7 398 kg of milk per additional cow, reduced by 25% 'for own risk', or on the basis of a quantity of milk for each such cow corresponding to the average annual quantity delivered per cow during the reference period, likewise reduced by 25% for own risk.
- 18 Ecological producers, within the meaning of Article 7 of Swedish Regulation No 1714, could ask for their milk quota to be calculated on the basis of their average production of 'ecological' milk in 1993 or 1994. If such a producer wished to have applied the rules relating to new producers or producers who had increased their production, the corresponding quota was allocated to him in accordance with Articles 10 and 10a of Swedish Regulation No 1714, but with no reduction for own risk.

- 19 In January 1995 the Swedish authorities proceeded to make provisional allocation of milk quotas to regular producers. They did the same for new producers between March and May 1995, whereupon they discovered that the allocation of milk quotas to producers who had increased their production would result in the guaranteed total quantity allocated to the Kingdom of Sweden being exceeded.
- 20 By Regulation 1995:812 amending Swedish Regulation No 1714, which came into force on 1 July 1995 (hereinafter 'Swedish Regulation No 812'), the reduction to be applied for own risk was increased from 15% to 30% for new producers and from 25% to 55% for producers who had increased their production. In addition, it was provided that the additional quota would now be allocated to the latter only for increases in the herd in excess of 10% of the number of cows held prior to the increase. Consequently, the quotas already allocated to new producers on a provisional basis were adjusted to take account of those new rates and criteria.

Facts and procedure in the main proceedings

- 21 In January 1995 Mr Karlsson received a provisional milk quota of 38 797 kg, corresponding to his average production for the years 1991 to 1993. He applied for an additional quota as a producer having increased his production, claiming that he had improved his premises and increased his herd from 7 to 12 cows. His application was granted by decision of 29 August 1995 and his milk quota was increased to 48 553 kg, a reduction of 55% having been applied in accordance with Article 10a of Swedish Regulation No 1714 as amended by Swedish Regulation No 812.
- 22 Mr Gustafsson applied for a milk quota as a new producer. By decision of 23 March 1995 he was granted a quota of 251 532 kg, calculated on the basis of 40 milk cows, a reduction of 15% having been applied in accordance with

Article 10 of Swedish Regulation No 1714. After that article had been amended by Swedish Regulation No 812, the decision was withdrawn and a new one dated 3 July 1995 substituted for it, fixing the quota at 207 144 kg, a reduction of 30% (the new rate) having been applied.

- 23 Mr Torarp delivered milk between 1991 and 1993. By decision of 13 January 1995 he was automatically allocated a milk quota, whereupon he informed the authorities that he had ceased milk production on 12 November 1994 because he had had an accident while working which prevented him from keeping milk cows. Nevertheless he applied on 13 February 1995 for a milk quota calculated on the basis of deliveries actually made during the reference years. By decision of 5 March 1995 the Agricultural Office withdrew the quota allocated automatically and rejected his application, in accordance with Article 5 of Swedish Regulation No 1714.
- 24 Mr Karlsson, Mr Gustafsson and Mr Torarp brought separate actions challenging the decision concerning them before the appropriate Länsrätten (County Administrative Court). Having lost at first instance, and again on appeal before the Kammarrätten (Administrative Court of Appeal), Jönköping, they brought a further appeal before the Regeringsrätten.
- 25 The latter found that as Community legislation stood there was a lack of implementing measures comparable to those contained in Regulation No 857/84, and was therefore in doubt as to whether the Swedish legislation was compatible with Regulation No 3950/92, Articles 5 and 40(3) of the Treaty and the principle of equal treatment; accordingly it decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Do Council Regulation (EEC) No 3950/92 establishing an additional levy in the milk and milk products sector, Articles 5 and 40(3) of the EC Treaty and the

fundamental Community law principle of equal treatment permit national provisions of a State which acceded to the Union on 1 January 1995 under which:

- (a) for producers who have not altered their production, average deliveries in 1991, 1992 and 1993 are adopted as the basis for the award of a milk quota,
- (b) producers who have commenced or increased production of milk between 1 January 1991 and 31 December 1994 must accept a reduction in milk quota, unlike milk producers whose production circumstances have not altered in that period and producers of ecologically produced milk, and that reduction is determined differently for producers who have commenced production than for those who have increased production,
- (c) producers who delivered milk before the State's accession to the EC's milk quota system but who — for reasons outside their control — have not delivered milk throughout the necessary qualification period for the award of a quota (1 March 1994 to 1 January 1995) are refused a quota?

