# OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 9 December 1992 *

*Mr President,*
*Members of the Court,*

## A — Introduction

1. The questions referred by the College van Beroep voor het Bedrijfsleven ('the College') on which I am giving my opinion today concern certain detailed aspects of the Community rules regarding milk quotas. The principal features of those well-known rules, and the characteristics of them which govern this case, are set forth in the Report for the Hearing; consequently, I will confine myself to a summary of the facts. I will revert to the individual applicable provisions when dealing with the specific questions referred to the Court for a preliminary ruling.

2. The plaintiff in the main proceedings ('the plaintiff') is a farmer established in the Netherlands. He originally operated a holding leased by him in Laag Zuthem. Between 17 May 1979 and 17 May 1984 he fulfilled, in relation to that holding, a non-marketing undertaking within the meaning of Regulation (EEC) No 1078/77. [1] Upon the expiry of that period he was unable to obtain a reference quantity pursuant to Article 2 of Regulation (EEC) No 857/84, [2] precisely because in 1983, the year chosen by the Netherlands as its reference year pursuant to that provision, he had, by reason of the aforementioned undertaking, delivered no milk.

3. Shortly after that the question arose whether the lease of the said holding, which was contractually due to expire on 22 February 1987, was to be extended beyond that date. An application by the plaintiff for such extension was dismissed by the Tenancy Chamber of the Kantongerecht (Cantonal Court) Zwolle by a decision of 16 September 1985. That decision was upheld by the Tenancy Chamber of the Gerechtshof (Regional Court of Appeal) Arnhem on 7 February 1986.

4. In that year the plaintiff resumed milk production and continued that production until the lease came to an end on 22 February 1987.

5. Since 1988 the plaintiff has been carrying on dairy farming activities in the form of an association with his son-in-law on another

* Original language: German.

1 — Council Regulation 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.

2 — 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, OJ 1984 L 90, p. 13.

holding situated at Gietheim. The association produced milk there during the year 1988/89.

6. Upon the introduction by Regulation (EEC) No 764/89 [3] of rules for the grant of 'special' reference quantities to so-called SLOM [4] farmers, who, in accordance with undertakings given pursuant to Regulation No 1078/77, had delivered no milk during the relevant reference year, the plaintiff likewise applied for the allocation of such a reference quantity.

7. Following the rejection of that application by the defendant in the main proceedings, and an unsuccessful objection, the plaintiff brought the matter before the College. By order of 7 March 1991 that court initially referred to the Court of Justice for a preliminary ruling three questions concerning the validity of a provision (contained in an implementing regulation of the Commission) regarding the identity of the holding operated by the applicant, the definition of the term 'producer' within the meaning of Regulation No 857/84 in the case of associations the members of which include a SLOM farmer, and, additionally, the question whether, in such a case, the person entitled to the special reference quantity is the SLOM farmer or the association.

8. By order of 26 June 1991 the court referred a further question, concerning the validity of Article 3a(5) of Regulation No 857/84 (in the version contained in Regulation No 764/89), which lays down rules regarding the remission or repayment of the additional levy in respect of quantities produced prior to the sixth period of application of the scheme (that is to say, prior to 1 April 1989).

## B — Opinion

*Question 1*

9. The first question referred by the national court concerns a provision inserted by the Commission, [5] following the adoption of Regulation No 764/89, as Article 3a of Regulation No 1564/88 'laying down detailed rules for the application of the additional levy referred to in Article 5c of Council Regulation (EEC) No 804/68', [6] and familiar to the Court from the cases of *Maier* [7] and *O'Brien*. [8] I would like to take this opportunity to cite once again the wording of the relevant provision, namely the first subpara-

3 — 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.

4 — This is an abbreviation of: Staking van de Levering van melk en zuivelprodukten en Omschakeling van het Melkveebestand (suspension of deliveries of milk and milk products and conversion of dairy herds).

5 — By means of Regulation (EEC) No 1033/89 of 20 April 1989 amending Regulation (EEC) No 1546/88 laying down detailed rules for the application of the additional levy referred to in Article 5c of Council Regulation (EEC) No 804/68, OJ 1989 L 110, p. 27.

6 — Regulation of 3 June 1988, OJ 1988 L 139, p. 12.

7 — Judgment in Case C-236/90 *Maier* [1992] ECR I-4483.

8 — Judgment in Case C-86/90 *O'Brien* [1992] ECR I-6251.

graph of Article 3a(1), emphasizing the passage at issue:

'The requests referred to in Article 3a(1) of Regulation (EEC) No 857/84 shall be made by the producers concerned to the competent authority designated by the Member State, in accordance with the procedure laid down by it and 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*, referred to in Article 5(2) of Commission Regulation (EEC) No 1391/78 ( [9]), *of their premium applications*.'

10. In that regard, the national court asks:

'Is Article 3a of Regulation (EEC) No 1546/88 of the Commission of the European Communities, as inserted therein by Commission Regulation (EEC) No 1033/89 of 20 April 1989, regard being had to the recitals in the preamble thereto, incompatible with higher-ranking Community law, and in particular with Article 3a of Regulation (EEC) No 857/84 of the Council of the European Communities, as inserted therein by Council Regulation (EEC) No 764/89?'

11. *I.* In order to answer this question, it is first necessary to examine the way in which the provision is to be interpreted in the light of circumstances such as those obtaining in the present case, more particularly, the question whether it precludes the allocation of a special reference quantity in such circumstances. This examination is necessary, since the reservations regarding the validity of the said provision which are set out in the order making the reference — that is to say, the doubts expressed by the court and the plaintiff as to its compatibility with Regulation No 857/84, and those of the plaintiff regarding the principle of the protection of legitimate expectations [10] — would appear in a different light, and would possibly be nugatory, if that provision did not constitute an obstacle to the allocation of a special reference quantity.

