OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 14 November 1990 *

Mr President,
Members of the Court,

1. The Community legislation governing milk quotas has been the source of numerous references to the Court, many of which have concerned the determination of the reference year and the possible derogations available to producers. The question raised in the present case concerns just such a difficulty.

2. Of the years 1981-83, the Netherlands authorities have taken 1983 as the reference year, while the plaintiffs seek to have 1982 used for that purpose, on the basis of Article 3 of Regulation (EEC) No 1371/84,[1] now Regulation No 1546/88, which the Court is asked to interpret here. That article allows a producer to choose another reference year within the 1981 to 1983 period when 'compulsory appropriation of a considerable part of the utilizable agricultural area of the producer's holding [results] in a temporary reduction of the fodder area of the holding'.

3. The plaintiffs, who operate a holding with an area of approximately 19 hectares, granted NV Nederlandse Gasunie the right to lay, use and maintain a gas pipeline on and in their land, in respect of which they received compensation. NV Nederlandse Gasunie used approximately 7 hectares of agricultural land during the period from April 1983 to October 1984.

4. By Royal Decree of 1963, a concession contract was granted for the laying and maintenance of that pipeline, which was declared to be in the public interest by a Royal Decree of 1964, in accordance with the Belemmeringenwet Privaatrecht (Law on Obstruction (Private Law)). According to the documents in the case, that law imposes on landowners an obligation to tolerate the construction of certain facilities on land and entitles them to compensation. Article 2 provides for the possibility of entering into an agreement concerning the land in question in order to avoid the obligation to tolerate the works being imposed. The agreement entered into between the concession-holder and the plaintiffs appears to fall within that category.

5. According to the Netherlands authorities, the plaintiffs' situation does not entitle them to rely on Article 3 of Regulation No 1371/84, because the use of a field to lay a pipeline cannot be regarded as compulsory appropriation of a considerable part of the utilizable agricultural area of the producer's holding within the meaning of that article.

6. The national court seeks essentially to ascertain whether a situation in which the owner of an agricultural holding has entered into an agreement of the kind referred to in Article 2 of the Belemmer-

* Original language: French.

1 — Regulation repealed and replaced by Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12).

ingenwet Privaatrecht, resulting in a temporary loss of the use of a considerable part of the utilizable agricultural area of his holding and a temporary reduction of its fodder area, a consequence which would also have occurred if the obligation in question had been imposed, is covered by the provisions of Article 3 of Regulation No 1371/84.

7. I agree with the Commission's view that that question raises two successive difficulties.

8. The first is whether the concept of compulsory appropriation should be interpreted as covering the imposition of an obligation to tolerate use as provided for in the Netherlands legislation.

9. First of all, I would point out that the reason for the existence of the provision lies in the desire to protect producers against the exceptional event which an encroachment of the public authorities into their rights of ownership represents. If an owner is prevented from using his fodder area as a result of public action, then he should be allowed to choose a reference year other than that during which the compulsory appropriation took effect.

10. In that respect, no distinction can be drawn between compulsory appropriation in the strict sense and the obligation to tolerate use, whether temporary or not, provided for in Netherlands law. From a producer's point of view, the consequences are identical in both cases: he is unable to produce fodder on the land affected.

11. Furthermore, as the Commission points out, to limit the possibility of having another year taken into account to cases of compulsory appropriation in the strict sense would lead to discrimination against producers whose ownership rights had been limited in another way, although the material situation of the owners during the year concerned is clearly identical in both cases.

12. Finally, the Netherlands Government's argument that, since the entitlement to compensation enables producers to maintain their level of production, there is no reason to allow those concerned to choose another reference year, is irrelevant. It is sufficient to note, in that regard, that national systems always provide for compensation in cases of compulsory appropriation. The compensation for the obligation to tolerate use cannot therefore constitute a ground for withdrawing the benefit of the legislation in issue from the producer concerned, since compulsory appropriation in the strict sense, to which the article incontrovertibly refers, involves just such a compensation.

13. The second difficulty will require the Court to determine whether the article under consideration can cover a situation in which the arrangements for the use of the land were defined in an agreement entered into between the concession-holder and the landowner in order to avoid their being imposed by the public authorities.

14. My answer here is very decidedly in the affirmative. The *very fact* of the transfer of the right to use the land is the result of a unilateral decision by the public authorities which is binding on the individual

landowner. The extent of the landowner's rights is therefore affected in the public interest. It can in no way be considered that his wishes play any part in *originating* the limitation of his right of ownership, which may even be imposed on him if no agreement is entered into. Whether he then chooses to enter into an agreement with the concession-holder in order to determine the arrangements governing the transfer or whether those arrangements are imposed by the public authorities, there can be no doubt that the principle of the burden on the land concerned was created by unilateral action of the public authorities. It is therefore not possible to treat the contract between landowner and concession-holder as an ordinary contract under private law, thereby ignoring a context in which the authorities might still impose a unilateral measure laying down the arrangements governing the transfer.

15. To refuse to recognize the transaction in question as a compulsory appropriation within the meaning of the legislation under consideration would, moreover, unjustifiably penalize a person wishing to defend his rights *vis-à-vis* an imposed 'co-contracting party' by negotiating with that party rather than passively allowing the authorities to impose the arrangements governing the transfer.

16. I therefore propose that the Court should rule as follows:

'The situation of a landowner who has entered into an agreement with a public works undertaking in order to avoid the unilateral imposition of an obligation to tolerate public works on the land concerned must be understood as corresponding to a compulsory appropriation within the meaning of Article 3 of Commission Regulation (EEC) No 1371/84 of 16 May 1984 (repealed and replaced by Commission Regulation (EEC) No 1546/88 of 3 June 1988) if the agreement in question affects a considerable part of the utilizable agricultural area of the producer's holding and results in a temporary reduction of the fodder area of the holding.'