²⁶ The question asks in substance whether legislation governing the initial allocation of milk quotas and adopted by a Member State which acceded to the European Communities on 1 January 1995, whereby (i) milk quotas are determined for normal producers on the basis of the average quantities delivered between 1991 and 1993, (ii) in calculating the quotas to be allocated to new producers and producers who have increased their production, unlike normal producers and

'ecological' producers, reductions are to be applied (and at different rates) and (iii) milk quotas are to be allocated only to producers whose production was continuous from 1 March 1994 to 1 January 1995 is compatible with Regulation No 3950/92, Article 5 of the Treaty and the principle of equal treatment, as enshrined in particular in Article 40(3) of the Treaty.

The relevant Community legislation

- 27 In so far as the Swedish court considers that the additional levy scheme for milk ceased to include rules governing the initial allocation of milk quotas for national producers when Regulation No 857/84 was repealed by Regulation No 3950/92, it is for the Member States, by virtue of Article 5 of the Treaty and in accordance with the general principles on which the Community is based and which govern relations between the Community and the Member States, to ensure that Community regulations are implemented within their territory. In so far as Community law, including its general principles, does not include common rules to that effect, the national authorities when implementing such regulations act in accordance with the procedural and substantive rules of their own national law (see, *inter alia*, Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau v Hauptzollamt Rosenheim* [1995] ECR I-4069, paragraph 26).
- 28 Next, contrary to what has been argued by the appellants in the main proceedings, the provisions of Article 5c (inserted by Regulation No 856/84) of Regulation No 804/68 cannot be considered to be either applicable or relevant.
- 29 Regulation No 856/84, the provisions of which were in fact abandoned even prior to the accession of the Kingdom of Sweden by Council Regulation (EEC)

No 2071/92 of 30 June 1992 amending Regulation No 804/68 (OJ 1992 L 215, p. 64), did not, as the Advocate General observed in point 32 of his Opinion, include detailed rules for the allocation of individual milk quotas, which appear in Regulation No 857/84 (repealed by Regulation No 3950/92); its sole purpose was to introduce an additional levy on milk and to designate those liable to pay it.

- 30 Apart from the fact that Article 5c of Regulation No 804/68 has never governed the initial distribution of milk quotas, the argument put forward by the appellants in the main action that the scheme introduced by that article forms part of the *acquis communautaire* and is therefore still relevant must likewise be rejected.
- 31 The scheme was introduced initially for a period limited to five consecutive 12-month periods, and subsequently extended to eight, and then nine, consecutive 12-month periods; it was extended by Regulation No 3950/92 again only for a limited period, this time seven more 12-month periods. Those circumstances are sufficient to exclude the milk quota scheme from the *acquis communautaire*.
- 32 Apart from the general principles of Community law, the Swedish legislation is therefore governed only by the requirements imposed by Regulation No 3950/92 as amended by the Act of Accession, and Articles 3 to 5 of the regulation as amended show clearly that it contains no rule designed to govern the initial allocation of milk quotas. The regulation is based in fact, as is demonstrated *inter alia* by Article 4 thereof as amended by the Act of Accession, on the premiss that milk quotas have already been allocated in all the Member States with the exception of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden prior to the entry into force of the regulation, in the Republic of Austria

and in the Republic of Finland by 1 April 1995 and in the Kingdom of Sweden by 1 April 1996.

33 Consequently, the only obligation imposed by Regulation No 3950/92 as amended by the Act of Accession on the Member States which acceded to the European Communities on 1 January 1995 is to ensure that the sum of the milk quotas thus allocated does not exceed the guaranteed total quantity, which in the case of the Kingdom of Sweden is 3 300 000 tonnes for deliveries and 3 000 tonnes for direct sales. That obligation results from Article 3(1) of the regulation, as amended.

34 Accordingly, it is for the Member States which acceded to the European Communities after the entry into force of Regulation No 3950/92 to determine, subject only to the restriction set out in Article 3(1) of the regulation as amended by the Act of Accession, the criteria governing that first allocation, and therefore national legislation such as that at issue in the main action which governs the initial distribution of milk quotas is not incompatible with the regulation.

