OPINION OF MR ADVOCATE GENERAL GULMANN
delivered on 20 April 1993 *

Mr President,
Members of the Court,

1. The question referred to this Court for a preliminary ruling by the High Court of Justice, Queen's Bench Division, in this case stems from the rules on milk quotas introduced by the Community in 1984 in Council Regulations Nos 856/84 and 857/84. [1]

The milk quota scheme and its implications when a tenancy comes to an end

2. There is no need to describe the rules in detail. They are familiar to the Court from the many cases to which they have given rise.

The aim of the scheme is to curb the growth of milk production and make possible structured development taking account of particular national and regional production conditions. The essence of the scheme is that, directly or indirectly, quotas are fixed (so-called reference quantities) for milk production on the individual holdings and a so-called additional levy is payable if those milk quotas are exceeded. The quotas are fixed on the basis of actual production in a specified reference year.

The scheme entails a very considerable limitation of the freedom of action that farmers should ideally enjoy and very large economic interests are at stake. If a holding is not allocated a milk quota, it cannot profitably be used for milk production. A farmer who wishes to set up as a milk producer must acquire a holding to which a milk quota attaches.

3. Not surprisingly the scheme has given rise to problems in the relationship between tenants and landlords of agricultural holdings. The Court has already had occasion to rule

* Original language: Danish.
1 — OJ 1984 L 90, pp. 10 and 13.

on such questions in a large number of cases. [2] The Court has ruled *inter alia* on whether and if so to what extent a requirement can be inferred from Community law that, when a tenancy comes to an end, the landlord is obliged to give the tenant economic compensation in cases where the milk quota attaching to the property was allocated to the tenant but passes to the landlord at the end of the tenancy.

4. It is a key principle of the scheme that milk quotas run with the land. Article 7 (1) of Regulation No 857/84 thus provides that: 'Where an undertaking is sold, leased or transferred by inheritance, all or part of the corresponding reference quantity shall be transferred to the purchaser, tenant or heir according to procedures to be determined'; the Court has held that that principle also applies in cases where a tenancy has come to an end. [3] For the rest, the original rules in Regulation No 857/84 do not contain any specific provisions for the relationship between landlords and tenants when the tenancy comes to an end.

2 — Of primary importance for the present case are the judgments of the Court of Justice in Case 5/88 *Wachauf* [1989] ECR 2609 and Case C-121/90 *Posthumus* [1991] ECR I-5833, both of which will be discussed later. The other judgments on the landlord/tenant relationship are the judgments of the Court of Justice in Case C-341/89 *Ballmann* [1991] ECR I-25, Case C-177/90 *Kühn* [1992] ECR I-35, and the judgment in Case C-236/90 *Maier* [1992] ECR I-4483. See also the Opinion of Advocate General Lenz in Case C-98/91 *Herbrink* (the Court has not yet given its judgment in that case).

3 — Paragraph 13 of the judgment in *Wachauf*, cited above in footnote 2.

However, in 1985 Regulation No 857/84 was amended and a new paragraph (4) was inserted in Article 7 which provides, as regards the ending of tenancies, that 'the reference quantity corresponding to the holding or the part thereof which forms the subject of the lease shall be put at the disposal of the departing lessee if he intends to continue milk production'. The reason given for that rule was that in certain cases the application of Article 7 resulted in difficult situations at an economic and social level for the outgoing tenant. [4]

5. It has transpired in practice that the special rules laid down in Article 4 (1) may also be relevant to tenants. Under that provision, the Member States may, for the purposes of the restructuring of milk production, grant compensation to producers undertaking to discontinue milk production definitively. Under Article 4 (2), the reference quantities thus freed are, as necessary, to be added to the national reserve for allocation to other producers in certain special cases. There is no need to expand on the interest that a tenant whose lease is coming to an end may have in seeking compensation for definitively discontinuing milk production. It is equally unnecessary to explain that the landlord's

4 — See the sixth recital in the preamble to Council Regulation No 590/85 of 26 February 1985 (OJ 1985 L 68, p. 1), and the Corrigendum (OJ 1985 L 81, p. 41).

interests must also be safeguarded in this connection. No specific rules are laid down in the applicable regulations as to how that conflict of interests is to be resolved. Just as it is left to the Member States themselves to decide whether actual compensation schemes should be introduced, the Member States have autonomy to lay down specific rules on the implementation of any such schemes.

