

reference quantities at issue, the concern to impede speculative transactions is an objective of general interest which justifies the restriction imposed on that right and the substance of that right is not thereby affected since the producer may both turn his holding to account and transfer it, with his reference quantities, to his heirs.

3. The concepts of 'sale' and 'lease' within the meaning of the second subparagraph of Article 3a(4) of Regulation No 857/84, as amended by Regulation No 764/89, must be interpreted as referring to every transfer, for consideration, of the ownership of, or the right to use, the holding, with the exception, however, of cases in which such a transfer arises from a transaction 'similar' to inheritance within the

meaning of the first paragraph of Article 7a of Regulation No 1546/88, as amended by Regulation No 1033/89. The last-mentioned concept must be interpreted as referring to every transaction which entails effects similar to those of inheritance, regardless of the form in which such transaction is effected. It embraces, in particular, transactions concluded in respect of the holding concerned between a producer and the potential beneficiary of his estate, provided that the terms of the transaction in question are such that, according to its purpose and subject-matter, the main intention is that the holding should continue to be exploited by the potential beneficiary and not that the marketable value of the holding should be realized by the person from whom he stands to inherit.

REPORT FOR THE HEARING in Case C-44/89 *

I — Facts and procedure

1. *The applicable Community legislation*

(a) 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 dairy herds (Official Journal 1977 L 131, p. 1) established *inter alia* a system of

non-marketing premiums to be granted on request to any producer who undertook not to deliver milk or milk products from his holding either for a consideration or free of charge for a period of five years (Articles 1 and 2).

(b) Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and

* Language of the case: German.

milk products (Official Journal 1984 L 90, p. 10) provided for an additional levy payable on quantities of milk delivered in excess of a reference quantity to be determined. That scheme is implemented in each region of the territory of the Member States in accordance with one of the following formulas (Article 1).

- Under Formula A, the levy is payable by every milk producer on the quantities of milk which he has delivered to a purchaser in excess of a reference quantity to be determined (producer formula);
- Under Formula B, the levy is payable by every purchaser of milk or other milk products on the quantities thereof delivered to him in excess of a reference quantity to be determined. The purchaser liable to the levy is to pass on the burden in the price paid only to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (purchaser formula).

(c) The general rules for the application of the additional levy are contained in Council Regulation (EEC) No 857/84 of 31 March 1984 laying down general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector. That regulation fixes in particular the reference quantity referred to in the basic regulation (No 856/84), that is to say the quantity exempted from the additional levy. The latter is in principle equal to the quantity of milk or milk equivalent delivered by a producer (Formula A) or purchased by a

purchaser (formula B) in the 1981 calendar year, plus 1% (Article 2(1)). However, the Member States may provide that on their territory the reference quantity is to be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 or 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity (Article 2(2)).

Articles 3, 3a, 4 and 4a of Regulation (EEC) No 857/84, as amended, enable the Member States to take account of certain special situations when fixing reference quantities or to allocate special or additional reference quantities. In the present case, Article 3a, inserted by Council Regulation (EEC) No 764/89 of 20 March 1989, is of particular importance:

Article 3a

1. Producers referred to in the third paragraph of Article 12(c):

- whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation (EEC) No 1078/77, expires after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to the March of the following year;
- who have not received a reference quantity under the terms laid down

pursuant to Article 5(4)(b) and/or Article 9(2) of Regulation (EEC) No 1546/88 and/or, with regard to the person to whom the premium is transferred, pursuant to Article 2 of this Regulation,

2. The special reference quantity shall be equal to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made, as determined by the competent authority concerned pursuant to Article 5(1)(e) of Regulation (EEC) No 1391/78, as last amended by Regulation (EEC) No 84/83, and for which the producer has not lost his entitlement to the premium.

shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity and provided that such producers:

(a) did not cease farming within the meaning of Article 2(3) and (4) of Regulation (EEC) No 1078/77 or transfer the whole of their dairy enterprise before the end of the non-marketing or conversion period;

Where the producer has obtained a reference quantity pursuant to Article 3, points 1 and 2, and/or Article 4(1)(b) and (c), the special reference quantity referred to in the first subparagraph of the paragraph shall be reduced by such quantity.

