OPINION OF ADVOCATE GENERAL JACOBS
delivered on 8 April 1992 *

My Lords,

1. In this case, the Court is once again asked to consider Article 3a of Council Regulation No 857/84 of 31 March 1984 (OJ 1984 L 90, p. 13), inserted by Council Regulation No 764/89 of 20 March 1989 (OJ 1989 L 84, p. 2). It will be recalled that the purpose of that new article was to enable a special reference quantity ('quota') to be awarded to milk producers who, in exchange for a premium, had entered into a non-marketing or conversion undertaking under Council Regulation No 1078/77 of 17 May 1977 (OJ 1977 L 131, p. 1). Such producers had previously been unable to obtain a quota under Article 2 of Regulation No 857/84, because they had not been able to produce milk in one of the reference years specified in Article 2 as the basis for the allocation of a quota. However, in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, it was held that such producers had a legitimate expectation of returning to milk production when their non-marketing or conversion undertaking expired. The new Article 3a was inserted in Regulation No 857/84 in order to do justice to those legitimate expectations. Following the Court's judgments in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585, Article 3a was amended by Council Regulation No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35) in order to do further justice to those same expectations, although that later amendment is not material to the issues raised in the present proceedings.

2. The award of a special quota under Article 3a is subject to various conditions and requirements. In particular, in order to receive a provisional quota under Article 3a(1), a producer is required not to have ceased farming or transferred the whole of his dairy enterprise during the period covered by his undertaking, and required to establish that he is able to produce on his holding up to the amount of quota requested. Applications for a provisional quota must be made within three months of 29 March 1989. Article 3a(3) provides, furthermore, as follows:

'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 direct sales and/or deliveries have attained during the previous 12 months a

* Original language: English.

level equal to or greater than 80% of the provisional reference quantity, the special reference quantity shall be definitively allocated to the producers. ... The level of direct sales and/or actual deliveries shall be determined by taking into account production rate trends on the producer's holding, seasonal conditions and any exceptional circumstances.'

As I have already said, the amendments made to Article 3a(3) by Regulation No 1639/91 are not material for the present purposes. I shall refer to the requirement that the producer must establish, within two years of 29 March 1989, that sales or deliveries of milk have attained a level of at least 80% of the provisional quota, as the 'production requirement'.

3. Mr O'Brien, who is the plaintiff in the main proceedings, is a farmer near Ballynalacken, County Cork. In 1979, he applied for entry into a non-marketing scheme under Regulation No 1078/77. His application was accepted, and in exchange for a premium he entered into a non-marketing undertaking covering the period 28 October 1979 to 27 October 1984. He accordingly refrained from producing milk during that five-year period, and was unable to resume production at the end of the period because he was, as a result, not eligible for a quota under Article 2 of Regulation No 857/84. On 24 June 1989, following the amendment to that regulation made by Regulation No 764/89, he applied to the Department of Agriculture and Food for a special quota under the new Article 3a, and was duly allocated a provisional quota of 39 803 gallons. Mr O'Brien was however informed, by a letter dated 28 August 1989, that in order to satisfy the conditions laid down for the definitive allocation of quota, he would have to demonstrate that deliveries of milk of the required level were made from land still operated by him at the end of the non-marketing period, which, it will be recalled, had expired nearly five years previously. Mr O'Brien found that condition unacceptable, since he had recently added new land to his holding. Thus, at about the time of his quota application, he had obtained a licence to use 60 acres of his brother's land which adjoined his own farm, and which he proposed to use in partnership with his brother. I shall refer to those 60 acres as the 'adjoining lands'.