12. Like the Commission, and contrary to the arguments advanced by the Netherlands Government in the oral procedure, I take the view in this regard that the contested provision precludes the allocation of a special reference quantity to the plaintiff (or to the partnership formed by him with his son-in-law).

13. Reference should be made in that regard primarily to the judgment in *O'Brien*. [11] In that case, the Court construed the unequivocal wording of the contested provision, read in conjunction with Article 3a(1) of Regulation No 857/84, as meaning that the provisional allocation of a special reference quantity is subject to the condition that the producer in question still operates, in whole or in part, the same holding as that which he operated at the time of his premium application. [12] The Court stated that such a producer can claim entitlement to the provisional grant of a special reference quantity only if he continues to operate, at least in

9 — OJ 1978 L 167, p. 45.

10 — According to the wording of the order making the reference, the plaintiff is challenging the compatibility of *Regulation No 764/89* with that principle. There can be no doubt, however, that the reference should be to Article 3a of Regulation No 1546/88, the validity of which is in issue in the first question referred for a preliminary ruling.

11 — Footnote 8 above.

12 — Paragraph 12 of the judgment.

part, the holding covered by his undertaking under Regulation No 1078/77. He loses that entitlement, on the other hand, where he has abandoned the operation of the whole of that holding. [13] The Court also referred in that regard to the third recital in the preamble to Regulation No 1033/89, [14] which states:

'applications (for the allocation of a special reference quantity) 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 or for the conversion of dairy herds'.

14. The Court's statements in that judgment were of an entirely general nature. In my view, therefore, the position can be no different in the present case, in which the farmer in question lost the holding on the expiry of his lease. At all events, the contested provision appears to constitute a specific expression of the principle of a 'link with the land', [15] whereby reference quantities are allocated to producers, that is to say, having regard to the definitions given in Article 12(c) and (d) of Regulation No 857/84, to the person or group of persons farming a holding at a particular time. [16] As the Court has inferred from Article 7(1) and (4) of Regulation No 857/84, in the version contained in Regulation (EEC) No 590/85, [17] and the first sentence of Article 5(3) of Regulation (EEC) No 1371/84, [18] that principle applies even where a holding is returned to the lessor on the expiry of a lease: in those circumstances, the lessee loses the reference quantity to the lessor. [19]

15. As regards those circumstances in which Member States may provide, pursuant to Article 7(4) of the amended version of Regulation No 857/84, that all or part of the reference quantity is to be put at the disposal of the outgoing lessee, I shall revert to this point in my examination of the validity of the contested provision. For the purposes of its interpretation at this stage, I need only state that the intention of the Community legislature was to secure the application, not of that exception, but merely of the aforementioned rule.

16. Thus Article 3a of Regulation No 1546/88 can clearly be regarded in the present context as confirming the principle of a link with the land in the event of the expiry of a lease, a special feature of which is, of course, the fact that that rule is applied to surrenders taking place between the end

13 — See footnote 12 above.

14 — Paragraph 13 of the judgment.

15 — This has now become the expression customarily used: see Case C-341/89 *Ballmann* [1991] ECR I-25; Report for the Hearing, I-29, right hand column; Opinion of Advocate General Tesauro, I-33, left hand column.

16 — Judgment in Case C-84/90 *Dent* [1992] ECR I-2009, paragraph 17.

17 — Council Regulation of 26 February 1985 amending Regulation (EEC) No 857/84 laying down 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 1985 L 68, p. 1.

18 — Commission Regulation of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, OJ 1984 L 132, p. 11.

19 — Judgment in Case 5/88 *Wachauf* [1989] ECR 2609, paragraphs 13 to 15; judgment in Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 22.

of the non-marketing period and the adoption of Regulation No 764/89, where the farmer concerned had not yet been allocated a quota.

17. In the present case, therefore, that provision precludes the allocation of a special reference quantity; no other interpretation appears possible.

18. *II.* The validity of that provision needs to be examined on that basis. I propose, for the purposes of such examination, to consider merely its effects with regard to the facts of this case. As is clear from a comparison with the case of *Maier*, it covers cases of widely differing kinds, with the result that its validity needs to be examined in the light of each of those cases.

19. *1.* The national court questions, first, the compatibility of the contested provision with Article 3a of Regulation No 857/84. That article requires only that the applicant must be able to produce the reference quantity requested on his holding. There is, however, no express requirement that he must still be operating the holding in respect of which the SLOM agreement was entered into.

20. Since Regulations Nos 857/84 and 1546/88 rank on the same level under Community law, it is appropriate to construe this question as meaning that consideration should be given to the question whether the Commission has wrongly assessed, as regards the contested provision, the limitations of its powers under Article 5c(7) of the basic regulation, Regulation No 804/68.

21. However, the rules as they emerge, for the purposes of the present case, from Article 3a of Regulation No 1546/88 in the light of the considerations just set out do not go beyond those limitations. Instead, they merely give concrete form to the rules established by Regulation No 857/84, particularly subparagraph (b) in Article 3a(1), but without distorting their meaning. It should be stated that the Court's conclusions in its judgment in *O'Brien* were not based solely on Article 3a of Regulation No 1546/88, but were derived jointly from that provision and from Article 3a(1) of Regulation No 857/84 — rightly, in my view. As regards the problem raised by the general principle of a link with the land in the light of the belated adoption of Regulation No 764/89, subparagraphs (a) and (b) of Article 3a(1) of Regulation No 857/84 cannot be construed as excluding the strict application of that principle to a departing lessee. Consequently, the Commission was not precluded by that latter provision from laying down the specific rule that the holding referred to in subparagraph (b) of that provision must be the same as that referred to in subparagraph (a); that rule is, incidentally, contrary neither to the structure nor the wording of the provision.

