OPINION OF ADVOCATE GENERAL JACOBS

delivered on 28 February 2002 [1]

1. Where a farmer leases on favourable terms his father-in-law's holding, which it is intended that his wife will inherit in due course, can that lease be regarded as 'an inheritance or similar means' for the purpose of allocating a special reference quantity in the context of the common organisation of the market in milk and milk products? That is, in essence, the question which the Niedersächsische Oberverwaltungsgericht (Higher Administrative Court for Lower Saxony), Germany, is called upon to decide and on which it seeks assistance from the Court.

The milk quota system

2. The common organisation of the market in milk and milk products has had a complex and sometimes turbulent history, in which the Court has played its part. Fortunately, it is not necessary for present purposes to review that history in full; a few of the more salient moments will provide sufficient context.

3. The present common organisation was established in 1968, [2] based essentially on pricing mechanisms. Reliance on pricing, however, led to overproduction and structural measures proved necessary to control the situation. Under one of those measures, [3] producers could receive a non-marketing premium if they undertook, essentially, to refrain from all dairy production for a period of five years. Overproduction nevertheless continued, and in 1984 [4] a system was introduced under which dairy producers were allocated a production quota known as a 'reference quantity', based on their production in one of the three previous years, and were subjected to an 'additional levy' on any quantities sold in excess of that quota.

4. Problems arose, however, from the interaction between those two schemes. Many

1 — Original language: English.

2 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, OJ, English Special Edition 1968(I), p. 176. A previous regime had, however, existed since 1964.

3 — 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, OJ 1977 L 131, p. 1.

4 — Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products, OJ 1984 L 90, p. 10; Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, OJ 1984 L 90, p. 13.

dairy producers had entered into non-marketing undertakings for a period of five years, intending to resume production thereafter. Yet on the expiry of the period they found themselves without a quota, since they had no previous production in the relevant year from which to calculate a reference quantity; consequently any quantities they sold would be subject to the additional levy. Following litigation[5] and amending legislation,[6] such producers were given entitlement to 'special reference quantities' determined in accordance with objective criteria, and that right was extended to those who had received the holding from them.

5. The provision relevant to the present case is Article 3a of Regulation No 857/84 as amended, in particular, by Regulation No 1639/91.[7] The last subparagraph of Article 3a(1) provides, in so far as is relevant:

'Producers:

...

— who have received the holding through an inheritance or similar means following expiry of the undertaking entered into under Regulation (EEC) No 1078/77 by the originator of the inheritance, albeit before 29 June 1989,

shall receive on a provisional basis, on application submitted within a time limit of three months from 1 July 1991 a special reference quantity...'

The case in the main proceedings

6. According to the order for reference, Mr Bredemeier farms with his wife in Lower Saxony. In addition to their own holding, he has worked his father-in-law's holding since June 1980. He did so on his father-in-law's behalf until 1 October 1986, since when he has taken it on under an indefinite lease. The lease is on favourable terms, said

5 — In particular Case 120/86 *Mulder* [1988] ECR 2321, Case 170/86 *Von Deetzen I* [1988] ECR 2355, Case C-189/89 *Spagl* [1990] ECR I-4539, Case C-217/89 *Pastätter* [1990] ECR I-4585, and Case C-314/89 *Rauh* [1991] ECR I-1647.

6 — In particular Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, OJ 1988 L 139, p. 12, Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 adopting 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, OJ 1989 L 84, p. 2, Commission Regulation (EEC) No 1033/89 of 20 April 1989 amending Regulation (EEC) No 1546/88 laying down detailed rules for the application of the additional levy referred to in Article 5c of Council Regulation (EEC) No 804/68, OJ 1989 L 110, p. 27, and Council Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation (EEC) No 857/84 adopting 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, OJ 1991 L 150, p. 35.

7 — Cited above in note 6.

to be about half the going rate, allegedly in order to maintain the farm pending its inheritance in due course by Mr Bredemeier's wife, who has been informally designated by her father as heir to the farm. The three apparently all live together.

7. Between June 1980 and June 1985, when Mr Bredemeier was merely managing it on his father-in-law's behalf, the father-in-law's holding was the subject of a non-marketing undertaking. During that period, Mr Bredemeier produced milk on his own holding and was consequently allocated a quota for future years. No quota was allocated in respect of the father-in-law's holding.

8. In 1989, having learned of the Court's judgments in *Mulder* and *von Deetzen I*,[8] Mr Bredemeier applied for a quota in respect of that holding. His application was dismissed on the ground that the lease had commenced after the expiry of the non-marketing period. In 1990, he applied again, arguing that the lease was a transaction similar to inheritance. That application too was dismissed, on the ground that he had not inherited the holding but leased it. He subsequently brought court proceedings challenging the dismissal of his applications.

9. Mr Bredemeier's action was dismissed at first instance on the ground, in particular, that the lease whereby he acquired the property was not 'an inheritance or similar means'. On appeal, he challenges that finding, stressing the factual circumstances outlined above.

10. The referring court finds itself unable to decide the point. It notes the Court's ruling in *von Deetzen II*[9] that the term 'similar transaction' in a related provision[10] 'must be interpreted as referring to any transaction, whatever its legal basis, which produces effects comparable to those of inheritance. It thus 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

8 — Both cited above in note 5.

9 — Case C-44/89 *Von Deetzen II* [1991] ECR I-5119, paragraph 38 of the judgment.

10 — See paragraphs 13 et seq. below.

be exploited by the potential beneficiary and not that the marketable value of the holding should be realised by the person from whom he stands to inherit'.

