OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 27 April 1989 *

My Lords,

1. In this case, the Court is asked to rule on the interpretation of Community legislation on milk quotas in the context of a dispute between a tenant farmer and the German authorities regarding the farmer's participation in a scheme granting compensation for the definitive discontinuance of milk production ('an outgoers' scheme'). Although the questions posed by the national court — concerning the interpretation of the definition of 'holding' and concerning the consequences, as regards the continuing exploitation of the quota, of the expiry of an agricultural tenancy — appear dry and technical, there are, underlying those questions, issues of some importance concerning the respective interests of landlords and tenants in the quota and concerning the legal nature of a quota.

The relevant legislation

2. For an understanding of the questions posed by the national court and of the underlying issues it is necessary first to consider the relevant Community and national legislation.

3. As is now well known, Council Regulation (EEC) No 856/84 (Official Journal 1984, L 90, p. 10), with a view to curbing surplus milk production, amended Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products by introducing a levy, additional to the co-responsibility levy, on quantities of milk or milk equivalent delivered beyond a reference quantity (or quota) to be determined. General rules for the application of the levy system are laid down in Council Regulation (EEC) No 857/84 (Official Journal 1984, L 90, p. 13), as amended, and detailed rules are to be found in Commission Regulation (EEC) No 1371/84 (Official Journal 1984, L 132, p. 11), as amended.

4. Article 4(1) of Regulation No 857/84 empowers Member States, with a view to the re-structuring of milk production, to grant compensation to producers undertaking to discontinue milk production definitively. Under Article 4(2), reference quantities released in this way are as necessary to be added to the national reserve for re-allocation to producers in special situations.

5. Article 7 of Regulation No 857/84, as amended by Council Regulation (EEC) No 590/85 (Official Journal 1985, L 90,

* Original language: English.

p. 13), is concerned with the transfer of reference quantities following a change of ownership or possession of a holding. Under Article 7(1):

'Where a holding is sold, leased or transferred by inheritance, all or part of the corresponding reference quantity shall be transferred to the purchaser, tenant or heir according to procedures to be determined.'

According to Article 7(4):

'In the case of rural leases due to expire, where the lessee is not entitled to an extension of the lease on similar terms, Member States may provide that all or part of the reference quantity corresponding to the holding which forms the subject of the lease shall be put at the disposal of the departing lessee if he intends to continue milk production.'

6. Article 12 of Regulation No 857/84 establishes certain definitions. Under paragraph (c), 'producer' is defined as:

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

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

supplying the purchaser'.

Under paragraph (d), 'holding' is defined as:

'all the production units operated by the producer and located within the geographical territory of the Community'.

7. Regulation No 1371/84 lays down detailed rules *inter alia* for the transfer of reference quantities on the change of ownership or possession of the holding. Under Article 5(1):

'Where an entire holding is sold, leased or transferred by inheritance, the corresponding reference quantity shall be transferred in full to the producer who takes over the holding.'

Article 5(2) provides for a proportionate transfer of the quota in the event of a partial transfer of a holding. Article 5(3) provides that:

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

Article 5(4), which was inserted by Commission Regulation (EEC) No 1043/85

(Official Journal 1985, L 112, p. 18), is concerned *inter alia* with the situation where a Member State makes use of the option in Article 7(4) of Regulation No 857/84 to permit a tenant on the expiry of his lease to retain all or part of the quota, and provides in essence that the amount of quota available to the tenant after the expiry of the lease must not exceed the amount available to him before the expiry.