6. On the basis of that review alone it can be concluded that the relevant Community rules do not entail any express obligation for the Member States to safeguard a tenant's economic interests in connection with milk quotas when his tenancy comes to an end. The specific rule in Article 7 (4) is certainly expressly directed to resolving the tenant's problems but it does not oblige the Member States to introduce the rules, which in any event are of limited scope rendering them unattractive in all cases where a tenancy comes to an end but the tenant does not wish to continue milk production on another undertaking. Moreover, the special compensation scheme under Article 4 (1) is optional for the Member States and, in any event, it is left to them to lay down any detailed implementing provisions.

On the other hand, it is in my view clear that the Community rules do not preclude Member States from adopting rules with the aim of protecting the economic interests of tenants in connection with the situation that, when a tenancy comes to an end, the milk quotas remain attached to the undertaking that is being left.

7. The key question in this case is whether it may be possible to deduce from the relevant Community provisions or from the Community law principles for the protection of fundamental rights that Member States have an obligation to protect the economic interests of tenants, and, if so, to what extent and under what conditions.

The facts of the case and the national legislation

8. In 1962 the plaintiff in the main proceedings, Dennis Bostock, became the tenant of an agricultural holding that had previously been leased by his father and grandfather. In 1962 the holding had a herd of 40 cows. Mr Bostock expanded both the production facilities and the herd considerably over the years and at the end of the tenancy there were 64 cows on the holding. On the introduction of the milk quota scheme, he was allocated a milk quota corresponding to his production in the reference year. In 1984, largely on grounds of ill health, he decided to surrender his tenancy of the holding to the landlord. The surrender took effect on the stipulated date of 25 March 1985 and, under the applicable rules on the matter, a special assessment was made of the parties' financial obligations. According to the information before us, compensation for the milk quota was neither demanded nor paid.

Mr Bostock had considered the matter but he and his advisers had discovered that there

was no basis for demanding such compensation either in Community law or in national law. Mr Bostock's assessment of the situation was that he had no possibility of availing himself of the scheme for compensation for definitively discontinuing milk production which had been introduced in the United Kingdom at the same time as the introduction of the milk quota scheme. Under that compensation scheme, an application had to be made within a prescribed short period and that application was subject to conditions which he was unable to fulfil. Those conditions included the consent of the landlord which Mr Bostock considered he could not obtain. There were also grounds precluding Mr Bostock from making use of the possibility referred to in Article 7 (4) of the regulation of retaining the milk quota. On the one hand, he no longer wished to carry on farming and on the other, Article 7 (4) had not been implemented in the United Kingdom.

9. However that legal position was regarded as unsatisfactory. For that reason, by the adoption of the Agriculture Act 1986, rules were introduced making it possible, when a tenancy came to an end, for the tenant to obtain compensation from the landlord for the milk quota. Those rules came into force in September 1986 and sections 13 and 14 together with schedules 1 and 2 laid down detailed rules for the calculation of the compensation. The main principles of those rules are as follows: the right to compensation is conditional on the milk quota having been allocated to the outgoing tenant during the tenancy period; the compensation is calculated according to a standard formula on the basis of a notional division between the tenant and the landlord; and in the event that no agreement can be reached, either of the parties can demand that the dispute be resolved by arbitration. It has been said in these proceedings before the Court that that scheme constitutes an appropriate basis for affording reasonable protection to the economic interests of the tenant.

However, that statute was not given retroactive effect and it cannot therefore be relied on by tenants whose tenancies came to an end between the introduction of the milk quota scheme in April 1984 and the date on which the new rules came into force in September 1986. Accordingly, Mr Bostock was not covered by that compensation scheme.

10. It was not until after the judgment of the Court of 13 July 1989 in *Wachauf* that Mr Bostock became aware that it might be possible to make a claim for compensation on the basis of Community law. Mr Bostock's attention focused on the Court's ruling in paragraph 19 of that judgment that:

'Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with

the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.'

11. On that basis in May 1990 Mr Bostock brought proceedings against the Ministry of Agriculture before the High Court claiming that the Government be required to make suitable provision for compensation to be paid to tenants surrendering holdings between April 1984 and September 1986. He submitted that that could be achieved by extending the compensation provisions of the Agriculture Act 1986 to such tenants or alternatively by introducing some other appropriate measures. [5]

12. The High Court has referred two questions to the Court of Justice for a preliminary ruling.

5 — The High Court has stated that there are 60 other tenants in the same situation as Mr Bostock who have brought proceedings against their landlords in order to obtain compensation corresponding to that under the Agriculture Act 1986. Those cases have been stayed pending a decision by the Court of Justice on the questions referred to it in this case.

