OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 2 October 1990 *

My Lords,

1. In Case 120/86 *Mulder* [1988] ECR 2321 and Case 170/86 *von Deetzen* [1988] ECR 2355, the Court ruled that Council Regulation (EEC) No 857/84 was invalid in so far as it did not provide for the allocation of a milk quota to producers who, pursuant to undertakings given by them, did not deliver milk during the reference year in question. In 1989, the Council adopted new measures seeking to give effect to those judgments by inserting a new Article 3a into Regulation No 857/84. The two cases C-189/89 *Spagl* and C-217/89 *Pastätter* ([1990] ECR I-4585), are both referred by the Finanzgericht (Financial Court) München and essentially raise the question whether those measures are adequate or whether they infringe fundamental principles of Community law.

2. The plaintiff in the national proceedings in Case C-189/89, Mr Spagl, farms a holding in Bavaria of some 12 hectares. On 1 April 1978, he entered the Community non-marketing scheme and undertook not to market milk or milk products for five years. During that period, he carried out improvements to his holding with a view to resuming milk production. When his undertaking expired on 31 March 1983 he was not able to resume production immediately because he lacked capital to buy a new dairy herd. Instead, he bought dairy calves and raised them himself, resuming production with 12 cows in May or June 1984. In the meantime, the additional levy (or milk quota) system had been introduced on 1 April 1984. Mr Spagl applied to the German authorities for a quota based on his milk deliveries prior to joining the non-marketing scheme, i.e. 31 656 kg. However, because he had not produced any milk in 1983, the reference year chosen by the Federal Republic, his quota was fixed at zero.

3. By decision of 4 April 1986, the defendant in the national proceedings, the Hauptzollamt Rosenheim, rejected an administrative appeal against the setting of the quota and Mr Spagl brought legal proceedings challenging that decision. By the time the action came to be considered by the referring court, Article 3a of Regulation No 857/84 had been adopted. However, it appeared that Mr Spagl was again ineligible for a quota, because he could not satisfy the condition in Article 3a that the non-marketing undertaking must have expired after 31 December 1983.

* Original language: English.

4. The national court questioned the compatibility of the cut-off date in Article 3a with general principles of law, in particular the principle of respect for legitimate expectations, the principle of non-discrimination, and the protection of the right to property, as well as with the objectives of the common agricultural policy set out in Article 39 of the Treaty. The national court also entertained doubts as to the validity of the restriction on the allocation of quota in Article 3a to 60% of previous production. It therefore referred two questions for a preliminary ruling, as follows:

'Is Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, valid

(1) in so far as producers whose period of non-marketing pursuant to the undertaking given under Regulation (EEC) No 1078/77 expired before 31 December 1983 or before 30 September 1983, as the case may be, but who in the relevant reference period had not yet produced any milk, receive no special reference quantities under the milk quota system pursuant to the first indent of Article 3a(1),

(2) in the event that Question 1 is answered in the negative, in so far as the special reference quantity is equal, under Article 3a(2), to only 60% of the quantity of milk or milk equivalent used as the basis for the non-marketing or conversion premium?'

5. From the case file, it appears that at the time of the reference Mr Spagl owed some DM 100 000 to the defendant in respect of the levy assessed on the whole of his deliveries in 1984-89.

6. The plaintiff in the national proceedings in Case C-217/89, Mr Pastätter, farms a small Bavarian holding of some 13.5 hectares. At the beginning of 1981 he entered the Community scheme for the conversion of dairy herds to beef production and received a premium calculated on the basis of his former deliveries of 83 110 kg. His four-year undertaking, which included an obligation not to market milk or milk products, expired on 31 December 1984, whereupon he resumed milk production. When he applied for the allocation of a quota his quota was initially fixed at zero because, like Mr Spagl, he had not produced any milk in the 1983 reference year. By decision of 21 February 1985, the Oberfinanzdirektion München rejected an administrative appeal against that allocation and Mr Pastätter brought legal proceedings. Again, by the time the case was heard, Article 3a of Regulation No 857/84 had been adopted, under which Mr Pastätter was eligible for a quota of 60% of his previous deliveries.

7. The national court however had doubts as to the compatibility of the 60% restriction with the general principles of respect for legitimate expectations, of non-discrimination and the protection of the right to private property. In the order for reference, it points out that the 60% rule is

particularly disadvantageous to small producers who may not be able to continue dairy farming on the basis of so limited a quota, and indicates that Mr Pastätter's holding can be run economically only as a dairy farm. Accordingly, the national court referred the following question in Case C-217/89, which is essentially the same as the second question in Case C-189/89:

'Is Council Regulation (EEC) No 857/84 of 31 March 1984, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, valid in so far as the special reference quantity is equal, under Article 3a(2), to only 60% of the quantity of milk or milk equivalent used as the basis for the non-marketing or conversion premium?'

8. The questions referred are concerned with the validity of two specific aspects of the new Article 3a of Regulation No 857/84, namely, the limitation of the grant of special reference quantities to producers whose non-marketing or conversion period expired after 31 December 1983 or after 30 September 1983 where appropriate ('the cut-off date'), and the basis of allocation of quota, i. e. 60% of previous deliveries ('the 60% rule'). In order to answer the questions it is necessary first to consider the relevant Community legislation.

