OPINION OF ADVOCATE GENERAL JACOBS
delivered on 8 April 1992 *

Mr President,
Members of the Court,

1. In this case, the Supreme Court of Ireland asks the Court to interpret once again Article 3a of Council Regulation No 857/84 of 31 March 1984 (OJ 1984 L 90, p. 13), which was inserted by Council Regulation No 764/89 of 20 March 1989 (OJ 1989 L 84, p. 2).

The legislative provisions

2. It will be recalled that Article 5c of Regulation No 804/68, inserted by Council Regulation No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), instituted an additional levy on milk production, payable on quantities of milk exceeding a certain reference quantity or 'quota'. Article 1 of Council Regulation No 857/84 fixes the amount of the levy, and Article 2 determines the amount of the quotas to be allocated to each producer. The quotas so determined are calculated with reference to the quantities of milk delivered in a particular year, and that 'reference year' can, at the election of the Member State concerned, be any one of the three calendar years 1981, 1982 or 1983. Article 3 of Regulation No 857/84 defines a number of special situations which are also to be taken into account in allocating quotas.

* Original language: English.

In particular, Article 3(3) provides as follows:

'Producers whose milk production during the reference year referred to under Article 2 has been affected by exceptional events occurring before or during that year shall obtain, on request, reference to another calendar reference year within the 1981 to 1983 period.'

Instances of such exceptional events are given in the second subparagraph of Article 3(3). By Article 3 of Commission Regulation No 1546/88 of 3 June 1988 (OJ 1988 L 139, p. 12), such exceptional events also include:

'if the producer runs the holding himself, occupational incapacity of long duration'.

3. Article 3a was inserted into Regulation No 857/84 by Regulation No 764/89 following the Court's judgments in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355. The purpose of the new article was to enable a quota to be allocated to milk producers who had

entered into a non-marketing or conversion undertaking under Council Regulation No 1078/77 of 17 May 1977 (OJ 1977 L 131, p. 1), and who had for that reason not engaged in milk production during the relevant reference year. As the first recital to Regulation No 764/89 explains, the list of special situations in Article 3 of Regulation No 857/84 does not include the case of producers who, by virtue of an undertaking given pursuant to Regulation No 1078/77, did not deliver any milk during the reference year selected by the Member State concerned. The recital concludes that 'the list of special situations in Article 3 must therefore be supplemented by a new Article, so that the producers concerned can receive a special reference quantity'. Following the Court's judgments in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585, Article 3a was amended by Council Regulation No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35).

4. Before Article 3a was amended, Article 3a(1) read, so far as is relevant, as follows:

'Producers ...

— whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation (EEC) No 1078/77, expires after 31 December 1983, or [in certain cases, including Ireland] after 30 September 1983 ...;

...

shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity ...'.

However, in Case C-189/89 *Spagl*, cited above in paragraph 3, the time-limits for the expiry of non-marketing or conversion undertakings which were set by that provision were held to be invalid. Article 3a(1) was accordingly amended by Regulation No 1639/91 in order to enable a quota to be granted to applicants whose undertakings expired in the course of 1983 (or, as the case may be, between 1 January and 30 September 1983), provided that they submitted an application within three months from 1 July 1991. In the fourth recital to Regulation No 1639/91, the new time-limits were justified as follows:

'Whereas in its Judgments [in Case C-189/89 *Spagl* and Case C-217/89 *Pastätter*] the Court of Justice stated that the Community legislator may validly introduce a time-limit concerning the expiry of the non-marketing or conversion period with the aim of preventing producers from benefiting from Article 3a of Regulation (EEC) No 857/84 if they did not deliver milk during all or part of the reference year in question for reasons not connected to a non-marketing or conversion undertaking; whereas all the Member States concerned took 1983 as the reference year; whereas, therefore, a producer, who, with every opportunity to do so, had not resumed milk production between 1 January 1983 and 1 April 1984, had adequately demonstrated his wish to abandon

milk production definitively for personal reasons not connected to the undertaking given or its consequences; whereas, therefore, only those producers whose period of non-marketing or conversion expired after 31 December 1982 should be allowed to benefit from the provisions of Article 3a.'

Although that recital refers to both of the Court's judgments, it was in fact only in the *Spagl* case that the Court considered the validity of the time-limit laid down by Article 3a(1). In paragraphs 15 and 16 of its judgment, the Court stated that that provision was invalid in so far as it was liable to exclude from the benefit of Article 3a producers who had not delivered milk during all or part of the relevant reference year, as a result of the carrying out of an undertaking given under Regulation No 1078/77. Thus, in amending the time-limit, the legislator took the view that producers could, consistently with the Court's judgment in *Spagl,* be excluded from the benefit of Article 3a in cases where the undertakings carried out by those producers did not overlap to any extent with the reference year for an award of a quota under Article 2.

