# OPINION OF ADVOCATE GENERAL JACOBS
delivered on 9 July 1992 *

*My Lords,*

1. In this case the Bundesverwaltungsgericht has asked for a preliminary ruling on the interpretation of Article 5(2) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11). The provision in question deals with the apportionment of milk quotas when part of a holding is sold, leased or transferred by inheritance.

## The relevant legislation

2. The Court is by now familiar with the basic legislation governing the milk quotas scheme. Council Regulation (EEC) No 856/84 (OJ 1984 L 90, p. 10) inserted Article 5c into Council Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products. Under the scheme established by Article 5c farmers are given a quota (described as a 'reference quantity') and milk produced by them in excess of the quota is subject to an additional levy fixed at prohibitively high rates.

3. General rules for the application of the levy are laid down in Council Regulation (EEC) No 857/84 (OJ 1984 L 90, p. 13). Article 7(1) of that regulation, as amended by Council Regulation (EEC) No 590/85 (OJ 1985 L 68, p. 1), provides:

'Where a holding 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 ...'

Article 7(4), as amended, provides:

'In the case of rural leases due to expire, where the lessee is not entitled to an extension of the lease on similar terms, Member States may provide that all or part of the reference quantity corresponding to the holding [or part thereof] [1] which forms the subject of the lease shall be put at the disposal of the departing lessee if he intends to continue milk production.'

4. Detailed rules for the application of the levy were laid down in Commission Regulation No 1371/84, Article 5 of which

* Original language: English.

1 — The words in square brackets were added by a corrigendum published in OJ L 81/41 of 23 March 1985.

provided that, for the purpose of applying Article 7(1) of Regulation No 857/84, the following rules should apply to the transfer of reference quantities:

'1. Where an entire holding is sold, leased or transferred by inheritance, the corresponding reference quantity shall be transferred in full to the producer who takes over the holding.

2. Where one or several parts of a holding is sold, leased or transferred by inheritance, the corresponding reference quantity shall be distributed among the producers operating the holding in proportion to the areas used for milk production or according to other objective criteria laid down by Member States. Member States may disregard transferred parts the area of which used for milk production is less than a minimum size which they shall determine.

3. The provisions of subparagraphs 1 and 2 above shall also be applicable in other cases of transfer which, under the various national rules, have comparable legal effects as far as producers are concerned. Member States may apply the provisions of subparagraphs 1 and 2 in respect of transfers taking place during and after the reference period.'

5. Regulation No 1371/84 has since been replaced by Commission Regulation (EEC) No 1546/88 (OJ 1988 L 139, p. 12), which came into force on 4 June 1988. The provisions of Article 7(1) to (3) of the new regulation are, apart from minor amendments not material in the present case, identical to those of Article 5(1) to (3) of Regulation No 1371/84.

6. The main implementing measure adopted in Germany in connection with the above provisions appears to be the Milch-Garantiemengen-Verordnung (MGVO) of 25 May 1984 *(Bundesgesetzblatt* 1984, Part I, p. 720). In the version in force since 25 June 1986 *(Bundesgesetzblatt* 1986, Part I, p. 1227) Paragraph 7(3a) provides:

'If parts of a holding which are used for the production of milk are returned to the lessor after 30 September 1984, on the basis of a lease concluded before 2 April 1984, no reference quantity shall be transferred with an area returned of a size less than 5 hectares; half of the reference quantity corresponding to an area in excess of 5 hectares shall be transferred to the lessor, up to a maximum of 2 500 kg per hectare. This does not apply if the lessor and the lessee agree otherwise, if the lessee terminates the lease or if the lessor proves that he is dependent on the reference quantity for milk production for himself, his spouse or his children; in such cases, however, a maximum of 5 000 kg per hectare shall be transferred to the lessor.'