22. *2.* The plaintiff's submissions, as set forth in the first order for reference made by the national court, [20] prompt me in addition to examine the compatibility of the contested provision with the principle of the protection of legitimate expectations.

20 — See paragraph 11 and footnote 10 above.

23. According to the judgments delivered in *Mulder* [21] and *Von Deetzen*, [22] it would be incompatible with that principle if it rendered the plaintiff subject to restrictions specifically affecting him precisely because he availed himself of the opportunities available under the Community rules to cease marketing milk in return for a premium. [23]

24. The plaintiff has asserted in this regard, both in the main proceedings and before the Court, that, if he had had a milk quota at the time of the expiry of the lease, that lease would have been extended or an arrangement would have been concluded between him and the lessor regarding the sharing of quotas. [24] As regards the first of those two possibilities, the plaintiff stated in the oral procedure that his lease would 'very probably' have been extended if he had held a milk quota since 1985. As to his prospects of retaining the milk quota (at least in part) despite his surrender of the tenanted holding, he asserted in the written procedure that he would certainly have been able to transfer any quota held by him at the time to his new holding. [25] By reason of the rules applicable in that regard in the Netherlands, he relies on Article 19 of the Beschikking Superheffing of 1988, [26] which provides that a lessee may, by agreement with his lessor, retain the reference quantity on the expiry of the lease. This would be the case in particular if, as in this instance, the lessor did not intend to operate as a dairy farmer on the holding in question. [27]

25. The two considerations advanced by the plaintiff, in which he compares in each case his actual situation with the circumstances which would have prevailed if he had already held a milk quota in 1987, need to be examined separately.

26. There is no need to dwell at length on his submission regarding the possible extension of the lease. On the assumption that the plaintiff could, as he alleges, have obtained such an extension if he had held a quota at the time, it could not be inferred from that fact that the contested provision was invalid. For he says nothing about the question whether the criterion laid down in that provision for the allocation of a special reference quantity is *itself* open to objection. Instead, he refers to a disadvantage arising from a past failure to act on the part of the Community legislature: the plaintiff maintains that, because no quota arrangement existed in 1987 in respect of SLOM farmers, he lost his former holding, with the result that he does not now fulfil the contested criterion. In the plaintiff's submission, the reason for his having been specifically disadvantaged in comparison to farmers who did not avail themselves of Regulation No 1078/77 lies not in the contested criterion but in the fact that there was no quota arrangement in force in 1987. A different conclusion could perhaps be arrived at if there were any basis for

21 — Judgment in Case 120/86 *Mulder* [1988] ECR 2321.

22 — Judgment in Case 170/86 *Von Deetzen* [1988] ECR 2355.

23 — See, for example, paragraph 24 of the judgment in *Mulder*.

24 — P. 5 of the order making the reference; also paragraph 33 at the end of the plaintiff's written observations.

25 — Paragraph 36 of his written observations.

26 — Staatscourant 1988, No 64 of 31.3.1988.

27 — Paragraph 23 of the plaintiff's written observations.

thinking that such absence of quota arrangements had systematically affected — in a manner similar to that alleged by the plaintiff in his own case — decisions in Member States regarding the extension of the leases concerned. However, there is no basis for such a view.

27. I now turn, therefore, to the submission concerning the possible retention of the milk quota (at least in part) despite the farmer having left the holding. That submission does indeed raise a problem as to the validity of the contested provision: should not the Community legislature, in order to prevent SLOM farmers from being specifically disadvantaged, have conferred comparable powers in relation to leases expiring between the end of the non-marketing period and the adoption of Regulation No 857/84 in its amended form?

28. A comparison with the situations of departing lessees in the two groups of farmers in question (on the one hand, farmers who did not avail themselves of Regulation No 1078/77 and, on the other hand, SLOM farmers) leads in principle to the conclusion that that question should be answered in the affirmative. It is true, as Advocate General Jacobs has rightly pointed out in relation to Article 7(4) of Regulation No 857/84, as amended, that Member States are not obliged to exercise such a power. [28] However, it must be stated that the provision contested in this case itself excludes the possibility of any rule more favourable to a departing lessee than the principle, specifically contained in the contested provision, of a link with the land.

29. Nevertheless, it is necessary in this connection to examine two possible reservations.

30. The first of those reservations might arise if the insertion of a provision empowering the Member States to adopt derogating rules, in the sense described, were precluded by insuperable obstacles. However, I am unable to discern any such obstacles.

31. It should be stated in this regard, first, that it is difficult for the Member States, in the light of the belated adoption of the quota arrangements relating to SLOM farmers, to lay down and apply objective criteria giving departing lessees the right to a quota. However, there appears to be no adequate indication, either in the documents before the Court or elsewhere, that such a procedure is completely impossible.

32. Next, nothing in the present case indicates the existence of any third party interests warranting protection such as to preclude any such rules. In particular, I am unable to ascertain any legal basis for supposing that a lessor in a situation such as that obtaining in the present case would be entitled to be spared from the disadvantages which he might suffer as a result of such rules.

