# OPINION OF ADVOCATE GENERAL
# STIX-HACKL
# delivered on 18 May 2006 [1]

## I — Introduction

1. In these proceedings for a preliminary ruling the Verwaltungsgericht Sigmaringen is asking the Court to interpret Article 7 of Regulation (EEC) No 857/84, [2] as amended by Regulation (EEC) No 590/85, [3] and Article 7 of Regulation (EEC) No 1546/88. [4]

2. This case is concerned with the question of retention of the milk reference quantity where a tenant voluntarily brings a rural lease to an end and the landlord is not a milk producer and does not intend to take up milk production or to grant a lease to another milk producer.

## II — Legal framework

### A — *Community law*

3. In 1984, as a result of surplus milk production within the Community, a rule providing for an additional levy on milk was introduced by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Council Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products. [5] Under Article 5c of Council Regulation (EEC) No 804/68 of 27 June 1968, [6] as amended by Regulation No 856/84, an additional levy was imposed on milk quantities which exceeded a reference quantity that was to be laid down.

1 — Original language: German.

2 — Council Regulation 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).

3 — Council Regulation of 26 February 1985 (OJ 1985 L 68, p. 1).

4 — Commission Regulation 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).

5 — OJ 1984 L 90, p. 10.

6 — OJ, English Special Edition 1968 (I), p. 176.

4. 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 were brought in by Regulation No 857/84.

5. The relevant parts of Article 7 of Regulation No 857/84, as amended by Regulation No 590/85, read as follows:

'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.

Where land is transferred to the public authorities and/or for public use, without prejudice to the second subparagraph of paragraph 3, Member States may provide that all or part of the reference quantity corresponding to the holding or to the part of the holding transferred shall be put at the disposal of the departing producer if he intends to continue milk production.

...

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.

5. The detailed implementing rules for this Article shall be adopted under the procedure laid down in Article 30 of Regulation (EEC) No 804/68.'

6. Article 7 of Regulation No 1546/88 also contains the following detailed rules in this connection, in extract:

'For the purposes of applying Article 7 of Regulation (EEC) No 857/84 and without prejudice to paragraph 3 thereof, the following rules shall apply to the transfer of reference quantities granted to producers and purchasers in application of formulas A and B and of reference quantities granted to producers selling for direct consumption:

1. Where an entire holding is sold, leased or transferred by inheritance, the corre-

sponding reference quantity shall be transferred in full to the producer who takes over the holding.

2. Where one or several parts of a holding is sold, leased or transferred by inheritance, the corresponding reference quantity shall be distributed among the producers operating the holding in proportion to the areas used for milk production or according to other objective criteria laid down by Member States. Member States may disregard transferred parts the area of which used for milk production is less than a minimum size which they shall determine. The part of the reference quantity corresponding to that area may be added entirely to the reserve.

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

4. In the event of the application of the second subparagraph of Article 7 (1) of Regulation (EEC) No 857/84, concerning the transfer of land to the public authorities and/or for public use, and Article 7(4) of the said Regulation, concerning rural leases which are due to expire and which cannot be extended on similar terms, all or part of the reference quantity corresponding to the holding or to the part of the holding which is the subject of the transfer or of the said lease shall be put at the disposal of the producer concerned if he intends to continue milk production, provided that the sum of the reference quantity thus made available to him and the quantity corresponding to the holding which he takes over or on which he continues milk production does not exceed the reference quantity which was available to him before the land was transferred or before the lease expired.

Member States may apply the provisions of points 1, 2 and 4 in respect of transfers during and after the reference period.

...'

7. With effect from 1 April 1994 Regulation No 857/84 was repealed and replaced by Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk sector. [7]

7 — OJ 1992 L 405, p. 1.

8. Article 7(1) of Regulation No 3950/92 reads as follows:

'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.

...'