7. The provision just quoted was presumably adopted in implementation of Article 7(4) of Regulation No 857/84, as amended by Regulation No 590/85. The German legislation does not, however, say how 'the reference quantity corresponding to an area in excess of 5 hectares' is to be determined. That quantity therefore falls to be determined 'in proportion to the areas used for milk production' in accordance with Article 5(2) of Regulation No 1371/84, in the absence of 'other objective criteria' laid down by the Member State in question.

*The facts and the essential issue*

8. Mr Knüfer leased a dairy farm from the father of Mr Buchmann. The surface area of the farm was 10 2112 hectares, consisting of 0.2395 hectares of farmyard and buildings, 0.1059 hectares of paths and lanes, 0.0879 hectares of woodland and 9 7779 hectares of cultivatable land, including 0.06 hectares of garden adjoining the farmhouse. In addition, Mr Knüfer leased 4.75 hectares from a Mr Holsteg and 0.75 hectares from a Mr Neuenhaus. He was awarded a milk quota of 88, 300 kg.

9. The lease with Mr Holsteg was terminated by mutual agreement on 28 February 1987. Mr Knüfer agreed that a reference quantity of 23, 750 kg (i. e. 5 000 kg x 4.75 hectares) should be assigned to Mr Holsteg. That arrangement was approved by the Landwirtschaftskammer Rheinland on 9 March 1987 and is no longer open to challenge.

10. Some months earlier Mr Buchmann's father terminated Mr Knüfer's lease and the farm reverted to its owner on 5 November 1986. On 14 October 1986 Mr Buchmann and his father concluded an agreement whereby the latter transferred to the former the farm leased to Mr Knüfer, together — it seems — with a large area of adjoining land (130 hectares in total). Mr Buchmann requested the Director of the Landwirtschaftskammer to certify that by virtue of that transfer a reference quantity had been transferred to him in respect of the property once leased to Mr Knüfer. The request was only partially granted. Mr Buchmann challenged the refusal to grant the request in full.

11. The dispute has now reached the Bundesverwaltungsgericht, which considers that its decision depends on the meaning of the expression 'the areas used for milk production' in Article 5(2) of Regulation No 1371/84.

12. The Bundesverwaltungsgericht has referred the following question to the Court:

'Does the phrase "areas used for milk production" in Article 5(2) of Regulation No 1371/84 include the yard, buildings and road areas of the holding, as that term is used in that provision?'

13. Although the facts and the legal proceedings (which it is unnecessary to recount here)

are somewhat complicated, and although the relevant legislation is by no means straightforward, the essential issue on which the Court must rule is relatively simple. When Mr Knüfer's lease expired and the land reverted to Mr Buchmann senior, it was necessary to determine what proportion of the milk quota granted to Mr Knüfer in respect of a holding that included other pieces of land should be transferred to Mr Buchmann, in accordance with Article 5(2) of Regulation No 1371/84. It may be noted that, by virtue of Article 5(3), Article 5(2) applies to the reversion of part of a holding to the lessor: Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paragraph 15. Under Article 5(2) the quota is to be divided up in proportion to the areas used for milk production. The question before the Court is whether the expression 'the areas used for milk production' refers solely to the meadows and grazing land or whether it includes the yard, buildings and lanes of the holding. If the expression is given the wider meaning, the land that reverted to the Buchmann family upon the expiry of the lease will constitute a larger proportion of the 'areas used for milk production' by Mr Knüfer and the milk quota transferred to Mr Buchmann will be correspondingly larger.

*The answer to the question*

14. Since the end of the written procedure in this case, the Court has given judgment in Case C-121/90 Posthumus v Oosterwoud (judgment of 6 December 1991), in which a similar question concerning the interpretation of an identical provision in Article 7(2) of Regulation No 1546/88 arose. The Court stated (in paragraph 9 of the grounds of the judgment) that, where the Member State has not fixed other objective criteria, the quota must be divided in proportion to the size of the respective areas of the holding that are used for milk production, including areas containing buildings, but that no account may be taken of the extent to which the different areas have contributed to the total milk production of the holding. In paragraph 1 of the operative part of the judgment the Court ruled that the quota must be divided solely on the basis of the areas used for milk production and that no account may be taken of other factors, such as the buildings that belong to the holding.