33. The second reservation concerns the limitations applying to the protection of legitimate expectations within the meaning of the

28 — Opinion of 4 July 1991 in Case C-121/90 *Posthumus* [1991] ECR I-5833, at p. I-5844, paragraph 22.

term as it appears in the judgments in *Mulder* and *Von Deetzen*. In its judgment in *Von Deetzen II*, [29] the Court defined those limitations as meaning that whilst SLOM farmers

'were legitimately entitled to expect to be able to resume the marketing of milk at the end of their non-marketing or conversion period, and to carry on that activity under conditions that involved no discrimination between them and other milk producers, they could not thereby expect that a common organization of the market would confer on them a commercial advantage which did not derive from their occupational activity'.

34. The Court went on to state:

'Those producers could not therefore expect to be in a position to dispose, for profit, of an advantage, such as the allocation of a reference quantity under the additional levy scheme, when that advantage had been conferred on them specifically in order to enable them to resume their occupational activity'.

35. Those considerations were also applied by the Court in the case of *Maier*, in which a SLOM farmer had leased his holding to a third party for a term of twenty years at a time between the end of the conversion period and the adoption of Regulation No 764/89. [30] However, those considerations cannot be applied to cases such as the present one, in which the principle of the protection of legitimate expectations would result in the SLOM farmer (or an applicant deriving title from him) retaining his entitlement to the special reference quantity, since they are based on the premise that the special reference quantity, after being allocated, is to be transferred to a third party. Moreover, a premium transaction which would be inadmissible under the quota system can take effect, in the event of the departure of a lessee, only if the lessee and the lessor agree, regardless of objective criteria, on the retention of the quota. However, the very objective of the power conferred by Article 7(4) of Regulation No 857/84, as amended, is, as its wording makes clear, to enable Member States, having regard to the circumstances of fact and of law (particularly the law on leases) obtaining within their territory, to lay down appropriate objective criteria on which to determine whether, and to what extent, a departing lessee is to retain the quota.

36. Thus it was open to the Commission, having regard to the principle of the protection of legitimate expectations, to give concrete form to Article 3a(1) of Regulation No 857/84 by means of the rule laid down in Article 3a(1) of Regulation No 1546/88 only in so far as it mitigated the effect of that provision by way of an exception corresponding to Article 7(4) of Regulation No 857/84.

29 — Judgment in Case C-44/89 *Von Deetzen* [1991] ECR I-5119, paragraph 21.

30 — See paragraphs 21 and 22 of the judgment.

37. However, the implications of the infringement, thus established, of that principle are restricted by the limitations inherent in the protection of legitimate expectations. Reference should be made in that regard to the second recital in the preamble to Regulation No 764/89, which correctly states that a farmer may claim the allocation of a quota on the basis of that protection only if he *intends* and *is able* to resume production.

38. As is apparent from the judgment in *Maier*, [31] the first of those two conditions is not fulfilled where the circumstances arising between the end of the non-marketing period and the adoption of Regulation No 764/89 are such as to make it clear that the farmer has finally ceased milk production. The Commission can treat that limitation on the protection of legitimate expectations as a ground for making the allocation of a special reference quantity conditional on the fulfilment of appropriate conditions.

39. With regard to the requirement that there must be a possibility of milk production, subparagraph (a) of Article 3a(1) requires the operation by the applicant of a qualifying holding. As is apparent from the case of *Maier*, therefore, the contested provision cannot in any event be impugned in so far as it confirms generally the requirement regarding the operation of a qualifying holding.

40. Finally, I would like to add an observation regarding the manner in which the power conferred on the Member States is to be exercised. Since the Member States are entrusted in that regard with the application of Community law, they must comply *inter alia* with its general legal principles. [32] These include the principle of the protection of legitimate expectations, as well as the principle of equal treatment, which has taken on a special character by virtue of Article 40(3) of the EEC Treaty. In the light of those principles, the Member States, in exercising the said power, must have regard to the question whether, and in what way, they have applied Article 7(4) of Regulation No 857/84, in the version contained in Regulation No 590/85.

41. In the light of the foregoing, I propose that the Court give the following answer to the first question referred by the College:

'Article 3a of Commission Regulation No 1546/88, in the version resulting from Regulation No 1033/89, is invalid in so far as it does not provide for the conferment on Member States of power to allocate a special reference quantity to a producer for the purposes of production on a holding operated by him which is not the holding which he (or a farmer who has fulfilled the undertaking given pursuant to Council Regulation No 1078/77 and from whom the producer derives his title) operated at the time of the grant of his premium application pursuant to

31 — See paragraph 22.

32 — As to the fundamental rights, see the judgment in *Wachauf* (footnote 19 above), paragraph 19.

Article 5(2) of Commission Regulation No 1391/78, where

— the holding originally operated, following the fulfilment of the undertaking given pursuant to Regulation No 1078/77, has had to be surrendered to the lessor by reason of the expiry of the lease and in the absence of any entitlement on the part of the lessee to its extension on comparable terms;

— the producer (or the farmer from whom he derives his title) did not finally cease milk production prior to the adoption of Regulation No 764/89; and

— the holding operated at the time of the request fulfils the conditions laid down in subparagraph (b) of Article 3a(1) of Regulation No 857/84.'

Questions 2 and 3

42. *I.* Question 1 concerns in essence the question of the identity of the holding in respect of which a special reference quantity can be requested. Questions 2 and 3, on the other hand, are concerned with certain conditions which must be fulfilled by the applicant in person. More precisely, the point at issue here is his status as a SLOM farmer or his relationship with such a person, on the one hand, and, on the other, with the holding to which the benefit of the special reference quantity attaches.

43. As regards the first of those aspects, the opening words of Article 3a(1) of Regulation No 857/84, read in conjunction with the first indent of that provision, make it clear that the applicant must himself in principle have fulfilled a non-marketing or conversion undertaking.