9. First, however, it should be noted that the legality of the cut-off date and of the 60% rule is at issue in a number of other cases pending before the Court. The validity of the cut-off date is raised directly in Case C-44/90 *Reese* and indirectly in Case C-85/90 *Dowling*. The validity of the 60% rule is directly raised (among other questions) in Case C-44/89 *von Deetzen (No 2)* and is indirectly at issue in the proceedings in Case C-104/89 *Mulder (No 2)* brought under Article 215(2) of the Treaty, as well as in a large number of further actions for damages brought against the Council and/or the Commission by former participants in the non-marketing and conversion schemes.

The Community legislation

10. Concerned by the growing Community surplus of milk and milk products, the Council on 17 May 1977 adopted Regulation No 1078/77 (Official Journal 1977 L 131, p. 1) introducing a system of premiums for producers who undertook for a specified period not to market milk or milk products (the non-marketing premium) or to cease milk deliveries and convert their dairy herds to meat production (the conversion premium). The non-marketing undertaking lasted five years and the conversion undertaking four years (Articles 2 and 3). The amount of the premium in both cases was fixed by reference to the producer's milk deliveries in the 12 months preceding the month when the application was lodged (Article 4 of Regulation No 1078/77, as amended by Council Regulation (EEC) No 1041/78, Official Journal 1978 L 134, p. 9). The scheme was closed

to new entrants on 15 September 1980 as regards the non-marketing premium and at the end of the 1980/81 milk year as regards the conversion premium (Council Regulation (EEC) No 1365/80, amending Regulation No 1078/77, Official Journal 1980 L 140, p. 18).

11. At the same time as introducing the non-marketing and conversion premiums, the Council also adopted Regulation (EEC) No 1079/77, introducing a co-responsibility levy due from all milk producers on the quantities of milk delivered and sold by them (Official Journal 1977 L 131, p. 6).

12. Those measures proved inadequate to stem rising milk production and on 1 April 1984 the Community introduced a system to control production based on an additional levy to be borne by milk producers on quantities of milk delivered in excess of an annual reference quantity (commonly known as a quota). To that end, Council Regulation (EEC) No 856/84 (Official Journal 1984 L 90, p. 10) inserted a new Article 5c into Council Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 I, p. 176). Under Article 5c(1), the levy is payable either by milk producers (Formula A) or by purchasers of milk or other milk products who must pass it on to the producers delivering to them in proportion to their contribution to the purchaser's reference quantity being exceeded (Formula B). Article 5c(3) provides that the sum of the reference quantities allocated to producers or purchasers may not exceed a guaranteed total quantity equal to the sum of the quantities of milk delivered in each Member State during the 1981 calendar year, plus 1%, and lays down the guaranteed quantities for each Member State. Within the guaranteed overall quantity for the Community, Article 5c(4) creates a Community reserve with a view to supplementing, at the beginning of each period of 12 months, the guaranteed quantities of the Member States in which the implementation of the levy system raises particular difficulties. Council Regulation (EEC) No 1335/86 amended Article 5c of Regulation No 804/68 by reducing the national guaranteed quantities by 3% in two stages between 1 April 1987 and 31 March 1989 (Official Journal 1986 L 119, p. 19).

13. Council Regulation No 857/84 (Official Journal 1984 L 90, p. 13) lays down general rules for the application of the levy system and in particular for the determination of the individual reference quantity or quota, i. e. the quantity exempt from the additional levy. Under Article 2(1), the quota is to be equal to the quantity of milk or milk equivalent delivered by the producer (Formula A) or purchased by a purchaser (Formula B) during the 1981 calendar year, plus 1%. However, under Article 2(2), Member States may provide that on their territory the quota is to be equal to the quantity of the milk or milk equivalent delivered or purchased during the 1982 or 1983 calendar year, weighted by a percentage so as not to exceed the guaranteed quantity laid down for the Member State concerned. That percentage can be modified so as to create within the national guaranteed quantity a reserve of quota for allocation to the categories of producers envisaged by Articles 3 and 4 (Articles 2(3) and 5).

14. Under Articles 3 and 4, Member States are empowered to allocate special or additional quotas to producers in special situations, such as those who have adopted a milk production development plan (Article 3(1) and Article 4(1)(b)), young farmers (Article 3(2)) and producers undertaking farming as their main occupation (Article 4(1)(c)). Article 4a, inserted by Council Regulation (EEC) No 590/85 (Official Journal 1985 L 68, p. 1), empowers Member States to re-allocate unused quotas to producers or purchasers in the same region and, if necessary, in other regions, with the re-allocation to be effected in order of priority within the same region, and then as between regions.

15. The recently adopted Articles 3b and 3c of Regulation No 857/84 extend the possibilities for Member States to grant quota to producers in special situations. Article 3b was introduced by Council Regulation (EEC) No 3880/89 (Official Journal 1989 L 378, p. 3) and empowers Member States to grant further additional or special reference quantities to certain categories of producers, including those with development plans, new producers and those whose quota does not exceed 60 000 kg. Under Article 3c, introduced by Council Regulation (EEC) No 1183/90 (Official Journal 1990 L 119, p. 27) Member States are required to grant extra quota to producers whose quota is less than 60 000 kg (or 100 000 kg in mountain areas) and, if quota remains available, to producers whose partially unused production capacity places them in a difficult situation. In order to release quota for allocation under Article 3c, Regulation No 1183/90 sets up a new Community scheme granting compensation to producers who undertake to abandon milk production definitively.

