OPINION OF ADVOCATE GENERAL LENZ

delivered on 21 May 1992 *

Mr President,
Members of the Court,

A — Facts

1. The request for a preliminary ruling from the Finanzgericht Hamburg which I am to consider today is concerned with the validity of an individual provision of Article 3c of 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. [1] As we know, the Community legislator inserted that article in the regulation on the additional levy adopted in order to deal with structural surpluses on the milk products sector [2] following the judgments in *Mulder* [3] and *Von Deetzen*, [4] in order to take account of the specific situation of farmers who carried out a non-marketing or conversion undertaking in accordance with Regulation (EEC) No 1078/77 [5] during the marketing year used to determined the quantities which would be exempt from the levy.

2. Article 3a of Regulation No 857/84, the original version [6] of which is the subject of the preliminary question, sets out for the allocation of the 'special' reference quantities provided for therein a number of conditions and restrictions, some of which the Court has already had occasion to consider. In the instant case, the Finanzgericht (Finance Court) Hamburg wishes to know if the second indent of Article 3a(1) is valid. Under that provision, a special reference quantity is to be allocated only to producers

'who have not received a reference quantity ..., with regard to the person to whom the premium is transferred, pursuant to Article 2 of this Regulation'.

3. The expression 'with regard to the person to whom the premium is transferred' refers to Article 6 of Regulation No 1078/77 and the second indent of the third subparagraph of Article 3a(2). As regards Article 6 of Regulation No 1078/77, it governs the possibility for a farmer who has taken over a holding or part of a holding to carry out the non-marketing or conversion obligations entered into by the former owner. That article reads as follows:

'1. Any person who takes over an agricultural holding may undertake in writing to

* Original language: German.

1 — OJ 1984 L 90, p. 13.

2 — By means of Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 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 (OJ 1989 L 84, p. 2).

3 — Judgment of 28 April 1988 in Case 120/89 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321.

4 — Judgment of the same date in Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg Jonas* [1988] ECR 2355.

5 — 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 (OJ 1977 L 131, p. 1).

6 — That article has since been amended by Council Regulation No 1639/91 (OJ 1991 L 150, p. 35). However, the amendments have no bearing on the provision at issue (see sections 21 et seq.).

continue to carry out the undertakings given by his predecessor.

In such case, the sums already paid shall remain the property of the latter and the balance shall be paid to his successor.

Otherwise, the sums already paid shall be refunded by the predecessor.

2. Where only part of a holding is transferred, the applicant shall retain his right to the premium if the person to whom he has transferred the property undertakes in writing to continue to fulfil the undertakings entered into by his predecessor. Otherwise, a proportion of the sums already shall be refunded by the predecessor, such proportion to be calculated by reference to the area under forage transferred.'

4. The third subparagraph of Article 3a(2) is concerned with the consequences as regards the allocation of a special reference quantity where the producer has transferred (under the aforementioned provision) part of his holding during the non-marketing or conversion period.

5. In such an event,

'— 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'.

6. It is against the backdrop of those provisions that the facts underlying the present request for a preliminary ruling should be considered.

7. The plaintiff in the main proceedings (to whom I shall refer simply as 'the plaintiff') produced milk in the year which the Federal Republic of Germany adopted as the reference year (1983) on certain land on his farm. As a result, under Article 2 of Regulation No 857/84 he obtained in 1984 a reference quantity of 183 816 kg. After he had acquired on 23 March 1984 an additional 2.5 hectares of agricultural land he applied for an increase in his reference quantity under Article 3a of Regulation No 857/84 to take account of the land which he had purchased. The new land had formed part of a holding with a utilizable area of 16.83 hectares, which in 1980 had supported fourteen dairy cows. The farmer had suspended milk production on 10 January 1981 for four years pursuant to an undertaking entered into under Regulation No 1078/77. The plaintiff took over that undertaking as regards the land which he had purchased.