44. Next, as regards the second aspect, the applicant must, according to those opening words, be a 'producer referred to in the third paragraph of Article 12(c)' of that provision. Article 12(c) provides that

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

45. The following questions referred by the College concern both of those aspects:

'Must Article 3a, in conjunction with Article 12(c) of Council Regulation (EEC) No 857/84, be interpreted as meaning that a person or group of persons are not prevented from being regarded as producers to whom both the first and second indents of Article 3a(1) and Article 3a(1)(a) are applicable by the fact that the conversion agreement was entered into by one person whereas, at the date of the request for a reference quantity on the basis of Article 3a, that person is operating a holding in collaboration with one or more other persons?'

'If Question 2 is answered in the affirmative, must the person who entered into the conversion agreement or the group of persons which operates the holding at the date of the request referred to in Question 2 be regarded as the person entitled to a reference quantity by virtue of Article 3a? [33]

46. *II.* In order to answer those questions, it should first of all be made clear that the concept of a producer under Article 12(c) of Regulation No 857/84, to which reference is made in the opening words of Article 3a(1) of that regulation, signifies a specific relationship between the applicant and the holding in question: he qualifies as a producer only if he *operates* that holding. Contrary to the understanding of the matter on which the College's second question is based, the question whether the applicant must have fulfilled an undertaking pursuant to Regulation No 1078/77, or to what extent he can derive from a farmer to whom that applies an entitlement to the allocation of a special reference quantity, concerns a condition of Article 3a(1) of Regulation No 857/84 which should not be confused with the applicant's status as a producer; it is with that status that the third question is concerned.

47. *III. 1.* On this basis, it is necessary first of all to examine the issue raised by the *second question*, namely whether subparagraph (a) of Article 3a precludes the allocation of a special reference quantity where the SLOM farmer operates the holding not on his own but in collaboration with one or more other persons in the form of an association. The circumstances of the present case indicate in that regard that the formation of the association was intended to be in anticipation of the transfer of the farm to its future heirs. It appears appropriate, therefore, to answer the question on the basis of what was held in the judgment in *Rauh*. [34]

48. In that case, the plaintiff, as the future heir to the farm, had under a contract of usufruct taken over the holding belonging to his parents, who had previously fulfilled a non-marketing undertaking, following the expiry of the non-marketing period. His request for the allocation of a special reference quantity was refused on the grounds that he had not taken over the holding until the time in question and that he could not therefore found any right on that provision. The Court held in that regard (paragraphs 18 and 19 of the judgment):

'a producer who, as in the case envisaged by the national court, has, by virtue of the application of Community provisions which infringe the principle of the protection of legitimate expectations, been denied the possibility of obtaining a reference quantity upon the expiry of his undertaking pursuant to Regulation No 1078/77, has consequently been unable to transfer the benefit flowing from the grant of such a quantity to his heir or to his successor in a transaction similar to succession. Such a producer has thus been

33 — According to the information given by the College, the question relates to Article 3a of *Regulation No 857/84*.

34 — Judgment in Case C-314/89 *Rauh* [1991] ECR I-1647.

subject to restrictions affecting him specifically precisely because of his non-marketing undertaking.

Those restrictions would be maintained if Article 3a of Regulation No 857/84 were interpreted as not permitting such an heir or successor to have granted to himself, in the same way as the producer himself, a special reference quantity under the conditions laid down in Article 3a.'

49. The Commission's objection that the original producer had not requested the allocation of a special reference quantity prior to the transfer of the holding was not accepted by the Court,

'since it cannot be held against a producer that he failed to apply for the grant of a reference quantity to which the Community rules applying at the time gave him no right.' [35]

50. The Court found that the incompatibility of Article 3a of Regulation No 857/84 with the principle of the protection of legitimate expectations can be avoided if that provision is interpreted as meaning that

'"producers" includes not just farmers who themselves entered into an undertaking pursuant to Regulation No 1078/77 but also those who, after the expiry of the undertaking entered into by the farmer, have taken over the holding in question by succession or by a similar transaction.' [36]

51. Thus the Court held that the said Article 3a

'must be interpreted as meaning that, subject to the conditions laid down therein, a special reference quantity may be granted to a producer who has taken over a holding by way of succession or a similar transaction after the expiry of a non-marketing undertaking entered into pursuant to Council Regulation No 1078/77 of 17 May 1977 by his predecessor in title'. [37]

52. In a later judgment — *Von Deetzen II* [38] — the Court explained in further detail the term 'transfer similar to succession', albeit with regard to a case concerning the transfer, pursuant to the first paragraph of Article 7a Regulation No 1546/88 (in the version contained in Regulation No 1033/89), of a special reference quantity which had already been allocated.

35 — Paragraph 21 of the judgment.

36 — Paragraph 23 of the judgment.

37 — Paragraph 25 and the operative part of the judgment.

38 — Judgment in Case C-44/89, cited above.

53. The Court stated (paragraphs 38 and 39 of the judgment):

'The term "similar transaction" must be interpreted as referring to any transaction, whatever its legal basis, which produces effects comparable to those of inheritance. It thus embraces, in particular, transactions concluded in respect of the holding concerned between a producer and the potential beneficiary of his estate, provided that the terms of the transaction in question are such that, according to its purpose and subject-matter, the main intention is that the holding should continue to be exploited by the potential beneficiary and not that the marketable value of the holding should be realized by the person from whom he stands to inherit.

It follows that neither the contribution of a holding to a private company in which the producer to whom the special reference quantity was granted has a share nor the fact that, under German law, the latter's share in the company accrues to the other members following his death or withdrawal from the company nor the leasing of the holding to the potential beneficiary of the estate of the producer to whom the special reference quantity was granted can be excluded from the definition of "any similar transaction", provided that the conditions of the contract embodying the transaction in question are such that they place the potential beneficiary in a privileged position compared with that of an operator taking over a comparable holding on an arm's length basis.'

