OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 4 July 1991 *

My Lords,

1. In this case, the Kantongerecht Beetsterzwaag has referred two questions concerning the Community rules on the transfer of milk quotas, that is to say the reference quantities, allocated to producers, which are exempt from the additional levy on milk production.

2. The Kantongerecht's questions concern, in particular, the interpretation of Article 7 of Commission Regulation No 1546/88 of 3 June 1988 (Official Journal 1988 L 139, p. 12), laying down detailed rules for the application of the additional levy. That regulation implemented Council Regulation No 857/84 of 31 March 1984 (Official Journal 1984 L 90, p. 13), which laid down general rules for the application of the levy. Article 7 of Regulation No 1546/88 implements, in particular, Article 7 of Regulation No 857/84, which provides for the transfer of quota in various circumstances.

3. Thus, Article 7 of Regulation No 857/84, as amended by Council Regulation No 590/85 of 26 February 1985 (Official Journal 1985 L 68, p. 1; corrigendum L 81, p. 41), provides that:

'1. 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.

...

3. Member States may provide that part of the quantities concerned shall be added to the reserve referred to in Article 5 or that referred to in Article 6(3), as the case may be.

...

4. 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 the part thereof which forms the subject of the lease shall be put at the disposal of the departing lessee if he intends to continue milk production.

...'

* Original language: English.

4. The first paragraph of Article 7 of Regulation No 1546/88 provides that:

'For the purposes of applying Article 7 of Regulation (EEC) No 857/84 and without prejudice to paragraph 3 thereof . . .

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. The part of the reference quantity corresponding to that area may be added entirely to the reserve.

3. The provisions of points 1 and 2 . . . shall be applicable under the various national rules, in other cases of transfer which have comparable legal effects as far as producers are concerned.

. . . '

5. Article 7, first paragraph, of Regulation No 1546/88 re-enacted, with modifications which are not material, a provision (Article 5 of Commission Regulation No 1371/84 of 16 May 1984, Official Journal 1984 L 132, p. 11) which was considered by the Court in Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609. In that case, the Court held that the concept of a transfer with 'comparable legal effects' to a lease (point 3 of the paragraph, cited above) must be taken to include an operation whereby a leased holding reverts to the lessor on expiry of the tenancy (paragraph 15 of the judgment). The Court also held that the Community rules in question afforded national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights (paragraph 22 of the judgment).

6. Rinze and Anne Oosterwoud, who are father and son and the defendants in the main proceedings, are co-lessees of a lease which has expired. Jeen Posthumus, the plaintiff in the main proceedings, is the owner of the reversion of the lease, which he has refused to extend for a further term. The lease related to a parcel of land forming part of a larger holding farmed by the Oosterwouds and benefiting from a milk quota of 145 430 kg. The Oosterwouds continue to produce milk on the remainder of the holding, but Mr Posthumus has

begun dairy farming on the parcel which has reverted to him. The plaintiff has therefore asked the Kantongerecht to declare, in substance, that he is entitled to have transferred to him the quota applicable to that parcel of land.

7. The Kantongerecht has accordingly asked for a preliminary ruling on the following two questions:

(1) Must Article 7, first paragraph, point 2 of Commission Regulation (EEC) No 1546/88, wherein it is provided *inter alia* that where one or several parts of a holding is leased (which must also be understood as meaning where such leasing is terminated) the corresponding reference quantity is to be distributed in proportion to the area used for milk production, be construed as meaning that if the Member State has not laid down any other objective criteria nor taken any measures under Article 7(4) of Council Regulation (EEC) No 857/84, the dairy farmer who continues to farm his holding but loses the use of some parcels of land as a result of the termination of the lease must, possibly for a consideration [vergoeding], surrender part of the reference quantity in the same proportion which the area to be surrendered bears to the holding's total area, without account having to be taken of the farm buildings (cowsheds) which he owns or leases from a third party?

(2) Must the objective criteria to be laid down by the Member States be understood as including criteria based on verifiable factual circumstances, such as the existence of buildings, land, labour, machines or such like?

8. Although it is clear that the Oosterwouds oppose the plaintiff's application to have a part of their quota transferred to him, it should be noted that neither they nor Mr Posthumus submitted written observations to the Court, nor were any of them represented at the hearing. The only indication of the grounds for opposing the transfer is given in the Order for Reference, which states merely that the Oosterwouds rely '*inter alia*' on the judgment of the Court in Case 5/88 *Wachauf* (cited above in paragraph 5).