8. In implementing the additional levy system, the Federal Republic of Germany *inter alia* adopted the Law on Compensation for Discontinuance of the Production of Milk for Sale (Gesetz über die Gewährung einer Vergütung für die Aufgabe der Milcherzeugung für den Markt) of 17 July 1984 (*Bundesgesetzblatt* I, p. 942) and an implementing order of 20 July 1984 (*Bundesgesetzblatt* I, p. 1023) (together, 'the German outgoers' scheme'). Under paragraph 3 of the implementing order, a claimant, who must be a producer within the meaning of Article 12(c) of Regulation No 857/84, must undertake to discontinue milk production definitively within six months of the date on which compensation is awarded. Under paragraph 3(2) of the order, a claimant who is the tenant of a 'holding' within the meaning of Article 12(d) of Regulation No 857/84 must in addition submit a written authorization from his landlord.

Facts and questions

9. From the order for reference and from the case file it appears that the plaintiff in the national proceedings, Hubert Wachauf, was the tenant of a farm held under a tenancy agreement originally made in 1959 between his parents and the owner of the farm, the Prinzessin zu Sayn-Wittgenstein. The farm had not been used by the lessor for dairy production before the grant of the lease and the agreement did not require that it should be so used. Mr Wachauf was in fact a dairy farmer and all the items which made the farm specifically suitable for milk production, such as the cows and milking equipment, were supplied by and belonged to him.

10. Mr Wachauf's tenancy agreement expired on 31 January 1983, and after the lessor and an agricultural court had refused to extend the lease, he eventually vacated the farm, apparently early in 1985. In the meantime, Council Regulation (EEC) No 856/84 had introduced the additional levy system with effect from 2 April 1984 and Mr Wachauf was allocated a reference quantity. Mr Wachauf applied for compensation for the definitive discontinuance of milk production under the German law referred to above, producing the written consent of the lessor. The lessor, however, subsequently withdrew that consent on the grounds that she had not understood that Mr Wachauf's participation in the scheme would result in the loss to the farm of the quota allocated to him. The German authorities in the form of the Federal Office for Food and Forestry (Bundesamt für Ernährung und Forstwirtschaft) thereupon by decision of 14 September 1984 withdrew their initial acceptance of Mr Wachauf's application. After Mr Wachauf had left the farm, the land was let to six different tenants and the corresponding quota was divided between them.

11. Mr Wachauf brought legal proceedings in respect of the refusal to admit him to the compensation scheme. In the order for reference, the national court seised of the action, the Administrative Court (Verwaltungsgericht) of Frankfurt, states that it doubts whether Mr Wachauf can be said to have leased a 'holding' in the meaning of Article 12(d) of Regulation 857/84 since at the time it was leased the farm was not specifically intended or adapted for milk production and all the features which did make it suitable for that purpose were supplied and owned by him rather than the lessor. If such a farm must none the less be regarded as a 'holding', so that the landlord's consent is required, then, in the national court's view, doubts arise as to the constitutional validity of the requirement of consent in the national compensation scheme. In principle, the court reasons, there appears to be no objective ground for treating producers differently on the basis of whether they are landlords or tenants. It says that if it is correct that Community legislation requires that the quota reverts with the land to the landlord at the end of the tenancy, then the requirement of consent might be seen as objectively justified as serving to protect the landlord's legitimate interest. The national court doubts, however, whether Community legislation can be interpreted as requiring reversion of the quota in a case such as the present, since that would deprive the tenant of the fruits of his labour and would amount to an unconstitutional expropriation without compensation.

12. Since it had doubts concerning the scope of the definition of 'holding' and concerning the rules relating to the transfer of quotas, the national court referred the following questions to the Court:

'1. Is an agricultural production unit having neither dairy cattle nor facilities (such as milking parlours) capable of being used exclusively for milk production a "holding" within the meaning of Article 12(d) of Council Regulation (EEC) No 857/84 of 31 March 1984?

2. Is the surrender of leased property upon the expiry of the lease a case having "comparable legal effects" within the meaning of Article 5(3) of Commission Regulation (EEC) No 1371/84 of 16 May 1984, if the leased property is an agricultural undertaking without dairy cattle and without any facilities capable of being used only for milk production (for example, milking parlours) and where the lease provided for no obligation on the part of the lessee to engage in milk production?'