The first question

13. The basis for this question [6] is the factual situation confronting Mr Bostock, that is to say a situation in which the milk quota was allocated during the tenancy and where, at the end of the tenancy, the quota passed to the landlord without compensation, and it is pointed out that the tenant was not in a position to avail himself of the schemes referred to in Article 4 (1) and Article 7 (4) of Regulation No 857/84.

It is asked whether, under those circumstances, an obligation may be inferred from Community law for a Member State to introduce a compensation scheme corresponding to that which was adopted by the Agriculture Act 1986, applicable to tenants whose tenancy came to an end in the period

6 — The question is worded as follows:
'Are Council Regulation (EEC) No 804/68, Council Regulation (EEC) No 857/84, Commission Regulation (EEC) No 1371/84 and/or the general principles of Community law to be interpreted as having placed on a Member State the obligation to adopt in respect of the period April 1984 (when the system of reference quantities came into force) to September 1986 (when the compensation provisions of the Agriculture Act 1986 came into force in the United Kingdom) measures similar to those adopted in the United Kingdom by means of the Agriculture Act 1986 in respect of the period from September 1986 entitling a tenant to receive compensation from his landlord in circumstances where:
(i) a reference quantity had been allocated to the tenant in respect of the holding pursuant to the said regulations,
(ii) the tenant surrendered his lease to the landlord during the period in question,
(iii) on the surrender of the lease the reference quantity passed with the holding to the landlord,
(iv) the situation fell outside Article 7 (4) of Regulation No 857/84 as amended by Council Regulation (EEC) No 590/85 and in any event the Member State concerned had not exorcised the power conferred by that provision to put some or all of the reference quantity at the disposal of the departing tenant,
(v) the Member State concerned operated an 'outgoers scheme' pursuant to Article 4 (1) (a) of Regulation No 857/84 but the tenant was required to obtain the permission of the landlord to participate in the scheme, applications to participate in the scheme were not being accepted at the time when the tenant surrendered the lease and the scheme was limited in terms of the money available in outgoers 'compensation?'.

between April 1984, when the quota scheme came into effect, and September 1986, when the Agriculture Act 1986 came into force. It is asked specifically whether such an obligation can be inferred from the relevant Community regulations and/or the general principles of Community law.

14. Mr Bostock contends in particular that under Community law the fundamental principles are binding on the Member States, that those principles include the prohibition of discrimination and respect for property, that the rules on compensation for milk quota are covered by Community law, and that the Member States are therefore under an obligation to comply with those principles when they lay down national rules on compensation for tenants. According to Mr Bostock, Article 5 of the EEC Treaty imposes a duty upon Member States to ensure the full application of Community law and that duty is incumbent both on administrative organs and on the national courts. It also follows from Community law, in Mr Bostock's view, that a legislature is obliged to amend its national legislation if the Court of Justice has held that it is incompatible with the Treaty.

15. It is appropriate to state at the outset that an affirmative answer to the national court's question cannot be inferred from the provisions in the regulations specifically cited in the question. The regulations concerned are Council Regulation No 856/84, which amended Regulation No 804/68 on the common organization of the market in milk and milk products and introduced the provision which is the basis for the milk quota scheme, Council Regulation No 857/84, which contains the basic rules on the milk quota scheme, and Commission Regulation No 1371/84, which contains rules for the implementation of Regulation No 857/84. Those regulations yield no basis for a finding that Member States are under a duty to provide for the protection of a tenant's economic interests when a tenancy comes to an end. As mentioned above, there are certain provisions in Regulation No 857/84 which in some circumstances could entail protection of a tenant's economic interests but those are provisions which the Member States may, but are not obliged to, implement. If anything of significance to the answer to the national court's question can be inferred from the scheme of the regulation, it must, in my view, be that on the contrary it is left to the individual Member States to decide whether, and if so to what extent, protection should be afforded to the economic interests of tenants.

16. It may be appropriate to point out in this connection that Council Regulation No 857/84 has been repealed and replaced by Council Regulation No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector [7]. That regulation modifies somewhat the principles in Regulation No 857/84 that are of significance in a case such as this.

7 — OJ 1992 L 405, p. 1.

The principle that in the event of a change in ownership or in a tenancy, the milk quota follows the land is embodied in Article 7 (1) of Regulation No 3950/92. That rule is supplemented by a new provision in Article 7 (2) in the following terms:

'Where there is no agreement between the parties, in the case of rural leases due to expire without any possibility of renewal on similar terms, or in situations involving comparable legal effects, the reference quantities available on the holdings in question shall be transferred in whole or in part to the producers taking them over, in accordance with provisions adopted or to be adopted by the Member States, taking account of the legitimate interests of the parties'.