(b) establish in support of their request, to the satisfaction of the competent authority, that they are able to produce on their holding up to the reference quantity requested;

Where the producer has transferred part of his holding during the non-marketing or conversion period:

(c) undertake to sell milk or other products direct to the consumer and/or to deliver milk to a buyer;

— the transferor's special reference quantity as established above shall be equal to 60% of the quantity for which entitlement to the premium has been retained,

(d) undertake, as regards the special reference quantity, not to apply for assistance under any programme for the abandonment of reference quantities until the end of the additional levy scheme.

— the transferee's special reference quantity as established above shall be equal to 60% of the quantity for which entitlement to the premium has been acquired.

3. If, within two years from 29 March 1989, producers can prove to the satisfaction of the competent authority that they have actually resumed direct sales and/or deliveries, and that such direct sales and/or deliveries have attained during the previous 12 months a level equal to or greater than 80% of the provisional reference quantity, the special reference quantity shall be definitively allocated to the producers. Should this not prove to be the case, the provisional reference quantity shall be returned in its entirety to the Community reserve. The level of direct sales and/or actual deliveries shall be determined by taking into account production rate trends on the producer's holding, seasonal conditions and any exceptional circumstances.

4. That part of the special reference quantity which is not intended for use during a 12-month period may not be the subject of a temporary transfer as referred to in Article 5c(1a) of Regulation (EEC) No 804/68.

Where the holding is sold or leased before the end of the eighth period of application of the additional levy scheme, the special reference quantity shall be returned to the Community reserve. Where only part of the holding is sold or leased, part of the special reference quantity shall be returned to the Community reserve. Such part shall be calculated on the basis of the feed-crop area sold or leased in accordance with the detailed rules to be defined under the procedure laid down in Article 30 of Regulation (EEC) No 804/68.

5. ...

6. ...'

(d) The detailed rules for the application of the additional levy were laid down 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 (Official Journal 1988 L 139, p. 12). Article 7a of that regulation, added by Commission *Regulation (EEC) No 1033/89* of 20 April 1989 (Official Journal 1989 L 110, p. 27), provides:

'Article 7a

The special reference quantity granted under the conditions laid down in Article 3a of Regulation (EEC) No 857/84 shall, in the event of the transfer of the holding by inheritance or by any similar transaction, be transferred in accordance with the first and third subparagraphs of Article 7 provided that the producer to whom the holding is transferred in whole or in part undertakes in writing to comply with the undertakings of his predecessor. Article 3a(4) of Regulation (EEC) No 857/84 shall continue to apply to the special reference quantity thus transferred.

Where the second subparagraph of Article 3a(4) of Regulation (EEC) No 857/84 applies, the producer shall notify his intentions in advance to the competent authority, which shall issue him with an acknowledgement of receipt. Within one month from the date of the acknowledgement of receipt, the competent

authority shall determine the quantity which is to return to the Community reserve and, where appropriate, notify the producer of the special reference quantity which will continue to be granted to him.

(b) In the course of those proceedings, the Finanzgericht referred a question to the Court on 26 June 1986 on which the latter gave a ruling by judgment of 28 April 1988 in Case 170/86 *von Deetzen* [1988] ECR 2355. The Court ruled:

In the latter case, the part which is to return to the Community reserve shall be calculated on the basis of the area under forage within the meaning of Article 1(1)(d) of Regulation (EEC) No 1391/78 leased or sold.'

'Council Regulation (EEC) No 857/84 of 31 March 1984, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984, is invalid in so far as it does not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking entered into under Council Regulation No (EEC) 1078/77 of 17 May 1977, did not deliver milk during the reference year adopted by the Member State concerned.'

2. *The dispute in the main proceedings*

(a) Georg von Deetzen, a farmer, received a non-marketing premium in 1980 under Regulation No 1078/77. The premium was granted subject to the condition that, for a period of five years ending on 7 September 1985, no milk or milk products from his holding would be disposed of for consideration or free of charge.

(c) Considering that the decision to be given depended on the effects of the abovementioned judgment, the Finanzgericht Hamburg, by order of 19 December 1988, stayed the proceedings and referred to the Court for a preliminary ruling under Article 177 of the of the European Communities the following question:

After the expiry of that period, Mr von Deetzen asked the Hauptzollamt (Principal Customs Office), Oldenburg, to grant him a reference quantity of 190 665 kg of milk, corresponding to the quantity of milk used as a basis for calculating the non-marketing premium. His application was rejected and on 5 March 1986 he brought an action before the Finanzgericht (Finance Court), Hamburg, for a finding that, in the event of his resuming milk production, he would not be required to pay an additional levy under the abovementioned Community regulations.