The principles of Community law governing the initial allocation of milk quotas

35 Even if when making the first distribution of quotas Member States enjoy a wide discretion in ensuring the implementation of Community rules within their territory, the Court has consistently held that the national rules they adopt must

be reconciled with the need to apply Community law uniformly so as to avoid unequal treatment of traders (*Dominikanerinnen-Kloster Altenhohenau*, paragraph 26). Similarly, as the Advocate General emphasised in point 36 of his Opinion, Member States must be guided by the specific aims of the common agricultural policy where the Community legislation whose implementation in the national territory they are endeavouring to ensure falls within the sphere of that policy.

- 36 In this particular case, it is sufficient to note that the legislation at issue and the observations made by the Swedish Government at the hearing reveal that the Kingdom of Sweden was guided in determining the national scheme for allocating milk quotas by the Community rules in force at the time when the additional levy scheme for milk was introduced.
- 37 In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements (Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16).
- 38 Those fundamental rights include the general principle of equality and the obligation not to discriminate, and the Swedish court asks whether the Swedish legislation at issue is compatible therewith.

The principle of equal treatment

- 39 The second subparagraph of Article 40(3) of the Treaty, which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified (Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25, and Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35).

Calculation based on the average quantities delivered between 1991 and 1993

- 40 There is nothing in the file to indicate that the Swedish legislation was in breach of the principle of equal treatment in electing to use the years 1991 to 1993 as the reference period and in basing the calculation of the milk quotas to be allocated to normal producers on the average quantities of milk which they delivered during that period. In fact by applying the same rules for the determination of milk quotas to all producers in the same situation, the Swedish legislation is treating comparable situations in the same way.
- 41 Consequently, national legislation governing the initial allocation of milk quotas and adopted by a Member State which acceded to the European Communities on 1 January 1995, whereby milk quotas for producers who did not alter their production between 1 January 1991 and 31 December 1994 are determined on the basis of the average quantities delivered between 1991 and 1993 is compatible with the principle of equal treatment.

The treatment of new producers and producers who have increased their production compared with normal producers

- 42 The Swedish Government is aware that new producers and producers who have increased their production are treated less favourably than normal producers when they choose to have their milk quota or the portion of it representing the increase in production determined on the basis of the average quantities delivered between 1991 and 1993 in accordance with Article 10 of Swedish Regulation No 1714. The result is that it is impossible for them, unlike normal producers, to obtain under their milk quota a volume equivalent to the total quantity of milk they are able to produce with the number of cows they have.
- 43 The Swedish Government also recognises that the other method of calculation proposed, based on a flat rate 7 398 kg of milk per cow and per year and which seeks to address the special situation of those two categories of producers, is likewise incapable of remedying the unequal treatment inasmuch as by that method the milk quotas for new producers and the additional milk quotas for producers who have increased their production are determined after making a reduction of 30% and 55% respectively. Thus, apart from the difference of treatment as between those two groups of producers attributable to the difference in the rate of reduction, new producers and producers who have increased their production are at a disadvantage compared with normal producers and also compared with ‘ecological’ producers, who, even if they are in a situation analogous to theirs, have no reduction applied.
- 44 Consequently, the burden resulting from determining milk quotas at a level below production capacity is borne unilaterally by new producers and producers who

have increased their production. Limiting the amounts which may be produced under the milk quotas in this way constitutes a restriction of the principle of non-discrimination on which those producers are entitled to rely.

- 45 However, it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights (Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18).
- 46 In the main action, fixing the milk quotas at a level lower than production capacity meets the primary aim of the Community in introducing the addition levy on milk, which is to reduce structural surpluses and improve the balance of the market, as indicated *inter alia* in the first recital in the preamble to Regulation No 3950/92.
- 47 More particularly, the reductions applied unilaterally to new producers and producers who have increased their production appear to be objectively justified, having regard to the specific contribution made by such producers to exceeding the guaranteed total quantity, as was found by the Swedish authorities when they made the provisional allocation of the quotas. The guaranteed total quantity allocated to the Kingdom of Sweden on its accession, which represents the amount of milk produced in that State in 1992, was established essentially on the basis of the quantities produced by normal producers. The risk of exceeding the total quantity is therefore primarily the result of the increase in production in recent years, which is mainly attributable to producers who have increased their production and to new producers.