15. At first sight there appears to be a contradiction between paragraph 9 of the grounds of the judgment and paragraph 1 of the operative part. The former implies that the area on which the buildings stand is to be taken into account when dividing up the quota in proportion to the area used for milk production, while the latter might be taken to suggest the opposite. It seems to me, however, that the contradiction is only apparent. What the Court meant, I think, is that the land on which the buildings stand should be taken into account but that it should not be given any weighting on the ground that it is of greater (or lesser) value than ordinary grazing land. In other words, the Court took the view that, if a Member State had not established any other objective criteria, the basic rule laid down in Article 7(2) of Regulation No 1546/88 should be applied on

a purely territorial basis. That is in accordance with the view that I expressed as Advocate General in *Posthumus*.

16. In the present case the written procedure ended before the judgment in *Posthumus* was delivered and since no hearing was held, pursuant to Article 104(4) of the Rules of Procedure, the parties have not had an opportunity to state their views on the implications of the *Posthumus* judgment for this case. However, the result cannot be in doubt following that ruling.

17. The Commission argued in its written observations that the expression 'areas used for milk production' should be interpreted as meaning only meadows and pastures, thus excluding cowsheds, farmyards, paths and lanes. However, I do not think that any of the arguments advanced by the Commission justifies departing from the precedent established in *Posthumus*.

18. According to the Commission's first argument, the narrow interpretation is suggested by the wording of the provision, which speaks of 'part of the holding' on the one hand and of 'areas used for milk production' on the other. The Commission infers from that terminology that the second expression has a narrow meaning and includes only areas *directly* used for milk production, i. e. meadows and pastures, but not buildings, yards or lanes. I do not agree. Obviously the expression 'areas used for milk production' cannot include woodlands, orchards, ornamental gardens, pigsties or any other element that is clearly incapable of contributing significantly to milk production. But if the expression is given its natural meaning there is no reason to exclude from it cowsheds, hay barns, the farmyard, lanes or any other part of the holding that makes a significant contribution to milk production. The suggestion that cowsheds are not directly used for milk production is particularly surprising. But the contribution to milk production made by the other items is equally undeniable. Even the lanes are vital because they constitute a means of communication between the various parts of the holding, whether for the purpose of driving cattle, carting hay or spreading manure.

19. The Commission argues secondly that its narrow interpretation is consistent with the purpose of the provision, which is, if I understand the argument correctly, to ensure an equitable division of the quota among the persons concerned. The Commission contends that the lessor would be unfairly advantaged if account were taken of the buildings that revert to him but no account could be taken of buildings retained by the lessee where no such buildings exist. I fail to see how any unfairness could result from including in the calculations land containing buildings, provided of course it is not given any special weighting on account of its greater value. On the contrary, it would be unfair to disregard such land where the buildings make a significant contribution to milk production.

20. Thirdly the Commission argues that, if the expression in question were intended to have a wider meaning, an appropriate definition would have been included in the regulation. The Commission refers to Council Regulation (EEC) No 1078/77 (OJ 1977 L 131, p. 1), Article 6(2) of which governs the repayment of non-marketing premiums in the event of a partial disposal of the producer's holding. The amount to be repaid is to be calculated on the basis of the 'area under forage', which is defined by Article 1(1)(d) of Commission Regulation (EEC) No 1391/78 (OJ 1978 L 167, p. 46) as meaning the 'total agricultural area farmed by a producer'. According to the Commission, a similar definition would have been included in Regulation No 1371/84 if the expression in question had been intended to have a wider meaning. It seems to me, however, that the only correct inference to be drawn from the absence of a definition of the expression 'areas used for milk production' is that the words have their natural meaning and include all areas that are used to a significant extent for the production of milk.

**The application ratione temporis of Regulations Nos 1371/84 and 1546/88**

21. The Bundesverwaltungsgericht has asked the Court to treat the question referred as a question on the interpretation of Article 7(2) of Regulation No 1546/88 if it considers that regulation to be applicable rather than Regulation No 1371/84. Since, as I have pointed out above (paragraph 5), there is no material difference between Article 5(2) of Regulation No 1371/84 and Article 7(2) of Regulation No 1546/88, it is not strictly necessary for the Court to give detailed consideration to the application *ratione temporis* of the two regulations. The Commission has, however, dealt with the subject at some length and I shall therefore express a view on it.

22. The Commission's approach is in my view wholly misconceived. The Commission first refers to the established case-law of the Court according to which there is a generally accepted principle that laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law: Case 1/73 *Westzucker* v *Einfuhr-und Vorratsstelle Zucker* [1973] ECR 723. The Commission observes that that principle is excluded only if its application would be contrary to the principle of legal certainty, according to which the legitimate expectations of the persons concerned must be protected. The Commission then observes, somewhat curiously, that it is for the national court to determine, apparently in accordance with national law, which Community provision applies in the event of a legislative amendment. The Commission goes on to maintain that, if that is, contrary to its view, a question of Community law, the national court should apply the regulation in force at the time of its decision, namely Regulation No 1546/88.

23. I disagree with the Commission in two respects. In the first place, I do not see how it can be for national law to decide whether the apportionment of a milk quota following the expiry of the producer's lease is governed by Article 5(2) of Regulation No 1371/84 or Article 7(2) of Regulation No 1546/88. The temporal scope of Community legislation is clearly a matter of Community law and must be determined in accordance with the relevant principles of the Community legal order. Any other view would be inconsistent with the need to ensure the uniform application of Community law.

24. Secondly, once it is established that the issue falls to be determined by Community law, it is in my view clear that the respective rights of Mr Knüfer and Mr Buchmann must be determined in accordance with the legislation in force at the time when the lease expired and the property reverted to its owner. In the present case the question is purely academic because there is no material difference between the two provisions. But if we suppose, for the sake of argument, that the later regulation laid down a new criterion for the division of the milk quota, different from that contained in the earlier regulation, it would be manifestly wrong for the national court to apply the later regulation simply because that was the regulation in force at the time when the matter came to be judicially determined. The *Westzucker* judgment cited by the Commission has no bearing whatsoever in the present case, which has nothing to do with the application of amending legislation to the future consequences of situations that arose under the former law. If Regulation No 1546/88, which came into force on 4 June 1988, were applied to the division of the milk quota between Mr Knüfer and Mr Buchmann, as a result of the reversion of the farm to its owner on 5 November 1986, that would constitute a clear case of retroactive application, for which however there is absolutely no justification. The relevant principles were clearly formulated in paragraphs 9 and 10 of the Court's judgment in Joined Cases 212/80 to 217/80 *Amministrazione delle Finanze dello Stato* v *Salumi* [1981] ECR 2735, at p. 2751:

'Although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, this is not the case with substantive rules. On the contrary, the latter are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them.

This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectations, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it. The Court has repeatedly emphasized the importance of those principles, in particular in the judgments of 25 January 1979 in Case 98/78 *Racke* v *Hauptzollamt Mainz* ([1979] ECR 69) and Case 99/78 *Decker* v *Hauptzollamt Landau* ([1979] ECR 101), in which it stated that in

general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication and that it may be otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.'

## Conclusion

25. Accordingly, I am of the opinion that the question referred to the Court by the Bundesverwaltungsgericht should be answered as follows:

The expression 'areas used for milk production' in Article 5(2) of Commission Regulation No 1371/84 includes the yard, buildings and road areas of the holding, provided that they make a significant contribution to milk production.