16. Council Regulation (EEC) No 775/87 (Official Journal 1989 L 78, p. 5) provided for the temporary withdrawal or suspension of 5.5% of individual quotas in two stages between 1 April 1987 and 31 March 1989, and granted compensation to producers in respect of the withdrawn quantities.

17. The amount of the levy, which was initially fixed at 75% of the target price for milk where Formula A was applied, and 100% where Formula B was applied, is currently 115% of the target price in respect of both formulas (see Council Regulation (EEC) No 774/87, Official Journal 1987 L 78, p. 3, and Regulation No 3880/89, cited above).

18. Commission Regulation (EEC) No 1546/88 lays down detailed rules for the application of the additional levy (Official Journal 1988 L 139, p. 12) and replaces an earlier regulation (Regulation (EEC) No 1371/84, Official Journal 1984 L 132, p. 11). Of particular relevance in these cases is Article 9(2) (formerly Article 6(2)), which empowers Member States to assign quotas to persons who have commenced operations after the beginning of the reference period on the same basis as indicated in Article 5(4)(b) of the same regulation, i. e. on the basis of their sales or deliveries in their last 12 months of operation before 1 April 1984, weighted by a percentage as appropriate. In the case of producers who have been producing for less than 12 months, Member States are to determine a quota on the basis of actual sales or deliveries.

19. The Community rules initially made no specific provision for the allocation of quotas to farmers who, because they were at the time participating in the non-marketing and conversion scheme, did not produce milk during the relevant reference year. As already indicated, the Court in Case 120/86 *Mulder* and Case 170/86 *von Deetzen* ruled that Regulation No 857/84 was invalid to the extent that it failed to make such provision.

20. In response to that judgment, and after negotiations lasting nearly a year, Council Regulation (EEC) No 764/89 was adopted (Official Journal 1989 L 84, p. 2). That regulation inserts a new Article 3a into Regulation No 857/84 providing for the provisional grant of special reference quantities to producers whose non-marketing or conversion period expired 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 March of the following year) and who have not already received a quota under the provisions for new entrants in Article 5(4)(b) and/or Article 9(2) of Regulation No 1546/88. Article 3a(1)(a) to (d) imposes certain further conditions designed essentially to ensure that producers applying for a special reference quantity seriously intend to resume milk production and are in a position to do so. Under Article 3a(2), the provisional quota is to 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. The provisional quota is rendered definitive 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 sales or deliveries during the previous 12 months have reached a level equal to or greater than 80% of the provisional quota.

21. In order to make the allocation of quota under Article 3a possible, the Community reserve of quota was increased. This was effected by reducing the national guaranteed total quantities by a further 1% (Council Regulation (EEC) No 3879/89, Official Journal 1989 L 378, p. 1), although the impact on individual quotas was offset by a reduction to 4.5% of the rate of temporary withdrawal fixed by Regulation No 775/87 (Council Regulation (EEC) No 3882/89, Official Journal 1989 L 378, p. 6). Council Regulation (EEC) No 3881/89 (Official Journal 1989 L 378, p. 5), which established the Community reserve for 1989/90, and Council Regulation (EEC) No 1184/90 (Official Journal 1990 L 119, p. 30), which established the reserve for 1990/91, each reserved 600 000 tonnes for the purpose of alleviating the difficulties encountered by Member States in allocating special reference quantities under Article 3a.

The validity of the cut-off date

22. Before reviewing the arguments of the parties, it is necessary to consider the precise scope of the first question referred in Case C-189/89 *Spagl*. Having regard to the factual position of Mr Spagl, it is probable that the national court, in questioning the validity of the cut-off date, is concerned with the situation of a producer whose

undertaking expired before that date and who cannot obtain a quota other than under Article 3a. However, the question as phrased is broad enough also to contemplate the situation of a producer whose undertaking expired before the cut-off date but who has already been granted a quota under Article 9(2) of Regulation No 1546/88. The Irish Government, which has submitted observations in Case C-189/89, states that its main concern is with producers in the latter situation who could obtain a more generous quota under Article 3a but who are barred from doing so by the terms of that provision.

23. In my view, the question must be understood in the narrow sense as contemplating only producers who have not already received a quota. Producers who have been allocated a quota under Article 9(2) of Regulation No 1546/88 are doubly excluded from the benefit of Article 3a — by the cut-off date and by the specific exclusion in the second indent of Article 3a(1) of producers who have 'received a reference quantity under the terms laid down pursuant to Article 5(4)(6) and/or Article 9(2) of Regulation No 1546/88 . . . '. That specific provision is not at issue in this case. However, it will fall to be considered in the pending case of *Reese* (Case C-44/90) which concerns precisely the situation of a producer who was granted a quota under Article 9(2) of Regulation No 1546/88 but who seeks a more generous allocation under Article 3a of Regulation No 857/84.

24. The arguments concerning the validity of the cut-off date involve primarily respect for the principles of legitimate expectations and of non-discrimination. Mr Spagl argues that at the end of his five-year non-marketing undertaking, he had a legitimate expectation to resume milk production, an expectation recognized by the Court in Cases 120/86 *Mulder* and 170/86 *von Deetzen*, and that the Community provisions should have provided an adequate transitional period for producers such as himself who were unable to resume production immediately. Mr Spagl also argues that former participants in the non-marketing and conversion scheme must all be treated as being in the same situation and that the cut-off date creates arbitrary differences in treatment between them which cannot be objectively justified.