8. Following the adoption of Regulation No 764/89, the Landwirtschaftskammer (agricultural chamber) Hannover certified the plaintiff a provisional special reference quantity equal to 60% of the quantity of milk which, in its view, had been transferred to the applicant as a result of the sale of the land. On that footing, the dairy to which the plaintiff delivered his milk increased his reference quantity by 6 820 kg to a total of 190 636 kg.

9. Hauptzollamt (principal customs office) Lüneburg ordered the recalculation of the reference quantity to be revoked on the ground that, under the second indent of Article 3a(1) of Regulation No 857/84, the plaintiff was not entitled to be allocated a provisional special reference quantity, since he already had been granted one on the basis of the milk that he had delivered in 1983.

10. The plaintiff applied to the Finanzgericht Hamburg to quash that decision. That court requested the Court of Justice to give a preliminary ruling pursuant to Article 177 of the EEC Treaty on the following question:

'Is the second indent of Article 3a(1) of Council Regulation (EEC) No 857/84, as amended by Council Regulation (EEC) No 764/89, valid in so far as persons taking over a premium granted pursuant to Council Regulation (EEC) No 1078/77 are barred from allocation of a provisional special reference quantity if they have received a reference quantity under Article 2 of Regulation (EEC) No 857/84?'

11. In the light of the judgments in *Mulder* and *Von Deetzen*, cited above, the Finanzgericht was inclined to take the view that that question should be answered in the affirmative, a view also taken by the Finanzgericht Düsseldorf, which referred a similar question to the Court in Case C-247/91. [7]

12. I shall where necessary consider other details of the facts and relevant legislation later in this Opinion. For the rest, I would refer to the Report for the Hearing.

7 — The case of *Börsch* v *Hauptzollamt Wuppertal*.

B — Opinion

13. I — The argument before the Court with regard to the validity of the provision in question was based on a specific interpretation of the relevant provision on which the Finanzgericht Hamburg had in fact based its preliminary question and the grounds of its order for reference. According to that interpretation, farmers in the plaintiff's situation are precluded from obtaining a special reference quantity. The plaintiff's situation is as follows:

— in accordance with the third subparagraph of Article 3a(2), he acquired part of a third party's holding, which was subject to a non-marketing or conversion undertaking, during the currency of that undertaking;

— he had also obtained a reference quantity, under Article 2, for *another holding which he farmed.*

14. Although, taken by itself, the wording of the provision in question can also be interpreted as meaning that the bar on obtaining more than one reference quantity *relates to one holding and one holding only* — which may put the doubts raised before the Court as to the validity of the provision in question in another light —, it is however appropriate to infer from the construction of Article 3a that the Community legislator intended the legal consequences at issue in this case. As Advocate General Jacobs recently argued in

detail in *Dowling*, [8] the Court is not entitled to ignore the legislator's clear intention as it appears objectively from the provision in question — not even from the point of view of an interpretation which is in conformity with the Treaty and with equal-ranking legal principles. The limits on interpretation under that approach may ensue not only from the clear wording of the provision, [9] but also from its construction and purpose. [10]

15. As far as the construction of Article 3a of Regulation No 857/84 is concerned, the following factors support the interpretation which has been put forward in this case.

16. According to the third subparagraph of Article 3a(2), the transferee of the premium is to obtain — in the event that the producer transferred *part* of his holding during the non-marketing or conversion period — a proportionate special reference quantity. A farmer who has acquired the *whole* of the holding while taking over his predecessor's non-marketing or conversion undertaking (and hence a proportion calculated *pro rata temporis* of the premiums — see the second subparagraph of Article 6(1) of Regulation No 1078/77) before it has come to end is entitled — as Advocate General Mischo has rightly held [11] — to the whole of the special reference quantity due in respect of the holding. In my view, that conclusion follows from a comparison of Article 3a(1)(a) and Article 3a(2)(3).

17. The producer who is referred to in Article 3a as the 'person to whom the premium is transferred' is therefore treated in the same way as his predecessor in title as regards his right to be allocated a special reference quantity.