The facts

5. Mr Dowling, the plaintiff in the main proceedings, applied in 1978 for a conversion premium under Regulation No 1078/77. His application was accepted, and he accordingly undertook not to produce milk for a period of four years ending on 22 November 1982. He suffered a heart attack in 1980, and underwent open heart surgery in February 1981. He continued to be unable to undertake physical work throughout 1982 and 1983, but in 1984 was able to resume limited physical activity.

6. From the written observations of the plaintiff, it appears that, despite his incapacity following his heart attack in 1980, farming was able to continue on his holding with the assistance of the plaintiff's son. Given the conversion undertaking, this was of course beef rather than dairy farming. However Mr Dowling did not resume dairy farming, even with his son's assistance, after the end of his conversion period. When the additional levy on milk production and the system of milk quotas was introduced in 1984, Mr Dowling was unable to obtain a quota under Article 2 of Regulation No 857/84 because he had not produced any milk in the relevant reference year, namely 1983. Since he had also not produced milk in 1981 or 1982, he was unable to make use of the possibility, provided by Article 3(3) of the regulation, of substituting an alternative reference year in the period 1981 to 1983.

7. Accordingly, when the new Article 3a was inserted into Regulation No 857/84 in order to give producers who had participated in a non-marketing or conversion scheme the opportunity of obtaining a quota, the plaintiff applied for a quota under that provision. His application was refused, on the ground that he did not satisfy the condition laid down in the first indent of Article 3a(1), cited above in paragraph 4, since his conver-

sion period had expired before 1 October 1983. On 6 October 1989 Mr Dowling brought proceedings before the High Court, with a view to establishing his right to a quota. The High Court refused to grant him relief, and he appealed to the Supreme Court.

8. The Supreme Court has accordingly referred the following question for a preliminary ruling:

'Is a farmer entitled to a provisional special reference quantity under Article 3c [sic] of Regulation (EEC) No 857/84 as amended by Regulation (EEC) No 764/89 if

— he ceased milk production in return for a conversion premium under Regulation (EEC) No 1078/77 for the period from 23rd November 1978 until 22nd November 1982

— he was incapacitated during 1983 and was accordingly unable to resume milk production in that year in circumstances in which the national authorities subsequently accepted that he would have been entitled to nominate either 1981 or 1982 as alternative reference years in accordance with the terms of Article 3(3) of Regulation (EEC) No 857/84

— he was unable to rely upon milk production during either 1981 or 1982 for the purposes of securing a reference quantity under Regulation (EEC) No 857/84 because both those years fell within the abovementioned four year conversion period?'

The reference to Article 3c of Regulation No 857/84 in the opening words of the question is evidently a mistake, as there is no such article. It is clear, however, that it is Article 3a which is intended. In what follows, I shall refer to the condition laid down in the first indent of Article 3a(1) of Regulation No 857/84 simply as 'the time-limit'. Although the question refers to producers who, like Mr Dowling, entered into a conversion undertaking under Regulation No 1078/77, it is clear that the same principles apply to producers who entered into a non-marketing undertaking under the same regulation. It may, however, be noted that, since non-marketing undertakings were for periods of five years, rather than the four years required for conversion undertakings, a non-marketing undertaking entered into in November 1978 would not have expired until November 1983.

Interpretation of the time-limit

9. Since Mr Dowling's conversion undertaking expired in November 1982, it would appear, on a literal reading of the first indent of Article 3a(1), that he has no prospect of receiving a quota under Article 3a. Although, as we have seen, that provision was subsequently amended in order that a quota could

be granted to producers whose undertakings expired in the course of the reference year 1983, it is clear that Mr Dowling's position is not affected by that amendment, since his undertaking expired before the end of 1982. Furthermore, as we shall see, it would appear from the Court's judgment in the *Spagl* case, cited above in paragraph 3, that the provision in question had to be given a literal construction: see paragraphs 14 to 15 below. Mr Dowling submits, however, that the provision laying down the time-limit is not to be construed literally, since the effect of such a construction would amount to unlawful discrimination against producers in his position. He does not suggest that Regulation No 857/84 is on that account invalid. Rather, in his submission 'It is established that gaps in the milk quota Regulations may be filled by application of the principle of equality, and that the terms of an EEC Regulation may be supplemented and applied by analogy to avoid discrimination.'