The first question

9. As I have already mentioned, in its judgment in Case 5/88 *Wachauf* the Court confirmed that the rules for the transfer of quota now contained in the first paragraph of Article 7 of Regulation No 1546/88 (which I shall call 'the transfer rules') applied to cases where land reverts to the lessor on the termination of a lease. The Court observed that in such circumstances there was a change in possession which had 'comparable legal effects' to those consequent upon the grant of a lease. In *Wachauf* the lease was of the entire holding, but the same reasoning must apply to the reversion of part only of a holding back to the lessor.

10. It is to be noted that the formulation of the first question assumes that no 'other objective criteria' have been laid down in the Netherlands for the purposes of point 2 of the transfer rules; and in its written observations, the Netherlands Government did state that no such criteria had been laid down. On the other hand, it appears that the relevant national legislation permits the parties themselves to determine by agreement the amount of quota transferred on the termination of a lease, at least within certain limits. The Commission expressed the view that such a system might amount to the laying down of 'other objective criteria', or might at least be consistent with the opportunity afforded to Member States to lay down such criteria. In the present case, however, it seems that no such agreement has been reached. Thus, although I shall return later to the question of what role the agreement of the parties can be allowed to play in the division of quota (see below at paragraphs 25-27), for the present purposes it is safe to assume that there are no 'other objective criteria' which are relevant to the division.

11. In the absence of such alternative criteria, the criterion provided in point 2 of the transfer rules applies: quota is distributed 'among the producers operating the holding in proportion to the areas used for milk production'. I shall refer to this as the 'basic rule'. From the Order for Reference it is clear that the Kantongerecht doubts whether it would be consistent with the Court's judgment in *Wachauf* to apply the basic rule in the present circumstances. Before addressing that question, however, I think it would be helpful to consider the meaning and effect of the basic rule in more detail. The latter question was one particularly addressed by the United Kingdom Government both in its written observations and in its oral submissions.

12. According to the written observations of the United Kingdom, in applying the basic rule, account should be taken of the fact that some areas of the holding may have contributed more significantly to milk production than others. Thus, the rule should be interpreted as permitting (but, in the United Kingdom's view, not necessarily as requiring) an apportionment of quota which takes into account the fact that the part of the holding transferred may contribute to a disproportionate extent (whether disproportionately greater or disproportionately less) to the total amount of milk produced from the holding. It seems therefore that the United Kingdom would interpret the basic rule as permitting, but not requiring, a distribution criterion expressed in terms of milk yield rather than surface area.

13. It is of course open to a Member State to lay down, under point 2 of the transfer rules, an objective criterion other than that of the basic rule, and expressed in terms of milk yield. There is therefore no doubt that such a criterion is permitted by the transfer rules, without being required by them. It is less clear, however, how the basic rule itself can be understood as providing such an option. It seems to me that the freedom of manoeuvre permitted to Member States by the transfer rules is given to them by the option of laying down 'other objective criteria', and not by the basic rule itself.

14. At the hearing, the United Kingdom appeared to go further, and argue not only that the basic rule should be capable of being applied in such a way as to take milk yield into account, but that it must be so applied. Only such an interpretation, it was said, would serve the policy of the legislation, which is to determine how much of the quota is properly to be attributed to the land which is transferred. Although the English version of the provision uses the words 'in proportion to the areas used', which might appear to suggest an approach strictly related to surface area, it was argued that the expression 'in proportion to' was misleading, and that other language versions express a less stringent rule. The Dutch version, in particular, uses the phrase 'op basis van', which could be read as meaning 'according to' or 'on the basis of', rather than 'in proportion to'.

15. Such a comparison of the different language versions does have the merit of explaining why the answer to the Kantongerecht's question is less obvious when the question is read in the original Dutch than when it is read in the English translation. It seems to me, however, that the United Kingdom's argument cannot be accepted, and for two reasons. First, it is the term 'areas used for milk production' which suggests a purely territorial criterion, rather than the phrase 'in proportion to'; the translation of the latter as 'op basis van' (Dutch), 'en fonction de' (French) or 'nach' (German) does not significantly affect its meaning. Secondly, it seems to me that the purpose of the legislation will only be served by interpreting the basic rule as expressing a simple and straightforward criterion. There is no need to give a more complicated construction to the basic rule, when Member States already enjoy the option of laying down 'other objective criteria' in the light of national conditions and experience. A Member State which considers that a strict division according to surface area would fail to do justice in a sufficient number of cases is free to devise a more elaborate criterion. It seems to me that the Community legislator intended to give the Member States that freedom, without however requiring them to adopt a more complex criterion. It is therefore unnecessary for a Member State to argue, as the United Kingdom apparently wishes to do, that in providing for milk yield to be taken into account it has done nothing more than implement the basic rule.