The wording of the questions

13. It appears from the facts of the case and the reasoning of the national court, summarized above, that the national court is essentially concerned to know whether a specific type of tenanted farm, namely a farm leased prior to the introduction of milk quotas and which, at the time it was leased, was not specifically adapted, equipped or

intended for milk production, falls within the definition of 'holding' in Regulation No 857/84. The national court also seeks to know whether, by virtue of Article 5(3) of Regulation No 1371/84, the expiry of the lease of such a farm will result in the transfer of the corresponding quota to the landlord or succeeding tenant.

14. In my view, the questions as put by the national court are phrased in terms that are wider than necessary for the solution of the issues outlined above. I therefore suggest that the questions be rephrased in somewhat narrower and more specific terms, as follows:

'1. Is an agricultural production unit held under a lease granted prior to the entry into force of Council Regulation No 856/84 a "holding" within the meaning of Article 12(d) of Council Regulation No 857/84 where the production unit, as leased, included neither dairy cattle nor facilities (such as milking parlours) capable of being used only for milk production and where the lease provided for no obligation on the part of the lessee to engage in milk production?

2. Must Article 5(3) of Commission Regulation No 1371/84 be interpreted as meaning that the surrender of a leased agricultural production unit upon the expiry of a lease granted prior to the entry into force of Council Regulation No 856/84 is a case having "comparable legal effects" within the meaning of that provision, where the agricultural production unit, as leased, included neither dairy cattle nor facilities (such as milking parlours) capable of being used only for milk production and where the lease provided for no obligation on the part of the lessee to engage in milk production?'

The first question

15. In my view, this question should be answered in the affirmative. The definition of 'holding'is very broad: 'all the production units operated by the producer and located within the geographical territory of the Community'. The inclusion in that definition of a reference to 'the producer', which is defined in Article 12(c) as a person farming a holding within the Community and 'selling milk or milk products directly to the consumer, and/or supplying the purchaser', indicates that in order to fall within the definition a farm must be engaged in milk production, and of course without such production there would not be a quota to be exploited. However, there is nothing in the wording of the definition to exclude a tenanted farm of the type described in the above question.

16. Moreover, as is pointed out in the written observations submitted by the United Kingdom Government, the definition of 'holding' in Article 12(d) of Regulation No 857/84 is provided for the purposes of the rules for the transfer of quota in Article 7 of that Regulation and Article 5 of Regulation No 1371/84 and the significance of the definition, for the purposes of the Community legislation, therefore lies in its consequences for the operation of those rules. Thus the object of

the first question is essentially the same as that of the second, namely to determine whether a tenant who has leased a farm which, at the time of letting, was neither specifically intended nor adapted for milk production, can be said to have leased a farm to which the transfer rules apply. As I will indicate below, there appears to be no reason why the transfer rules should not apply to a farm of this kind, with the result that such a farm must constitute a 'holding' for the purposes of Article 12(d).

17. I would add a further comment on the definition of 'holding'. The written and oral observations presented by the Bundesamt, the Commission and the United Kingdom Government all express concern at the perceived suggestion on the part of the national court that any farm, if it is to be a 'holding' for the purposes of Article 12(d), must be equipped and used directly and exclusively for milk production or be destined, by means, for instance, of a clause in a lease, for such direct and exclusive use. The observations point out that such a definition of 'holding' would exclude the very large number of mixed farms, where dairy farming is combined with arable and other types of agriculture. My view of the national court's reasoning is that it did not intend to make such a sweeping suggestion, and that it is essentially concerned with the status only of a particular category of tenanted farms. However, I would add, for the record, that, having regard to its wording and purpose, the definition of 'holding' in Article 12(d) of Regulation No 857/84 will certainly include a mixed holding, provided, of course, that milk production is actually carried out on the holding.