B — *National law*

9. The Federal Republic of Germany provided for the allocation of reference quantities in the Milchgarantiemengenverordnung (German regulation on guaranteed quantities for milk, 'the MGV') of 21 March 1994, [8] as most recently amended by the 33rd Änderungsverordnung (amending regulation) of 25 March 1996. [9]

10. The relevant parts of Paragraph 7 of the MGV read as follows:

'(3a) If parts of a holding that are used for milk production are returned to the landlord after 30 September 1984 under a lease that was concluded prior to 2 April 1984, no reference quantity shall be transferred for an area surrendered of up to 5 hectares; the reference quantity corresponding to an area in excess of 5 hectares shall pass to the landlord as to one half subject, however, to a maximum of 2 500 kg per hectare. This shall not apply where the landlord and tenant conclude an agreement to the contrary, the tenant terminates the lease or the landlord can prove that he is reliant upon the reference quantity for milk production for himself, his spouse or his children; in those cases, however, a maximum of 5 000 kg per hectare shall pass to the landlord. The reference quantity passing to the landlord pursuant to the first or second sentence shall, insofar as it was allocated under the last subparagraph of Article 3a(1) and the second possibility in the first sentence of Article 3a(3) of Regulation (EEC) No 857/84, be released to the Federal Republic of Germany if the transfer takes place prior to the expiry of the deadline laid down for that purpose in the measures specified in Paragraph 1. The transfer of reference quantities under the first sentence shall not encompass reference quantities which, under the fifth sentence of Paragraph 2a(4) in conjunction with Paragraph 2a(3) of the Milchaufgabevergütungsgesetz (Law on payments for

8 — BGBl. 1994 I, p. 586.
9 — BGBl. 1996 I, p. 535.

discontinuation of milk production), have been released and allocated to the lessee for consideration.

...'

## III — Facts, main proceedings and questions referred for a preliminary ruling

11. On 15 November 1980 Mr Leiprecht leased a milk-production area of 4.01 hectares to the father of Mr Kibler, who is the claimant in the main proceedings ('the claimant).

12. The claimant, who had by now succeeded his father, terminated the lease on 30 November 1992. Before doing so he had sublet a pro-rata milk reference quota (reference quantity) to Mr Ott.

13. On 16 December 2002 Mr Leiprecht, the landlord, then applied to the Amt für Landwirtschaft, Landschafts- und Bodenkultur Ravensburg (Ravensburg agency for agriculture, countryside and soil cultivation, 'the ALLB') for the grant of a certificate for the proportion of the milk reference quantity that had reverted to him as a result of the demised land being returned. In that application he said that he himself was not a milk producer and that he did not intend to take up milk production.

14. By a decision of 5 May 2003 a certificate was granted to Mr Leiprecht by the ALLB stating, first, that with effect from 1 April 2003 a reference quantity of 4 391.28 kg per hectare had been assessed for the transfer back of the land used in milk production totalling 4.0166 hectares; second, the certificate said that he had been transferred a delivery reference quantity of 11 817 kg with a reference fat content of 4.08%.

15. Although Mr Ott, the sub-lessee, claimed only that the reference fat content given was wrong, the claimant and Mr Leiprecht lodged an objection to the ALLB decision.

16. The claimant's objection was dismissed by a decision of the Regierungspräsidium Tübingen (Tubingen Regional Council) of 27 April 2004. It reasoned that for the purposes of a legal assessment recourse should be had to those provisions that

applied on 30 November 1992. The relevant regulation was therefore Regulation No 857/84 of 31 March 1984 and the judgment of the Court in *Thomsen*[10] on the interpretation of Regulation No 3950/92 did not apply.

17. On 25 May 2004 the claimant instituted judicial proceedings against that decision in the referring court. He is essentially reasoning that on the date that the lease was surrendered neither Mr Ott nor Mr Leiprecht was a milk producer. He argues that the *Thomsen* judgment also applies to cases that come under the provisions of Article 7(1) of Regulation No 857/84 and especially to the detailed rules for the application of the additional levy referred to in Article 5c of Regulation No 804/68, which mentions the term 'producer' in the context of the transfer of a holding and reference quantity.

18. Land Baden-Württemberg, the defendant in the main proceedings, ('the defendant') argues that the quota assignee's status as milk producer is not relevant. The term 'producer' is not mentioned in the first subparagraph of Article 7(1) of Regulation No 857/84 as amended by Regulation No 590/85. A provision whereby on the expiry of a lease a landlord has to be a producer in order to be able to receive the quota once again is to be found for the first time in Article 7(2) of Regulation No 3950/92.

10 — Case C-401/99 [2002] ECR I-5775.

19. In the view of the referring court the question whether the reversion of a reference quantity to the landlord depends upon his status as a producer cannot be clearly answered on the basis of former case-law of the Court. If the answer to this question should be in the affirmative the question that then arises is whether, in the event of the land being returned, the reference quantity can be retained by a tenant who has voluntarily brought the lease to an end.