A corresponding duty to take account of 'the legitimate interests of the parties' is contained in Article 8 of Regulation No 3950/92, which lays down rules corresponding to those in Article 4 of Regulation No 857/84.

At the hearing the Commission stated that those new provisions should be seen against the background of the *Wachauf* judgment.

There is no call in these proceedings to take a view on the legal effects of those new provisions. Suffice it to say that it is presumably possible to infer from the new regulation an admittedly somewhat non-specific obligation for the Member States, in a situation such as this, to lay down rules which take account of the legitimate interests of the parties, including the tenants.

I do not consider that those new provisions can be used as a significant aid to interpretation in order to resolve what is the decisive question in the present case, namely whether a positive duty may be derived from the Community law principles on the protection of fundamental rights for Member States to protect the economic interests of tenants when a tenancy comes to an end. Such a duty now follows, it seems, expressly from a regulation adopted by the Council but it cannot be concluded from that that the duty could not already have applied before on the basis of the general principles of Community law for the protection of fundamental rights. The new provision may signify that the Council considered that it was necessary to lay down expressly such an obligation for the Member States but it may also merely signify that the Council considered it appropriate to lay down that duty in express terms, even though it was already implicit in the general principles of Community law.

17. Before I turn to consider the question whether in the situation where a tenancy comes to an end, obligations for the Member States may be inferred on the basis of the fundamental rights applying under the Community legal order, it is appropriate first to

analyse the judgment of the Court of Justice in the *Wachauf* case and then to consider briefly the substantive content of the obligation to protect the interests of tenants that may be inferred from the fundamental rights applicable under Community law.

The *Wachauf* case

18. The *Wachauf* case concerned a question referred for a preliminary ruling by a German court. Mr Wachauf had operated an agricultural holding as a tenant. The landlord had ended the tenancy. Mr Wachauf thereupon applied for compensation for the definitive discontinuance of milk production in pursuance of the applicable German rules on the matter. The authorities rejected the application because the landlord refused to give his consent and such consent was, under the German rules, a condition for such an application to be granted. The German court proceeded on the basis of the fact that at the start of the tenancy the property let had not been equipped for milk production and that it was Mr Wachauf who, during his tenancy, had laid the basis for milk production on the undertaking. The German court was uncertain how far the relevant Community rules, under which the milk quota passes to the landlord (the milk quota follows the land), were applicable in such circumstances. The Court of Justice held, in answer to the questions submitted to it, that the general rules of the regulation were also applicable in a situation such as that of Mr Wachauf. In its order for reference, however, the German court had stated that such a result was unreasonable where the landlord had never produced milk nor helped to build up a holding producing milk since the tenant would thereby be deprived of the fruits of his labours without any compensation, which would be contrary to the German Constitution.

In response to that view, the Court of Justice, in paragraphs 17 and 18 of its judgment, first referred to its consistent case-law under which fundamental rights form an integral part of the general principles of the law, the observance of which the Court is to ensure and briefly reviewed the content of the relevant fundamental rights. In paragraph 19 it stated that: 'Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. ... those requirements are also binding on the Member States when they implement Community rules ...'. In paragraphs 20 and 21 it analysed the scope of Article 7 (4) and Article 4 (1) of Regulation No 857/84 and held, in paragraph 22, that: 'The Community regulations in question accordingly leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively'. It then held in paragraph 23: 'The submission that the rules in question

conflict with the requirements of the protection of fundamental rights in the Community legal order must therefore be rejected'.

19. Clearly there are major differences between the *Wachauf* case and this case. The *Wachauf* case concerned the application of the rules concerning compensation on the occasion of definitive discontinuance of milk production. In this case Mr Bostock refrained from applying for such compensation from the outset because he considered, rightly according to the information given, that it was not possible for him to avail himself of the United Kingdom outgoer's scheme. In the *Wachauf* case, the tenancy was ended by the landlord whereas in this case it was Mr Bostock who terminated the tenancy agreement. In the *Wachauf* case, milk production on the holding was established in its entirety by the tenant while Mr Bostock has merely increased the milk production already in place on the holding at the start of his tenancy.

Those differences signify on the face of it that there was greater concrete need for the protection of Mr Wachauf's interests than there is to protect those of Mr Bostock.

But those differences cannot be of conclusive significance as regards the answer to be given to the question submitted in this case. The question is whether a duty can be inferred from the general principles of Community law for Member States to adopt rules to protect the economic interest of tenants corresponding to the rules under the Agriculture Act 1986 and in that Act it does not seem that conclusive significance was attached to the differences that exist between the situations of Mr Wachauf and Mr Bostock.