4. Mr O'Brien accordingly brought proceedings before the High Court, seeking a declaration to the effect that, for the purpose of satisfying the production requirement, a holding comprises all the land operated by the producer at the time of his quota application, and not merely the land operated by him at the end of the non-marketing or conversion period. The High Court refused to grant the requested declaration, and Mr O'Brien therefore appealed to the Supreme Court, which has referred the following question to the Court for a preliminary ruling:

For the purposes of fulfilling the condition prescribed by Article 3a(3) of Council Regulation (EEC) No 857/84 (as inserted by Article 1 of Council Regulation (EEC) No 764/89) is it necessary that the milk the subject of the direct sales and/or deliveries relied on be produced exclusively from so

much of the lands by reference to the produce of which the non-marketing or conversion premium was calculated as were still operated by the relevant producer at the end of the non-marketing or conversion period?

5. It appears from the Order for Reference that Mr O'Brien was granted the licence to use the adjoining lands as part of what the Order describes as 'joint venture arrangements' made at the time of his quota application. Under the same arrangements, Mr O'Brien leased from his brother 40 cows. It appears moreover that at the same time the two brothers entered into a partnership agreement, under the terms of which the plaintiff contributed the adjoining lands, his own land and the 40 leased cows to the capital of the partnership. Thus, the two brothers formed a partnership for the purpose of exploiting the quota, and the adjoining lands formed part of the partnership assets.

6. In what follows, I shall first consider what answer should be given to the question which has been referred to the Court, and then turn to consider what are the consequences where the holding in question is operated by a partnership rather than by an individual producer. I will then finally consider how, in circumstances such as the present ones, the level of production is to be calculated for the purposes of Article 3a(3).

7. For the sake of brevity, I shall refer only to producers who, like the plaintiff, entered a non-marketing scheme under Regulation No 1078/77, although it is clear that the same principles apply equally to producers who entered a conversion scheme under the same regulation.

The meaning of 'holding'

8. By Article 4(1) of Regulation No 1078/77, as amended by Council Regulation No 1041/78 of 22 May 1978 (OJ 1978 L 134, p. 9), the non-marketing premium is calculated on the basis of the quantity of milk delivered by the producer during the 12 months preceding his application for entry into the non-marketing scheme. Thus, the question referred by the Supreme Court asks in substance whether, for the purposes of Article 3a(3) of Regulation No 857/84, a 'holding' is limited to land used by the producer before his application for a non-marketing premium and still retained by him at the end of the non-marketing period.

9. The Supreme Court does not expressly raise the question whether land added to the producer's holding *during* the period of his non-marketing undertaking can also form part of his 'holding' for the purposes of Article 3a(3). Although, in their written observations, both the Commission and the Irish Government appeared to suggest that the question referred should be answered in the affirmative, the Irish Government appeared also to accept that the holding can include land added during the period of the non-marketing undertaking. Furthermore, at the hearing the Commission adopted a more

flexible position, submitting now only that what it called the 'heart' of the holding must remain unchanged as between the date of the premium application and the time for the satisfaction of the production requirement. By the 'heart' of the holding, it seems that the Commission means the part of the holding essential to the recommencement of milk production. At the hearing, the Irish Government maintained the view that the production requirement can be satisfied by production taking place on land which was added to the holding in the course of the non-marketing period, but not on land added after the end of that period.

10. As the plaintiff points out in his written observations, if the original view of the Commission or the view of the Irish Government were to be accepted, the result would be a harsh one for the producers concerned; although, as I have already mentioned, the Commission's view became markedly more liberal at the hearing. Thus, in the ten years during which such producers were excluded from dairy farming, their ability to produce milk on the original holding may have severely diminished. Leases of parts of the holding may, for instance, have come to an end, other parts of the holding may have been voluntarily disposed of when it appeared that the producer's expectations of returning to dairy production were frustrated by the quota regulations, and the original dairy installations may not have been maintained in working order. To require such producers to attain the specified level of production on the remaining parts of their original holding would therefore be liable to frustrate the legitimate expectations of resuming production which were recognized by the Court in Case 120/86 *Mulder* and Case 170/86 *von Deetzen,* cited above in paragraph 1, and reaffirmed in Case C-189/89 *Spagl* and Case C-217/89 *Pastätter,* similarly cited above.