54. The Court further pointed out that it was for the national court to establish whether the requirements in that regard were satisfied. [39]

55. That judgment makes it clear, for the purposes of the present case, that a transfer similar to succession may also take place in such a way that the beneficiary does not, as in the case of *Rauh*, become the producer as such but forms, in collaboration with the person from whom he stands to inherit, an association (in the form either of a group of persons or a legal person) which itself has the status of a producer.

56. In order to resolve the present case on the basis of the *Rauh* judgment, as supplemented by the judgment in *Von Deetzen*, it is necessary to clarify the effects of the remaining differences between the facts of this case and those in *Rauh*.

57. The first of those differences lies in the fact that the holding in the case of *Rauh* (as in *Von Deetzen II* also) was owned by the potential testator, whereas in the present case there is nothing to indicate that the plaintiff is the owner of the holding; on the contrary, the first of the orders for reference states that it has been 'leased by the association'. However, I am of the view that even in circumstances such as these a transfer similar to succession cannot be ruled out from the outset. The right established by the lease to operate the holding can constitute the

39 — Paragraph 40 of the judgment.

subject-matter of that transfer. The extent to which the matter can in fact be assessed in that way depends on the circumstances, namely the contents of the lease and the nature of the association. That is a matter for the national court to determine in so far as may be necessary.

58. The question referred for a preliminary ruling can be satisfactorily answered, as regards that point, by reference to the requirement that there be a transfer similar to succession.

59. There are two further differences between the present case and the case of *Rauh*; these relate to the special circumstance giving rise to Question 1. The first lies in the fact that the holding possibly forming the subject-matter of the transfer similar to succession is not the same as the holding on which the undertaking pursuant to Regulation No 1078/77 was fulfilled. The second, which is closely linked to the first, lies in the fact that production commenced at the same time as, or shortly after, the dealings on the basis of which the transfer similar to succession was effected. It is not in dispute that the plaintiff at no time operated the holding at Gietheim on his own.

60. As regards the first point, the answer to the first question referred by the College shows that the plaintiff could be entitled (depending on whether, and in what way, the Netherlands make use of the power conferred on it) to call for the special reference quantity to be credited to the operation of a holding other than the SLOM holding, provided that he was to operate the holding in question on his own. In the light of the judgment in *Rauh*, however, a producer who operates the same holding pursuant to a transfer similar to succession cannot in those circumstances be placed in a worse position. In my view — and here we come to the second point — this assessment is not altered where the SLOM farmer has not at any time operated the holding on his own but the producer has instead started to operate it immediately upon or after the transfer similar to succession. I can see no objective reason for distinguishing between those two cases.

61. 2. Since, therefore, the answer to Question 2 is that Article 3a of Regulation No 857/84 does not preclude the allocation of a special reference quantity under the conditions referred to above where the SLOM farmer operates the holding in question in collaboration with one or more other persons, the *third question* also needs to be considered.

62. In examining the issue raised by that question, namely which of the potential grantees — the SLOM farmer, the 'association' as such or its members jointly — is entitled to the special reference quantity, reference should be made to the wording of Article 3a(1), read in conjunction with the third paragraph of Article 12(c) of Regulation No 857/84 (that latter provision having been inserted by Regulation No 764/89). According to that wording, it is the 'producer', that is to say, the person or group of persons 'farming a holding', as the latter provision puts it, who is entitled to the allocation of a special reference quantity. On that basis, and taking account of the definition of the term 'holding' laid down in Article 12(d)

of Regulation No 857/84, the Court in the case of *Maier* defined the term 'producer' in accordance with Article 3a of Regulation No 1546/88, which corresponds beyond all doubt with the term as it is used in Regulation No 857/84. It stated that the term

'can mean only a person farming a holding who operates on his own responsibility an integral set of units for the production of milk'. [40]

63. Since, in the light of that definition, the plaintiff does not have the status of a producer, or at any rate not in his capacity as an individual person, there can be no question of his being entitled to the special reference quantity on his own. [41] For the rest, the answer to the question posed depends on the legal nature of the 'association' formed by the two farmers and on who is actually operating the holding. If that association is a legal person, and if it is operating the holding in that capacity, it is entitled to the special reference quantity. If, on the other hand, it is merely an association not having any legal personality of its own, and if the two farmers are operating the holding together within the context of that association, they will be jointly entitled to the reference quantity, but in their capacity as a group of persons regarded as a producer under Regulation No 857/84. [42] That too is a matter for the national court to determine in so far as may be necessary.

40 — Paragraph 11 of the judgment.

41 — See the Opinion of Advocate General Jacobs of 8 April 1992 in Case C-86/90 *O'Brien* [1992] ECR I-6251, paragraph 22.

42 — See Article 12(c).

64. *IV.* In the light of the foregoing, I propose that the Court give a joint answer to Questions 2 and 3, given the connection between them. I regard it as sensible for the Court, in so doing, to establish the connection with Question 1 by specifying that the change in the identity of the producer, in so far as it has occurred as a result of the transfer similar to succession, does not preclude the allocation of a special reference quantity even where there has been a permissible change in the location of the holding within the meaning of the answer to Question 1, nor even where the operation of the new holding has been commenced by the producer immediately upon or after the transfer similar to succession. [43]

65. The answer could be worded as follows:

'Article 3a, read together with the third subparagraph of Article 12(c) of Council Regulation No 857/84, in the version resulting from Council Regulation No 764/89, is to be interpreted as meaning that it permits the allocation of a special reference quantity to a legal person or a group of persons operating the holding in question (the producer), even where the producer has not itself fulfilled the undertaking pursuant to Regulation No 1078/77 but its members include a farmer to whom that condition applies and who has, following the fulfilment of that undertaking, transferred, in a manner similar to succession, the right to operate the holding, in so far as that right accrues to the other members of the producer.