The treatment of producers who have increased their production compared with that of new producers

- 48 Of the producers who have a reduction applied to their milk quotas, new producers are treated more favourably than producers who have increased their production, the rate of reduction applied being lower where production began after 1 January 1991 and before 1 January 1995.
- 49 However, the difference in treatment is justified by the aims of agricultural policy pursued, according to the information given by the Swedish Government during the proceedings, by the Kingdom of Sweden in the milk sector and which do not exceed the bounds of the discretionary power it enjoys.
- 50 Community law recognises the legitimacy of such aims. In the first place, in the context of the original additional levy scheme, Article 3(1) of Regulation No 857/84 already permitted Member States to give preferential treatment to young producers. In the second place, in the context of the current additional levy scheme, Article 5 of Regulation No 3950/92 permits the Member States to grant additional or specific quantities to certain producers on objective grounds.

The treatment of 'ecological' producers

- 51 In pursuing aims of agricultural policy, Member States may be justified in exempting certain producers from reductions made for reasons pertaining to ecology, in particular certain ecological methods of production, even if their situation is analogous to those of new producers or producers who have increased

their production. However, neither the grounds in the order containing the reference nor the observations made by the interveners in accordance with Article 20 of the EC Statute of the Court of Justice are sufficiently detailed to enable the Court to expand on the matter,

The alleged discrimination suffered by Swedish producers compared with producers in other Member States

52 The appellants in the main action claim that the requirements relating to the protection of the environment which all Swedish producers must comply with under Article 5 of Swedish Regulation No 1714 constitute discrimination against them compared with producers of other Member States.

53 However, any unequal treatment of producers in a Member State compared with those in other Member States which are the result, as in this case, simply of divergencies between the legislations in those States does not entail discrimination of the kind prohibited by Article 40(3) of the Treaty if the national legislation at issue applies to all producers concerned on the basis of objective criteria (see, to that effect, Case 308/86 *Lambert* [1988] ECR 4369, paragraphs 21 and 22).

The requirement that production be continuous

54 As regards the refusal to grant Mr Torarp a milk quota on the ground that he had interrupted deliveries, it should be remembered at the outset that it is for the

national court alone to assess the scope of the national provisions and the manner in which they must be applied (see, for example, Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] ECR I-2201, paragraph 20). Consequently, the application of the national provision in question in Mr Torarp's case, and in particular the reasons for which the Swedish authorities refused him a milk quota, cannot be reviewed by the Court in proceedings under Article 177 of the Treaty.

- 55 As indicated by the Advocate General in points 60 and 61 of his Opinion, the Court has held that national rules governing the initial allocation of milk quotas which do not permit certain kinds of accident to be taken into account, so that a producer who has suffered such an accident which has appreciably reduced his milk production during the reference period is given a lower milk quota than that to which he would have been entitled had the accident not occurred, are not contrary to the principle of non-discrimination — or, moreover, the principle of the protection of legitimate expectations (Case 84/87 *Erpelding v Secrétaire d'État à l'Agriculture et à la Viticulture*) [1988] ECR 2647, paragraphs 15 to 21).
- 56 The justness of that conclusion is all the more plain where the rules permit milk producers to obtain a milk quota even where they have been obliged by circumstances outside their control to interrupt milk production during the reference period or part of it, provided that they can show special circumstances justifying their application to resume production. That approach reflects that of the additional levy scheme, which permits producers to resume production after having interrupted it in certain circumstances, notably in the case of producers who had given a non-marketing undertaking in accordance with Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of diary herds (OJ 1977 L 131, p. 1), provided that they intended to continue production and were able to show, if necessary, that they were in a position to market the quantities of milk for which they were applying.

- 57 By contrast, the decisions of the Court of Justice show that milk quotas may be refused for producers seeking them not in order to resume marketing milk on a permanent basis but in order to obtain a purely financial advantage therefrom, relying on the market value acquired by the milk quota in the meantime (see, *inter alia*, Case C-44/89 *Georg von Deetzen v Hauptzollamt Oldenburg* [1991] ECR I-5119, 'Von Deetzen II', paragraph 24). In order to prevent speculation by seeking a milk quota for the sole purpose of selling it to someone else, therefore, the requirement that there be special grounds enables the national authorities to measure the producer's seriousness of intent and genuine capacity to effectively resume milk deliveries.