11. It is true that, as the Irish Government points out, the legitimate expectations recognized by the Court in those cases were of resuming production at the end of the non-marketing period: that is to say, in the case of Mr O'Brien, at the end of 1984. It cannot however be said that, in order to satisfy such an expectation, it would be sufficient to allow the plaintiff to include production from land added before the end of the non-marketing period, but to exclude land added subsequently. For it was precisely the legitimate expectation of resuming production as soon as the non-marketing period had ended which was frustrated by the adoption of the quota legislation in its original form. It was only when, in 1989, Regulation No 857/84 was amended by Regulation No 764/89, that producers in the plaintiff's position had any prospect of returning to production. If, therefore, as the Irish Government concedes, for the purposes of satisfying the production requirement a 'holding' can include land added to the holding during the non-marketing period, it is difficult to see how it could not include land added subsequently, during a period when the producers continued to be excluded from dairy farming as a result of invalid Community legislation. Indeed, since producers who had

already obtained a quota under Article 2 of Regulation No 857/84 were able, during the same period, to add land to their holding without losing any quota, any other result would amount to discriminatory treatment of producers who had participated in a non-marketing scheme and who, as a result of defective Community legislation, were temporarily unable to obtain a quota. It is true that producers with a quota awarded under Article 2 may not have been able to sell land during that period without losing a portion of their quota to the purchaser: see Article 7(1) of Regulation No 857/84; but it is true, equally, that the value of such land would then be enhanced by virtue of the attached quota.

12. It seems to me that there is in any event no basis in the relevant provisions for restricting the meaning of 'holding' in any of the ways proposed by the Commission or the Irish Government.

13. Article 12(d) of Regulation No 857/84 defines 'holding' as 'all the production units operated by the producer and located within the geographical territory of the Community', a definition which was not amended when Article 3a was inserted by Regulation No 764/89. On the face of it, that definition allows the producer's 'holding' at any given time to include any land then used by him for milk production. There is nothing in the express wording of the definition which would limit the holding to land used for milk production on some earlier occasion. The question therefore arises whether there is anything in Article 3a itself, or in any other relevant provisions, which would so limit the meaning of 'holding'.

14. In its written observations, the Commission points out that the basis for the calculation, under Article 3a(2) of Regulation No 857/84, of the provisional amount of quota awarded under Article 3a(1), is the holding as it existed prior to the producer's entry into the non-marketing scheme. It follows, according to the Commission, that the same holding, or at least, according to its later view, the 'heart' of that holding, must be used for the purposes of satisfying the production requirement of Article 3a(3). It seems to me however that that argument cannot be accepted. In its original version, Article 3a(2), first subparagraph, provided as follows:

'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 ..., and for which the producer has not lost his entitlement to the premium.'

That provision does not refer to any particular holding, but rather to a quantity of milk. Similarly, after the amendment made to Article 3a(2) by Council Regulation No 1639/91, the provision continues to refer to 'the *quantity* in respect of which the premium entitlement ... has been preserved or acquired' (my emphasis). Of course, any quantity of milk produced before the application for a non-marketing premium was made must have been produced on land then operated by the producer. However, as we have seen, Article 3a was added to Regulation No 857/84 in order to satisfy the legitimate expectations of farmers who wished to

return to milk production. In calculating the quota they were to be awarded, therefore, it seems to me that the relevant factor was the volume of production previously attained, and not the particular lands upon which that production took place.

15. It is true that, by Article 3a(1)(a) of Regulation No 857/84, an applicant for a quota must not, before the end of the non-marketing period, have ceased farming or transferred the whole of his dairy enterprise, that is to say the part of the holding used to produce milk. Furthermore, the new Article 3a of Commission Regulation No 1546/88, laying down detailed rules for the implementation of the quota system, which was inserted by Commission Regulation No 1033/89 of 20 April 1989 (OJ 1989 L 110, p. 27), provides, in its paragraph 1, as follows:

'The requests [for a quota under Article 3a(1) of Regulation No 857/84] ... shall be made by the producers concerned to the competent authority designated by the Member State ... provided that the producers can prove that they still operate, in whole or in part, the same holdings as those they operated at the time of the approval ... of their premium applications.'

