# OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 September 2001 [1]

1. The questions referred to the Court concern the interpretation of the Community legislation on the milk and milk products sector and, more specifically, the provisions relating to the reference quantities [2] established in 1984 with the aim of preventing the over-production of milk in the European Community.

## I — Facts of the main proceedings

2. The main proceedings arose from the disagreement between the contracting parties as regards the allocation of the reference quantity, following the expiry of the lease and the return of the leased holding to the owners.

3. The lessee, Mr Thomsen, [3] intends to retain the reference quantity whereas the lessors, the Henningsen heirs, [4] are claiming its transfer in their favour.

4. Let us look at the facts behind the dispute.

5. Mr Thomsen ran a dairy farm from 1982, initially together with his father in the form of a civil law partnership and then, after dissolution of that partnership, as a sole proprietor. Under an agreement with Mr Henningsen dated 30 April 1981, Mr Thomsen's father leased farmland for a period expiring on 30 September 1993. Mr Henningsen died in 1991 and, by letter of 20 August 1993, his heirs gave notice terminating the lease agreement with immediate effect. Following a settlement providing for an extension of the lease agreement, Mr Thomsen and his father surrendered the leased land to the Henningsen heirs, on 30 September 1995.

6. After an application by the Henningsen heirs dated 24 November 1995, the defendant administration, the Amt für ländliche

1 — Original language: French.

2 — The expression means the quotas which producers or purchasers of milk or other milk products have available and to which they must adhere, on penalty of having to pay a sum of money or 'levy', if the quantities allocated are exceeded.

3 — Also described as the 'applicant in the main proceedings'.

4 — Also described as the 'intervenors in the main proceedings'.

Räume Husum (Office for Rural Areas), certified by decision of 16 January 1996 that a reference quantity had been transferred to the Henningsen heirs as the lessors of part of the holding, with effect from 1 October 1995. It took that decision on the basis of Paragraph 7(2) and (4) of the Milchgarantiemengenverordnung (German regulation on guaranteed milk quantities) of 21 March 1994. [5]

7. After an unsuccessful objection before the defendant administration, Mr Thomsen brought an action for annulment of the decision of 16 January 1996 in the form of the decision of 14 February 1996 on the objection. Mr Thomsen claimed that, under the relevant provisions of Community law, a reference quantity could be transferred only to a milk producer. In his view, the Henningsen heirs had never produced milk and did not intend to do so in the future.

8. By judgment of 23 March 1998, the competent Verwaltungsgericht (Administrative Court) (Germany) dismissed the action on the ground that, given the other provisions of Regulation (EEC) No 3950/92, [6] the notion of producer referred to in Article 7(2) of that regulation must be interpreted widely, in the sense that it refers to both former and potential producers. In its opinion, any person entitled to a reference quantity can be deemed to be a milk producer even if that person neither sells nor supplies milk.

9. The applicant in the main proceedings appealed against the judgment of the Verwaltungsgericht before the Schleswig-Holsteinisches Oberverwaltungsgericht (Germany).

## II — Legal background

*Community law*

10. In 1984, due to the continuing imbalance between supply and demand in the milk sector, a system of additional levies was introduced by Council Regulation (EEC) No 856/84 of 31 March 1984, amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products. [7] Under Article 5c of Council Regulation (EEC) No 804/68 of 27 June 1968, [8] as amended by Regulation No 856/84, an additional

5 — BGBl. 1994 I, p. 586; regulation amended by the 31st Änderungsverordnung of 3 August 1994 (BGBl. 1994 I, p. 2050) and the 32nd Änderungsverordnung of 26 September 1994 (BGBl. 1994 I, p. 2575) hereinafter 'the MGV'.

6 — Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

7 — OJ 1984 L 90, p. 10.

8 — OJ, English Special Edition 1968 (1), p. 176.

levy is payable for quantities of milk in excess of a reference quantity to be determined.