Observance of the principle of proportionality

- 58 As regards the restriction on the exercise of fundamental rights attributed to the fixing of milk quotas *inter alia* for new producers and producers who have increased production at a level lower than their production capacity, it should be remembered that when a Member State imposes restrictions on the exercise of fundamental rights it must observe the principle of proportionality. In accordance with that principle, the restriction must not constitute, having regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights (*Wachauf*, paragraph 18).
- 59 In the first place, there is nothing in the file indicating that fixing milk quotas for new producers and producers who have increased their production at a level lower than their production capacity is not appropriate and necessary in order to avoid exceeding the guaranteed total quantity. According to the observations of

the Swedish Government, the restriction placed on the account to be taken of their production capacity was calculated precisely because of the risk that the total quantity would be exceeded.

60 In the second place, the Swedish Government has shown, by figures produced at the hearing, that for the 1995/1996 milk year only 1% of the guaranteed total quantity was not distributed, a figure which fell to 0.2% for the 1997/1998 milk year. In view of the fact that Community legislation permits a national reserve to be constituted, and in the light of the very small quantity withheld by the Swedish authorities, a Member State cannot be exceeding its discretionary powers where the quantities not allocated are so small.

61 In the light of all those considerations relating to the existence of a breach of the principle of equal treatment, it is clear that national legislation governing the initial allocation of milk quotas and adopted by a Member State which acceded to the European Communities on 1 January 1995, whereby (i) new producers who commenced production between 1 January 1991 and 31 December 1994 and producers who increased their production during the same period, but not producers who did not alter their production between 1 January 1991 and 31 December 1994 and 'ecological' milk producers, have a reduction applied (and at different rates) in the calculation of their milk quotas, (ii) an individual reference quantity is granted only to producers who can show that their production was continuous between 1 March 1994 and 1 January 1995, unless a producer who was compelled to interrupt delivery during that period can show special circumstances justifying the grant of a reference quantity, is compatible with the principle of equal treatment.

The principle of the protection of legitimate expectations

- 62 The appellants in the main action maintain that the Swedish legislation infringes the principle of the protection of legitimate expectations because the national scheme for allocating milk quotas does not faithfully reflect the Community scheme resulting from Regulation No 856/84 and, more particularly, because the allocation of a milk quota is subject to requirements relating to the protection of the environment and the requirement that production have been continuous between 1 March 1994 and 1 January 1995.
- 63 Those complaints cannot be upheld. The principle of the protection of legitimate expectations may be relied upon as against Community rules only to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation (Case C-22/94 *Irish Farmers Association and Others v Minister for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809, paragraph 19). Analysis of the national legislation at issue in the main proceedings has already shown that the relevant Community rules cannot have had such an effect.

Costs

- 64 The costs incurred by the Swedish Government and 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Regeringsrätten by decision of 27 May 1997, hereby rules:

Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, and the principle of equal treatment enshrined more specifically in the second subparagraph of Article 40(3) of the EC Treaty (now, after amendment, the second subparagraph of Article 34(2) EC), are to be interpreted as not precluding national legislation governing the initial allocation

of individual reference quantities and adopted by a Member State which acceded to the European Communities on 1 January 1995, whereby:

- individual reference quantities for producers who did not alter their production between 1 January 1991 and 31 December 1994 are determined on the basis of the average quantities delivered between 1991 and 1993;
- new producers who commenced production between 1 January 1991 and 31 December 1994 and producers who increased their production during the same period, but not producers who did not alter their production between 1 January 1991 and 31 December 1994 and ‘ecological’ milk producers, have a reduction applied (and at different rates) in the calculation of their milk quotas;
- an individual reference quantity is granted only to producers who can show that their production was continuous between 1 March 1994 and 1 January 1995, unless a producer who was compelled to interrupt delivery during that period can show special circumstances justifying the grant of a reference quantity.

Kapteyn

Hirsch

Ragnemalm

Delivered in open court in Luxembourg on 13 April 2000.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber