has been awarded under Article 4(1)(c) of Regulation No 857/84 to a partnership of several persons and in addition a special reference quantity is awarded under Article 3a in respect of the same holding but to only certain members of the partnership, which has the status of producer, the first reference quantity falls to be deducted in full from the second reference quantity.

REPORT FOR THE HEARING
in Case C-84/90 *

I — Facts and procedure

1. *The Community rules applicable*

(a) *Council Regulation (EEC) No 1078/77* of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (Official Journal 1977 L 131, p. 1) set up *inter alia* a system of conversion premiums which were to be granted at the request of milk producers who wished to convert their dairy herd to meat production and undertook not to dispose of either milk or milk products from their holdings whether for a consideration or free of charge for a period of four years (Articles 1 and 3).

(b) *Council Regulation (EEC) No 856/84* of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal 1984 L 90, p. 10) introduced an additional levy on milk quantities delivered exceeding a reference quantity to be determined. That system was to be implemented in each region of the territory of the Member States in accordance with one of the following formulas (Article 1):

— Under Formula A the levy was to be payable by a milk producer on the quantities of milk delivered to a purchaser which exceeded the reference quantity to be determined (producer formula);

— Under Formula B the levy was to be payable by a purchaser of milk or other milk products (dairies) on the quantities of milk delivered by a producer which exceeded the reference quantity to be determined. The purchaser liable to the levy was to pass on the burden in the

* Language of the case: English.

price paid to those producers who had increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded (purchaser formula).

(c) The general rules for the application of the additional levy are contained in Council Regulation (EEC) No 857/84 of 31 March 1984 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 (Official Journal 1984 L 90, p. 13). That regulation fixes in particular the reference quantity referred to in the basic regulation, Regulation No 856/84, that is to say the quantity exempted from the additional levy. That quantity is in principle 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% (Article 2(1)). However, Member States may provide that on their territory the reference quantity is to be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity (Article 2 (2)).

Articles 3, 3a, 4 and 4a of Regulation No 857/84, as amended, allow Member States to take certain special situations into account for the determination of reference quantities or allocation of special or additional reference quantities. In the present case, Article 3a, which was added by amending Council Regulation (EEC) No 764/89 of 20 March 1989 (Official Journal 1989 L 84, p. 2), should be cited:

'*Article 3a*

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

— whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation (EEC) No 1078/77, expires after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to the March of the following year;

— who have not received a reference quantity under the terms laid down pursuant to Article 5(4)(b) and/or Article 9(2) of Regulation (EEC) No 1546/88 and/or, with regard to the person to whom the premium is transferred, pursuant to Article 2 of this Regulation,

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

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

(b) establish in support of their request, to the satisfaction of the competent

authority, that they are able to produce on their holding up to the reference quantity requested;

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

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

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

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

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

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

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

3-6. ....'

Article 4(1)(b) and (c) of Regulation No 857/84 is worded as follows:

'*Article 4*

1. In order to complete the restructuring of milk production at national or regional level or at the level of the collecting areas, the Member States may, in connection with the application of formulas A and B:

(a) ....

(b) grant an additional reference quantity to producers realizing a milk production development plan approved after the entry into force of this Regulation under Directive 72/159/EEC, on condition that this plan meets the

criteria referred to in Article 1(2) of Regulation (EEC) No 1946/81;

(c) grant producers undertaking farming as their main occupation an additional reference quantity, whether their herd fulfils the conditions set out in paragraph (b) or not.

2. ....'

Article 12 of Regulation No 857/84 lists various definitions, among which is that for 'producer'. That term is defined in Article 12(c) of Regulation No 857/84, as amended by Regulation No 764/89, in the following way:

'(c) producer: a natural or legal person or group of natural or legal persons farming a holding located within the geographical territory of the Community:

— selling milk or other milk products directly to the consumer, and/or

— supplying the purchaser;

For the purposes of applying Article 3a, any natural or legal person or group of natural or legal persons farming a holding located within the geographical territory of the Community shall be deemed to be a producer of an agricultural holding.'

2. *The action in the main proceedings*

(a) Mr and Mrs Dent, the applicants in the main proceedings, are dairy farmers who sell milk wholesale to the Milk Marketing Board. Their holding consists of a farm and a grazing area in Cumbria.

On 31 January 1980 Mr and Mrs Dent, then trading in partnership with each other as 'J J Dent', applied for entry into the dairy herd conversion scheme established by Council Regulation No 1078/77 of 17 May 1977. Their application was accepted and milk production on their holding ceased in or about April 1980. The conversion period was four years expiring on 30 April 1984. Their entitlement to conversion premium was based on 1 609 488 litres of milk.

On 6 April 1980 Mr and Mrs Dent introduced their son Michael James Dent into the partnership and the name of the partnership was changed to 'Messrs J J Dent'.

At the end of the conversion period the partnership obtained an 'exceptional hardship quota' pursuant to the Dairy Produce Quota Regulations 1984, which had been adopted to implement Council Regulations Nos 856/84 and 857/84 of 31 March 1984. The amount of exceptional hardship quota awarded was 873 600 litres.

After amending Regulation No 764/89 of 20 March 1989 was adopted by the Council, Mr and Mrs Dent succeeded in having a special reference quantity awarded to them pursuant to Article 3a of Regulation No 857/84 as amended. The amount awarded was 92 093 litres, that is to say 965 693 litres (a quantity equal to 60% of their entitlement to premium under the conversion scheme) less the 873 600 litres awarded by way of exceptional hardship quota.

In the main proceedings Mr and Mrs Dent maintain in substance that in reducing their special reference quantity by the amount of the exceptional hardship quota the defendant Ministry misinterpreted Article 3a(2) of Regulation No 857/84 as amended.

The Queen's Bench Division of the High Court which heard the case decided to stay the proceedings and refer to the Court of Justice, pursuant to Article 177 of the EEC Treaty, the following questions: [1]

'1. On the proper interpretation of the second subparagraph of Article 3a(2) of Council Regulation (EEC) No 857/84 of 31 March 1984 (as inserted by Council Regulation (EEC) No 764/89 of 20 March 1989), does the special reference quantity referred to in the first subparagraph of that paragraph fall to be reduced by the amount of a reference quantity obtained by the producer pursuant to provisions of national regulations (*in casu*, paragraph 17 of Schedule 2 to the Dairy Produce Quotas Regulations 1984) which implemented only Article 4(1)(c), and not Article 4(1)(b), of Regulation No 857/84?

2. On the proper interpretation of the said second subparagraph of Article 3a(2) of Regulation No 857/84 (as inserted by Regulation No 764/89), and having regard to the definition of 'producer' in Article 12 (c) of Regulation 857/84, where a special reference quantity is awarded to two persons (*in casu*, a husband and wife) who farm their holding in partnership with a third person (*in casu*, their son) does that special reference quantity fall to be reduced by the amount of a reference quantity (or a proportion thereof) where that reference quantity was awarded in respect of the same holding and otherwise falls within the said subparagraph but was obtained by the three persons as a partnership?'

3. *Procedure before the Court*

The order for reference was received at the Court Registry on 22 March 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Mr and Mrs Dent, represented by Richard Gordon, Barrister, London, and by Messrs Cartmell Shepherd, Solicitors, Carlisle, by

1 — The questions as set out include the punctuation agreed between the parties but omitted from the formal order of the Queen's Bench Division (per the written observations of the United Kingdom).

the United Kingdom, represented by Stephen Richards, Barrister, London, and Rosemary Caudwell, of the Treasury Solicitor's Department, acting as Agent, and by the Commission of the European Communities, represented by Peter Oliver, a member of its Legal Service, acting as Agent.

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations

1. *The first question*

(a) *Mr and Mrs Dent* submit that they fall outside the ambit of the second subparagraph of Article 3a(2) of Regulation No 857/84 inasmuch as they obtained a reference quantity (the 'exceptional hardship' quota) solely pursuant to Article 4(1)(c) of Regulation No 857/84 and not 'pursuant to Article 3, points 1 and 2 and/or Article 4(1)(b) and (c)' thereof and that, accordingly, the special reference quantity awarded to them under Regulation No 764/89 does not fall to be reduced by the 'exceptional hardship' allocation.

In support of that view, Mr and Mrs Dent rely, first, on the terminology of the second subparagraph of Article 3a(2). The use of the solely conjunctive expression 'and' is to be contrasted with the alternative conjunctive and disjunctive expression 'and/or' in the same subparagraph. The fact that the two expressions are employed alongside each other in the same subparagraph connotes that the expression 'and' used alone was intended to be solely conjunctive.

Secondly, Mr and Mrs Dent submit that there is no justification for departing from a construction of the aforesaid second subparagraph of Article 3a(2) based on the natural meaning of the words used therein. In that connection they point to the sixth recital in the preamble to Regulation No 764/89 which states '... the quantities granted are not intended to confer an undue advantage but must in fact be produced by those to whom they are allocated ...'. The applicants maintain that there is no 'undue' advantage in permitting them to retain the benefit of the obtaining of a reference quantity under Article 4(1)(c) of Regulation No 857/84 and that the said sixth recital is intended to ensure merely that the special reference quantity is only awarded to producers who produce the quantities granted.

Finally, according to Mr and Mrs Dent, there is every reason for restricting the reduction of previously awarded reference quantities from the special reference quantities granted under Regulation No 764/89. By definition, persons applying for the grant of such special reference quantities were ineligible for allocation of 'primary' quota under Article 2 of Regulation No 857/84. The obtaining of an additional reference

quantity under Articles 3 and/or 4 thereof by virtue of a special situation did not compensate for a producer's failure to obtain 'primary' quota.

In conclusion, Mr and Mrs Dent submit that the Court should reply to the first question as follows:

'On the proper interpretation of the second subparagraph of Article 3a(2) of Regulation No 857/84, where a Member State has granted a quota to a producer under national regulations, implementing Article 4(1)(c) of that Regulation but not Article 4(1)(b) thereof, such quota does not fall to be reduced from the special reference quantity referred to in Article 3a.'

(b) The *United Kingdom* submits that the 'exceptional hardship' quota is a reference quantity obtained 'pursuant to Article 3, points 1 and 2, and/or Article 4(1)(b) and (c)' of Regulation No 857/84 and must therefore be deducted from the special reference quantity calculated according to the first subparagraph of Article 3a(2).

With regard to the argument that the exceptional hardship quota was obtained pursuant to the national regulations (paragraph 17 of Schedule 2 to the Dairy Produce Quotas Regulations 1984), rather than pursuant to Article 4(1)(c) of Regulation No 857/84, the United Kingdom contends that, as a matter of ordinary language, awards obtained 'pursuant to' national regulations that give effect to a Community regulation are also obtained 'pursuant to' the corresponding provisions of the Community regulation. Moreover, if the opposite interpretation were adopted, the second subparagraph of Article 3a(2) would become devoid of substance given that neither Article 3 nor Article 4 of Regulation No 857/84 gives producers a direct right to a reference quantity: both authorize the Member States to adopt further measures at the national level.

As regards the argument that the exceptional hardship quota was obtained pursuant solely to Article 4(1)(c) of Regulation No 857/84, whereas a reference quantity falls to be deducted only if obtained pursuant to both Article 4(1)(b) and Article 4(1)(c) of the regulation, the United Kingdom considers that that interpretation would very seriously limit the number of cases in which reference quantities already obtained fell to be deducted from special reference quantities awarded under Article 3a. Such a limitation would run counter to the policy of the Community rules, conferring an undue advantage on recipients of special reference quantities.

Moreover, according to the United Kingdom, it is very unlikely that a producer would qualify for an award under both point 1 and point 2 of Article 3, or under Article 4(1)(b) and Article 4(1)(c), given that the United Kingdom chose to make awards pursuant to point 1 but not point 2

of Article 3 and chose to give effect to Article 4(1)(c) but not to Article 4(1)(b).

For the above reasons, the United Kingdom concludes that there are strong grounds for reading 'and' as 'and/or' in the expression 'pursuant to Article 3, points 1 and 2, and/or Article 4(1)(b) and (c)'. A reference quantity is therefore obtained 'pursuant to ... Article 4(1)(b) and (c)' within the meaning of the second subparagraph of Article 3a(2) even if it is obtained pursuant solely to Article 4(1)(c).

In conclusion the United Kingdom submits that the Court should reply to the first question as follows:

'The second subparagraph of Article 3a(2) of Council Regulation (EEC) No 857/84 of 31 March 1984 (as inserted by Council Regulation (EEC) No 764/89 of 20 March 1989) is to be interpreted as meaning that the special reference quantity referred to in the first subparagraph of that paragraph falls to be reduced by the amount of a reference quantity obtained by the producer even where the latter reference quantity was obtained pursuant to provisions of national regulations which implemented only Article 4(1)(c) and not Article 4(1)(b) of Regulation No 857/84.'

(c) The *Commission* substantially shares the point of view of the United Kingdom.

With regard to the argument that since the 'special hardship' quota had been granted under the (British) 'Dairy Produce Quotas Regulations' it could not have been granted simultaneously 'pursuant to' Article 4(1)(c) of Regulation No 857/84, the Commission emphasizes that the term 'pursuant to' has a very general meaning. Thus where Regulation A is enacted and Regulation B is then adopted on the basis of that and measure C is then taken by which Regulation B is applied to an individual case, both Regulation B and measure C have been adopted 'pursuant to' instrument A.

Moreover, according to the Commission, the purpose of the second subparagraph of Article 3a(2) is to prevent the unjust enrichment which would ensue if producers were granted two reference quantities covering the same production twice over (see the sixth recital in the preamble to Regulation No 764/89). As the Court of Justice recognized in its judgment of 6 June 1990 in Case C-174/88 *Hall* [1990] ECR 2237, it would be contrary to the whole philosophy of the milk quotas regime to grant two sets of quotas with respect to one quantity of milk.

As regards the argument that a quota deduction is only to be made where producers have been granted a quota under Article 4(1)(b) and (c) simultaneously, the Commission objects that that would render the second subparagraph of Article 3a(2) inapplicable to the United Kingdom since that State has chosen not to implement Article 4(1)(b) at all.

In conclusion the Commission suggests the following reply to the first question:

'On the proper interpretation of the second sub-paragraph of Article 3a(2) of Regulation No 857/84, where a Member State has granted a quota to a producer under national regulations implementing Article 4(1)(c) of the same regulation, that quota is to be deducted from the special reference quantity referred to in Article 3a.'

2. *The second question*

(a) *Mr and Mrs Dent* point out that by virtue of the second subparagraph of Article 3a(2) of Regulation No 857/84 reductions of the special reference quantity only fall to be made where a particular reference quantity has been obtained by 'the producer'. They submit that the 'producer' referred to in the second subparagraph of Article 3a(2) of Regulation No 857/84 must be the same 'producer' as is referred to in Article 3a(1) thereof. It is clear from that latter provision that only producers who have given an undertaking of non-marketing or conversion pursuant to Regulation No 1078/77 are entitled to the provisional allocation of a special reference quantity.

In the above circumstances, Mr and Mrs Dent consider that the recipient of the special reference quantity (namely Mr and Mrs Dent) was not the same 'producer' as that obtaining the reference quantity under Article 4(1)(c). The 'exceptional hardship' quota under the Dairy Produce Quotas Regulations was awarded to the family partnership of three persons, namely Mr and Mrs Dent and their son. If the partnership had been dissolved the son would have been entitled to an account for the value of his milk quota.

It cannot therefore be right, in the view of Mr and Mrs Dent, that quota which they would have to account for to their son on a dissolution of the partnership should fall to be deducted from the special reference quantity awarded solely to Mr and Mrs Dent. Consequently the applicants in the main proceedings maintain that none of the 'exceptional hardship' quota falls to be deducted from the special reference quantity in question. In any event, the principles of proportionality and legitimate expectation require that no more than two-thirds of the 'exceptional hardship' quota be so deducted.

In conclusion Mr and Mrs Dent submit that the second question should be answered as follows:

'The said second subparagraph of Article 3a(2) of Regulation No 857/84 does not operate so as to reduce from the special reference quantity referred to in Article 3a obtained by two individuals, a reference quantity obtained by those two persons in partnership with a third person.'

(b) The *United Kingdom* points out that the holding in question has been farmed at all material times as a family partnership. Until 6 April 1980 the partners were Mr and Mrs Dent. Their son joined the partnership with effect from 6 April 1980. Just over two months before the son became a partner, Mr and Mrs Dent had applied for entry into

the dairy herd conversion scheme established by Regulation No 1078/77. The period of the conversion scheme ran for four years from April 1980 to 30 April 1984. Their son was thus a member of the partnership throughout the period covered by the conversion scheme. It was the family partnership which obtained an exceptional hardship quota pursuant to Article 4(1)(c) of Regulation No 857/84 and it continues to farm the holding.

In those circumstances the United Kingdom considers that it would be an extraordinary result if, simply because the son joined the partnership just after Mr and Mrs Dent had applied for entry into the dairy herd conversion scheme, the special reference quantity now awarded under Article 3a did not take account of the exceptional hardship quota awarded to the family partnership. The effect of leaving the exceptional hardship quota out of account would be to give the persons who farm the holding virtually double the amount of quota that they would have received if the son's name had been included in the application for entry into the dairy herd conversion scheme. The provisions of Article 3a would therefore operate not to compensate them for their inability to obtain a primary quota (by reason of their participation in the conversion scheme during the relevant reference years), but to confer on them a very substantial undue advantage.

In view of the definition of 'producer' given in Article 12(c) of Regulation No 857/84, the natural approach in the present case is to view the Dent family partnership as a 'group of persons' farming the holding. On that basis the special reference quota awarded under Article 3a is in substance awarded to the group, although in name awarded only to Mr and Mrs Dent. Since it was the same group that obtained the exceptional hardship quota, the special reference quantity should be reduced by the amount of the exceptional hardship quota.

The United Kingdom adds that even if, in relation to the grant of a special reference quantity under Article 3a, Mr and Mrs Dent are to be considered as individuals or as a separate group from the family partnership, the exceptional hardship quota should fall to be deducted in the same way. It is evident that Mr and Mrs Dent were in substance the recipients of an exceptional hardship quota, albeit that in name it was awarded jointly to them and their son. It would be highly artificial to say that the exceptional hardship quota was awarded not to Mr and Mrs Dent but to the partnership of Mr and Mrs Dent and their son. It would be equally artificial to allocate the exceptional hardship quota between them (that is to say, attributing one third to each member of the family partnership) and then to deduct only two-thirds of that quota from the special reference quantity awarded to Mr and Mrs Dent. The reality of the matter is that both

the exceptional hardship quota and the special reference quantity relate to one and the same holding, farmed by the same people. The operation of the scheme established by the regulations should not be distorted by the introduction of technical distinctions based on the particular constitution of the family partnership from time to time and/or on which members of the partnership happened to apply at any particular time for a particular benefit in respect of their joint holding.

In conclusion, the United Kingdom submits that the answer to the second question should be as follows:

'The said second subparagraph of Article 3a(2) of Council Regulation (EEC) No 857/84 is to be interpreted as meaning that a special reference quantity awarded to two persons who farm their holding in partnership with a third person falls to be reduced by the amount of a reference quantity which was obtained in respect of the same holding and otherwise falls within the said subparagraph but was obtained by the three persons as a partnership.'

(c) The *Commission* makes the preliminary point that it is the Dent family partnership that is the 'producer' within the meaning of Article 12(c) of Regulation No 857/84. It is plain from the wording of the subparagraph added to that provision by Regulation No 764/89 that each holding can only have one 'producer'. Since the partnership was the 'producer', Mr and Mrs Dent could not be the 'producer' of the same holding. Accordingly one would have thought the special reference quota should have been awarded to the partnership.

In any case, for the purpose of answering the question posed, in the Commission's opinion it must be assumed that the award of the special reference quantity to Mr and Mrs Dent rather than to the partnership has to stand. That circumstance is, however, no more than a technicality, as quotas are always granted in relation to a particular holding.

The Commission emphasizes in this context the importance of ensuring that quotas are not granted twice over in respect of the same quantity. Thus, it says, the submissions and arguments put forward by Mr and Mrs Dent fly in the face of both the letter and the spirit of Regulation No 764/89.

In conclusion the Commission suggests that the second question should be answered as follows:

'Where the producer of a holding is a partnership and for whatever reason a special reference quantity is granted under Article 3a of Regulation No 857/84 to certain individual partners rather than to the partnership, that fact cannot be relied on to avoid the deduction provided for by the second subparagraph of Article 3a(2).'

M. Zuleeg

Judge-Rapporteur