18. Against this background, it cannot be understood why the legislator should have sought to avoid overlapping with a reference quantity under Article 2 (relating to the same agricultural land) only in the case of the transferee of the premium but not in the case of the original farmer. The aim of avoiding such overlapping is already pursued in fact — in the case of both those categories of persons — by the dates laid down in Article 3a(1), irrespective of which version (that of Regulation No 764/89 or that of Regulation No 1639) is taken. As far as the former version is concerned, the first indent of Article 3a(1) sets dates and provides that a special reference quantity can be obtained only when the non-marketing or conversion period expired after those dates. It follows from an overall consideration of the first and second recitals in the preamble to Regulation No 764/89 that the aim was to ensure that special reference quantities are granted only to those very farmers who were unable to obtain reference quantities under Article 2 of Regulation No 857/84 owing to the non-marketing or conversion undertaking to which their holdings were subject. The Court held in *Spagl* [12] that the provision laying down those dates was unobjectionable in that regard. It aimed and had the effect of

8 — Opinion of 8 April 1992 in Case C-85/90 *Dowling* v *Ireland* [1992] ECR I-5305, paragraph 10 et seq., in particular paragraph 15.

9 — See the judgment in Case C-37/89 *Weiser* v *Caisse Nationale des Barraux français* [1990] ECR I-2395, paragraph 8.

10 — See the judgment in *Mulder*, cited above, paragraph 15.

11 — Opinion in Case C-314/89 *Rauh* v *Hauptzollamt Nürnberg/Fürth* [1991] ECR I-1660, paragraph 14 *in fine*.

12 — Judgment in Case C-189/89 *Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539, paragraph 13.

excluding from the special system provided for in Article 3a two categories of producer:

— those who, because they had not supplied any milk from their holdings during the whole or part of the reference year, could not obtain any reference quantity under Article 2 where the reason for which they had not supplied any milk was not the existence of a non-marketing or conversion undertaking, and

— those who had supplied milk from their holdings throughout the reference period and therefore *could* or *a fortiori* actually *did obtain* a reference quantity under Article 2.

19. In that context, it is significant that even where the Member State in question chose 1983 as the reference year and — in the case of the second alternative in the first indent of Article 3(a)(1) — the non-marketing or conversion period ended before the end of 1983, Article 3a assumes that a reference quantity could not be allocated under Article 2 in the absence of deliveries *throughout* the reference year. In such case, however, the system set out in the old version of Article 3a allowed a reference quantity to be allocated under Article 5(4)(b) or Article 9(2) of Regulation No 1546/88, [13] which does not require supplies or sales to have been effected during the (whole of) the reference year. [14] It is consistent with this that reference quantities coming under the last two provisions should also be mentioned in the second indent of Article 3a(1), thereby supplementing the excluding mechanism set out in the first indent. [15]

20. It follows that, according to the construction of the old version of Article 3a, the limiting date set out in the first indent of paragraph 1 already had the aim and effect of excluding producers who obtained a reference quantity for the same holding under Article 2. In contrast, the ground for exclusion at issue in this case has the aim and effect of precluding the allocation of a special reference quantity to farmers who obtained a reference quantity under Article 2 for *another holding*.

21. The new version of Article 3a (Regulation No 1639/91), which the Council adopted in order to take account of the annulment of the provision on the limiting date and the 60% figure in paragraph 2, [16] is constructed somewhat differently. It sets out very detailed rules for some farmers who,

13 — Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12).

14 — Cf. Advocate General Jacobs' Opinion in *Dowling*, cited in footnote 8, paragraph 28.

15 — In contrast, reference quantities coming under Article 3(1) and (2) or Article 4(1)(b) and (c) do not result in there being a bar to entitlement under Article 3(a); they are merely reduced: see the second subparagraph of Article 3a(2).