10. There is no doubt that Community legislation is to be interpreted, so far as possible, in such a way that it is in conformity with general principles of Community law, including in particular the principle of equal treatment (which in the sphere of agriculture is also laid down by Article 40(3) of the Treaty) and the principle of the protection of legitimate expectations. Thus, in interpreting Community legislation, the Court must presume that the legislator did not intend to flout such overriding principles of Community law. There are, however, limits as to how much interpretation can achieve. Beyond those limits, the Court has no choice but to declare the legislation invalid for breach of Community law; for the Court does not have any general power to amend or supplement legislation which would otherwise be invalid: see for example Case C-37/89 *Weiser* [1990] ECR I-2395, and in particular the remarks of Advocate General Darmon at page I-2415.

11. In support of the proposition that the Court can disregard the literal terms of Community legislation, the plaintiff cites Case 109/76 *Blottner* v *Nieuwe Algemene Bedrijfsvereniging* [1977] ECR 1141, where the Court had to construe the phrase 'present or future implementing measures' in Article 1(j) of Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416). Article 40(1) of the regulation provides for the aggregation of insurance periods in the case of a worker successively or alternately subject to the legislations of two or more Member States, and Article 1(j) defines 'legislation' for those purposes to mean laws, regulations and other provisions 'and all other present or future implementing measures'. The Court interpreted the latter phrase as including measures which were no longer in force at the time of the adoption of the relevant Community regulations. As the Court observed at paragraph 12 of the judgment:

'The objective of [the aggregation of time periods for the purposes of social security benefits, as laid down by Article 51 of the

Treaty] ... would not be attained if the worker lost the status of an insured person ... solely because of the fact that, at the time when those regulations were adopted, the national legislation in force at the time when the worker was insured had been replaced by different legislation.'

Thus, the objective of Article 40(1) of the regulation would have been frustrated by any more restrictive interpretation of Article 1(j). Indeed, as Advocate General Warner observed in his Opinion, at page 1158, any other interpretation would have led to 'a patent absurdity', and for the reasons he gave, the interpretation did not in fact contradict the text of the provision. The *Blottner* case therefore shows, at most, only that the Court will if necessary give effect to the clear objective of a provision by means of an extensive interpretation of its terms.

12. The plaintiff also refers to Joined Cases 201 and 202/85 *Klensch* v *Secrétaire d'État* [1986] ECR 3477. In that case the Court stated that, in certain circumstances, all or part of a quota must be added to the national reserve, rather than retained by the purchaser to whom it had been allocated pursuant to formula B in Article 2 of Regulation No 857/84, notwithstanding that the regulation made no express provision for such an adjustment in those circumstances: see paragraphs 19 to 22 of the judgment. Since however it was the case, equally, that nothing in the regulation purported to exclude such an adjustment, it does not seem to me that the plaintiff is assisted by the Court's approach in *Klensch*. Finally, the plaintiff cites Case 165/84 *Krohn* v *BALM* [1985] ECR 3997, where the Court recognized that, in certain exceptional circumstances, a Community regulation containing an omission which is incompatible with a general principle of Community law may be extended to situations other than those envisaged by the regulation: see paragraph 14 of the judgment. The Court did not, however, state that a regulation may be so extended where that would be precluded by its express terms or clear intention.

13. The limits of what the Court can achieve by way of the interpretation of Community provisions are in fact well illustrated by the vicissitudes of the legislation presently at issue, which the Court has twice declared invalid. Regulation No 857/84 was first declared to be invalid in Case 120/86 *Mulder* and Case 170/86 *von Deetzen*, cited above in paragraph 3. In those cases, the Court held that a total and continuous exclusion from milk production, of producers who had entered into an undertaking under Regulation No 1078/77, frustrated the legitimate expectations of those producers: see paragraph 26 of the judgment in *Mulder*, and paragraph 15 of the judgment in *von Deetzen*. The Court did not consider that it was possible to interpret the provisions in question in such a way as to allow such producers to receive a quota. As the Court stated in paragraph 15 of its judgment in *Mulder:*

'An analysis of the scheme and purpose of Articles 3 and 4 of Council Regulation No 857/84 shows that they list exhaustively

the situations in which special or additional reference quantities may be allocated by the Member States. Those provisions do not cover the situation of a producer who delivered no milk during the reference year because of a non-marketing undertaking entered into under Regulation No 1078/77; consequently, such a producer may claim a reference quantity only if he falls within one or more of the situations specifically envisaged for that purpose.'