However, it also notes that it is not Mr Bredemeier but his wife who is the designated heir to the holding in question.

11. It has therefore stayed the proceedings and sought a preliminary ruling on the following question:

'Is an agricultural holding received through "similar means" within the meaning of Article 3a of Council Regulation (EEC) No 857/84 of 31 March 1984 (OJ 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35), where, following expiry of the non-marketing undertaking entered into by the producer under Regulation (EEC) No 1078/77, the holding is leased by him to the husband of the designated heir before 29 June 1989 on conditions more favourable than normal market conditions?'

Analysis

12. The observations submitted in this case are refreshingly concise. Mr Bredemeier has submitted one page, although the Commission has stretched to eight, and no hearing has been requested. Both propose, essentially, that the Court should follow the line taken in *Von Deetzen II*, and I agree.

The relationship between Rauh *and* Von Deetzen II

13. A minor difficulty in applying that case-law might appear to lie in the fact that it concerned a different provision from the one in issue here, worded (in most language versions) in slightly different terms. However, I do not consider that to be any obstacle.

14. The provision interpreted in *Von Deetzen II* was Article 7a of Regulation No 1546/88, [11] inserted by Article 1(3) of

11 — Cited above in note 6.

Regulation No 1033/89.[12] It provides essentially that special reference quantities, once allocated, follow the holding in the event of its transfer 'by inheritance or by any similar transaction', in the same way as was already the case for ordinary reference quantities under Article 7 of Regulation No 857/84,[13] where a holding is transferred by inheritance.

15. That provision thus relates not to the allocation of a special reference quantity in respect of a holding which had been transferred by inheritance or a similar transaction — the point in issue in the present case — but to the transfer of a holding to which such a quota had already been allocated.

16. The provision with which the present case is concerned was introduced into Article 3a of Regulation No 857/84[14] by Article 1(II)(a)(5) of Regulation No 1639/91.[15] The first recital in the preamble to the latter states that amendment was necessary because the Court had found Article 3a to be invalid in *Spagl* and *Pastätter*[16] and because, 'following the interpretation of the aforementioned Article by the Court of Justice in [*Rauh*[17]], producers who acquired the milk holding through an inheritance or similar means and made no application between 29 March and 29 June 1989, or whose applications were rejected, should be allowed to apply or to re-apply'. The substantive amendment also uses the words 'through an inheritance or similar means', an expression slightly different from that of 'by inheritance or by any similar transaction' interpreted in *Von Deetzen II*.[18]

17. However, in *Rauh* — a judgment delivered before Article 3a of Regulation No 857/84 was amended — the Court had borrowed from the terminology of Article 7a of Regulation No 1546/88 to find that Article 3a of Regulation No 857/84 should be interpreted as meaning that, 'subject to the conditions laid down therein, a special reference quantity may be granted to a producer who had taken over a holding by way of succession or a similar transaction after the expiry of a non-marketing undertaking...'

12 — Cited above in note 6.

13 — Cited above in note 4.

14 — Article 3a was itself added by Regulation No 764/89.

15 — Cited above in note 6.

16 — Both cited above in note 5.

17 — Cited above in note 5.

18 — Of the eight language versions which I have consulted, the difference in wording appears to be very minor, except perhaps in the Portuguese version, where 'similar transaction' in Article 7a is rendered as 'negócio gratuito' whereas 'similar means' in Article 3a is 'via analoga'.

18. In those circumstances, it seems clear that, whatever possible reasons of euphony may have prompted the Council to vary the wording used, the intended meaning of 'through an inheritance or similar means' in the amended version of Article 3a of Regulation No 857/84 is exactly the same as that of 'by inheritance or by any similar transaction' in Article 7a of Regulation No 1546/88.

Extension of the interpretation in Von Deetzen II

19. The remaining difficulty which the national court experiences lies in the fact that the interpretation in *Von Deetzen II* refers to 'the potential beneficiary of the estate' and it is not Mr Bredemeier but his wife who is the potential beneficiary of his father-in-law's estate.

20. The Commission submits, and I agree, that the essential point in the ruling in *Von Deetzen II* is that 'the holding should continue to be exploited by the potential beneficiary and not that the marketable value of the holding should be realised by the person from whom he stands to inherit' [19] and that the concept in question refers to 'every transaction which entails effects similar to those of inheritance, regardless of the form in which such transaction is effected'. [20] Such definitions include in principle situations such as the present in which two spouses jointly operate a holding of which one is the presumed heir and the other the tenant on favourable terms agreed to because of the relationship between the parties.

21. However, as the Commission has further pointed out, it is essential that the presumed heir be the real beneficiary and that there be no disguised transfer to another party. In the event of a divorce, say, the presumed heir must be in a position to assert her (or his) rights to the holding and the quota. Moreover, the proviso in paragraph 38 of *Von Deetzen II*, concerning the main intention of the transaction, must be met. The national court must be satisfied, before deciding in favour of Mr Bredemeier, that those conditions are met in the light of all the legal and factual circumstances of the case.

19 — Paragraph 38 of the judgment.

20 — Paragraph 41 of the judgment, paragraph 3 of the operative part.

Conclusion

22. I am therefore of the opinion that the Court should give the following answer to the Niedersächsische Oberverwaltungsgericht:

The lease of a holding to the spouse of the presumed heir to the holding constitutes transfer 'through an inheritance or similar means' for the purposes of Article 3a of Council Regulation (EEC) No 857/84 provided that:

— the terms of the lease 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 realised by the person from whom he or she stands to inherit; and

— the presumed heir is the real beneficiary of the transfer and his or her rights will be preserved, even in the event of divorce or separation.