43 — For further details, see paragraph 58 above.

If, notwithstanding the fact that the holding in question is not the same as that on which the farmer fulfilled the undertaking pursuant to Regulation No 1078/77, that farmer would have been entitled to the allocation of a special reference quantity had he been going to operate it on his own, the allocation of the special reference quantity to the producer is precluded neither by the identity of the holding operated nor by the fact that the farmer has at no time operated that holding on his own but the producer commenced to operate it immediately upon or after the transfer similar to succession.'

*Question 4*

66. The fourth question referred by the College concerns Article 3a(5) of Regulation No 857/84, which provides as follows:

'Producers eligible under paragraph 1 who receive a special reference quantity on the terms laid down in paragraphs 2, 3 and 4 shall not be liable to the additional levy in respect of quantities produced prior to the sixth period of application of the scheme which do not exceed the provisional special quantity.'

67. The College asks in that regard:

'If Question 1 or Question 2 is answered in the negative, is Council Regulation (EEC) No 857/84 valid in so far as it does not provide for remission or repayment of the levy, or in so far as this is precluded by Article 3a(5) of the regulation, in respect of the period between the expiry of the conversion agreement and the date at which there was a change in the situation, as a result of which the producer concerned is not eligible for a provisional special quantity, in so far as the quantity of milk produced in that period does not exceed the reference quantity which would have been allocated if that change had not taken place?'

68. According to the grounds of the order for reference, the College is concerned with those quantities which were delivered by the plaintiff from his holding at Laag Zuthem between the resumption of milk production and the end of his lease.

69. *I.* The College asks the question in the event that 'Question 1 or Question 2 is answered in the negative'. Since in my view consideration of Question 1 has disclosed that Article 3a of Regulation 1546/88 contravenes higher-ranking Community law, and since consideration of Question 2 has disclosed that Article 3a of Regulation No 857/84 does not, under certain conditions, preclude the allocation of a special reference quantity where the SLOM farmer operates the holding in question in collaboration with another person, the answer to both questions is 'in the negative'. If the Court were to concur with my proposals, it would be unnecessary, from a formal standpoint, to answer Question 4.

70. However, I propose to deal briefly with that question, as follows. Quite apart from the fact that the Court may diverge from my proposals regarding the first two questions, it should also be stated that the national court, in linking its final question to the giving of a negative answer to the first two questions, is proceeding on the basis of a false premise. The national court acknowledges that in this case a special reference quantity is *ipso jure* to be granted, constituting at the same time the decisive quantity for the purposes of Article 3a(5). However, the proposed answer to the first question would merely result in the conferment on Member States of a power comparable with Article 7(4) of Regulation No 857/84, in the version contained in Regulation No 590/85, the effects of the exercise of which on this case are at present uncertain. Clearly, the College did not contemplate the first question being answered 'in the negative' in quite that sense when it formulated the conditions subject to which the fourth question was to be answered. For that reason I regard it as appropriate to examine that last question also.

71. *II.* Since, without any doubt, Article 3a(5) of Regulation No 857/84, applying as it does in that regard, grants an 'amnesty' in respect of previous deliveries only to those producers who both fulfil the conditions for the allocation of a special reference quantity at the time of making their request and are actually granted one, it is not enough for the applicant to have fulfilled those conditions at an earlier time.

72. Contrary to the view advanced by the Council in the oral procedure, sums which may have been paid in the past as additional levies cannot in those circumstances be refunded (since that would amount to unjust enrichment). More precisely, the judgments in *Mulder* and *Von Deetzen* did not nullify the legal basis for such previous payments, which is contained in Article 5c of Regulation No 804/68 and in Regulation No 857/84, as supplemented by Regulation No 1371/84. In those judgments Regulation No 857/84 (as supplemented by the version contained in Regulation No 1371/84) was declared to be null and void in so far as the Council had *omitted*, in breach of higher-ranking Community law, to provide for the grant to certain producers of reference quantities by way of *exception* to the principle underlying the additional levy. However, the finding of nullity did not relate to the legal basis underlying the additional levy itself. Thus it was for the Council in its discretion — and, of course, in accordance with the aforesaid judgments — to specify the principle and scope of any reference quantities, by way of an exception within the meaning stated above. In so far as this did not happen, it cannot be said the additional levies paid pursuant to Regulation No 857/84 were paid otherwise than on a legal basis.

73. *III.* 1. Since, therefore, farmers who previously fulfilled the conditions laid down in Article 3a(1) to (4) of Regulation No 857/84 (supplemented, as the case may be, by the implementation regulations adopted by the Commission), but who no longer do so at the time of making their request, are not, by virtue of their exclusion from the ambit of paragraph (5) of that provision, eligible for any remission or repayment of additional levies in respect of the

past, it is necessary to examine the validity of that paragraph, on which doubt is cast in the second part of the question.

74. (a) As regards compatibility with the principle of the protection of legitimate expectations, consideration must consequently be given to the question whether Article 3a(5), within the meaning given to it by the judgments in *Mulder* and *Von Deetzen*, specifically disadvantages SLOM farmers by comparison with other farmers. It should be stated in that regard that the Court not only disapproved — at one stage — the absence of quota rules in respect of SLOM farmers (see the judgments in *Mulder* and *Von Deetzen*), but also, what is more, held parts of those special rules, following their adoption, to be invalid, again by reason of their infringement of the principle of the protection of legitimate expectations. [44] The latter step was necessary because the stipulations at issue provided expressly for the defects originally complained of to be perpetuated in the new system, and for the scope of their application to extend into the future.