20. The essential basis for the question submitted is without doubt the Court's ruling in paragraph 19 of the *Wachauf* judgment that a duty to protect the economic interests of tenants can be inferred from the fundamental rights applying in the Community legal order and that duty also applies to Member States when they implement Community provisions.

The substantive content of the fundamental rights established in the *Wachauf* case

21. It follows from the *Wachauf* judgment that the Community law principles on the protection of fundamental rights imply that a tenant must be given compensation if, at the end of his tenancy, he is deprived 'of the fruits of his labour and of his investments in the tenanted holding'.

22. It should be pointed out that the Commission and the United Kingdom submitted in that case that a milk quota is nothing but a mechanism for regulating the market which cannot be regarded as an intangible asset giving rise to property rights.

Mr Advocate General Jacobs made the following comments on that submission in his Opinion in that case: 'In my view, while this might correspond to the intention of the Community legislation, it does not reflect economic reality. If one considers the nature of the quota from the point of view of the producer, then it is plain that what the quota amounts to is a form of licence to produce a given quantity of a commodity (milk) at a more or less guaranteed price without incurring a penalty (the additional levy). In a market which has been effectively ossified by the introduction of quotas, such a "licence" is bound to acquire an economic value. This value will primarily translate into higher rental and capital values for dairy holdings' (paragraph 25).

Mr Advocate General Jacobs had previously stated: '... it is clear in my view that the principle of respect for the right to property must always be observed in the implementation of the quota legislation. ... That analysis can be applied, in my view, to the intangible asset constituted by a milk quota, which can properly be regarded as having an independent economic value; and in accordance with that analysis, I would suggest that there may well be cases where the permanent loss to the tenant of the use and value of the quota on expiry of a tenancy can be viewed as a measure of expropriation' (paragraph 24).

It may be assumed that the Court of Justice based its judgment in *Wachauf* in any event to some extent on the same analysis as that in the Opinion of Mr Advocate General Jacobs.

But it must also be noted that the Court confined itself to laying down a general principle from which it is not readily possible, in my view, to infer the detailed conditions for when compensation is payable and the principles that are to apply in determining the amount of such compensation.

That also corresponds to the view expressed in the Opinion of Mr Advocate General Jacobs who stated *inter alia*: 'If the above analysis is correct, then there *may* be cases where failure by a Member State to provide for compensation would amount to breach of the principle of respect for the right to property' (emphasis added, paragraph 27); 'It is of course for the national court to determine in the concrete case whether and to what extent account should be taken of the tenant's interest in the quota. It is not in my view appropriate for this Court to seek to spell out in the framework of the present case the kinds of circumstances which the national courts will need to take into account' (paragraph 30).

23. Since the question in this case is whether it follows from the fundamental rights applying in the Community legal order that the Member States are obliged to adopt rules corresponding to the Agriculture Act 1986, there is also no need in this case to consider further the substantive content of the fundamental right established by the Court. It may be presumed that the Agriculture Act 1986 affords tenants protection that complies with the requirements stemming from the fundamental right established by the Court.

Nor have any doubts been voiced in the present case as to the compatibility with Community law of the rules actually adopted. The dispute is only as to whether rules corresponding to those adopted in 1986 should also have been adopted for the period prior to the entry into force of the 1986 rules.

24. None the less it is still appropriate to make two remarks concerning the substantive content of the fundamental right that may be of relevance in the event that the Court should find that it follows from Community law that the Member States have a general duty to adopt rules to protect the economic interests of tenants.

First of all, it cannot be left to the national authorities and courts to determine the substantive content of that fundamental right. It is possible and to be expected that they should have a certain discretion with regard to the detailed formulation of the rules to protect the interests of tenants but it must ultimately be the Court of Justice which lays down the limits on that discretion, a not altogether easy task.

25. Secondly, it should properly be pointed out that the United Kingdom is right in stating that the content of the fundamental right established by the Court must not be defined in such a way that there is an obligation to introduce a body of rules which precisely corresponds to those introduced in the United Kingdom. The Member States must also, where appropriate, be able to implement adequate protection of the economic interests of tenants by adopting rules which cannot be said strictly to correspond to the rules in the Agriculture Act 1986.

However, that is not, in my opinion, of conclusive importance in the context of this case. An affirmative answer to the question submitted might be given on the basis that the Agriculture Act 1986 in any event constitutes adequate compliance with the alleged duty under Community law to protect fundamental rights and that it would therefore have to follow from the prohibition under Article 40 of the Treaty of discriminatory treatment of producers within the Community that the rules under the Agriculture Act 1986 must also apply to farmers who were not directly able to rely on the provisions of that Act because of the date on which it entered into force.