20. It is against this background that the Verwaltungsgericht Sigmaringen referred the following questions to the Court for a preliminary ruling in a decision of 12 May 2005, received by the Registrar of the Court on 6 July 2005:

'(1) Is national legislation of a Member State, which provides that on the return of a leased part of a holding the corresponding reference quantity for the areas of the tenant's holding used for milk production is to revert to the landlord along with that part of the holding even if the landlord, at the time it is so returned, is no longer a milk producer, no longer intends to take up milk production and also does not intend to grant a lease to another milk producer, in conformity with Article 7(1) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 590/85, and with points 2, 3 and 4 of the first subparagraph of Article 7 of Regulation (EEC) No 1546/88?

(2) If the answer to the first question should be in the negative: Is national legislation of a Member State, which provides that on the ending of a lease the reference quantity is to be retained in its entirety by the tenant of that part of the holding, in conformity with Article 7(1) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 590/85, and with point 4 of the first subparagraph of Article 7 of Regulation (EEC) No 1546/88 even where the lease has been voluntarily brought to an end?'

## IV — The first question referred

21. First of all, it should be borne in mind that in the context of judicial cooperation between national courts and the Court of Justice, it is for national courts to establish and to evaluate the facts of the case and for the Court of Justice to provide the national court with such guidance on interpretation as may be necessary to enable it to decide the dispute. [11]

22. By its first question the referring court asks essentially whether, under the Community legislation on the additional levy for milk applicable before Regulation No 3950/92 came into force — particularly Regulation No 857/84, as amended by Regulation No 590/85 and Regulation No 1546/88 — when a demised part of a holding is returned the corresponding reference quantity for the areas used for milk production can revert back to the landlord even if, at that time, the landlord is no longer a milk producer and also does not intend to take up milk production or to grant a lease of the land concerned to another milk producer.

23. In the judgment in *Thomsen* the Court ruled that upon expiry of a rural lease of a dairy holding, the transfer in whole or in part to the lessor of the reference quantity attached to that holding is possible only where the lessor himself either has the status of a milk producer or intends to take up milk production or where, at the date of expiry of the lease, he transfers the reference quantity to a third party who has that status. [12]

24. However, there is particular doubt in the main proceedings as to whether the status of producer is a precondition for the transfer back to the lessor of the reference quantity attached to the demised land because the judgment in *Thomsen* was pronounced in

11 — See inter alia Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 50; Case 332/88 *Alimenta* [1990] ECR I-2077, paragraph 9; and Case 139/85 *Kempf* [1986] ECR 1741, paragraph 12.

12 — *Thomsen* (cited in footnote 10), paragraphs 41, 45 and 46.

relation to Regulation No 3950/92, Article 7(1) of which — in contrast to the first subparagraph of Article 7(1) of Regulation No 857/84, as amended by Regulation No 590/85, which applies in the present case — expressly mentions the term 'producer'.

25. It should be noted with regard to this distinction that when interpreting Regulation No 3950/92 in the *Thomsen* case the Court relied more than once on the principle that a reference quantity can be allocated to a farmer only if he has the status of a producer. [13]

26. This principle derives from the general scheme of the provisions concerning the additional levy on milk [14] and, as rightly claimed by the Commission, has been relied upon by the Court even prior to the judgment in *Thomsen* in connection with the interpretation of similar provisions in Regulation No 857/84. [15]

27. Accordingly, the interpretation by the Court in the *Thomsen* judgment, by which a lessor can be allocated a reference quantity only if he has the status of producer or intends to take up milk production or grant a lease to another milk producer, is based not on the wording of Regulation No 3950/92 but on a general principle underlying the provisions concerning the additional levy on milk generally and Regulations No 857/84 and No 1546/88 in particular. The ruling by the Court in *Thomsen* must therefore also apply in this case.

28. Therefore, the answer to the first question must be that Article 7(1) of Regulation No 857/84, as amended by Regulation No 590/85, and points 1, 3 and 4 of the first subparagraph of Article 7 of Regulation No 1546/88 should be interpreted as meaning that on the return of a leased part of a holding the corresponding reference quantity for the areas used for milk production cannot revert to the landlord if, at that time, he is no longer a milk producer and does not intend to either take up milk production or to grant a lease of the areas concerned to another milk producer.

## V — The second question referred

29. By its second question the referring court asks essentially, if the answer to the

13 — *Thomsen* (cited in footnote 10), paragraphs 32 and 39.

14 — Ibid.