25. The Council and the Commission defend the cut-off date essentially on three grounds. First, as regards the issue of legitimate expectations, they argue that Article 3a of Regulation No 857/84 is designed to perform the limited function of ensuring the allocation of reference quantities to producers who, following their participation in the non-marketing and conversion scheme, were unable to obtain a quota in any other way: in their view, producers in Mr Spagl's situation were in a position to obtain a quota under the pre-existing Community provisions. They point out that Mr Spagl had over a year between the expiry of his non-marketing undertaking and the introduction of the additional levy system; in that time, he could have resumed production and attracted a quota either under Article 2 of Regulation No 857/84 or under Article 9(2) of Regulation No 1546/88. Alternatively, even if he was not able to resume

production before 1 April 1984, it should have been possible for him to obtain a quota under Articles 3 or 4 of Regulation No 857/84, which permit Member States to allocate special or additional reference quantities to producers in a special situation, or under Article 4a which permits the redistribution of unused reference quantities. The Community legislation thus already took account of producers in his position, and there was no question of a total and permanent exclusion from the market.

26. Secondly, the Council argues that the cut-off date is in any event justified by overriding considerations of legal certainty and of the effectiveness of the levy system. Finally, as regards the principle of non-discrimination, the Council argues that the situations of producers whose non-marketing undertakings expired prior to 31 December 1983, and of those whose undertakings expired after that date are objectively different in that in the latter case there was no possibility of production during 1983, the reference year chosen by most of the Member States.

27. The preamble to Regulation No 764/89 does not contain any reason for the inclusion of the requirement that, in order for him to be eligible for a special reference quantity, a producer's undertaking must have expired after 31 December 1983 (or 30 September 1983, as the case may be). In my view, the arguments of the Council and Commission do not succeed in justifying that requirement.

28. As regards the argument that producers in Mr Spagl's position could have obtained a quota under the general Community provisions, it should be noted that Article 2 of Regulation No 857/84 applies only in the case of producers who were in production throughout the relevant reference year. Article 9(2) of Regulation No 1546/88, dealing with new producers, is an optional provision which, although it was applied in Germany, was not implemented in all Member States. Even where it was applied, Article 9(2) was subject to the availability of reserves of quota in the relevant national reserve, and in any event could only assist producers who were in production for at least one month before 1 April 1984, which was not the case with Mr Spagl. As for Articles 3 and 4 of Regulation No 857/84, as the Court pointed out in Case 120/86 *Mulder*, quotas may be allocated under those provisions only to the extent that a producer falls within one or more of the situations specifically envisaged and to the extent that Member States have reserves of quota available for allocation to producers in special situations. The Court in the same case also stated that while Article 4a of Regulation No 857/84 accords Member States a wide margin of discretion as regards the allocation of unused reference quantities, that power is limited by the rule as to priority allocation laid down in the second subparagraph of Article 4a(1), and by the extent to which unused reference quantities are available (Case 120/86 *Mulder*, at paragraphs 15 to 20). In any event, Article 4a only permits re-allocation of unused quantities on an annual and *ex post facto* basis: it therefore does not provide

a basis for the lasting allocation to individual producers of fixed reference quantities.

29. It follows that the general provisions of the Community legislation do not ensure that in all cases a producer whose non-marketing or conversion undertaking expired before 31 December 1983 (or before 30 September 1983, where appropriate) will obtain a quota under the additional levy system. If such a producer is also excluded from the award of a special reference quantity under Article 3a of Regulation No 857/84, he will effectively be barred from resuming milk production for the duration of the levy system, in practice probably for good.

30. As the Court pointed out in Case 120/86 *Mulder*

'... total and continuous exclusion of that kind for the entire period of application of the regulations on the additional levy, preventing the producers concerned from resuming the marketing of milk at the end of the five-year period, was not an occurrence which those producers could have foreseen when they entered into an undertaking, for a limited period, not to deliver milk. ... Such an effect therefore frustrates those producers' legitimate expectation that the effects of the system to which they had rendered themselves subject would be limited' (paragraph 26).

31. A cut-off date which has the effect of definitively depriving certain producers of the possibility of resuming production must therefore be seen as incompatible with the principle of respect for legitimate expectations. It is not, in my view, relevant that a producer may, for reasons of an individual nature, have delayed the resumption of production until after the cut-off date in circumstances where he could, in principle, have resumed production beforehand. The crucial consideration is that the cut-off date in Article 3a of Regulation No 857/84 was imposed retroactively, with the result that producers whose undertaking expired prior to that date had no warning of the need to resume production as quickly and fully as possible and could not have foreseen that failure to do so would exclude them definitively from the market. The recognition of the legitimate expectations of those producers cannot be made dependent on the purely chance factor of timing.