The question whether the fundamental rights applying under Community law are binding on the Member States in a situation such as the present

26. The key question must therefore be whether the fundamental premiss for that argument — namely that under Community law the Member States are under a duty to protect the interests of tenants — is correct.

27. As mentioned above, Mr Bostock considers that that premiss is already implicit in the judgment in *Wachauf* where it was held that the fundamental rights applying in the Community legal order 'are also binding on the Member States when they implement Community rules'. The United Kingdom contends that it is not possible to infer such a general obligation for the Member States and points out in this connection that the judgment in *Wachauf* can only be construed as meaning that Member States are under such a duty when they implement Community provisions which are specifically envisaged in Community regulations. The Commission — so far as I have understood it — is of the view that under Community law there is no general obligation for Member States to protect the fundamental rights of tenants but that, on the other hand, such a duty arises when the Member States introduce rules with the object or effect of protecting the economic interests of tenants.

28. In his Opinion in *Wachauf*, Mr Advocate General Jacobs considered that it is possible to infer from Community law an obligation for Member States to protect the interests of tenants, even where the Member States have not made use of the possibilities of adopting rules envisaged in Article 4 (1) and Article 7 (4) of Regulation No 857/84. Accordingly, he proposed that the Court give *inter alia* the following answer to the questions submitted in that case: 'The principle of respect for the right to property guaranteed by the Community legal order requires Member States to provide for financial compensation by the landlord to a tenant farmer who, on expiry of the lease of a holding, loses the right to exploit the quota, in a case where, having regard to the particular situation of the tenant farmer, failure to provide for compensation would result in a breach of that principle' (paragraph 31, point 4). [8]

29. The judgment of the Court in *Wachauf* cannot, in my opinion, be cited in support of the view that it follows from the fundamental rights applicable in the Community legal order that there is a duty incumbent on the Member States to implement general protection of the economic interests of tenants in connection with milk quotas. As mentioned above the Court held that the Community provisions in question leave the national authorities a sufficiently wide margin of appreciation to enable them to apply those

8 — He reiterated that view in his Opinion in the *Posthumus* case cited in footnote 2, above; see in particular paragraphs 19 to 22.

rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the tenant the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively and that there is therefore no conflict between those Community rules and the requirements of the protection of fundamental rights in the Community legal order. The Court's finding that the fundamental rights in the Community legal order are 'binding on the Member States when they implement Community rules' was one of the premisses necessary in order for the Court to reach that result and must presumably merely be construed as referring to the fact that that duty applies when the Member States implement rules on the basis of an express enabling provision in Community law. [9]

30. On the other hand, however, it would be incorrect to presume that in the *Wachauf* judgment the Court adopted a view on the question raised in this case.

This question must be determined on the basis of the general case-law of the Court concerning the legal effects in the Member States of the fundamental rights applying in the Community legal order.

It should be noted first of all that in its judgment of 18 June 1991 in the *ERT* case [10] the Court held:

— first that 'fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures', and

— secondly, that: 'For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case 5/88 *Wachauf* v *Federal Republic of Germany* [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed' (paragraph 41).

9 — The judgment of the Court in the *Posthumus* case (see footnote 2) may possibly be an expression of the view that there is no general obligation incumbent upon Member States on the basis of Community law to protect the economic interests of tenants. That case concerned a dispute between the tenants of an agricultural holding and the purchaser of a small part of that holding and the question submitted concerned in particular the calculation of the size of the milk quota which the purchaser claimed should be transferred to him. The court making the reference had stated, with reference to the *Wachauf* judgment, that it might be incompatible with the rights of the tenants if a proportionate part of the milk quota was transferred to the purchaser. As mentioned above, Mr Advocate General Jacobs considered that it was incumbent on the national legal orders to protect the tenants' rights in those circumstances. The Court did not express a view on that question and resolved the matter by interpreting the relevant provisions of the regulations which laid down the criteria for the allocation of the milk quota.

10 — Case C-260/89 *ERT* [1991] ECR I-2925.

It should also be pointed out that the Court has first and foremost had occasion to hold that fundamental rights form an integral part of Community law in order to ensure that those fundamental rights are complied with by the Community institutions in the exercise of their powers under the Treaties. The Court, which under Article 164 of the Treaty is to 'ensure that in the interpretation and application of this Treaty the law is observed', must necessarily ensure that fundamental rights are respected by the Community institutions. It is particularly important in this respect that the fundamental rights applying in the Community legal order have their basis not just in 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' but also in 'the constitutional traditions common to the Member States'.