14. The Council was accordingly obliged to amend Regulation No 857/84 in order to add to the list of special situations in which quotas could be allocated. That was done, as we have seen, by means of the insertion of a new Article 3a into the regulation. However, in Case C-189/89 *Spagl* and Case C-217/89 *Pastätter,* cited above in paragraph 3, Article 3a was itself held to be invalid in two respects. The rule laid down in Article 3a(2), according to which the amount of a quota provisionally awarded under Article 3a(1) was limited to 60% of the milk previously delivered, was held to be invalid because that level of abatement, applicable only to producers who were returning to production after carrying out an undertaking given under Regulation No 1078/77, was excessively high in relation to that applied to other producers: see paragraph 23 of the judgment in *Spagl,* and paragraph 14 of the judgment in *Pastätter.* Furthermore, as we have already seen, in *Spagl* the time-limit laid down by the first indent of Article 3a(1) was also held to be invalid, in that it excluded from the benefit of Article 3a producers who had failed to deliver milk during all or part of the reference year as a result of an undertaking given under Regulation No 1078/77.

15. If the Court had been able to remove or adjust the time-limit fixed by Article 3a(1), or the 40% abatement required by Article 3a(2), it is clear that it would have been unnecessary for those provisions to have been declared invalid. Notwithstanding however that both provisions, on their literal construction, frustrated the legitimate expectations of producers who had carried out an undertaking given pursuant to Regulation No 1078/77, and notwithstanding that Article 3a was inserted into Regulation No 857/84 precisely in order to satisfy the legitimate expectations of such producers, the Court did not feel itself able to interpret those provisions in such a way as to bring them into conformity with Community law. It seems to me that the Court was unable to do so because the intention of the legislation, however defective, was abundantly clear, and there was accordingly no occasion to depart from the literal meaning of the provisions in which it was expressed. Since the intention of the legislator was inconsistent with a general principle of Community law, the Court had no choice but to declare invalid the provisions which gave effect to that intention.

16. In the same way, Regulation No 857/84 was originally held to be invalid, prior to the insertion of Article 3a, because it was impossible to interpret Articles 3 and 4 of the regulation as making provision for producers who had failed to deliver milk in the relevant reference year in consequence of an undertaking given under Regulation No 1078/77. As the Court pointed out in paragraph 15 of its judgment in Case 120/86 *Mulder*, cited above in paragraph 13, it is clear from an analysis of Articles 3 and 4 of Regulation No 857/84 that the list of

special situations specified in those articles is intended to be exhaustive. The Court could not therefore fill a gap in the regulation by making provision for a further special situation: it could only declare the regulation to be invalid in so far as it failed to make such provision.

17. Thus, there is in my opinion no doubt that, in enacting the original version of Article 3a(1), the legislator intended the time-limit to exclude all producers whose conversion undertakings expired before the time-limit laid down. The same intention is equally manifest in the amended provision resulting from Regulation No 1639/91, and in particular from the fourth recital to that regulation, which was cited above in paragraph 4. There is equally no doubt, in my view, that the list of special situations provided for in Regulation No 857/84 continues to be exhaustive after the addition of Article 3a and the subsequent amendment of that article. Thus, Article 3a provides a new special situation in which a quota is available, but it is not intended to alter the scope of Article 3(3) by making available a further alternative reference year for the purpose of that provision.

18. It follows that Mr Dowling will only be able to obtain relief in these proceedings if Regulation No 857/84 is declared to be invalid in so far as it fails to make provision for a producer in his circumstances. Although the question of validity has not been referred, and the question has not been raised in any of the observations submitted to the Court, it is one which the Court can, in my opinion, raise of its own motion, particularly in view of the fact that the plaintiff has argued that the regulation, on its literal construction, violates general principles of Community law. The Court has thus heard argument on issues which have a direct bearing upon the validity of the regulation. As we shall see, however, none of those arguments is in fact sufficient to establish its invalidity.

Validity of the time-limit

19. According to the plaintiff, there are in effect two respects in which the time-limit, literally construed, is contrary to general principles of Community law. First, the plaintiff argues that producers in his position fall within the scope of the decisions in Case 120/86 *Mulder* and Case 170/86 *von Deetzen*, cited above in paragraph 3, and that he accordingly has a legitimate expectation of returning to milk production which should be protected by the Court. The plaintiff argues, secondly, that to deprive him of a quota would be contrary to the principle of non-discrimination. I shall consider those submissions in turn.

20. It will be recalled that, in *Mulder* and *von Deetzen*, the Court stated that a producer who has voluntarily ceased production for a certain period cannot legitimately expect to resume production under the same conditions as those which previously applied; however, where he was encouraged by a Community measure to undertake to suspend marketing for a limited period, he could legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affected him

precisely because he availed himself of the possibilities afforded by that scheme. The question which must be considered, therefore, is whether, on expiry of his undertaking in November 1982, Mr Dowling could be said to be subject to restrictions under Community law which were the specific consequence of his participation in a conversion scheme.