15 — See Case C-341/89 *Ballmann* [1991] ECR I-25, paragraph 9, and Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 24.

first question should be in the negative, whether under Regulation No 857/84, as amended by Regulation No 590/85, and Regulation No 1546/88, on the ending of a lease the reference quantity can be retained in its entirety by the tenant of that part of the holding where the lease has been voluntarily brought to an end.

30. The Court has consistently held that the entire system of reference quantities is based on the general principle laid down by Article 7 of Regulation No 857/84 and Article 7 of Regulation No 1546/88, that a reference quantity is allocated in relation to land and must therefore be transferred with that land. [16]

31. In principle, therefore, a reference quantity is transferred only by transfer of the land of the holding to which it attaches, provided that such transfer complies with the formal requirements and other conditions laid down in that regard by Article 7 of Regulation No 857/84 and Article 7 of Regulation No 1546/88. In other words, the system of reference quantities precludes the bare transfer of reference quantities alone, except where Community law provides otherwise. [17]

32. In this case, however, consideration should be given to the exception established by Article 7(4) of Regulation No 857/84, as amended by Regulation No 590/85, for the application of which detailed rules are laid down by point 4 of the first subparagraph of Article 7 of Regulation No 1546/88. [18]

33. Under Article 7(4) of Regulation No 857/84 the Member States may provide for the reference quantity to be put at the disposal of the departing lessee. In addition to the fact that, as the German Government has stated, the Federal Republic of Germany has not made any use of such a possibility, it is apparent from the very wording of this provision that it relates to cases where the lessee intends to continue milk production after the expiry of a lease that cannot be extended.

34. It is also clear from the sixth recital in the preamble to Regulation No 590/85 that this provision, which is also to be afforded strict interpretation as an exception to the general principle that the reference quantity has to be transferred with the land to which it is attached, was introduced by Regulation No 857/84 so as to alleviate the difficult consequences at an economic and social level that might result from the application of that principle in the case of a lessee whose

16 — See, to that effect, *EARL de Kerlast* (cited in footnote 15), paragraph 17, and Case C-463/93 *St. Martinus Elten* [1997] ECR I-255, paragraph 24; see also Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 13, and Case C-189/92 *Le Nan* [1994] ECR I-261, paragraph 12.

17 — See *EARL de Kerlast* (cited in footnote 15), paragraph 19.

18 — See *Herbrink* (cited in footnote 16), paragraph 14.

lease on a holding is due to expire but who intends to continue milk production elsewhere.

35. As the Commission correctly states, in my opinion, in view of the objective of that exception the position of a lessee who brings a rural lease to an end voluntarily — as in the present case — does not warrant the same protection as that of a lessee whose lease is due to expire and who is not entitled to an extension of that lease on similar terms.

36. The exception provided in Article 7(4) of Regulation No 857/84, as amended by Regulation No 590/85, does not therefore apply in a case such as this.

37. The answer to the second question referred to the Court must therefore be that Article 7(1) of Regulation No 857/84 and point 4 of the first subparagraph of Article 7 of Regulation No 1546/88 are to be interpreted as meaning that in the event of a rural lease being brought to an end the reference quantity cannot be retained by the lessee of part of the holding if the lease has been voluntarily brought to an end.

38. Ultimately, therefore, in circumstances such as those appertaining in the main proceedings, because the relevant conditions are not fulfilled, the reference quantity attached to demised land cannot either revert to the lessor, who does not have the status of producer, or be retained by the departing lessee, who has voluntarily brought the lease to an end. As suggested by the German Government and the Commission in this case, the reference quantity at issue should therefore, at most, be allocated to the national reserve and then reallocated.

## VI — Costs

39. The costs incurred by the German Government and by the Commission are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

## VII — Conclusion

40. In the light of the foregoing, I conclude that the questions referred for a preliminary ruling should be answered as follows:

(1) Article 7(1) of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as amended by Council Regulation (EEC) No 590/85 of 26 February 1985, and points 1, 3 and 4 of the first subparagraph of Article 7 of 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 should be interpreted as meaning that on the return of a leased part of a holding the corresponding reference quantity for the areas used for milk production cannot revert to the landlord if, at that time, he is no longer a milk producer and does not intend to either take up milk production or to grant a lease of the areas concerned to another milk producer.

(2) Article 7(1) of Regulation No 857/84 and point 4 of the first subparagraph of Article 7 of Regulation No 1546/88 are to be interpreted as meaning that in the event of a rural lease being brought to an end the reference quantity cannot be retained by the lessee of part of the holding if the lease has been voluntarily brought to an end.