31. According to the Court's consistent case-law, the fundamental rights applying in the Community legal order cannot be used to assess the lawfulness of national legislation which lies outside Community law. The Court thus stated in its judgment in the *ERT* case: 'As the Court has held (see the judgment in Joined Cases 60/84 and 61/84 *Cinéthèque* v *Fédération Nationale des Cinémas Français* [1985] ECR 2605, paragraph 25, and the judgment in Case 12/86 *Demirel* v *Stadt Schwäbisch Gmund* [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law' (paragraph 42). That was reiterated by the Court in paragraph 31 of its judgment in Case C-159/90. [11]

11 — Case C-159/90 *Grogan* [1991] ECR I-4685.

The Court has held that the legislation of the Member States may be assessed on the basis of the fundamental rights applying in the Community legal order in at least two situations: first, where the national legislation implements Community rules (paragraph 19 of the judgment in *Wachauf*); secondly, but more indirectly, in cases where a Treaty provision derogating from the principle of freedom of movement is relied on by a Member State in order to justify a restriction on freedom of movement stemming from that Member State's legislation. The more indirect significance of the fundamental rights applying in the Community legal order in the latter group of cases results from the fact that the Court uses the fundamental rights in order to give a restrictive or extensive interpretation of the derogations laid down in the Treaty from the principle of freedom of movement. [12]

32. The key question in this case is whether rules such as those adopted in the

12 — In paragraph 43 in the *ERT* the Court held: 'In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights'.
In its judgment in Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3503, the Court held that the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law and that: 'That provision covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down. Consequently, it is also binding on the Member States when they are implementing the said common organization of the markets' (paragraphs 8 and 9).
In his Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191 Mr Advocate General Jacobs expresses the view that an employed person or a self-employed person who relies on Articles 48, 52 and 59 of the Treaty in connection with employment or an occupation in another Member State is 'entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights' (paragraph 46). In its judgment in that case on 30 March 1993 the Court did not adopt a view on that suggestion which, in my opinion, is too far-reaching.

Agriculture Act 1986 are so closely connected to Community law that they 'fall within the scope of Community law'. The issue is of fundamental significance because it is determinative for the division of powers between the Court of Justice and national courts as regards the protection of basic rights and the question is a difficult one to answer. The issue lies within an area where the Court must tread carefully. Similar questions may arise in the most diverse situations and it is important that the Court develop its case-law in the light of the cases that are submitted to it.

There are good grounds for leaving that task to the legal systems of the Member States. I consider it neither necessary nor correct to hold in this context that the Member States must respect the fundamental rights applying in the Community legal order.

33. A significant factor in this case is that in setting up the milk quota scheme in 1984 the Community legislature did not provide for a general duty incumbent on the Member States to protect the economic interests of tenants in connection with milk quotas.

The fact that a legal problem has arisen as a result of the adoption of Community rules is, in my view, not in itself sufficient to entail that the solution adopted for that problem by the national authorities must necessarily respect the fundamental rights applying in the Community legal order. The starting point is that such problems can and should be resolved within the framework of the national legal systems in accordance with the solutions which apply in the Member States to corresponding problems that have arisen on the basis of national legislation.

The Commission rightly pointed out in its oral observations that the Member States have specifically been given a discretion and that the Community legislation is very largely silent on the respective interests of landlords and tenants with the result that it is left to national law to strike the balance according to each Member State's own national traditions.

The most natural solution in a situation such as this is that individuals have their rights protected within the framework of the respective national legal system. There is no reason to believe that the Member States' legal systems cannot perform that task adequately. It is not insignificant in this respect that the Member States of the Community are all States that are governed by the rule of law and are obliged to respect the fundamental rights laid down in the European Convention on Human Rights.

It is also significant in this connection that the fundamental rights applying in the Community legal order are based on the constitutional traditions common to the Member States — precisely because those traditions are to be used as the basis for assessing the legality of the rules of Community law which have to apply uniformly in all the Member States — and that that basis for the fundamental rights applying in the Community legal order may make them less suited for application in cases where they are merely to serve to assess the legality of rules adopted by individual Member States.

34. Moreover, I do not consider that support for the contrary result can be derived from the need to ensure uniform and effective application of the relevant Community rules on the milk quota scheme. In this area the Community legislature has largely left it to the Member States to implement the rules under the regulations in accordance with the particular circumstances applying in their respective countries and quite different solutions have actually been chosen by the various Member States within the framework laid down by the Community regulations.