11. The general rules for the application of the additional levy were defined by 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 No 804/68 in the milk and milk products sector. [9]

12. Regulation No 857/84 was repealed by Regulation No 3950/92, which extended the additional levy system, initially intended to apply until 1 April 1993, until 1 April 2000.

13. Under the second paragraph of Article 5 of Regulation No 3950/92:

'... reference quantities available to producers who have not marketed milk or other milk products for one of the 12-month periods shall be allocated to the national reserve and may be reallocated in accordance with the first subparagraph. Where the producer resumes production of milk or other milk products within a period to be determined by the Member State, he shall be granted a reference quantity in accordance with Article 4(1) no later than 1 April following the date of his application.'

14. Article 7 of Regulation No 3950/92 provides:

'1. Reference quantities available on a holding shall be transferred with the holding in the case of sale, lease or transfer by inheritance to the producers taking it over in accordance with detailed rules to be determined by the Member States taking account of the areas used for dairy production or other objective criteria and, where applicable, of any agreement between the parties. Any part of the reference quantity which is not transferred with the holding shall be added to the national reserve.

...

2. Where there is no agreement between the parties, in the case of rural leases due to expire without any possibility of renewal on similar terms, or in situations involving comparable legal effects, the reference quantities available on the holdings in question shall be transferred in whole or

9 — OJ 1984 L 90, p. 13.

in part to the producers taking them over, in accordance with provisions adopted or to be adopted by the Member States, taking account of the legitimate interests of the parties.'

15. Article 9(c) of Regulation No 3950/92, as amended by Council Regulation (EEC) No 1560/93 of 14 June 1993, [10] defines the notion of producer as follows:

'For the purposes of this regulation:

...

(c) "producer" means a natural or legal person or a group of natural or legal persons farming a holding within the geographical territory of a Member State:

— selling milk or other milk products directly to the consumer,

and/or

— supplying the purchaser'.

*German law*

16. The Federal Republic of Germany defined the methods for organising the transfer of reference quantities in the MGV.

17. Pursuant to Paragraph 7(2) of the MGV, when part of a holding is transferred on the basis of a lease, a corresponding reference quantity is transferred to the lessee. This part corresponds to the ratio between the land pertaining to the transferred part of the holding which is used for milk production and the total area of the holding.

18. According to Paragraph 7(4) of the MGV, if the lessee is not entitled to renew the lease and wishes to continue milk

10 — OJ 1993 L 154, p. 30.

production, one half of the relevant reference quantities is transferred to the lessor, subject to a maximum of 2 500 kg per hectare. This restriction to one half, that is 2 500 kg per hectare, does not apply where the lessor requires the reference quantities in order to produce milk for himself, his spouse or his children.

19. Under Paragraph 9 of the MGV, the milk producer must provide the purchaser with a certificate drawn up by the competent authorities of the *Land*, in this case the Amt für ländliche Räume, showing the reference quantities transferred to him, the corresponding date, the transferring milk producer and the fat content of the production.

20. If the lessor immediately transfers the surrendered land to another lessee, the transfer of the former lessee's reference quantities to the lessor is shown in a first certificate and then the competent authority draws up a second certificate concerning the transfer of the lessor's reference quantities to the new lessee.

## III — The questions referred for a preliminary ruling

21. The referring court points out first of all that, according to the interpretation by the Verwaltungsgericht, the notion of 'producer', within the meaning of Article 9(c) of Regulation No 3950/92, includes both former and future, that is potential, 'producers'.

22. It is uncertain whether that interpretation should be endorsed. It considers that the wording of Article 9(c) of Regulation No 3950/92 is clear and that a literal interpretation would mean that, under Article 7 of the regulation, transfers of reference quantities can take place only if the person taking over the holding is a producer at the time of the transfer or, at any rate, becomes a producer at that time.

23. Conversely, the criteria for application of Article 7 of Regulation No 3950/92 are not satisfied when parts of a holding to which reference quantities attach are transferred by purchase, lease or surrender of leased land to a person who is not a producer and who does not intend to take over milk production or to pass on the land to third parties for that purpose.