32. I would add that the breach of the principle of respect for legitimate expectations cannot in my view be said to be justified by reference to overriding considerations of legal certainty or the effectiveness of the additional levy system. Legal certainty might well justify the imposition of a time-limit for applications for the award of special quota (and Article 3a does impose such a limit) but cannot justify the retroactive imposition of a cut-off date as a condition of eligibility for the grant of such quota. As regards the effectiveness of the system, the Council and Commission are concerned that Article 3a will encourage the resumption of production by producers who would not otherwise have contemplated it but who now wish to profit from the important asset value which a milk quota currently represents. In my view, reference to the effectiveness of the levy system might justify measures to discourage the resumption of milk production in general (and I will return to this point when

considering the 60% rule), but cannot justify the imposition of a cut-off date excluding certain returning producers in a purely arbitrary fashion. In any event, Article 3a already contains a number of restrictions designed to discourage an opportunistic return to milk production, notably the provision in Article 3a(4) that where the holding is sold or leased before 31 March 1992, the special reference quantity will be returned to the Community reserve.

33. As regards the issue of discrimination, it is clear that the cut-off date produces differences of treatment between former participants in the non-marketing and conversion scheme. Those producers whose undertakings expired after 31 December 1983 (or after 30 September 1983, as the case may be), are entitled under Article 3a to a provisional reference quantity of 60% of former deliveries and have a transitional period of two years in which to re-establish production and render the provisional quota definitive. At the other extreme, those producers whose undertakings expired before 31 December 1983 and who had no production before 1 April 1984, either because their undertakings expired too close to the cut-off date or because, like Mr Spagl, they were for practical or financial reasons unable to resume production promptly, are excluded altogether from the quota system and will be liable to pay the additional levy on every litre of milk delivered by them.

34. The cut-off date produces a further difference in treatment in that producers whose undertakings expired prior to that date cannot benefit from the 'amnesty' provision contained in paragraph 5 of Article 3a. That paragraph provides that

'producers eligible under paragraph 1 who receive a special reference quantity . . . shall not be liable to the additional levy in respect of quantities produced prior to the sixth period of application of the scheme [i.e. before 1 April 1989] which do not exceed the provisional reference quantity'.

Excluded from the scope of this provision are producers who were ineligible for a special quota because their undertakings expired before the cut-off date.

35. It cannot be argued that the possibility or otherwise of production in the reference year amounts to an objective difference in the situation of producers because, as already indicated, that possibility was purely illusory for a number of the affected producers, in particular those whose undertakings expired close to the cut-off date. In the absence of an objective ground for differentiation between the situations of former participants in the non-marketing and conversion schemes, the cut-off date in Article 3a must be regarded as incompatible with the principle of non-discrimination which finds expression in Article 40(3) of the Treaty.

36. Since the cut-off date is in my view invalid for breach of the principles of protection of legitimate expectations and of non-discrimination, it is not necessary for me to consider the possibility of a breach of the principle of protection of private property or of incompatibility with the objectives of the common agricultural policy.

37. As a final point, I would mention that if the provision imposing the cut-off date is held invalid, then the Community legislator will have to amend Regulation No 764/89 so as to give a new opportunity to producers who were previously excluded by that provision to apply for a special reference quantity, even if the practical effects of the amendment are likely to be relatively small.

The 60% rule

38. Mr Spagl and Mr Pastätter submit that the 60% rule is incompatible with the principles of respect for legitimate expectations and of non-discrimination. As regards legitimate expectations, they argue that the Court ruled in Cases 120/86 *Mulder* and 170/86 *von Deetzen* that a producer who had taken part in the non-marketing or conversion scheme could legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affected him precisely because he availed himself of the possibilities offered by the Community provisions. As to the principle of non-discrimination, they point out that the basic entitlement to quota of producers who produced during the reference year is considerably higher than the 60% offered under Article 3a of Regulation No 857/84, and argue that there are no objective grounds for that differentiation.

39. The Council points out that even producers who received quota under Article 2 of Regulation No 857/84 were not entitled to 100% of their production in the reference year but were subject to deductions made by Member States under Article 2(1) or imposed by the Community in the course of the operation of the additional levy system. The Council adds that 60% is only a basic entitlement and that it is necessary to consider the validity of Article 3a in the context of the other provisions which make it possible for producers contemplated by Article 3a to obtain special or additional reference quantities, notably, Articles 3, 3b, 3c, 4, and 4a of Regulation No 857/84, and emphasizes that in applying those largely discretionary provisions Member States are bound by general principles of Community law. As regards specifically the issue of legitimate expectations, the Council and Commission argue that while the Court in Cases 120/86 *Mulder* and 170/86 *von Deetzen* recognized a legitimate expectation on the part of former participants in the non-marketing and conversion scheme not to be excluded from milk production, it did not recognize a right to return to a level of production comparable to that which they had previously enjoyed. They submit that the 60% rule is in any event justified in the overriding interest of preserving the stability of the milk market and safeguarding the objectives of the additional levy system, and of avoiding an undue benefit for returning producers. As regards the principle of non-discrimination, they argue that producers contemplated by Article 3a are in

an objectively different situation from those who received quota in the normal way under Article 2 of Regulation No 857/84 in that they were not in production during the reference year and therefore did not contribute to the total guaranteed quantity. Finally, as regards the issue of property rights, which is one of the concerns of the referring court, the Council and Commission point out that the right to property is not absolute but may be restricted in the general interest.