The second question

18. The national court considers that the surrender, on expiry of the lease, of a farm which, as leased, was not a milk-producing holding, cannot be regarded as a case comparable to the grant of a lease of a milk-producing holding to which a quota already attaches: in the latter case, the lessor, who has attracted the quota by his efforts, continues to receive the benefit of the quota through the rent, while in the former case the tenant, on expiry of the lease, will, in the absence of any provision for compensation, lose all the benefit of the quota 'earned' by his efforts. Although it is not spelled out in the order for reference, it is the logical consequence of the national court's reasoning that in a case such as that under consideration, the quota would not revert with the land to the landlord but would, presumably, remain with the tenant.

19. I do not think that it is possible to accept that reasoning. Article 5(3) of Regulation No 1371/84 requires a comparison to be made between two legal transactions — in this instance, the grant and expiry of a lease — in order to determine whether those two transactions as such, and independently of other considerations, may be said to have comparable legal effects as far as producers are concerned. The character of the holding when leased, and the question of which of several producers may be said to have a better title to the quota, is essentially irrelevant to that comparison. Looked at in this way, the legal effect of the surrender of a lease must be

seen as essentially the same as that of its grant, namely, the transfer of the leased property from one party to the other.

20. Acceptance of the national court's view would moreover give rise to a substantial breach in the principle — expressed in Article 7 of Regulation No 857/84 and Article 5 of Regulation No 1371/84 — that the quota follows the land on transfer, since, as is pointed out in the written observations submitted by the Commission, the United Kingdom and the defendant in the national proceedings, it is common practice in a number of Member States for tenant farmers to lease only land and buildings and to provide dairy cattle and equipment themselves. The national court's view is also inconsistent with the specific provisions of the legislation — namely Article 7(4) of Regulation No 857/84 and Article 5(4) of Regulation No 1371/84 — which, by way of derogation from the principle that the quota follows the land, permit Member States to provide, in a narrowly defined category of cases, that outgoing tenants may retain all or part of the quota if they wish to continue milk production. Acceptance of the national court's view could result in a much larger number of outgoing tenants being entitled to retain all or part of the quota, without any commitment on their part to continue milk production. I would therefore answer the second question also in the affirmative.

The underlying questions

21. The national court takes the view that if the questions referred for a preliminary ruling are answered in the affirmative, then an issue arises as to the compatibility with constitutional guarantees of equality and of respect for private property of the rule requiring the landlord's consent to a tenant's participation in the German outgoers' scheme and the rule that, on the expiry of the tenancy, the quota reverts with the land to the landlord. The national court's concern with constitutional guarantees appears to stem from its conviction that there may be cases in which it is the tenant, rather than the landlord, who through his efforts has attracted a quota to the holding, and that in such cases it would be inequitable if the landlord could, without more, veto the tenant's participation in an outgoers' scheme and if the landlord, on the expiry of the tenancy, were to obtain all the benefit of the quota to the exclusion of the tenant.

22. I agree with the national court that there may well be cases in which it is necessary to take account of the interest of the tenant in the quota. As the Commission points out in its written observations, the Community legislation is largely silent on the respective interests of the landlord and tenant, leaving it to the Member States to strike the necessary balance. That this should be left to national authorities is logical, given the diversity of national legal systems and implementing legislation and the different circumstances of individual producers. However, this does not, in my view, mean that Community law has nothing to contribute to a solution of the problem. In particular, the Court has emphasized in Joined Cases 201 and 202/85 *Klensch* v *Secrétaire d'État* [1986]

ECR 3477 that the prohibition of discrimination laid down in Article 40(3) of the Treaty covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down; consequently, it is also binding on the Member States when they are implementing a common organization and precludes national implementing measures which result in discrimination between producers. Moreover, I consider that when implementing Community law it is also incumbent upon Member States to have regard to the principle of respect for the right to property which, as the Court has recognized (see for example Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727), is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in Article 1 of the first Protocol to the European Convention on Human Rights. Although the Court's case-law has hitherto been concerned with respect for property rights by the Community legislator itself, the same principles must in my view apply to the implementation of Community law by the Member States, since it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator.