35. As mentioned above, the Commission considers that it is not possible to infer from the Community regulations or the fundamental rights applying in the Community legal order that a positive obligation is incumbent on the Member States to lay down rules to protect the economic interests of tenants in connection with the ending of tenancies. The Commission submits, however, that the position is different where the Member States lay down rules whose object or effect is precisely to afford such protection. If the Member States lay down such rules, they must, according to the Commission, respect the fundamental rights applying in the Community legal order. That view is understandable, but in my opinion it is not tenable. It is hardly a conclusive argument against the Commission's view that it appears illogical that a Member State which has adopted no rules at all for the protection of the economic interests of tenants is not thereby acting in breach of the fundamental rights applying in the Community legal order whereas a Member State which has sought in its legislation to lay down certain protective rules must comply with those fundamental rights to the full. On the other hand, the Commission's contention cannot in any event lead to more than a requirement that the content of the rules that are in fact adopted must comply with the fundamental rights applying in the Community legal order. But it is undisputed in this context that the content of the rules adopted in the United Kingdom in 1986 complied with the Community law requirement on the protection of the fruits of the labours of the tenant and so on. The dispute is not as to the content of those rules but as to their temporal scope. The only criticism made of the United Kingdom authorities is that they did not adopt such protective measures right from the start of the milk quota scheme. I do not consider that it can be argued that the Member States that have not adopted any such rules at all are not obliged to do so under Community law but that the Member States which later adopt the rules required are under a duty under Community law to make such rules apply right from the introduction of the milk quota scheme.

36. To summarize therefore, my view is that no duty can be inferred either from the relevant Community regulations or from the fundamental rights applying in the Community legal order for Member States to protect the economic interests of tenants when their tenancies come to an end as regards the milk quotas allocated to them. Such protection must be obtained within the individual Member States' legal systems in accordance with the constitutional rules applying in those States.

37. In the course of this case it has been contended — amongst others by the Commission — that it should be considered whether the prohibition of discrimination under Article 40 (3) of the EEC Treaty and the principle of equal treatment under Community law entails that tenants whose tenancy came to an end in the period between April 1984 and September 1986 can derive rights from the rules in the Agriculture Act 1986. In my view that question must be answered in the negative. As established above, the Agriculture Act 1986 was not adopted in compliance with a Community law duty to protect the economic interests of tenants and, *taken in isolation*, the principle of equal treatment under Community law cannot entail a duty for the national legislatures to make rules on the protection of tenants applicable from a certain time. In this instance, the national legislature refrained from giving the law retroactive effect and in so doing it acted in accordance with the principle of legal certainty under which laws may be given retroactive effect only in exceptional cases, only where the purpose of the law renders that necessary, and if due account is taken of the legitimate expectations of those who have acted in reliance on the existing rules. It is difficult to imagine cases where there is a breach of the principle of equal treatment because the legislature failed to give rules retroactive effect and I consider that, in any event, no such circumstances exist in a situation such as this.

The principle of equal treatment cannot, therefore, alter the conclusion reached earlier.

The second question

38. The second question referred for a preliminary ruling by the High Court is as follows:

'In the absence of national measures of the kind referred to in question (a) are Regulation No 804/68, Regulation No 857/84, Regulation No 1371/84 and/or the general principles of Community law to be interpreted as conferring on a tenant a directly enforceable right to claim compensation from his landlord in the circumstances aforesaid?'

39. The answer to this question in fact follows from the answer given to the first question. It is plain that the relevant Com-

munity regulations do not contain any rules that can be relied on as a legal basis for a claim for compensation by a tenant in proceedings against a landlord in connection with the loss of milk quotas and if the principles applying in the Community legal order for the protection of fundamental rights cannot be relied upon as giving rise to a duty for the authorities of Member States, still less can they be relied on as creating obligations in proceedings between tenants and landlords. There is therefore no need to express a view on the question, which is in fact of fundamental importance and of some difficulty, whether the Community law principles regarding the protection of fundamental rights may in some cases be relied on as creating obligations in proceedings between individuals and not just in proceedings between individuals and the authorities which are the primary addressees of fundamental rights.

Conclusion

40. I therefore propose that the Court give the following answers to the questions submitted by the High Court:

— No obligation may be inferred from Council Regulations No 804/68 and No 857/84 and Commission Regulation No 1371/84 or from the general principles of Community law for Member States to adopt measures such as those taken by the United Kingdom in the Agriculture Act 1986 regarding a tenant's right to claim compensation from his landlord.

— Those regulations and general principles of Community law cannot be interpreted as meaning that a tenant can invoke them directly as a basis for a claim for compensation against his landlord.