40. In my opinion, the issue of legitimate expectations is far less clear-cut in relation to the 60% rule than in relation to the cut-off date. It is true that the Court in Cases 120/86 *Mulder* and 170/86 *von Deetzen* ruled that a former producer in the non-marketing and conversion scheme could legitimately expect, upon the expiry of his undertaking, not to be subject to restrictions which affect him precisely because of his participation in the scheme. The relevant paragraph must however be seen in its context:

'23. It must be conceded, as the Netherlands Government and the Commission have correctly observed, that 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 mean time.

24. The fact remains that where such a producer, as in the present case, has been encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions.

25. However, the regulations on the additional levy on milk give rise to such restrictions for producers who, pursuant to an undertaking entered into under Regulation No 1078/77, did not deliver milk during the reference year. As stated in the reply to the first question, those producers may in fact be *denied a reference quantity* under the new system precisely because of that undertaking if they do not fulfil the specific conditions laid down in Regulation No 857/84 or if the Member States have no reference quantities available.

26. Contrary to the Commission's contention, *total and continuous exclusion* of that kind for the entire period of application of the regulations on the additional levy, *preventing the producers concerned from resuming the marketing of milk* at the end of the five-year period, was not an occurrence

which those producers could have foreseen when they entered into an undertaking, for a limited period, not to deliver milk. There is nothing in the provisions of Regulation No 1078/77 or in its preamble to show that the non-marketing undertaking entered into under that regulation might, upon its expiry, *entail a bar to resumption of the activity* in question. Such an effect therefore frustrates those producers' legitimate expectation that the effects of the system to which they had rendered themselves subject would be limited.' (emphasis added).

If the relevant part of the judgment is read as a whole, with particular reference to the phrases which I have emphasized, it is apparent that the specific restriction to which the Court took objection was the total exclusion from the market of certain former participants in the non-marketing and conversion schemes which resulted from the operation of the then applicable rules. There is nothing in the judgment to suggest that the Court recognized an expectation on the part of former participants to return to a level of production comparable to that which had been achieved prior to joining the scheme.

41. I would add that the overriding interest of the Community in restricting excess milk production is an element which must be balanced against the legitimate expectation of producers to return to production: the purchase, storage and disposal of surplus milk products still constitutes one of the largest burdens on the Community budget. I emphasize that those considerations do not in my view justify any form of discrimination between producers, and I will turn to that question below.

42. In my view, returning producers had a legitimate expectation, not necessarily to resume full production, but not to be treated less favourably, when allowance had been made for differences in their circumstances, than producers who continued in production during the reference year ('continuing producers'). It follows that the complaint based on legitimate expectations can be examined together with the complaint based on discrimination, in so far as the latter complaint rests on a comparison between the treatment of returning producers and the treatment of continuing producers.

43. If such a comparison is made, then it is clear at the outset that Article 3a accords a markedly lower basic entitlement than that enjoyed by producers who were allocated a quota in the normal way under Article 2 of Regulation No 857/84. This is true even if account is taken of the fixed deductions made at the Community level and the variable deductions made by the different Member States under Article 2(1) of Regulation No 857/84, which do not apply to producers receiving a quota under Article 3a. The total deductions imposed at Community level by means of the reduction in national guaranteed quantities under Regulation No 1335/86 and Regulation No 3879/89 and the suspension or withdrawal of individual quotas effected by Regulations Nos 775/87 and 3882/89, amount to a total of 8.5%. As regards deductions made at the national level, it appears from information supplied by the Commission in response to a question from

the Court that the United Kingdom made the largest deduction under Article 2(1), fixing individual quotas at the level of 1983 deliveries, less 9%. The net result, for a United Kingdom producer, without taking account of the possibility of the attribution of special or additional quotas under other provisions, is the allocation of a quota corresponding to 82.5% of production in 1983 (i.e. deliveries in reference year less 17.5%). Even this 'worst case' scenario amounts to a substantially higher basic entitlement than that accorded under Article 3a.

44. The situation in the Federal Republic of Germany was more complicated because under the national implementing rules different percentages were applied according to the level of deliveries and according to whether or not production was increased between 1981 and 1983. A producer in the most unfavourable position, i.e. a very large producer whose deliveries in 1983 exceeded those in 1981, suffered an initial reduction of 4%, further deductions related to the scale of production and the rate of increase, and an additional reduction of 3.5% in respect of quantities produced in excess of 300 000 kg. At the other extreme, small producers (i.e. those producing 60 000 kg of milk or less) who had not increased production between 1981 and 1983 suffered a reduction at the national level of only 2%. These figures too indicate a basic entitlement considerably in excess of 60%.

45. It is also plain that the discretionary provisions of Regulation No 857/84 cannot be relied upon with certainty to supplement the basic 60% entitlement. For the same reasons that Articles 3, 4 and 4a cannot guarantee the allocation of a quota to producers excluded from the scope of Article 3a by the cut-off date (see paragraph 28 above), they cannot guarantee a quota in excess of 60%.