16 — See the judgments in *Spagl*, cited in footnote 12, and in Case C-217/89 *Pastätter* v *Hauptzollamt Bad Reichenhall* [1990] ECR I-4585.

under the former version, were precluded by the limiting date from being allocated a special reference quantity. It assumes that all the Member States concerned elected for 1983 as the reference year. [17] In the result, farmers who, on account of their non-marketing undertakings, supplied no milk or milk products at any time in the reference year receive a special reference quantity from which reference quantities coming under Article 5(4)(b) or Article 9(2) of Regulation No 1546/88 (or if the Member State concerned does not apply the latter provision, Article 2 of Regulation No 857/84) [18] are *deducted*.

22. For its part, the clause at issue is to be found both in the general rule set out in the first subparagraph of paragraph 1 (second indent) and in the specific provision (last subparagraph, first indent) which was introduced pursuant to the judgments in *Spagl* and *Pastätter*. It is even clearer than in the old version of Article 3a that the exclusion intended and effectuated thereby relates to reference quantities obtained by farmers as operators of *another holding*.

23. II — *1*. The question of validity must be considered without taking account of whether the provision as interpreted in this way (and hence the national court's question) is relevant for determining the dispute. That is question for the national court alone. [19] It is therefore of no interest whether, as the Commission considers, the plaintiff in the main proceedings is not a producer for the purposes of Article 3a and, as a result, cannot be regarded on that ground alone as being entitled to a special reference quantity. [20] No more does it have any bearing whether the Commission is right to take the view that Article 7(2) of Regulation No 1546/88 in itself militates against the grant of a special reference quantity. [21] Lastly, it is unnecessary to tackle the question aired at the hearing of the effect on the entitlement claimed by the plaintiff — regard being had to the wording of the third subparagraph of Article 3a(2) — of the fact that he took over his predecessor's conversion undertaking, but not the (fraction of the) premium. [22] The operative part and the grounds of the order for reference are expressly based on the scenario in which the premium has been taken over.

24. *2*. Within that framework I would first tackle the question of the compatibility of

17 — See the fourth recital in the preamble.

18 — See the second subparagraph of paragraph 2 of the new provision.

19 — Cf., for example, the judgment in Case C-297/89 *Rijksadvocaten* v *Ryborg* [1991] ECR I-1943, paragraph 9.

20 — The Commission bases this view on the fact that the plaintiff in the main proceedings supplies milk because he has obtained a reference quantity under Article 2 of Regulation No 857/84. The Commission considers that since the concept of a producer within the meaning of the third subparagraph of Article 12(c) in the version of Regulation No 764/89 does not cover milk deliveries by the producer, unlike the concept defined in the first paragraph, the plaintiff cannot be regarded as a producer for the purposes of Article 3a of Regulation No 857/84. In that regard, it should be mentioned in passing that that view clearly conflicts with Article 3a(5) and the seventh recital in the preamble to Regulation No 764/89 and likewise with the first indent of the third subparagraph of Article 3(1) of Regulation No 1546/88 (in the version set out in Commission Regulation (EEC) No 1033/89 of 20 April 1988 (OJ 1989 L 110, p. 27)).

21 — In any event, I take the view that that provision is not applicable from the outset to the sale in this case, since it relates only to cases in which the original farmer already had a reference quantity.

22 — Whereas, under Article 6(2) of Regulation No 1078/77, the original applicant (the owner of the whole of the farm) conserves his entitlement to the premium in the event that he should transfer part of the farm — but not if he transfers it all — if the person to whom he transferred the part of the farm concerned undertook to fulfil his predecessor's obligations, the third subparagraph of Article 3a(2) covers the case where the person to whom the land is transferred acquires a (proportional) entitlement to the premium. The ensuing problems of interpretation and validity have been brought before the Court in Case C-81/91 *Twijnstra* and in Case C-175/91 *Ahlers and Grünefeld*.

the provision at issue with the principle of protection of legitimate expectations. Since the provision constitutes an exception to the principle that there is an entitlement to a special reference quantity, which is based on the judgments in *Mulder* and *Van Deetzen*, it appears appropriate to apply the criteria expounded in that case-law. It follows therefrom that a measure restricting the production of levy-free milk is contrary to the principle of protection of legitimate expectations in the following circumstances:

— the economic operator was encouraged by a measure of the Community to suspend marketing (paragraphs 23 and 24 of the judgment in *Mulder*);

— it was not foreseeable that the (non-marketing) undertaking given would prevent the producer concerned from resuming his activities on its expiry (paragraphs 24 and 26, *loc. cit.*); and

— the provision in question affects him specifically precisely because he availed himself of the possibilities offered by the Community legislation (paragraph 25, *loc. cit.*),

25. (a) On closer inspection, it is clear straight away that the first and third criteria cannot really be transposed to this case. As regards the first of them (encouragement by a Community measure), it has to be held, in common with the Commission, that in the case of a transferee the 'encouragement' to carry out the non-marketing or conversion undertaking stems less from the Community legislation than from the purchase of the land. As regards the third criterion — the causal link between the suspension of milk production as a result of the Community legislation and the bar on the possibility of producing milk levy free — it is not fulfilled from the formal point of view in any event where, as in this case, the remaining non-marketing or conversion period does not coincide with the reference year either in whole or in part.

26. Admittedly, in *Mulder* and *Van Deetzen* the Court had to deal with situations in which there was no change in the farmer during the non-marketing period. Nevertheless, whether the principles set out therein can be applied to a farmer in the plaintiff's situation depends on whether the basic idea on which that case-law is based can be transposed to that situation despite its special features.

27. That basic idea can be linked to the logical consistency of the Community measure, which means in practice that the Community cannot, on the one hand, offer the possibility of non-marketing in return for a premium (a sacrifice made in the general interest) and, on the other, make the acceptance of that offer the starting point for treatment which is more disadvantageous than that given to economic operators who did not take up the offer and hence did not take part in limiting production in the general interest. The position would be different only if had been sufficiently foreseeable that that more unfavourable treatment would occur, and hence that the sacrifice to be accepted would be greater.

28. Those considerations may be transposed to a case like the present one where non-marketing is (a) attached to the holding and

is something which the transferee is therefore bound to comply with even though he did not himself comply with the relevant undertaking (during the period preceding the resumption of production) and (b) decisive for the question of the grant of a reference quantity under Article 2 of Regulation No 857/84. If those conditions are met, the expectations of the successor to a holding subject to a non-marketing or conversion undertaking have the same essential features as those of a farmer who has farmed such a holding from the beginning of the non-marketing or conversion undertaking. In view of the desired limited nature of the obligation, the successor is entitled to assume that, by comparison with the purchase of a holding not subject to such an undertaking, the purchase of such a holding or part of a holding did not involve disadvantages over and above the promise to fulfil the undertaking during the outstanding non-marketing period. In this case, it seems logical to treat the transferee no differently than the way in which he would have been treated had he himself carried out the non-marketing or conversion undertaking from the outset.

29. Let us therefore now turn to those two conditions.

30. As regards in the first place the question of the non-marketing or conversion undertaking being attached to the holding, Article 2(2)(a), Article 3(2)(a) and Article 6 (quoted at the beginning of this Opinion) of Regulation No 1078/77 suggest that the undertaking is tied to the holding. According to the first two provisions, in fact, the producer undertakes during the non-marketing or conversion period that

'neither milk nor milk products *from his holding* will be disposed of, whether for consideration or free of charge'.

31. The features which, under the first indent of Article 2(2)(b) (to which Article 3(2)(b) refers) and Article 3(2)(c), characterize the non-marketing or conversion undertaking point in the same direction.

32. Article 6, which covers the position where a new farmer takes over the holding, draws a distinction depending on whether the new farmer does or does not take over the non-marketing or conversion undertaking. It follows that the successor to a holding may in any event enter into an obligation to carry out the commitments assumed by his predecessor. If he does, the obligation runs, so to speak, with the holding. If he does not, his predecessor has to refund all or part of the sums which have already been paid. Both of those legal consequences confirm that the obligation is attached to the holding in accordance with Articles 2 and 3, since they mean that the non-marketing or conversion undertaking may not be carried out independently of the exploitation of the holding which is subject to it.