'(1) Is Article 177 of the EEC Treaty to be interpreted as meaning that a further request for a preliminary ruling is permissible where the national court cannot reach a decision because the competent Community institutions have not enacted any legislation following a declaration by the Court of Justice that certain legislation is invalid, and measures need to be adopted in order to remedy that legal situation?

(2) If Question 1 is answered in the affirmative, what is the effect of the Court's judgment of 28 April 1988 in Case 170/86 inasmuch as the Council of the European Communities has taken no action since then?.

end of the eighth period of application of the additional levy scheme, valid?

(3) If Question 2 is answered in the affirmative,

(d) However, the national court took the view, following the adoption of Regulations Nos 764/89 and 1033/89 on the basis of which Mr von Deetzen's reference quantity had in the meantime been fixed as 114 399 kg of milk) that the questions submitted in the order for reference of 19 December 1988 had become devoid of purpose. Consequently, by order of 8 August 1989, it withdrew those questions and submitted the following instead:

(a) For the purposes of the second paragraph of Article 3a(4) of Regulation No 857/84, as amended by Regulation No 764/89, is the concept of "sale" to be interpreted as including the arrangement of the farm as a private firm (*Gesellschaft bürgerlichen Rechts*) of which the producer to whom the special reference quantity is granted is a partner?

(1) Are Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, and Commission Regulation (EEC) No 1033/89 of 20 April 1989, based upon it, valid in so far as the special reference quantity under Article 3a(2) is equal to only 60% of the quantity of milk or milk equivalent by reference to which the non-marketing or conversion premium was established?

Can a "sale" be said to have occurred if the person having arranged his farm as a private firm ceases to be a partner in that firm on account of death or for some other reason and his share accrues to the other members?

(2) Is the second paragraph of Article 3a(4) of Regulation No 857/84, under which the special reference quantity is to be returned to the Community reserve if the holding is sold or leased before the

(b) How are the words "by any similar transaction" to be construed for the purposes of the first paragraph of Article 7a of Regulation No 1546/88, as amended by Regulation No 1033/89? Do they cover the leasing of a farm to a person who, under the statutory rules of succession, stands to inherit from the producer entitled to the special reference quantity?

In the grounds of the order for reference of 8 August 1989, the national court expresses the view that the limitation of the special reference quantity to 60% of the quantity of milk delivered by the producer during the 12-month period preceding the month in which the application for a non-marketing premium or conversion premium was lodged frustrates the legitimate expectations of the producers that the provisions concerning the non-marketing of milk would be of only limited scope. In the Finanzgericht's view, the legitimate expectations of the producers are not satisfied where, upon resuming the marketing of milk, they are subjected to substantial restrictions which the other producers do not have to bear. Moreover, such restrictions are not justified by the general interests of the Community in relieving the market of surpluses; the general principles of Community law can only be complied with if the same treatment is accorded to the various categories of producers involved.

The Finanzgericht also entertains doubts regarding the validity of the provision under which the special reference quantity returns to the Community reserve in the event of sale or lease of the holding before the end of the eighth period of application of the additional levy scheme. For other producers, the sale or lease of a holding does not entail loss of the reference quantity, the latter being transferred to the purchaser or lessee. The impossibility of transferring a reference quantity may, in some cases, involve a substantial financial loss. The validity of the provision in question is also dubious, in the view of the Finanzgericht, in so far as no reason for it is included in the preamble to Regulation No 764/89.

Finally, the Finanzgericht wonders whether the concept of 'sale' within the meaning of

Regulation No 857/84, as amended by Regulation No 764/89, refers only to sales under civil law or whether it also covers the contribution of a holding to a firm. It also wonders whether the leasing of the holding to the potential beneficiary of an estate constitutes an operation similar to inheritance within the meaning of Regulation No 1546/88, as amended by Regulation No 1033/89.

3. Procedure before the Court

The order for reference dated 19 December 1988 was received at the Court Registry on 20 February 1989; the amending order of 8 August 1989 was received at the Court Registry on 20 October 1989.

Pursuant to Article 20 of the Protocol on the Court of Justice of the EEC, written observations were lodged by the Council of the European Communities, represented by Arthur Brautigan, an Adviser in its Legal Service, acting as Agent, and by the Commission of the European Communities, represented by Dierk Booss, Legal Adviser, acting as Agent. Their observations related both to the questions contained in the order of 19 December 1988 and to those in the order of 8 August 1989.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, on 6 February 1991, to assign the case to the Fifth Chamber pursuant to Article 95 of the Rules

of Procedure, and to open the oral procedure without any preparatory inquiry.