There must therefore be some continuity between the holding as it existed before the non-marketing period and the producer's current holding. It does not seem to me however that those provisions are intended to require a producer to resume production on a holding which is identical to the holding he operated at the time of his premium application. The provision which has just been cited is explained as follows in the third recital to Regulation No 1033/89:

'Whereas it should be stipulated that applications may be submitted solely by producers in a position to operate at least in part the same production units as those they operated when applying for the premium for the non-marketing [of] milk ...; whereas, where producers no longer operate the same holdings [i. e. production units — see Article 12(d) of Regulation No 857/84, cited above in paragraph 13], they have thereby demonstrated, according to the logic of the premium scheme, their intention of ceasing milk production and are therefore not affected by the special arrangements laid down ... pursuant to Article 3a of Regulation (EEC) No 857/84 ...'.

It may not be entirely clear what is meant, in that recital, by the 'logic of the premium scheme'. It can be seen however that the purpose of the provision is not to confine production to lands belonging to the original holding, but simply to ensure that the applicant for a quota intends to resume his previous activities, as opposed to embarking upon an entirely distinct venture. The legislator took the view that that purpose would be adequately secured as long as some at least of the original holding was to be used again for milk production.

16. It is to be noted, furthermore, that by the third sentence of Article 3a(3) of Regulation No 857/84, the level of sales or deliveries, for the purpose of satisfying the production requirement, is determined 'by taking

into account production rate trends on the producer's holding, seasonal conditions and any exceptional circumstances'. It is I think clear that the trends and seasonal conditions in question relate to the period during which the producer is attempting to satisfy the production requirement, and not to a period prior to the non-marketing undertaking. There is no indication that 'the producer's holding' means anything other than the producer's current holding, rather than being restricted to that portion of it which was originally farmed by the producer.

17. That interpretation is confirmed by an examination of Article 3a(1)(b) of Regulation No 857/84, which provides that, in order to receive a provisional quota under Article 3a(1), producers must:

'establish in support of their request ... that they are able to produce on their holding up to the reference quantity requested.'

That condition contains no express or implied limitation on the extent of the producer's 'holding'. Furthermore, as we have already seen, detailed rules for the implementation of Article 3a are laid down in the new Article 3a inserted into Commission Regulation No 1546/88 by Commission Regulation No 1033/89. Those rules contain no requirement that the producer identify what quantities of milk are produced from which part of the current holding, whether for the purposes of satisfying the condition just cited or for satisfying the production requirement itself. Such an identification might be difficult, but it would surely be necessary if the relevant conditions could be satisfied only by milk produced from certain parts of the holding.

18. I therefore reach the conclusion that for the purpose of fulfilling the requirement laid down by Article 3a(3) of Regulation No 857/84, a producer can rely, in principle, upon milk produced from any part of his current holding. It is clear however that that principle is subject to two qualifications. First, the conditions laid down by Article 3a(1)(a) of Regulation No 857/84 and by Article 3a(1) of Commission Regulation No 1546/88 must continue to be satisfied. Thus, the producer must still operate, in whole or in part, the holding he operated at the time of the approval of his premium application, since that was a condition for the provisional award of the quota which is definitively allocated under Article 3a(3) of Regulation No 857/84. Secondly, for the purposes of Article 3a(3), the holding upon which production takes place must be the holding as it existed at the time of the application for a provisional quota, since it is in respect of the latter holding that the amount of the provisional quota was established under Article 3a(1)(b) of Regulation No 857/84. It seems to me however that any more restrictive interpretation of Article 3a would frustrate the clear purpose of that provision, and is moreover not justified by the wording of any of the relevant legislation. As I have already suggested, such a

conclusion is also the more equitable one. It is difficult to see why a producer who genuinely wishes to return to milk production should be confined to that portion of his holding which he operated five or (on the Commission's original view) even ten years previously, or should be obliged (on the Commission's subsequent view) to continue to produce on the 'heart' of his original holding.