75. The position is different in the present case, however. The provision complained of is limited to the introduction of retroactive rules governing remission in relation to specific farmers. The reason why other farmers are not eligible for remission of the additional levy in respect of the period prior to 1 April 1989 lies in the system, disapproved in the *Mulder* and *Von Deetzen* judgments, which applied before 1 April 1989 or, to put it more precisely, in the lacuna to which that system gave rise in the absence of any quota rules applying to SLOM farmers; it does not lie in the remission rules themselves. Those rules neither perpetuate the lacuna in the old system as regards the future [45] nor preclude remission in favour of ineligible farmers in respect of the past. To adopt the wording used by the national court (see the way in which the question referred is formulated): remission is 'precluded', for the purposes of the point at issue here, not by the rules themselves but by the old milk quota system, which they leave unchanged. I am therefore of the view that those rules cannot be held to be invalid by reason of any infringement of the principle of the protection of legitimate expectations.

76. (b) Nor do I consider that the principle of equal treatment has been infringed. The only standpoint from which, in that regard, an infringement could possibly be regarded as having occurred is that of discrimination against farmers enjoying the benefit of the provision. However, it should be stated in that connection that the two groups of farmers are in different situations, as the Commission has rightly pointed out. The important point for those who were in fact entitled to a reference quantity, and in relation to whom it was thus certain that they would be commencing or resuming milk production, was as far as possible to limit, in the interests

44 — Judgments in Case C-189/89 *Spagl* [1990] ECR I-4539, Case C-217/89 *Pastätter* [1990] ECR I-4585 and Case C-264/90 *Wehrs* [1992] ECR I-6285.

45 — It is precisely because there exists no entitlement to a special reference quantity in the future that no remission is allowed in respect of the past.

of the economic recovery of their holdings, the disadvantages flowing from past payments or arrears due in respect of the additional levy. Since a farmer who is not in receipt of a reference quantity is not expected to produce milk in the future, past payments and arrears of the type referred to fall in their entirety within the ambit of the damage caused to his dairy holding by the old quota system, including, as the case may be, the relinquishment of that holding. Consequently, I can see nothing arbitrary in an adjustment in favour of that group within the context of the compensation payable in accordance with the judgment in *Mulder II*. [46]

77. 2. On that basis, finally, I am able to examine the first part of the question referred by the College, which seeks general information regarding the 'validity' of Regulation No 857/84 'in so far as it does not provide for remission or repayment of the levy...'. As will be apparent from my foregoing observations, the lacuna in the rules which the national court acknowledges is the same as that forming the subject-matter of the judgments in *Mulder* and *Von Deetzen*. The Court's finding in those cases regarding the invalidity of Regulation No 857/84 does not require any supplementary comment in the present case.

78. For all those reasons, the answer to the fourth question referred for a preliminary ruling should be, in the event that it falls to be examined by the Court, that consideration of Article 3a(5) of Regulation No 857/84 has disclosed no factor of such a kind as to affect its validity.

## C — Conclusion

79. In the light of the foregoing considerations, I propose that the Court give the following answers to the questions referred to it by the College van Beroep voor het Bedrijfsleven:

In response to the first three questions:

(1) Article 3a of Commission Regulation No 1546/88, in the version resulting from Regulation No 1033/89, is invalid in so far as it does not provide for the conferment on Member States of power to allocate a special reference quantity to a producer for the purposes of production on a holding operated by him which is not the holding which he (or a farmer who has fulfilled the undertaking given pursuant to Council Regulation No 1078/77 and from whom the

46 — Judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061.

producer derives his title) operated at the time of the grant of his premium application pursuant to Article 5 2 of Commission Regulation No 1391/78, where

— the holding originally operated, following the fulfilment of the undertaking given pursuant to Regulation No 1078/77, has had to be surrendered to the lessor by reason of the expiry of the lease and in the absence of any entitlement on the part of the lessee to its extension on comparable terms;

— The producer (or the farmer from whom he derives his title) did not finally cease milk production prior to the adoption of Regulation No 764/89; and

— the holding operated at the time of the request fulfils the conditions laid down in subparagraph (b) of Article 3a(1) of Regulation No 857/84.

(2) Article 3a, read together with the third subparagraph of Article 12(c) of Council Regulation No 857/84, in the version resulting from Council Regulation No 764/89, is to be interpreted as meaning that it permits the allocation of a special reference quantity to a legal person or a group of persons operating the holding in question (the producer), even where the producer has not itself fulfilled the undertaking pursuant to Regulation No 1078/77 but its members include a farmer to whom that condition applies and who has, following the fulfilment of that undertaking, transferred, in a manner similar to succession, the right to operate the holding, in so far as that right accrues to the other members of the producer.

If, notwithstanding the fact that the holding in question is not the same as that on which the farmer fulfilled the undertaking pursuant to Regulation No 1078/77, that farmer would have been entitled to the allocation of a special reference quantity had he been going to operate it on his own, the allocation of the special reference quantity to the producer is precluded neither by the identity of the holding operated nor by the fact that the farmer has at no time operated that holding on his own but the producer commenced to operate it immediately upon or after the transfer similar to succession.

As far as may be necessary, in response to the fourth question:

(3) Consideration of Article 3a(5) of Regulation No 857/84 has disclosed no factor of such a kind as to affect its validity.