II — Written observations

Since the questions submitted in the order for reference of 19 December 1988 were superseded by those in the order of 8 August 1989, the present Report for the Hearing summarizes only the observations concerning the latter questions.

(1) The first question (order for reference of 8 August 1989)

The Council and the Commission both submit that Article 3a(2) of Regulation No 857/84, as amended by Regulation No 764/89, is valid.

(a) The *Council* states that it was impossible to apply to the producers concerned, whose non-marketing or conversion period ended after 31 December 1983 (or, as the case may be, after 30 September 1983), the reference production which was used when fixing the reference quantities of the other producers, since the producers in question had produced nothing in the period 1981 to 1983. It was therefore necessary to rely, for the production reference, on the latest known production figures, namely those on the basis of which the non-marketing or conversion premium had been granted. Thus, the producers concerned are objectively in a different situation from that of the other producers as regards their reference quantities.

According to the Council, since the overall quantity guaranteed by the Member State is the aggregate of the milk deliveries by the various producers in 1981, it did not seem justifiable to reduce the active producers' individual quantities so as to enable reference quantities to be allocated to the producers concerned. Consequently, the Council increased the Community reserve by 600 000 tonnes. In all the circumstances, the most balanced solution was, first, to recognize the rights of those concerned to the allocation of a reference quantity and, secondly, to limit that quantity to 60% of their reference production.

The Council then considers the validity of the contested limitation to 60% in relation to the principle of the protection of legitimate expectations, the fundamental right to property and the principle of equal treatment.

In its view, the principle of the protection of legitimate expectations has not been infringed since the limitation to 60% is not a specific limitation imposed on the producers concerned, representing their total and permanent exclusion from the marketing of milk throughout the currency of the regulations on the additional levy. Also, Article 3a does not of itself exclude the application of the other provisions of Regulation No 857/84, which allow adjustment of the reference quantities of producers who find themselves in difficulty. Moreover, says the Council, the Member States themselves are required, in applying the optional provisions of Community law, to observe the general principles of Community law such as the principle of the protection of legitimate expectations.

The Council also considers that the right to property is safeguarded since Article 3a contains no absolute and definitive limitation on the future production of those concerned. On the contrary, they may increase their production following allocation by the Member State concerned of a reference quantity of more than 60% on the basis of Articles 3, 3b, 4 or 4a or indeed following the acquisition, by purchase or lease, of a reference quantity additional to the reference quantity granted under Article 3a.

In that context, the Council also states that the Court has held that, in circumstances necessitating the evaluation of a complex economic situation, as is the case concerning the common agricultural policy, the Community legislature enjoys a wide discretion as to the nature and scope of the measures to be taken.

Moreover, in the Council's view, the issue in the present case is a straightforward limitation on the use of real property, namely the requirement of not making use of a dairy holding's full reference production. Such a limitation is justified by the Community public interest, it being necessary to ensure that the market surpluses are not increased by the exploitation of new production capacity.

According to the Council, the limitation at issue involves no discrimination whatsoever: first, the producers concerned are objectively in a different situation, as regards their reference production, from that of the producers who delivered milk during the

reference year (1981 to 1983) and, secondly, the limitation imposed is necessitated by the fragile stability of the milk market.

The producers concerned are thus in an intermediate position between the producers who delivered milk during the reference year and those who may, if appropriate, benefit from the application of the optional provisions of Articles 3 and 4 of Regulation No 857/84. The former are entitled to the allocation of a reference quantity on the basis of the production achieved during the reference year, less any abatements resulting from the application of a different reference year or additions to the national reserve and less any abatements resulting either from the reduction of aggregate quantities or from the suspension of individual quantities. The second category, on the other hand, has no real entitlement to the grant of a reference quantity; however, the producers in that category may benefit from an optional grant of a special or additional reference quantity. That means that, if the various provisions are judiciously applied, it is possible to avoid any difference of treatment of producers that is not justified by objective criteria.

(b) The *Commission* observes that the producers who had signed a non-marketing undertaking under Regulation No 1078/77 did not, by contrast with those referred to in Article 2 of Regulation No 857/84, contribute to the establishment of the total quantity guaranteed by the Member State. Unlike the producers referred to in Article 3 of that regulation, they may claim entitlement to a certain reference quantity and are not therefore dependent on a corresponding decision by the Member States.