46. Similar objections can be made if one resorts to the recently adopted Articles 3b and 3c of Regulation No 857/84. Article 3b at first sight appears appropriate for the purpose of supplementing the 60% entitlement, in that it empowers Member States to grant further additional or special reference quantities *inter alia* to new producers and those whose quota does not exceed 60 000 kg. However, the usefulness of Article 3b is limited by the requirement that allocation must not exceed 1% of the Member State's guaranteed quantity, and of course by the availability of quota in the relevant national reserve. Still more hypothetical is Article 3c, which was inserted into Regulation No 857/84 by Regulation No 1183/90 and requires Member States to grant extra quota to small producers and, if quota remains available, to producers with partially unused production capacity. Although it has not yet been implemented, Article 3c also appears in principle capable of helping certain Article 3a producers. However, although the provision is binding on Member States, it should be noted that quota allocated under Article 3c must first be released by other producers who participate in the new Community programme for financing the cessation of milk production. The availability of quota under Article 3c will thus depend upon the success of that programme, which itself is likely to be contingent upon the willingness

of the Member States to top up the Community rates of compensation.

47. It thus appears indisputable that there is a difference in treatment as regards the allocation of quota as between returning and continuing producers and that the abovementioned provisions of the Community legislation cannot eliminate that difference in all cases. In order to decide whether this difference in treatment amounts to unlawful discrimination, it is necessary to determine whether there are objective grounds for that differentiation. While I do not find the arguments advanced by the Council and Commission on this central issue very convincing, it seems to me that the following points must be raised.

48. First, it could reasonably be assumed that continuing producers were dependent for their livelihood on continuing production, whereas returning producers, even if they had made investments with a view to resuming production, had been able for a period of years to make other uses of their farms. Such an assumption must be particularly strong in the case of former participants in the conversion scheme, who were required by their four-year undertaking to convert their dairy herds to beef production.

49. Secondly, no exact comparison was possible between continuing producers and returning producers, because the base figures on which the quotas were to be calculated were necessarily different. The quota of continuing producers under Article 2 of Regulation No 857/84 was properly based on their production in the reference year, i.e. on recent production figures, while for returning producers, when Regulation No 764/89 was adopted, the only available base was their production many years previously.

50. Thirdly, in the case of continuing producers it could properly be assumed that they would be adversely affected by any reduction in their existing production levels, and that assumption was reflected in the fact that their basic entitlement to quota was substantially related to their production in the reference year. The same assumption could not necessarily be made in the case of returning producers, because of the very fact that they were resuming production from a nil base.

51. Fourthly, continuing producers could properly be regarded as constituting a homogeneous category which should be treated in the same way; although there were some variations, such as the flexibility in the choice of reference year under Article 3(3) of Regulation No 857/84, there was little difficulty in ensuring that they should be treated uniformly, that is, broadly in line with their existing levels of production. In contrast, returning producers were not in comparable situations among themselves. I will elaborate this point.

52. When Regulation No 764/89 was enacted, a single formula had to be found to apply to potentially at least tens of thousands of producers in a wide variety of situations. No doubt there were some, like Mr Spagl, who intended to resume production to the full extent of their previous production or more, others who intended to resume production to a lesser extent, others again who might be induced to resume production by the adoption of the 1989 regulation itself. In addition, there were probably differences between the intentions and expectations of those who had received the non-marketing premium and those who had received the conversion premium. In those circumstances, any attempt at mathematical equality was impossible. Moreover, for reasons which I have mentioned earlier, it would also be impossible to achieve complete equality between the returning producers and the existing producers in the different Member States, given the great diversity of their situations and of the solutions adopted in the Member States themselves in dealing with them. This is illustrated by the fact that where, as in the United Kingdom, the basic quota of continuing producers after the various deductions was 82.5%, rather than 100%, the 60% figure gave the returning producers approximately three-quarters of the quota of continuing producers, whereas in another Member State, where continuing producers may have had a basic entitlement of 90%, the 60% figure gave the returning producers some two-thirds only. In making this comparison, I recognize that the base figure was not comparable as between returning producers and continuing producers, since the base figures were derived from different years, while production overall was generally increasing. Nevertheless the point remains valid that the situation of producers in different Member States varied widely, with the result that complete equality could not be attained.

53. In those circumstances, although the 60% quota must be regarded as low in relation to the claims of some returning producers, it cannot in my view be regarded as infringing the principle of non-discrimination. A higher figure might even have been excessive in relation to the reasonable expectations of other producers who had abandoned production but who might now be led to resume production. To focus only on those returning producers who may have suffered hardship as a result of the 60% restriction does not suffice to establish discrimination, since the figure of 60% must be assessed in relation to all the diverse cases taken together. It was therefore not unreasonable for the Community legislator to leave it to the Member States to 'top up' the 60% in appropriate cases where they had the means to do so, so as to take account of the circumstances of individual producers, even if, in the nature of the system, it was not possible to ensure that, even with such topping-up, every single producer would receive a quota exactly proportionate to his expectations or his needs.

54. I therefore conclude that the 60% rule is not invalid for breach of the principle of non-discrimination. Nor, in my view, can it be regarded as being incompatible with due observance of the right to property. As the Court has recognized, notably in Case 44/78 *Hauer* [1979] ECR 3727, paragraph 23 and Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18, the exercise of the right to property may be restricted, in particular in the context of a common organization of the market, provided that the restrictions in question correspond to objectives of general interest pursued by the Community. In my opinion, the 60% restriction is justified by the objective of general Community interest consisting in the containment of surplus milk production. At the same time, that restriction cannot be said to amount to a disproportionate or intolerable interference such as to impinge upon the very substance of the right to property. The 60% limit restricts, but does not remove the producer's right to use his holding for dairy production, and does not affect the possibility of using the farm for other purposes or of disposing of it. As I have already said, given the impossibility of achieving absolute equality between returning and continuing producers, and as between the different categories of returning producers, the 60% restriction must be regarded as proportionate and reasonable.