24. Since the Schleswig-Holsteinisches Oberverwaltungsgericht considered that the solution to the dispute in the main

proceedings requires an interpretation of Community law, it referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 7(2) of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector to be construed as meaning that, on the expiry of rural leases, the reference quantities available on the holdings in question may be transferred in whole or in part in accordance with provisions adopted or to be adopted by the Member States, taking account of the legitimate interests of the parties, only if at the time of surrender the lessors are producers as defined in Article 9(c) of Regulation No 3950/92?

(2) If the notion of producer in Article 7(2) is to be understood in a broader sense, is a transfer in such cases also possible where the lessors do not envisage taking up the marketing of milk but are desirous of transferring the reference quantities together with the land to third parties?

(3) If the answer to (2) is affirmative, must the third parties to whom the reference quantities are to be transferred be producers as defined in Article 9(c) of Regulation No 3950/92?'

## IV — The questions referred

25. In its three questions, which should be examined together, the referring court is essentially asking whether Article 7(2) of Regulation No 3950/92 should be construed as meaning that the transfer of a reference quantity available on the expiry of a rural lease can be made in favour of the lessor only if he either has the status of 'producer' [11] or transfers the reference quantity available to a third party who has that status.

26. As the referring court itself pointed out, the wording of Articles 7(2) and 9(c) of Regulation No 3950/92 is unambiguous. [12]

27. Under Article 7(2) of Regulation No 3950/92, the reference quantities available on the holdings in question are to be transferred in whole or in part to the

11 — Also referred to in this Opinion as 'the condition at issue'.

12 — Page 15 of the French translation of the order for reference.

producers taking them over. It is apparent from Article 9(c) of Regulation No 3950/92 that, for the purposes of that regulation, 'producer' means a person farming a holding selling milk or other milk products directly to the consumer and/or supplying those products to the purchaser.

28. As a result a lessor who does not carry out the activity of selling or supplying milk on the day when the lease expires cannot claim the reference quantity available from the lessee.

29. Furthermore, it follows from the general scheme of the legislation concerning the additional levy on milk that a reference quantity can be allocated to a farmer only if he has the status of producer. [13] In the case of a transfer, by lease, of a reference quantity together with the land to which it attaches, it can only take place in accordance with the first subparagraph of Article 7(1) of Regulation No 3950/92 if the lessee has the status of a producer. [14]

30. It is true, as indicated by the German Government, that the reference quantity at issue in *EARL de Kerlast* was transferred to the lessee and not to the lessor.

31. But while the first subparagraph of Article 7(1) of Regulation No 3950/92, which is the provision interpreted by the Court in that judgment, is not at issue in the main action, it imposes an identical condition. Accordingly, *EARL de Kerlast* can be applied to this case.

32. The first subparagraph of Article 7(1) provides for the simultaneous transfer of the reference quantity and the holding in the case of the sale, lease or transfer by inheritance of the holding *to the producers taking it over*. While this is not a return to the lessor after expiry of the lease, the situation is comparable, however, since the transfer of the reference quantity takes place in favour of an operator who may, like the lessor, be the owner of the holding. According to that article, the reference quantity available on a holding is transferred with the holding in the case of sale, lease or transfer by inheritance to the producers taking it over. Whether it is to a purchaser or an heir, the transfer is subject to the condition that they are producers.

33. *EARL de Kerlast* confirms the existence of that prior condition. In that judgment, reference is made to the *Ballmann*

13 — Case C-341/89 *Ballmann* [1991] ECR I-25, paragraph 9.

14 — Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 24.

case, cited above, according to which it follows from the general scheme of the legislation concerning the additional levy on milk that a reference quantity cannot be allocated to a farmer who is not a producer.

34. I see no reason to disagree with that judgment.

35. In the present case, both the first subparagraph of Article 7(1) and Article 7(2) of Regulation No 3950/92 refer specifically to transfers of reference quantities available 'to the producers taking them over'. I do not think it appropriate to construe in different ways two provisions which are worded strictly identically, unless an interpretation which neglects the principle of legal certainty is to be recommended.