16. On the other hand, it is with some justice that the United Kingdom observes that, in determining the area used for milk production, regard should be had to the cycle of agricultural usage to which the holding has recently been subject. Thus, the area used for milk production is not confined to the land where there are found the currently lactating cows, but should be taken to include land currently used to support cows between lactation periods, to maintain cows for future inclusion in the herd, and to provide forage for the herd, as well as site buildings and equipment. It may be that it is precisely this broad view of the meaning of 'area used for milk production' which leads the United Kingdom to suggest that account should be taken of the fact that some of those areas contribute proportionately more milk than others. As I have already suggested, however, that view

departs from the territorial criterion which is laid down by the basic rule; the solution to the problem raised by the United Kingdom lies with the national legislature, which is free to lay down a criterion expressed in terms of milk yield if it sees fit.

17. As we have already seen, the Kantongerecht's first question assumes that no such 'other objective criteria' have been laid down by the Netherlands. Given that, as I have argued, the basic rule is to be interpreted as leading to a transfer of quota strictly according to the areas used for milk production, the question arises whether an application of that rule in the present circumstances would be consistent with the Court's judgment in Case 5/88 *Wachauf* (cited above in paragraph 5). The Kantongerecht's doubts appear to be prompted by the following considerations.

18. First, the Netherlands has made no use of the option given to Member States to implement Article 7(4) of Regulation No 857/84 (cited above in paragraph 3). Thus, it appears that the national courts in the Netherlands are not obliged to allow the departing lessee to keep the quota relating to the leased land if he intends to continue milk production. The existence of that option was however one of the reasons given by the Court in *Wachauf* for the validity of the transfer rules as applied to departing lessees: see paragraph 20 of the judgment. The other provision mentioned by the Court was Article 4(1)(a) of Regulation No 857/84, which allows Member States to award compensation to producers undertaking to discontinue milk production definitively. The possibility of participating in such a compensation scheme is of particular importance to a lessee who loses possession of his entire holding on expiry of the lease, as was the case in *Wachauf*. In a case such as the present one, however, in which part only of the holding has been lost, it might be thought that the option of receiving compensation for a complete cessation of milk production is a less satisfactory means of protecting the rights of lessors who wish to continue dairy farming.

19. It appears furthermore that the Kantongerecht is concerned whether satisfactory protection can be given under the basic rule to the rights of the departing lessees, given, in particular, their investment in buildings, machinery and livestock.

20. It is true that in its judgment in *Wachauf*, the Court expressly referred to the options given to Member States by Article 7(4) and Article 4(1)(a) of Regulation No 857/84. I do not think however that it intended to imply that those options provided the only possible means of protecting the rights of the departing lessee. In *Wachauf*, the farmer had applied for compensation for the discontinuance of milk production under national legislation implementing Article 4(1)(a), and so the compensation available under that provision was particularly relevant. In paragraph 19 of

its judgment, however, the Court stated a more general principle:

'... it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.'

21. Thus, it seems to me that a Member State is not obliged to exercise the option given to it under point 2 of the transfer rules (to lay down 'other objective criteria'), or under Article 7(4) of Regulation No 857/84 (to allow departing lessees to retain quota), as long as the lessee receives appropriate compensation, having regard to the labour and investment expended in acquiring the quota. It appears that the courts in the Netherlands do indeed have the power to award compensation in such circumstances, and that this power has been exercised so as, for example, in some cases to award the lessee compensation for half the market value of the amount of quota transferred to the lessor.

22. It follows that, as long as adequate compensation is given for loss of quota, the national court can, and indeed must, apply the relevant provisions of Article 7 of Regulation No 1546/88. Thus, where part only of a holding reverts to the lessor, and no other objective criteria for the transfer of quota have been laid down by the Member State, quota is to be transferred in proportion to the areas used for milk production (subject to the Member State's right to add part of the quantities concerned to the reserve). Where all the land concerned is used for milk production, the amount of quota transferred will be a proportion of the total quota equal to the proportion which the area of land transferred bears to the total area of the holding. Where part only of the land is so used, the relevant proportion will be that which the part of the area transferred used for milk production bears to the part of the total area so used. It will then be for the national court to determine what amount of compensation for loss of quota is appropriate in all the circumstances.

23. The Kantongerecht, in formulating its first question, also asked whether account has to be taken of the farm buildings (cowsheds) which the farmer owns or leases from a third party. It is clear that, to the extent that such buildings are used for milk production, the land on which they stand should be taken into consideration as part of the area so used. Furthermore, investment in such buildings may be a factor to be taken into account in assessing the lessee's contribution to the building up of the quota, and to that extent may therefore have to be taken into account by the national court in awarding compensation for loss of quota: see Case 5/88 *Wachauf*,

paragraph 19 of the judgment, cited above in paragraph 20. Other forms of compensation are however in my view a matter for national law alone. Community law is concerned with the allocation of quota and the possible requirement of compensation for loss of quota, but not with compensation for other forms of loss or unjust enrichment.