The retroactivity of the 60% rule

55. Finally, it is necessary to consider an issue which has not been raised in the observations submitted in these cases, namely, the retroactivity of the 60% rule. As I have already mentioned (at paragraph 34 above), paragraph 5 of Article 3a exempts producers who receive a special reference quantity from the payment of the additional levy in respect of quantities of milk produced prior to the sixth period of application of the scheme (i. e. before 1 April 1989) which do not exceed the amount of the provisional special reference quantity. It appears from the preamble to Regulation No 764/89 that that provision was adopted in the interests of fairness and it was plainly intended by the legislator to benefit returning producers. However, the result of the provision is to impose the levy with retrospective effect on returning producers in respect of their past production exceeding their 60% special quota. In my view, the retrospective imposition of the 60% rule must be regarded as unlawful.

56. When in 1984 it adopted Regulation No 857/84, laying down rules for the allocation of quotas, the Community legislator made no provision for former participants in the non-marketing and conversion schemes. Rightly considering that that omission was unlawful, a number of affected producers resumed production on the expiry of their undertakings, but at that time had no way of knowing what the relevant limit on their production should be. The Court's judgments of 28 April 1988 in Case 120/86 *Mulder* and Case 170/86 *von Deetzen*

confirmed that the legislator's omission, and thus, by implication, the imposition of the levy on the production of returning producers, was unlawful. However, the judgments gave no indication as to what the correct limit on production should be.

57. It was not until the adoption of Regulation No 764/89 on 20 March 1989 that the situation was finally clarified. However, in providing for the allocation of a 60% quota to returning producers, that regulation in effect adopted a completely new solution. While there would, in my view, have been no difficulty if the 60% quota had been adopted at the outset in 1984, it was unlawful to impose the new solution retrospectively. Returning producers who had been subject to the levy when it was first introduced could properly consider, after the judgments mentioned above, that the imposition of the levy was unlawful, and that they were entitled to recover any sums that they had paid, in any event on quantities up to the amount of their previous production. To that extent, it was not open to the legislator to reimpose the levy retrospectively. Moreover, it is inequitable to impose it retrospectively on producers who, because of the initial error of the Community legislator, have been kept in complete uncertainty as to the size of their quotas. The inequitable character of the legislation is underlined by the penal rate of the levy.

58. I would add that the retroactive application of the 60% rule cannot in any event be said to serve the objectives of the additional levy system since any excess quantities had already been produced.

59. I conclude that the 60% quota cannot be imposed in respect of periods prior to 1 April 1989 (i. e. prior to the sixth period of application of the levy system) and that the affected producers should not be liable to pay the additional levy on their production up to — as the only possible yardstick — 100% of their deliveries before joining the non-marketing or conversion scheme. It is true that, even after allowing for the differences between the base figures which I have already mentioned, the figure of 100% may put some of those producers in a better position as regards the period up to 1 April 1989 than continuing producers who received a quota corresponding to some 80% or 90% of their previous production. However, again no true comparison is possible, since continuing producers were able to plan their production and so avoid the levy altogether, while in the case of returning producers, in view of the uncertainty as to the relevant production limit, no such planning was possible.

60. I would emphasize that the above remarks do not imply that former participants in the non-marketing and conversion schemes had a legitimate expectation to produce 100% of their former production between the date of the expiry of their undertaking and 1 April 1989. Their

only legitimate expection was not to be treated less favourably than continuing producers having regard to the objective differences in their positions. The crucial factor is that during that period they had no basis for knowing what the relevant figure was because the legislator had not made any provision for them at all.

Conclusion

61. Accordingly, I would give the following answers to the questions of the national court in Case C-189/89 *Spagl*:

'(1) Article 3a of Council Regulation (EEC) No 857/84 is invalid in so far as a producer whose period of non-marketing pursuant to an undertaking given under Council Regulation (EEC) No 1078/77 expired before 31 December 1983 (or before 30 September 1983, as the case may be), is not eligible for receipt of a special reference quantity.

(2) Article 3a of Council Regulation (EEC) No 857/84 is invalid in so far as a producer who receives a special reference quantity under that provision is liable to pay the additional levy in respect of quantities produced prior to the sixth period of application of the scheme which do not exceed the quantity of milk delivered or the quantity of milk equivalent sold by that producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made pursuant to Council Regulation No 1078/77.

(3) Examination of Article 3a of Council Regulation (EEC) No 857/84 has revealed no further factor of such a kind as to affect the validity of the provision in question.'

62. In Case C-217/89 *Pastätter*, I would give the following answers:

'(1) Article 3a of Council Regulation (EEC) No 857/84 is invalid in so far as a producer who receives a special reference quantity under that provision is liable to pay the additional levy in respect of quantities produced prior to the

sixth period of application of the scheme which do not exceed the quantity of milk delivered or the quantity of milk equivalent sold by that producer during the 12 calendar months preceding the month in which the application for the non-marketing or conversion premium was made pursuant to Council Regulation No 1078/77.

(2) Examination of Article 3a of Council Regulation (EEC) No 857/84 has revealed no further factor of such a kind as to affect the validity of the provision in question.'