21. The answer to that question is, in my opinion, clear. When Mr Dowling's undertaking expired, he was under no restriction imposed by Community law preventing him from producing milk. The additional levy on milk production, and with it the system of quotas, was not introduced until 1 April 1984. Throughout 1983 Mr Dowling had the opportunity to resume milk production, and, given that 1983 was the applicable reference year for the purposes of Article 2 of Regulation No 857/84, eventually to obtain a quota pursuant to that provision. As we have seen, Mr Dowling was in fact prevented from returning to milk production in 1983 for reasons of ill-health, and was consequently unable to obtain a quota. His failure to make a timely return to milk production cannot therefore be attributed to the carrying out of his conversion undertaking; it must rather be attributed to his ill-health.

22. It is true that Mr Dowling was unable to make use of the possibility, provided by Article 3(3) of the regulation, of substituting 1981 or 1982 as an alternative reference year, given that he had produced no milk during either of those years; and it is true, equally, that his lack of production in those years can be attributed to his conversion undertaking. It must be noted, however, that the possibility of substituting an alternative reference year under Article 3(3) only arose because Mr Dowling was incapacitated during the reference year 1983. It was that incapacity, and not Mr Dowling's conversion undertaking, which first gave rise to the possibility of substituting a different reference year, and to his need to do so. In my view, therefore, there is not a sufficiently direct connection between the plaintiff's carrying out of his conversion undertaking, and his failure to obtain a quota. It is clear from the Court's judgment in Case C-189/89 *Spagl*, cited above in paragraph 3, that the Community legislator is entitled to exclude from the benefit of Article 3a those producers whose failure to deliver milk during the relevant reference year is attributable to factors other than their fulfilment of an undertaking under Regulation No 1078/77: see paragraph 13 of the judgment; and see also Case C-177/90 *Kühn* v *Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, at paragraph 15 of the judgment.

23. It seems to me therefore that Mr Dowling's legitimate expectation of returning to milk production at the end of his conversion period was not frustrated by the Community provisions in question, but rather by his ill-health during 1983. On the other hand, there is no doubt that he is treated differently, under the relevant provisions, as compared with a producer who had the opportunity of producing in one of the alternative reference years permitted by Article 3(3) of Regulation No 857/84. The question must therefore be considered whether such a difference in treatment amounts to unlawful discrimination between producers within the Community, contrary to Article 40(3) of the Treaty.

24. In Case 84/87 *Erpelding* v *Secrétaire d'État à l'Agriculture et à la Viticulture* [1988] ECR 2647, the Court observed that the rule preventing producers, whose milk production has been significantly reduced throughout the 1981 to 1983 period, from obtaining a quota based on representative production, affected such producers adversely in comparison with those able to rely upon such production during a reference year. The rule was none the less held to be justified by the need to limit the number of years which may be taken as reference years, in the interests both of legal certainty and of the effectiveness of the quota system: see paragraph 30 of the judgment, and see also Case 113/88 *Leukhardt* v *Hauptzollamt Reutlingen* [1989] ECR 1991. It seems to me that exactly the same considerations apply in the present case. In order for Mr Dowling to obtain a quota, it would in effect be necessary for him to be permitted to substitute, for the reference year 1983, a year falling outside the three-year period 1981 to 1983. For, in claiming the benefit of Article 3a of Regulation No 857/84, he is claiming the right to take the twelve months preceding his application for a conversion premium as the basis for the allocation of a quota: see Article 3a(2) of the regulation. It does not seem to me that his case for being permitted to make reference to a year outside the three-year period is stronger than that of any other producer who, for whatever reason, has been unable to produce a sufficient quantity of milk during those three years. In my view, therefore, the argument based upon the principle of non-discrimination must equally be rejected. Thus, no considerations have been advanced which would lead to the conclusion that Regulation No 857/84 is invalid in so far as it fails to make a quota available to a producer in Mr Dowling's position.

Conclusion

25. I am accordingly of the opinion that the question referred by the Supreme Court of Ireland should be answered as follows:

Where a producer's conversion period pursuant to an undertaking given under Regulation No 1078/77 expired before 1 January 1983, the producer is not entitled to a provisional special reference quantity under Article 3a of Regulation No 857/84, as amended by Regulation No 764/89 and by Regulation No 1639/91, notwithstanding the fact that in 1983 he suffered from an occupational incapacity which, but for the carrying out of his conversion undertaking, might have enabled him to obtain, pursuant to Article 3(3) of Regulation No 857/84, reference to another calendar year within the 1981 to 1983 period.