24. Although, strictly speaking, the answer given above would be sufficient to dispose of the Kantongerecht's first question, various related issues were touched upon in the written observations and in argument before the Court, and it may be useful to comment on them.

25. In the first place, it appears from the written observations of the Netherlands Government that the legislation in force in the Netherlands allows the parties themselves to determine by agreement the amount of quota to be transferred on the termination of a lease of part of a larger holding. It seems that it is only in the absence of such an agreement that the national court will impose a solution in terms of the areas used for milk production, with financial compensation paid to the departing lessee in appropriate circumstances. Both the Netherlands Government and the Commission appear to regard such a system as consistent with the transfer rules.

26. Although in principle I can see no objection, in a situation where compensation is payable by the lessor, to allowing the amount of that compensation to be decided by agreement between the parties, it does not seem to me that such an agreement can be allowed to decide, at the parties' entire discretion, the amount of quota which is to be transferred. It is one thing to permit Member States to lay down 'other objective criteria' for the division of quota, but quite another to allow Member States to leave the matter to the discretion of the parties. That would be contrary both to the terms of the legislation, and especially to the notion of 'objective criteria', and contrary also to what must be assumed to be the purpose of the legislation, namely to avoid manipulation of the quota system and to prevent trading in quotas.

27. Accordingly, while it may well be natural for the parties in the first instance to seek to reach agreement on the amount of quota to be transferred, any such agreement must be based on the criterion laid down by the Community legislation or on such other criteria as have been laid down by Member States. Moreover, Member States must, in my view, take appropriate measures to ensure that such agreements are consistent with those criteria. If Member States do not take such measures, then it is impossible to see how the requirements of the Community legislation can be satisfied. Such measures might also include the scrutiny of the terms of compensation agreed, in order to ensure that such agreements do not amount to a disguised form of trading in quotas.

28. Contrary to the suggestion of the Commission, it does not seem to me moreover that the laying down of 'objective criteria' by the Member State could consist in allowing the national courts to decide, on a case by case basis, whether and to what extent they should take account of any objective factors. It is for the Member State

to lay down in advance the criteria which must be taken into account by the national courts, just as it is for the Member State to decide, by choosing whether to implement Article 7(4) of Regulation No 857/84, whether the national courts should allow the departing lessee to keep all or part of the quota.

The second question

29. As we have seen, neither the Netherlands Government nor the Kantongerecht suggests that the Netherlands has made use of the option of laying down 'other objective criteria'. The second question can however be understood as asking whether such criteria have been laid down in circumstances where, under national law, the division of quota is left to the agreement of the parties or to the discretion of the national court.

30. As I have already suggested, the answer to be given to such a question is that the criteria must be binding on the parties, rather than modifiable by agreement, and must be laid down in advance in the form of rules to be applied by the national court, rather than left to its discretion in each individual case. As the United Kingdom suggests, 'objective criteria' can be understood as including any verifiable criteria relating to the objective properties of the holding and the farming activities carried out thereon. I would add however that the criteria must be appropriate to the object of achieving an equitable division of quota. Clearly, such criteria could include those designed to ensure that the amount of quota transferred reflects the contribution of the area in question to milk production.

Conclusion

31. I am accordingly of the opinion that the questions referred by the Kantongerecht should be answered as follows:

(1) Article 7, first paragraph, of Commission Regulation No 1546/88 must be construed as meaning that, where a Member State has not laid down any other objective criteria pursuant to point 2 of that paragraph or taken any measures under Article 7(4) of Council Regulation No 857/84, a dairy farmer who continues to farm his holding but loses the use of some parcels of land as a result of the termination of the lease of those parts, must surrender a part of the reference quantity attributable to the holding. The part surrendered must bear the same proportion to the total reference quantity as the milk-producing

area of land reverting to the lessor bears to the total milk-producing area of the holding. If necessary, appropriate compensation for loss of quota must be awarded to the departing lessee.

(2) The objective criteria which the Member States are permitted to lay down pursuant to point 2 of the first paragraph of Article 7 of Regulation No 1546/88, must be understood as including any verifiable criteria which relate to the objective properties of the holding and the farming activities carried out thereon, and which are appropriate to the object of achieving an equitable division of the quota. Such criteria must take the form of binding rules laid down in advance by law, regulation or administrative provision.