The common interpretation of the two paragraphs of Article 7 is also dictated by the interpretation, within the first subparagraph of Article 7(1) of Regulation No 3950/92 itself, of the three situations envisaged by that provision. The status of producer, required in *EARL de Kerlast* in the case of transfer of a reference quantity by lease, must necessarily apply in the case of sale or inheritance, unless the words 'producers taking them over', placed in that sentence as a common factor, are to be interpreted differently.

36. The principle thus based on the general scheme of the legislation applicable is not contradicted by other considerations which would justify distinguishing a tenant, purchaser or heir, on the one hand, and a lessor recovering his holding, on the other, in order to apply the condition relating to the status of producer. Like the purchaser or heir, the lessor is the owner of the holding. It is therefore natural that the status of producer required of the first two is also applied to him.

37. The intervenors in the main proceedings point out that Article 7(1) of Regulation 857/84 provided that, in the case of sale, lease or transfer by inheritance, the transfer was made to the purchaser, tenant or heir, without mentioning the condition at issue. That regulation was repealed by Regulation No 3950/92 but, according to the intervenors, it is clear from the 15th recital in the preamble to the latter regulation that the original choice should not be changed, namely 'the principle ... that when an undertaking was sold, leased or transferred by inheritance, the corresponding reference quantity was transferred to the purchaser, tenant or heir'. The intervenors infer from that recital that the substitution of the term 'producer' for 'purchaser', 'tenant' or 'heir' does not impose a condition of carrying out production activity.

38. That interpretation ignores the fact that a Commission text, Regulation (EEC)

No 1371/84, laid down detailed rules for the application of the additional levy as it had just been established, [15] which led it to specify, in particular, the detailed rules for the application of Article 7(1) of Regulation No 857/84. Point 1 of the first subparagraph of Article 5 of Regulation No 1371/84 provided that, in the case of sale, lease or transfer by inheritance, the reference quantity was transferred to the producer who takes over the holding. Consequently, the concern shown by the Community legislature, in the preamble to Regulation No 3950/92, not to change the initial wording must not only be understood as a concern to maintain the principle of transfer to the purchaser, tenant or heir. It also shows the will to retain the condition at issue. If it had been otherwise, it may be presumed that the Community legislature would have specified it by mentioning it in the preamble and withdrawing that condition from the first subparagraph of Article 7(1) of Regulation No 3950/92. However, that condition, included in Regulation No 1371/84, which is a Commission regulation, is now taken up in Regulation No 3950/92, which is a Council regulation.

39. It is therefore not established that, by Regulation No 3950/92, the Council intended to change the general scheme of the legislation applicable to the additional levy, as described by the Court in the *EARL de Kerlast* judgment.

40. The *St. Martinus Elten* case, [16] which, it is argued by the German Government, confirms that the surrender of the holding to the lessor includes the corresponding reference quantities, cannot be taken as recognition by the Court that the lessor did not have the status of a producer.

41. In that judgment, the Court ruled that 'on expiry of a lease, the reference quota reverts to the lessor, where the former lessee does not intend to continue milk production'. [17] In fact, there is no mention of the condition that the lessor must carry out production. According to the German Government, the lessor, in that case, was a Catholic parish and did not consider producing milk itself.

42. It is true that the *St. Martinus Elten* judgment made no reference to the condition at issue, although it already appeared in point 3 of the first subparagraph of Article 5 of Regulation No 1371/84, which was applicable at the material time in the main proceedings. [18]

43. However, I do not draw from that judgment the same conclusions as those relied on by the German Government in its written observations.

15 — Regulation (EEC) No 1371/84 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).

16 — Case C-463/93 *St. Martinus Elten* [1997] ECR I-255, paragraph 30.

17 — Paragraph 35.

18 — Paragraph 31.