33. It follows from these considerations that the obligations in question are attached to the holding.

34. As a result, they also have an effect on the allocation of a special reference quantity under Article 2 of Regulation No 857/84. This is quite clear from the case at issue. There the allocation of a special reference quantity was refused without having regard to the fact that the conversion obligation did not concern the plaintiff but his predecessor in so far as it precluded milk deliveries during the 1983 reference year.

35. All the parties to these proceedings assume that this legal consequence applies to farmers in the plaintiff's situation and I do not consider that this should exercise us particularly. It is sufficient to refer to certain relevant passages of the legislation. Thus, Article 3(3) of Regulation No 857/84 is manifestly based on the idea that the events which are liable to affect production during the reference year — and to have corresponding consequences by virtue of Article 2 — are events connected with the holding. Article 3 of Regulation No 1371/84 (or Article 3 of Regulation No 1546/88), which was adopted in order to supplement that provision, is to be construed in the same way (see in particular the second indent).

36. In addition, in adopting Article 3a of Regulation No 857/84, the legislator also started out from the premise that the effect of non-marketing or conversion during the reference period attaches to the holding. As I have already made clear, the transferee of the premium is treated as if he were the original owner in the event of the whole or part of the holding's being transferred.

37. Lastly, the preamble to Regulation No 1033/89 includes the following passage:

'whereas these special arrangements (set out in Article 3a of Regulation No 857/84) only concern producers who *could not obtain the allocation of a reference quantity for their holdings since their holdings were subject to an obligation in the reference year selected by the Member State*'. [23]

38. It follows in principle from the above that the criteria set out in *Mulder* and *Von Deetzen* are applicable to farmers in the plaintiff's position in view of their predecessors' non-marketing or conversion undertakings. In that regard, the fact that the predecessor was 'encouraged' by Regulation No 1078/77 to suspend milk deliveries plus the fact that it was precisely he whom the undertaking prevented from making deliveries during the reference year have the same implications for the plaintiff's legal position as they would if those facts had applied to him personally.

39. If the instant case is considered solely in the light of that principle, there is no doubt that the plaintiff fulfils the criteria set out in the case-law.

40. (b) However, an exception to that principle could apply in this case on the ground that the land in question was not purchased until 23 March 1984, when the Commission's proposals which subsequently became Council Regulation Nos 856/84 and 857/84

23 — See, depending on the language version, the third or fourth recital; emphasis supplied.

(which were adopted on 31 March 1984 and entered into force on the following day) had already been published (in Official Journal 1983 C 314, p. 5). The Commission argues that nowhere in those proposals or in the Council's *travaux préparatoires* is any reference made to the idea that producers who undertook not to market milk should obtain a reference quantity. In its view, the fact that the plaintiff purchased the land at a very low price and did not apply for a reference quantity after the quota system came in suggests that he had no expectation that he should be granted a reference quantity.

41. In that regard, it should be noted in the first place that the national court does not ask whether the grant of a special reference quantity should be refused because the plaintiff's individual conduct might perhaps suggest that he had no expectation of obtaining a reference quantity. Consequently, details of that kind should not be taken into account in considering the question. [24] In contrast, the question as to the effect of the Commission's proposals on the expectations of a producer who took over a holding after 19 November 1983 goes beyond this case.

42. Is it the case that farmers who carried out the transaction crucial to the question of protection of legitimate expectations, namely the acquisition of the agricultural land (the holding or part of a holding) after publication of the Commission's proposal, are also entitled to rely on the limited scope of the obligation which they assumed in the same way as if the transaction had been carried out before the date in question?

43. To my mind, that question should be answered in the affirmative. The relevance of the basis for the operation of the principle of protection of legitimate expectations afforded by Regulation No 1078/77 is not affected by the Commission's proposal. It seems doubtful to me in any event whether such a Commission proposal — in the absence of other additional factors in the shape of existing legal provisions, the conduct of Community institutions or other material circumstances — is in itself capable of having such an effect. Admittedly, up to now the Court has taken Commission proposals into account in considering whether the economic operator concerned was (still) entitled to entertain an expectation that a particular legal situation would continue to obtain. However, as far as I can see, it has invariably looked upon Commission proposals as one factor among others, which, taken together, suggested that a prudent economic had to expect an change in the legal situation to his disadvantage. [25] In any event, the importance which the Commission seeks to attach to the proposal published in November 1983 is at odds with that which appears from the text itself having regard to its context.

44. The proposal does not expressly deal with the question of producers who entered into a non-marketing undertaking. However, it does contain a provision to the effect that the Member States are to adopt the necessary provisions to deal with the specific cases of

24 — However, the Court has already dismissed the argument based on fact that no application was made (judgment in *Rauh* v *Hauptzollamt Nürnberg/Fürth*, cited above, paragraphs 20 and 21).

25 — See Joined Cases 95 to 98/74, 15 and 100/75 *Union Nationale des Coopératives agricoles de céréales* v *Commission and Council* [1975] ECR 1615, paragraph 38 et seq., Case 84/81 *Staples Dairy Products* v *Intervention Board for Agricultural Produce* [1982] ECR 1763 and Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* v *Hauptzollamt Itzehoe* [1991] ECR I-415, paragraph 56 et seq.

certain producers. Those cases are not listed exhaustively. This is precisely what distinguishes the text of the proposal from the system adopted in Regulations Nos 857/84 and 1371/84, which are based on exhaustive rules governing specific cases (farmers whose output was nil or reduced in the reference year). [26] In addition, the proposal provided for 1981 to be the reference year, when, in view of the deadlines fixed for new applications under Regulation No 1078/77, [27] a very large proportion of farmers who had availed themselves of the possibilities offered by Regulation No 1078/77 had to carry out a non-marketing or conversion undertaking. Steps taken to fulfil that obligation in 1981 could not be gone back on in 1983. In the absence of concrete evidence — which, as I have shown, is lacking — it could not be assumed that the Commission sought to propose the adoption of rules incompatible with the principles of protection of legitimate expectations. In addition, the Commission submitted, concurrently with the proposal in question, another proposal, which sought to amend Regulation No 1078/77. [28] The second recital in the preamble to the proposal for a regulation once again stresses the limited scope of the non-marketing or conversion undertaking:

'Whereas the non-marketing and conversion premiums are granted subject to an undertaking that, *during the non-marketing or conversion period*, neither milk nor milk products will be disposed of, whether for a consideration or free of charge'. [29]

45. Finally, as the proposal prayed in aid by the Commission does not make any reference to the idea that a more disadvantageous system should apply to producers who took over a holding or part of a holding after the proposal had been published, it should be considered that it does not preclude legitimate expectations also on the part of such producers.

46. It follows from the whole of the foregoing that producers in the plaintiff's situation enjoy protection of their legitimate expectations within the meaning of the *Mulder* and *Von Deetzen* case-law. According to that case-law, any adverse treatment specifically linked to non-marketing in reference years is unlawful. In that context, it is appropriate, as I have shown, to consider the undertaking provided for in Regulation No 1078/77 as a whole, the upshot being that it is irrelevant that the plaintiff did not himself carry out the conversion obligation in the reference year.

47. (c) The infringement of the principle of protection of legitimate expectations which has been found to exist is unaffected by the fact that the disadvantage introduced — refusal of a (special) reference quantity — is not only connected with the absence of milk supplies during the reference year pursuant to Regulation No 1078/77 but also with the fact that the farmer concerned obtained a reference quantity for another holding under

26 — See the judgments in *Mulder*, cited above, paragraph 15, in Case C-67/89 *Berkenheide* v *Hauptzollamt Münster* [1990] ECR I-2615, paragraph 14, and in Case C-177/90 *Kühn* v *Landwirtschaftskammer Ems* [1992] ECR I-35, paragraph 11.

27 — The deadline for new applicants was 15 September 1980 for the non-marketing premium and the end of the 1980/1981 marketing year for milk for the conversion premium: Article 1 of Council Regulation No 1365/80 amending Regulation No 1078/77 (OJ 1980 L 140, p. 18).

28 — OJ 1983 C 314, p. 9.

29 — My emphasis.

Article 2 of Regulation No 857/84. It may be that no danger to the means of existence of the producer concerned could be said to have been involved here, since he already had a reference quantity under Article 2 of Regulation No 857/84. The Commission raised this matter at the hearing, arguing that, since the plaintiff had that reference quantity, it could not be regarded as unjust that he could not qualify for a reference quantity under Article 3a of Regulation No 857/84.

48. I cannot agree with that view. The effect of the principle of protection of legitimate expectations within the meaning of the *Mulder* and *Von Deetzen* case-law is to protect the economic operator against legal consequences which he had no cause to have to reckon with at the time of the (commercial) transaction at issue. The protection relates therefore to that transaction and not to the means of existence of the economic agent.

49. For all those reasons, it should be held that the provision at issue is invalid in any event for infringing the principle of protection of legitimate expectations because it disqualifies producers in the plaintiff's situation from entitlement to a special reference quantity.

50. *3.* Whereas what I have considered so far merely warrants a declaration of invalidity which is confined to that situation, since I have not considered the case of a purchase made after the adoption of Regulations Nos 856/84 and 857/84, it seems to me, however, to be necessary to declare the provision at issue invalid in its entirety on the ground that it is breach of the *general principle of equal treatment* enshrined in Article 40(3) of the EEC Treaty.

51. As I have already explained, in the event of a transfer of part (or the whole) of the holding Article 3a treats the transferee of the premium in the same way as the original owner of the holding or of the relevant part of the holding — irrespective as to the time when the transfer took place during the currency of the non-marketing or conversion period. The manifest aim of the provision was to protect those producers in relation to the transactions which they carried out in the same way as producers directly contemplated by the judgments in *Mulder* and *Von Deetzen*. In view of that aim, I can see no objective reason for endorsing more unfavourable treatment for producers who already have a reference quantity granted under Article 2. Neither is such treatment warranted by the requirement for legal certainty and effectiveness for the quota system. Admittedly, that requirement may preclude holding that there has been any discrimination within the meaning of Article 40(3) of the EEC Treaty, in so far as it justifies limiting the number of situations in which economic operators obtain, on account of their particular circumstances, *better treatment than would actually be authorized under the general rule*. The Court has acknowledged this, for example, with regard to the reasons for taking a different reference year into account [30] and with regard to a restriction on the reference years which could be chosen. [31] However, in this case the opposite situation is involved, namely an *exception* to the *general rule* set out in Article 3a of Regulation

30 — Judgment in *Kühn* v *Landwirtschaftskammer Ems*, cited above, paragraph 18.

31 — Judgment in Case 84/87 *Erpelding* v *Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1988] ECR 2647, paragraph 30.

No 857/84 to the *detriment* of the economic operator. In other words, the above-mentioned requirement takes account of the fact that the Community legislator cannot set up a system with innumerable distinctions in order to take such singular situations into account and hence avoid treating unlike situations in the same way. In contrast, it cannot justify differentiation introduced by the legislator itself which is tantamount to unequal treatment unwarranted by any objective reason (that is to say, in identical situations or in situations whose differences do not warrant their being treated differently on the basis of objective criteria).

52. It follows from the whole of the foregoing considerations that the provision at issue is also contrary to the prohibition of discrimination enshrined in Article 40(3) of the EEC Treaty.

C — Conclusion

53. I therefore propose that the Court should answer the question referred for a preliminary ruling by the Finanzgericht Hamburg as follows:

The second indent of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, is invalid in so far as persons taking over a premium granted pursuant to Council Regulation No 1078/77 are barred from allocation of a provisional special reference quantity if they have received a reference quantity under Article 2 of Regulation (EEC) No 857/84.