23. I will take those two principles in turn, and will consider first the principle of non-discrimination, which is in my view relevant when examining the requirement of the landlord's consent. As has been seen, the Community legislation leaves it to Member States to determine the conditions of participation in a national outgoers' scheme established under Article 4(1) of Regulation No 857/84. As a general rule, I cannot see any objection to a requirement that the landlord should consent to the participation of the tenant in such a scheme since the consequence of participation will be the permanent loss of the quota to the holding. At the same time, for the authorities of a Member State to allow the landlord an unqualified power of veto might in certain cases result in a breach of the principle of non-discrimination in that the same requirement would be applied to all tenant farmers irrespective of their individual situation and in particular of their contribution to the acquisition of the quota. Such a breach might result, for example, where a tenant farmer wished to discontinue milk production in the course of his lease, but was precluded from benefiting from the outgoers' scheme by the absence of the landlord's consent, even though it was the tenant rather than the landlord who by his efforts had attracted the quota to the holding. In such a case the requirement in the national scheme of the landlord's consent might be contrary to the principle of non-discrimination.

24. Secondly, it is clear in my view that the principle of respect for the right to property must always be observed in the implementation of the quota legislation. In his analysis of that principle in his Opinion in the *Hauer* case, Advocate General Capotorti suggested that the hallmarks of an expropriating measure, which should give rise to

an obligation to compensate, are twofold: namely, that the measure results in the deprivation of all appreciable economic value in the asset and that the deprivation is permanent ([1979] ECR 3727 at pp. 3759-3762). That analysis can be applied, in my view, to the intangible asset constituted by a milk quota, which can properly be regarded as having an independent economic value; and in accordance with that analysis, I would suggest that there may well be cases where the permanent loss to the tenant of the use and value of the quota on expiry of a tenancy can be viewed as a measure of expropriation.

25. In their written observations in this case, both the Commission and the United Kingdom Government have sought to argue that a quota is nothing more than an instrument of market management and cannot be considered as a kind of intangible asset in which property rights can arise. In my view, while this might correspond to the intention of the Community legislation, it does not reflect economic reality. If one considers the nature of the quota from the point of view of the producer, then it is plain that what the quota amounts to is a form of licence to produce a given quantity of a commodity (milk) at a more or less guaranteed price without incurring a penalty (the additional levy). In a market which has been effectively ossified by the introduction of quotas, such a 'licence' is bound to acquire an economic value. This value will primarily translate into higher rental and capital values for dairy holdings. But that a quota can also have an intrinsic value is shown by the practice of 'quota leasing', i.e. the temporary transfer without land of unused quota from one producer to another, a practice authorized by Article 5c (1a) of Regulation No 804/68, as amended by Council Regulation (EEC) No 2998/87 (Official Journal 1987, L 285, p. 1). It is also indicated, though more indirectly, by Article 7(4) of Regulation No 857/84, which can be seen as designed to protect the tenant's interest in the economic value represented by the quota.

26. Community legislation has not resolved the issue of ownership of quota, possibly because it was not considered desirable to admit — for fear of creating a market in quota — that a quota could be owned at all. The issue is not an easy one. On the one hand, the fact that the transfer rules in principle require the quota to follow the land suggests that these attach to the land and should therefore be regarded as the property of the landowner. On the other hand, the existence of Article 7(4) of Regulation No 857/84 and the recent authorization of 'quota leasing' indicate that attachment to the land is not absolute. Moreover, the quotas are allocated to a person, the individual producer, who may of course be a tenant, on the basis of his production in a given reference year, rather than to a holding. These considerations in my view suggest that it is possible for either a landlord or a tenant to have a proprietary interest in a quota.

27. If the above analysis is correct, then there may be cases where failure by a Member State to provide for compensation would amount to breach of the principle of respect for the right to property. Such compensation would normally be payable by

the landlord in return for his obtaining the value of the quota, which might otherwise be seen as a form of 'unjust enrichment'.