44. If, in *St. Martinus Elten*, the Court wished to explain the system applicable to the reference quantity in the event of termination of the lease, it is in view of the fact that the lessee did not intend to continue milk production. [19] At no point was there any debate about whether or not the parish in question had the status of a producer. Consequently, we believe that the allocation of the reference quantity was determined by the Court in consideration of the only factual data it had, namely the abandonment of milk production by the lessee. Since it was no longer a producer, it was not, in any case, entitled to retain the reference quantity at issue.

45. That finding is confirmed by the fact that the Court went on to make a reference to Articles 7 of Regulations Nos 857/84 and 1546/88 [20] although the first does not mention the condition relating to the status of producer and the second refers to it, without stating the reasons for favouring one of the two provisions. It is my view that the Court would have had to state precise reasons on this point if it had considered that Article 7 of Regulation No 1546/88, which was nonetheless adopted pursuant to Article 7 of Regulation No 857/84, had added the condition at issue to it unlawfully.

46. The failure to mention the condition relating to the lessor's status as a producer can therefore be explained only by examining the question referred for a preliminary ruling concerning the legal rules applicable in the event of termination of a lease in the light of the activity of the lessee.

47. I must now examine the impact on the reply to the questions referred of the principle that the reference quantity is transferred with the land giving rise to its allocation. [21] According to the Court's case-law, the Community legislature intended that, in principle, at the end of the lease, the reference quantity should revert to the lessor who retakes possession of the holding. [22] In this way, the Court formalises the principle that the reference quantity must remain attached to the land in order to prevent speculation on milk quotas and a concentration of those quotas to the benefit of producers who are inclined to practise intensive farming. [23]

48. In the present case, the application of the principle of the concomitant transfer of land and reference quantities would not be

19 — Paragraph 35.

20 — 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).

21 — Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 13.

22 — Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 13, and *St. Martinus Elten*, cited above, paragraph 30.

23 — See point 31 of the Opinion of Advocate General Ruiz-Jarabo Colomer in *EARL de Kerlast*.

without consequence. It would mean conceding that the status as a producer of the lessor whose holding is no longer subject to a lease is not a condition of the transfer, in his favour, of the reference quantity previously held by the lessee.

49. That is not the solution I recommend in this case.

50. It is clear from the case-law of the Court that that principle is not without exceptions.

51. *Ballmann* and *EARL de Kerlast* demonstrate that point, as they make the allocation and transfer of a reference quantity conditional upon the fact that the farmer is a producer.

52. In the same way, in *Wachauf* and *St. Martinus Elten*, the Court set out that principle by stating that it applies only subject to the Member States' power to allocate all or part of the reference quantity to the departing lessee. That exception is the expression of the provision applicable at the time, under which 'in the case of rural leases due to expire, where the lessee is not entitled to an extension of the lease on similar terms, Member States may provide that all or part of the reference quantity corresponding to the holding or the part thereof which forms the subject of the lease shall be put at the disposal of the departing lessee, if he intends to continue milk production'. [24]

53. The Court thus logically drew the inferences from legislation limiting the principle in question to the benefit, in that case, of the lessee.

54. There are no grounds for reasoning otherwise, in the present case, where the notion of 'producer' must be understood as expressing the intention of the Community legislature to make the right of the lessor to take over the reference quantity conditional upon the demonstration of his status as a farmer selling or supplying milk, that is his status as 'producer', within the meaning of Article 9(c) of Regulation No 3950/92.

55. It is merely a question of applying to the owner himself the rule of preventing the speculative manœuvres to which farmers who abandon or do not intend to take over milk production are likely to resort. As is

24 — Article 7(4) of Regulation No 857/84, as amended by Council Regulation (EEC) No 590/85 of 26 February 1985 (OJ 1985 L 68, p. 1, corrigendum OJ 1985 L 81, p. 41).

clear from the settled case-law of the Court on the allocation of reference quantities, 'that milk quotas may be refused for producers seeking them not in order to resume marketing milk on a permanent basis but in order to obtain a purely financial advantage therefrom, relying on the market value acquired by the milk quota in the meantime'. [25]

56. The condition at issue also applies to the third parties to whom a lessor decides to assign his holding. In so far as Article 7(2) of Regulation No 3950/92 refers to producers, it does not restrict the transfer of reference quantities to lessors alone. It allows them, when they regain possession of their holding, to enter into a contract with a new lessee. Consequently, that new lessee can be the recipient of the reference quantity only if he is a 'producer', within the meaning of Article 9(c) of Regulation No 3950/92.