Against that background, it was necessary to adopt rules which took particular account of the following circumstances:

- the allocation of a reference quantity should not undermine the objective assigned, regarding market and structural policy, to the milk quota system, namely re-stabilization of the market in the milk sector;
- since the grant of the reference quantity was compulsory, it was appropriate at the same time to avoid according more favourable financial treatment to the producers entitled to a reference quantity than to those who could be granted a special reference quantity only on the basis of a corresponding discretionary decision by the Member States;
- finally, account had to be taken of the Community and national reserves still available. As the Court has held, the Member States must take account of the situation of the producers in question in fixing reference quantities only if they have quantities available for that purpose.

The Commission states that, in view of those factors, it seemed appropriate first to fix an aggregate reference quantity (a total of 6.62 million tonnes for the Community) for those producers, based on the most recent figures available to the competent authority before implementing the non-marketing or conversion programme. According to the Commission's estimates, it was foreseeable that the volume of

applications for a reference quantity submitted by the group of producers in question would correspond to about one million tonnes. That estimated quantity could not however be taken into account in its entirety but had to be reduced, in order to preserve the stability of the market, to 600 000 tonnes. The Community reserve was therefore increased by that quantity. Since the reserve used for the allocation of reference quantities was thus less by 400 000 tonnes than the envisaged total quantity applied for, it was necessary to reduce the latter uniformly for all the producers concerned by limiting their reference quantities to 60% of their previous production.

According to the Commission, the contested decision does not contravene the principle of the protection of legitimate expectations. As the Court held in its judgment in Case 170/86, *supra*, a producer who has voluntarily ceased production for a certain period cannot legitimately expect to be able to resume production under the same conditions as those which previously applied and not to be subject to any rules of market or structural policy adopted in the meantime. There is thus no basis for any expectation that the previous quantity will be allocated or that that production will be maintained. Any legitimate expectations that the producers concerned might entertain are, on the contrary, limited exclusively to the right to ask to be readmitted to the milk market in any event.

In the Commission's view, there has been no encroachment on the right to property. In a common organization of the market, the exercise of the right to property may be

restricted for reasons of structural and market policy, provided that the restrictions in fact correspond to objectives of general interest pursued by the Community and do not, having regard to the aim pursued, constitute a disproportionate and intolerable interference which undermines the very substance of the rights guaranteed.

The contested legal situation does not deprive the plaintiff in the main proceedings of his right to property and does not limit his enjoyment thereof in a manner which affects the very substance of that right. Basically, the plaintiff still retains ownership of his property and the right to enjoy it; he may dispose of his farm, transfer it by way of inheritance, or sell or lease it together with the reference quantity, provided that he observes the time-limit laid down in Article 3a(4). Moreover, in the event of the allocation of a reference quantity equal to 60% of the earlier production, the plaintiff himself is entitled to create the necessary capacity to ensure profitable production, if necessary by buying or leasing a holding which carries a reference quantity.

The contested restriction on exercise of the right to property is, in the Commission's view, justified by the general interests of the Community; it was needed in order to ensure that the balance achieved in the milk market through application of the basic rules on the collection of the additional levy was not upset. The 60% rule thus strikes a fair balance between the conflicting interests of the Community and the producers, namely the stability of the milk market, on the one hand, and, on the other, the allocation of the highest possible reference quantity.

The provisions adopted likewise cannot be regarded as giving rise to objectively unfounded discrimination between producers, and it cannot therefore be concluded that there has been any breach of the principle of equal treatment.

The Commission concedes that the plaintiff in the main proceedings has not, by virtue of the limitation of his reference quantity to 60% of his previous production, been treated in the same way as all the other producers who, before the adoption of Regulation No 764/89 and under Regulation No 857/84 as amended, received a reference quantity on which no similar limitation was imposed. However, the Commission considers that this difference of treatment is justified since the situations are not comparable. By contrast with the producers referred to in Article 2 of Regulation No 857/84, those covered by Regulation No 764/89 did not deliver milk during the reference year in question; the reference quantity claimed by those producers was not therefore included in the total guaranteed quantity used as a basis for the milk quota system.

