OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 14 November 1990 *

Mr President,
Members of the Court,

1. In the present proceedings for a preliminary ruling, the Court is requested to interpret the terms 'producer' and 'holding' used in Article 12(c) and (d) of Council Regulation No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector. [1]

Article 5c of Regulation No 804/68, [2] as amended by Regulation No 856/84, [3] introduced for a period of five years, with a view to reducing structural surpluses in the industry, an additional levy to be charged on quantities of milk delivered in excess of a reference quantity (exempt from the levy), to be determined in accordance with the procedures laid down in Regulation No 857/84.

I refer the Court to the Report for the Hearing for details of the applicable legislation and shall now briefly summarize the facts of the case.

2. Under the relevant Community legislation, Mr Ballmann was granted a reference quantity corresponding to the milk production of about 40 cows; Mr Menkhaus, on the other hand, was granted a reference quantity equal to the milk production of about 20 cows, on the basis of the milk production obtained by him in 1983 on his own holding, where the facilities had become outdated.

By contract of 15 June 1987, Mr Ballmann, who owns an agricultural holding with 60 cow stalls, 20 of which are located in a new shed, leased to Mr Menkhaus, likewise a farmer engaged in milk production, the 20 stalls in the new shed.

Following signature of the lease, the competent Oberfinanzdirektion (Regional Finance Directorate) gave notice that Mr Menkhaus could no longer be regarded as a milk producer within the meaning of the applicable Community rules and that, as a result, the milk production obtained by him would be set against Mr Ballmann's reference quantity.

The lease provides *inter alia* that the parties are to provide separately for the feeding, milking, insemination and veterinary treatment of their respective livestock. Apart from the general facilities of the cowshed, only the milking machinery is used by both

* Translated from the Italian.

1 — OJ 1984, L 90, p. 13.

2 — Regulation No 804/68 of the Council on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

3 — OJ 1984, L 90, p. 10.

parties. However, the milk obtained is stored in separate tanks and the amount obtained by each is measured by an electronic gauge.

Relying on the provisions of the lease, Mr Ballmann instituted proceedings before the Finanzgericht (Finance Court) against the decision adopted by the Oberfinanzdirektion. His claim was dismissed on the grounds that the lessee could not use his own reference quantity on the lessor's holding.

The Bundesfinanzhof (Federal Finance Court), before which Mr Ballmann brought an appeal, made the present reference to the Court, in which it asks essentially whether the terms 'producer' and 'holding' used in Article 12(c) and (d) respectively of Regulation No 857/84 are to be interpreted as meaning that a milk producer who has leased accommodation for his cows must set the milk produced against the lessor's reference quantity, the latter also being a milk producer, or against his own reference quantity, which was granted to him on the basis of the milk production of his own holding. It also asks whether the answer must take account of the terms of the lease, the circumstances of the case or both.

3. It is first necessary to establish who must be regarded as the producer of the milk from cows accommodated in the leased stalls.

The concept of producer is defined in Article 12(c) of Regulation No 857/84 as the farmer (whether a natural or legal person) 'selling milk or other milk products directly to the consumer, and/or supplying the purchaser', provided that his holding is located within the geographical territory of the Community. The term in question is therefore to be read in close conjunction with the term 'holding', which is defined in Article 12(d) as 'all the production units operated by the producer and located within the geographical territory of the Community'.

Those definitions show that the status of producer attaches to anyone who operates a holding, that is to say a collection of production units, and that ownership of the units in question is not a requirement.

That interpretation is, moreover, in conformity with the case law of the Court, which, in its judgment of 13 July 1989[4] stated that the leasing of a holding or part thereof does not exclude the existence of an undertaking for the production or marketing of milk within the meaning of Article 12 of Regulation No 857/84, thus interpreting the term in question broadly.

Furthermore, as emphasized by the Commission in its observations, the interpretation whereby a lessee of production units may also be a 'producer' for the purposes of the milk levy system is in conformity with the reality of the situation and with the spirit of the system. The purpose of the milk quota system is not to

4 — Case C-5/88, *Wachauf* [1988] ECR 2609.

eliminate all production but rather to ensure that such production, albeit reduced, is carried out under the best possible technical and structural conditions.

4. Since it has been established that a lessee may also be regarded as a producer for the purposes of the legislation at issue, what remains to be determined is whether, in principle, it is possible to set the milk production obtained in the production units belonging to a farmer, who is also a milk producer, against the reference quantity granted to the lessee in respect of a holding which he owned.

It is undeniable that the legislation at issue establishes a link between the reference quantity and the land. Article 7(1) of Regulation No 857/84 provides, for example, that where a holding is leased, the corresponding reference quantity is to be transferred to the tenant.

However, as the Commission emphasized, that principle is intended to restrict the possibility of 'marketing' reference quantities and to restrict the possibility of speculation.

On the other hand, the fact of a link with the land does not imply that the quantity exempt from the levy must be produced using the same production units as those previously used for the milk production taken as the basis for determination of the reference quantity. In fact, the quantities in question are not attributed to a holding but to a person, namely the producer and there is, therefore, no reason for that producer not to be a lessee to whom a reference quantity was granted on the basis of production obtained by him in a given reference year and therefore, possibly, on another holding.

Indeed, it seems to me that milk produced by a farmer in leased production units may, in principle, be set against the reference quantity granted to him on the basis of milk production obtained on premises owned by him, and that applies even where the lessor is also a milk producer.

5. As regards the second question, concerning the specific conditions to be satisfied for the milk obtained by the lessee to be set against his reference quantity, it is necessary in the first place to take account of the link created by Article 12 between the milk production and the producer's holding.

As we have seen, the status of producer presupposes that the person concerned independently manages the holding; that means, in principle, that for the application of the system in question, it is essential for the quantities of milk produced on the holding to be reliably apportioned if there is more than one producer.

Admittedly, under a lease, such an apportionment might prove difficult where, as in the present case, the lessor and the lessee are both milk producers. In such circumstances, in order to verify whether the quantities of milk produced by the persons concerned are actually and unequivocally apportioned, reference must be made to the terms of the lease and to the production conditions.

It is clear that such an assessment is a matter to be undertaken by the national court, on the basis of a number of objective criteria. This means that: the lessee must actually manage the leased production units independently, on his own account, and, above all, that the quantity of milk produced by him must be clearly distinguished from that produced by the lessor, and must therefore be stored and delivered separately.

6. In view of the foregoing considerations, I therefore suggest that the Court give the following answer to the questions submitted by the Bundesfinanzhof:

Article 12(c) and (d) of Regulation No 857/84 must be interpreted as meaning that the quantity of milk obtained by a farmer from his own cows accommodated in leased production units must be set against the reference quantity of the lessee where the latter operates those units on his own account and where the quantities of milk produced by the lessor and the lessee are also distinguished from each other without possibility of error.