57. The Commission has recommended the interpretation of Article 7(2) of Regulation No 3950/92 which I propose the Court should adopt. At the hearing, however, it recognised that such a solution does not allow the lessor to recover the reference quantity in order to resume the activity of producer when he has interrupted that activity, particularly by dint of leasing his holding.

25 — Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 57.

58. In fact, the proposed interpretation, though legal, does not allow the lessor in that situation to obtain the transfer of the reference quantity. That is a flaw in the existing provision which justifies an interpretation of Article 7(2) of Regulation No 3950/92 such as to reconcile the letter and the general scheme of the legislation with the concern to allow an owner who wishes to do so to obtain the transfer of the reference quantity in order to resume production.

59. According to the German Government, the notion of 'producer' should be interpreted in the light of the second subparagraph of Article 5 of Regulation No 3950/92.

60. It should be borne in mind that, under that provision, reference quantities available to producers who have not marketed milk for 12 months are to be allocated to the national reserve and may be reallocated. It is also provided that the producer is to receive a reference quantity where he resumes production within a certain period.

61. The German Government maintains that, according to those provisions, a temporary interruption to milk production

does not mean that the status of producer disappears. A farmer who abandons the production and supply of milk for a period of 12 months is considered to be a producer during that period.

62. The solution recommended by the German Government does not seem to me to be compatible with Article 9(c) of Regulation No 3950/92.

63. We know that the definition of 'producer' is given by that provision 'for the purposes of this regulation'. That means that, if another definition is not stated in an article of that regulation with a view to a specific and derogating rule, any reference to the term 'producer' must be read as implementing the notion as defined in Article 9(c) of Regulation No 3950/92.

64. A producer, within the meaning of that provision, is therefore a farmer who sells milk or milk products to the consumer or supplies them to the purchaser, and not a farmer who has ceased to do so. To describe the latter as a producer would mean that any farmer who has produced milk in the past should be considered to be a producer, including where he did not intend to resume that production, in breach of Articles 7 and 9(c) of Regulation No 3950/92. In the same way, any farmer expressing the intention, even if it is uncertain, of resuming production would benefit from the transfer of the reference quantities, provided that he is the lessor of the holding.

65. The flaw mentioned above can, however, be mitigated. For that purpose, I ask the Court to interpret the rules applicable in a manner which is more respectful of their content and the general scheme of the legislation.

66. Therefore, the Court can describe as a producer, within the meaning of Article 7(2) of Regulation No 3950/92, not only the lessor, a farmer, who sells milk or other milk products direct to the consumer or supplies them to the purchaser, but also a person who undertakes to do so as soon as the lease expires.

67. In my view, there is no reason to distinguish a lessor who produces milk from one who is preparing in a definite manner to produce it.

68. Compliance with that undertaking can be guaranteed by the Member States under conditions to be determined by them.

## Conclusion

69. In view of the foregoing, I propose that the Court should give the following reply to the questions referred to it by the Schleswig-Holsteinisches Oberverwaltungsgericht:

Article 7(2) of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector should be construed as meaning that the transfer of a reference quantity available on the expiry of a rural lease can be made to the lessor only if he either has the status of a 'producer' within the meaning of Article 9(c) of that regulation or, on expiry of the lease, transfers the reference quantity available to a third party who has that status. The notion of 'producer' within the meaning of Article 7(2) of Regulation No 3950/92 also includes the lessor who undertakes to take up the activity of 'producer' with the meaning of Article 9(c) of that regulation as soon as the lease expires.