19. Thus, the essential factors are the identity of the producer who is returning to dairy farming, and the quantity of milk previously delivered by that producer. It is therefore necessary to consider whether the position is affected by the circumstance that, as in the present case, the holding is farmed not by an individual producer but by a partnership.

Where the holding is farmed by a partnership

20. When a quota is awarded under Regulation No 857/84, it is awarded to a producer rather than to a holding, and it is accordingly necessary to identify the producer who is operating the holding at the time of the award: see the recent Opinion of Advocate General Lenz in Case C-236/90 *Maier* v *Freistaat Bayern* [1992] ECR I-4483, at I-4492, at paragraphs 10 to 11 of the Opinion. It is true that if all or part of the holding is subsequently transferred, the quota is then regarded as attached to the various parts of the holding for the purposes of determining how much quota is transferred with the land or, as the case may be, forfeited to the Community reserve: see Article 3a(4) and Article 7(1) of Regulation No 857/84, and Articles 7 and 7a of Commission Regulation No 1546/88 as amended by Commission Regulation No 1033/89. It remains the case that, until the holding is transferred in whole or in part, the quota is enjoyed by the producer operating the holding as the latter is composed from time to time.

21. As well as the composition of the holding, however, the composition of the producer may also change. By Article 12(c) of Regulation No 857/84, the 'producer' of a holding for the purposes of Article 3a is the 'natural or legal person or group of natural or legal persons' farming the holding. Thus, the 'producer' of a holding can be a group of persons, and it is clear that the composition of such a group may change over time.

22. The holding which initially benefits from an award of a quota is of course the holding operated by the producer at the time of the award. Similarly, when a quota is awarded, it is allocated to the producer operating the holding at the time of the award: see Case C-84/90 *Dent* [1992] ECR I-2009, at paragraph 17 of the judgment. A quota awarded under Article 3a(1), in particular, is awarded to the group of producers currently operating the holding, and the recipients of such a quota are not restricted to those among the persons currently operating the holding who originally entered into the non-marketing undertaking referred to in Article 3a(1). Thus where, as in the present case, the producer who originally entered into the undertaking now operates the holding in partnership with another person, the award

of any quota under Article 3a(1) should be made to the partnership of two which is currently farming the holding, rather than to any individual member of the partnership. It is to be noted however that the partnership must include the original producer, since otherwise the conditions laid down by Article 3a(1)(a) and by Article 3a(1) of Regulation No 1546/88 (see paragraph 18 above) will not be satisfied. Moreover, the purpose of the legislation is to enable the original producer or his heir to return to dairy farming, and not to enable an entirely different producer to commence production on the holding: see Case C-44/89 *von Deetzen* v *Hauptzollamt Oldenburg* [1991] ECR I-5119, at paragraph 29 of the judgment.

23. It seems to me that the quota is still, in principle, to be awarded to the group of persons currently farming the holding, even where, as in the present case, the composition of the holding has changed since the application for a non-marketing premium, as well as the composition of the producer. It is clear that the holding will not, in any case, benefit from a quota exceeding the amount laid down in Article 3a(2), which is in turn based upon the quantities produced by the original producer, from the holding as it existed before the application for a premium. Thus, in the present case, in entering into the partnership arrangements with his brother, the plaintiff was doing no more than attempting to ensure that he would be able to resume milk production at a level comparable to his previous output. It is true that, as a result of those arrangements, the plaintiff's brother will benefit from an interest in a quota he would otherwise not have enjoyed; the result however will not be to increase the total amount of quota, since the plaintiff's own interest in the quota is reduced accordingly. It seems to me therefore that no undue advantage will result if the quota is awarded to the partnership rather than to an individual producer.