28. I would add that it is in my view not possible to argue that Article 7(4) of Regulation No 857/84 already makes sufficient provision for account to be taken of a tenant's interest in the quota. Article 7(4) of Regulation No 857/84 is optional, and if a Member State chooses not to implement it, the normal transfer rules will apply, depriving the tenant both of the use and of the value of the quota. In any event, Article 7(4) only provides for the case of the departing tenant farmer who wishes to retain some or all of the quota in order to continue milk production elsewhere. It does not provide for the case of a departing tenant who would prefer to give up milk production, e.g. with a view to retirement or pursuing a different occupation.

29. Nor does it appear that national agricultural holdings legislation can be relied upon to redress the balance in favour of the tenant. It is of course correct that under the legislation of a number of Member States, agricultural tenants enjoy a high degree of security of tenure. However, such protection is not universal. In fact, at the hearing the Commission agent confirmed that Article 7(4) of Regulation No 857/84 was introduced precisely out of concern for the unprotected status of certain agricultural tenants in the Federal Republic of Germany. Moreover, while the agricultural holdings legislation of certain Member States provides for compensation for the tenant on the expiry of the tenancy for improvements effected by him, it is doubtful whether this would necessarily include compensation for the value of the quota. (See, as regards France, Lorvellec, 'Le régime juridique des transferts de quotas laitiers' in [1987] *Revue du droit rural* No 157, 409-417, at p. 413.) This is illustrated for example by the fact that in the United Kingdom, whose agricultural holdings legislation already provided both for a high degree of security of tenure and for compensation in respect of improvements effected by tenants, it has been thought appropriate to introduce in addition specific legislation providing for compensation by landlords to certain tenants for quota on the expiry of their tenancies (Agriculture Act 1986, sections 13 and 14 and Schedules 1 and 2).

30. It is of course for the national court to determine in the concrete case whether and to what extent account should be taken of the tenant's interest in the quota. It is not in my view appropriate for this Court to seek to spell out in the framework of the present case the kinds of circumstances which the national courts will need to take into account; it must be sufficient for the Court to indicate in general terms the applicability of the principles of non-discrimination and of respect for the right to property in this context.

Conclusion

31. Accordingly I am of the opinion that the following answers should be given to the questions referred by the national court:

(1) The definition of 'holding' in Article 12(d) of Council Regulation No 857/84 includes an agricultural production unit held under a lease granted prior to the entry into force of Council Regulation No 856/84 where, as leased, the production unit included neither dairy cattle nor facilities (such as milking parlours) capable of being used only for milk production and where the lease provided for no obligation on the part of the lessee to engage in milk production.

(2) Article 5(3) of Commission Regulation No 1371/84 must be interpreted as meaning that the surrender of a leased agricultural production unit upon the expiry of a lease granted prior to the entry into force of Council Regulation No 856/84 is a case having 'comparable legal effects' within the meaning of that provision, even where, as leased, the production unit included neither dairy cattle nor facilities (such as milking parlours) capable of being used only for milk production and where the lease provided for no obligation on the part of the lessee to engage in milk production.

(3) The prohibition of discrimination laid down in Article 40(3) of the EEC Treaty precludes Member States from requiring, as a condition of participation in a scheme for the definitive discontinuance of milk production made under Article 4(1) of Council Regulation No 857/84, that a tenant farmer must obtain the consent of his landlord, if the imposition of that requirement, having regard to the particular situation of the tenant farmer, would result in discrimination between producers.

(4) The principle of respect for the right to property guaranteed by the Community legal order requires Member States to provide for financial compensation by the landlord to a tenant farmer who, on expiry of the lease of a holding, loses the right to exploit the quota, in a case where, having regard to the particular situation of the tenant farmer, failure to provide for compensation would result in a breach of that principle.