Regardless of the fact that the legal positions of the two groups of producers were different at the outset, it is improbable, for economic and agricultural reasons, that the producers referred to in Regulation No 764/89 could, on expiry of the four or five year conversion or non-marketing period, resume production at exactly their previous level. On the contrary, the resumption of dairy farming requires a transitional phase during which it is impossible immediately to achieve the previous production level. Those producers are therefore in a situation more comparable to

that of those who are starting milk production for the first time.

The different treatment of the producers covered by Regulation No 764/89 as compared with those who, admittedly, likewise did not deliver any milk during the reference year but to whom there may be granted a reference quantity not subject to the 60% rule pursuant to Articles 3 or 4 of Regulation No 857/84, is also based on the fact that two non-comparable groups of producers are involved. Whilst the producers covered by Regulation No 764/89 are entitled to a given reference quantity, the second group of producers has to rely on a decision in that regard on the part of the competent authorities in the Member States. For that purpose, the latter may take account of structural policy rules. On the other hand, a producer who has not marketed milk for four or five years, in consideration of the payment of a premium, is not entitled to argue, on the basis of structural policy considerations, that he should be able to resume milk production.

(2) The second question (order for reference of 8 August 1989)

Both the Council and the Commission maintain that the second subparagraph of Article 3a(4), in the version inserted by Regulation No 764/89, is valid.

(a) The *Council* considers that the *ratio legis* of the provision in question, according to which, in the event of sale or leasing before 1 April 1992, the reference quantity

is to return to the Community reserve, is to ensure that some producers who qualify for the allocation of a special reference quantity on the basis of Article 3a do not apply for an allocation solely in order to realize its value shortly afterwards rather than to resume their economic activity as milk producers on an enduring basis.

To extend the benefit of Article 3a to people who have no possibility or intention of resuming their previous economic activity amounts not only to impairing the balance of the market, for no good reason, by creating new production capacity which would be disposed of forthwith but also to securing an undue advantage for such persons, for which there is no justification.

According to the Council, the contested restriction is not discriminatory. Firstly, the starting position of the producers qualifying for the benefit of Article 3a is not comparable to that of producers who have been granted a reference quantity since 1984, since the reference quantities have progressively acquired an appreciable and enduring economic value only because of the prolongation of the levy scheme. Secondly, the contested restriction is justified objectively since it is necessary to make a selection from amongst the potential beneficiaries in order to limit the benefit of Article 3a exclusively to producers who have the will and the actual capacity to resume their economic activity as milk producers on a lasting basis.

(b) In the *Commission's* view, the second subparagraph of Article 3a(4) is based on

the view that it was impossible to place the producers concerned in the same legal position in all respects as the producers who had contributed to the available quotas through deliveries of milk in 1981. The validity of that provision must be assessed according to the same criteria as those applied to the limitation of the special reference quantity to 60%.

The legitimate expectations of the farmers concerned do not extend to the transfer of a special reference quantity, possibly after the resumption of production, but only to the resumption of production itself.

Similarly, the fact that the plaintiff can only sell his farm without the special reference quantity until the expiry of the eighth period of application (31 March 1992) does not constitute an unlawful restriction on the right to property or the possibility of exercising that right. The actual substance of the right to property is not affected provided that the right to dispose of the holding as such is maintained. The producer concerned is merely being asked to waive a benefit for a relatively short period of time; the unavailability of that benefit cannot be regarded as a disproportionate and intolerable impairment of the owner's rights, in view of the aim pursued by that provision, namely to grant the special reference quantity only to the farmers concerned who use it themselves for a given period.

According to the Commission, the principle of equal treatment is likewise not encroached upon since the producers affected by the rules — unlike the other

producers — are not granted their reference quantity on the basis of a continuing delivery of milk over previous years but in fact on the basis of the principle of the protection of legitimate expectations. Since those reference quantities were not incorporated in the overall guaranteed quantity but have to be provided at the expense of the other producers, no comparison of the two situations is possible.

Finally, the Commission considers that an adequate statement of reasons was provided for Article 3a(4). The preamble to Regulation No 764/89 describes in exceptional detail the overall situation which led to the adoption of the measures in question and draws the appropriate inferences clearly and unambiguously. Thus, the third and fourth recitals explain the reasons for limiting the reference quantity to 60% of the reference production; the sixth recital gives reasons for the provision at issue here, indicating that the guaranteed quantities are not intended to 'confer an undue advantage' but 'must in fact be produced by those to whom they are allocated'.

(3) The third question (order for reference of 8 August 1989)

Only the Commission expressed views on this question.