24. It must however be emphasized that, in order to receive a provisional quota under Article 3a(1), producers must establish that they are able to produce on their holding up to the amount requested: see Article 3a(1)(b). Similarly, by Article 3a(3), before the allocation is made definitive, producers must prove they have actually resumed sales or deliveries from their holding. Thus, a quota is awarded under Article 3a in order that milk be produced by the person or group of persons to whom the quota has been allocated. That condition prevents a quota from being awarded to an applicant who has no intention of producing milk, but who merely wishes to enter into an arrangement with another producer in order that the latter may produce milk on his own land while benefiting from the former producer's eligibility for a quota. It is accordingly for the national court to determine, where necessary, whether any arrangements entered into by the producer are genuinely designed to enable him to produce milk from his holding, possibly in association with others, or whether, on the contrary, the arrangements are merely a device intended to enable the benefit of the quota to be transferred to another person.

Calculation of the level of production

25. Finally, the plaintiff suggests in his written observations that a question arises as to the application of the time-limits for the

award of a quota laid down, in particular, by the first sentence of Article 3a(3) of Regulation No 857/84. The plaintiff suggests that it would be unjust to require producers in his position to establish that the appropriate level of production has been attained within two years from 29 March 1989, since, in Ireland at least, such producers have continued to suffer a state of legal uncertainty as to which lands qualify as parts of their holding for that purpose.

26. No question concerning the time-limit for the satisfaction of the production requirement has been referred by the Supreme Court. On the other hand, the question raised by the plaintiff can be understood as asking how, in the present circumstances, the level of production is to be calculated for the purposes of the production requirement: so understood, it falls squarely within the question referred.

27. It seems to me that it would not be unreasonable to require a producer in Mr O'Brien's position to have resumed at least some sales or deliveries in the twelve months before 29 March 1991, even given the state of legal uncertainty which then obtained: after all, such a producer knew that milk produced on some at least of his holding, namely the part of the original holding still retained by him, would count towards fulfilling the production requirement. It is to be noted furthermore that, by the last sentence of Article 3a(3), in determining the level of sales or deliveries attained, account must be taken of 'any exceptional circumstances'. In my view, among the exceptional circumstances which must be taken into account are circumstances where a producer has not been able to produce milk from the full extent of his current holding, because of continuing legal uncertainty as to whether all such production would count towards satisfying the requirement. In the present case, therefore, the competent authority must take into account estimates of sales or deliveries which would have been made from the adjoining lands, as well as any sales or deliveries which have actually been made by the plaintiff before 29 March 1991.

Conclusion

28. I am accordingly of the opinion that the question referred by the Supreme Court should be answered as follows:

(1) For the purpose of fulfilling the condition prescribed by Article 3a(3) of Council Regulation No 857/84 of 31 March 1984, the sales or deliveries in question are not confined to milk produced on the original holding operated by the producer at the time of his application for a non-marketing or conversion premium, but may include milk produced on any part of the holding

operated by the producer at the time of his application for a provisional reference quantity under Article 3a(1), provided that he still operates, in whole or part, the original holding, and that he has effectively returned to milk production.

(2) Where, at the time of the award, the holding is operated by a partnership, a provisional reference quantity awarded under Article 3a(1) of Regulation No 857/84, or a definitive quantity awarded under Article 3a(3), must be allocated to the partnership and not to any individual producer.

(3) The exceptional circumstances referred to in the last sentence of Article 3a(3) of Regulation No 857/84 include circumstances where a producer has not been able to resume milk production on parts of his holding as a result of continuing legal uncertainty as to whether such production would count towards satisfying the requirement laid down by Article 3a(3). Accordingly, in determining, for the purposes of that provision, the level of sales or deliveries attained, the competent authority must take into account estimates of the production which would otherwise have taken place on those parts of the holding.