(a) With respect to the *first part of this question*, the Commission states that Article 3a(4) of Regulation No 857/84 must be considered in the context of the other provisions of that regulation or the basic regulation, No 804/68, and in particular

Article 5c(1) of Regulation No 804/68 and Article 7 of Regulation No 857/84.

reference quantity is 'linked to the soil'. That idea also underlies Article 12(c) of Regulation No 857/84 under which a 'producer' may be a group of natural persons.

The following two conclusions may be drawn from those provisions, read together:

- (i) Article 3a makes no special provision for the transmission of a holding by way of inheritance; in other words, the transfer of reference quantity to heirs remains possible (Article 7a of Regulation No 1546/88, added by Regulation No 1033/89);
- (ii) the sale or leasing of a holding referred to in the second subparagraph of Article 3a(4) must be construed in the sense provided for in Article 7 of Regulation No 857/84.

Consequently, certain factors support the view that the contribution of a holding to a firm in which the owner has an interest must be regarded as a type of transfer that is not covered by Article 7 of Regulation No 857/84.

Finally, in order to prevent evasion of the obligation to produce a specified quantity within a specified period, as laid down in Article 3a(3), the Commission submits that the contribution to a firm must be regarded as affecting the quotas only if it extends appreciably beyond the expiry of the appointed period (30 March 1990).

The Commission states that, on the basis of the foregoing considerations, the important question is whether the planned contribution of the holding to a private firm, in which the producer has an interest, falls within the scope of the terms 'sold' or 'leased' used in Article 7 of Regulation No 857/84. The continuing exploitation of the holding to which the plaintiff refers by a firm of which he himself or one or more of his children is a member is not a sale under German civil law since, by virtue of Paragraphs 706, 718 and 719 of the BGB (German Civil Code), a holding contributed to a firm continues to form part of the business assets of the member who makes the contribution. Moreover, the fact that, in the case of the contribution of a holding to a firm, the reference quantity is transferred and accrues to all the members, is a reflection of the principle whereby the

The departure from the firm of the member who contributed his holding creates, for the remaining members, a situation where the holding is the subject of an overall succession, which is similar to that of a sale. In such a case, there is a sale within the meaning of Article 7(1) and (3) of Regulation No 1546/88 and, therefore, of Article 7(1) of Regulation No 857/84, so that Article 3a(4) applies. In the event of the death of the member who contributed his holding, the only case in which that legal consequence does not arise is where the remaining members jointly take over the holding as heirs.

In conclusion, the Commission proposes the following answer to the first part of the third question:

'The contribution of a holding to a private firm in which the producer, who is entitled to a special reference quantity under Article 3a(1) of Regulation No 857/84, has an interest, is not subject to the limitations laid down in the second subparagraph of Article 3a(4) if that contribution is not intended to evade the objective thereof, namely to ensure that the reference quantity does not provide the producer with an undue advantage and that that quantity is actually produced by him.

That provision is not evaded:

— where the lifetime of the firm extends well beyond 30 March 1991;

— where the producer continues farming; and

— where the reference quantity can be produced on the land and using the livestock which the producer contributes to the firm.

That provision is applicable where the producer leaves the firm within the period mentioned in the second subparagraph of Article 3a(4) of Regulation No 857/84, except where all the remaining members take over the holding as heirs after the death of the producer.'

inheritance referred to in Article 7a of Regulation No 1546/88 must, in the light of Article 7(1) and (3) of that regulation, be interpreted as being a transfer of the entire holding which, under the different national rules, entails legal effects comparable to inheritance, that is to say a transaction in which the successor irrevocably takes over all the rights and all the obligations of his predecessor. In that regard, it is not sufficient for the holding to be actually managed on his own account by the person entitled to inherit; an additional requirement is that the lease must not be capable of termination and that the lessee should actually take over the holding as an heir. In such circumstances, the limitations laid down in the second subparagraph of Article 3a(4) are not applicable.

In conclusion, the Commission proposes that the second part of the third question be answered as follows:

'A transfer of the entire holding, involving the irrevocable assumption by the transferee of all the rights and all the obligations of the producer is a transaction similar to inheritance within the meaning of the first paragraph of Article 7a of Regulation No 1546/88. A lease may constitute a transaction similar to inheritance where it is not capable of termination and the lessee actually takes over the holding as heir.'

(b) With respect to the *second part of this question*, the Commission states that the concept of a transaction similar to

M. Zuleeg
Judge-Rapporteur