JUDGMENT OF THE COURT (Second Chamber)
25 May 2000 *

In Case C-273/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Hans-Josef Schlebusch

and

Hauptzollamt Trier

on the interpretation of the first sentence of Article 3a(3) 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 (OJ 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35),

* Language of the case: German.

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, G. Hirsch (Rapporteur) and V. Skouris, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Schlebusch, by J. Lukanow, Rechtsanwalt, Euskirchen,

— the Commission of the European Communities, by M. Niejahr, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2000,

gives the following

Judgment

1 By order of 14 May 1998, received at the Court on 20 July 1998, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of the first sentence of Article 3a(3) 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 (OJ 1984 L 90, p. 13), as amended by Council Regulation (EEC) No 1639/91 of 13 June 1991 (OJ 1991 L 150, p. 35) ('the provision at issue').

2 That question was raised in proceedings between Mr Schlebusch, a milk producer at the material time in the case in the main proceedings, and the Hauptzollamt (Principal Customs Office) ('the HZA') Trier concerning the definitive allocation of a special reference quantity in addition to an original reference quantity.

The Community legislation

3 On account of the surpluses then a feature of milk production in the Community, the Council adopted Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1). That regulation provided for the payment of a non-marketing or a conversion premium to producers undertaking not to market milk or milk products for a period of five years or to convert their dairy herds to meat production during a period of four years.

4 Since there was again an excess of milk produced in 1983, 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 (OJ 1984 L 90, p. 10) introduced an additional levy on quantities of milk delivered exceeding a reference quantity to be determined, for each producer or purchaser, within a total quantity guaranteed to each Member State. In accordance with Regulation No 857/84, the reference quantity exempt from the levy is equal to the quantity of milk or milk equivalent delivered by a producer or purchased by a dairy, depending on the formula chosen by the Member State, during the reference year. The reference year was chosen by each Member State from the years 1981 to 1983.

5 Following the judgments of the Court of 28 April 1988 in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355 ('*Von Deetzen I*'), the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation No 857/84 (OJ 1989 L 84, p. 2). That regulation added a new Article 3a to Regulation No 857/84, making it possible in certain circumstances to allocate a special reference quantity to those producers, commonly called 'SLOM producers', who, pursuant to an undertaking entered into under Regulation No 1078/77, did not deliver milk during the reference year adopted by the Member State concerned (the 'SLOM I' system).

6 Following the judgments of the Court of 11 December 1990 in Case C-189/89 *Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539 and Case C-217/89 *Pastätter* v *Hauptzollamt Bad Reichenhall* [1990] ECR I-4585 declaring invalid various provisions of Article 3a of Regulation No 857/84, as amended by Regulation No 764/89, the Council enacted Regulation No 1639/91 in order to comply with those judgments (the 'SLOM II' system).

7 Article 3a of Regulation No 857/84, as amended by Regulation No 1639/91, was worded as follows:

'1. Producers referred to in the third paragraph of Article 12(c):

— whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation No 1078/77, expires, without prejudice to the provisions of the last subparagraph, after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to March of the following year;

— who, being premium transferees, have not received a reference quantity pursuant to Article 2 and/or Article 6 of this Regulation,

shall receive provisionally, if they so request within three months from 29 March 1989, a special reference quantity ...

...

2. ...

3. If, within two years of 29 March 1989 or, in the case referred to in the last subparagraph of paragraph (1), from 1 July 1991, provided that the additional

levy scheme is extended, the producer can prove, to the satisfaction of the competent authority, that he has actually resumed direct sales and/or deliveries and that the direct sales and/or deliveries reached a level greater than or equal to 80% of the provisional reference quantity during the last 12 months, the special reference quantity shall be definitively allocated to him ...

4. That part of the special reference quantity which is not intended for use during a 12-month period may not be the subject of a temporary transfer as referred to in Article 5c(1)(a) of Regulation No 804/68.

...'

8 Regulation No 857/84 was repealed as from 1 April 1993 by 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), which extended for seven years, with modifications, the additional milk levy scheme.

9 Article 4(3) of Regulation No 3950/92 essentially reproduces the rules in Article 3a(3) of Regulation No 857/84, as amended by Regulation No 1639/91. Thus, a producer who has provisionally received a specific individual reference quantity pursuant to the last subparagraph of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 1639/91, is definitively allocated the specific reference quantity if he can prove before 1 July 1993 to the satisfaction of the competent authority that he fulfils the same conditions as those laid down in Article 3a(3) of Regulation No 857/84, as amended by Regulation No 1639/91.

10 In its judgment of 3 December 1992 in Case C-264/90 *Wehrs* v *Hauptzollamt Lüneburg* [1992] ECR I-6285 the Court declared invalid the rule commonly known as 'the anti-accumulation rule' laid down in the second indent of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89. This rule, which also appeared in the second indent of the first subparagraph of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 1639/91, barred transferees of a non-marketing or conversion premium granted under Regulation No 1078/77 who had obtained a reference quantity pursuant to Article 2 of Regulation No 857/84 from being allocated a special reference quantity.

11 Following *Wehrs*, the Council adopted Regulation (EEC) No 2055/93 of 19 July 1993 allocating a special reference quantity to certain producers of milk and milk products (OJ 1993 L 187, p. 8). Regulation No 2055/93, which entered into force on 1 August 1993, permits producers who had entered into a non-marketing or conversion undertaking under Regulation No 1078/77 and who — because of the rule against overlapping — had until then not been entitled to a special reference quantity to obtain such a quantity in addition to an original reference quantity (the 'SLOM III' scheme).

12 Article 12(1) of Regulation No 2055/93 provides:

'A producer, within the meaning of Article 9(c) of Regulation (EEC) No 3950/92, who:

— ...

— has taken over part of a holding subject to the same provisions but for which no reference quantity has been allocated pursuant to Article 3a of Regulation (EEC) No 857/84,

shall receive a special reference quantity on request, provided that:

...

...

...

— he establishes in support of his application, on the basis of criteria to be determined, that he is able to increase production on his holding by the amount of the special reference quantity applied for.'

The facts and the question referred to the Court

13 Mr Schlebusch was, at the material time, a milk producer. As at 1 April 1991 he held an original reference quantity of 50 704 kg of milk.

14 On his taking a lease of land subject to the non-marketing scheme he was allocated a provisional special reference quantity in October 1991 of 20 380 kg under the SLOM II scheme.

15 After he had obtained that special reference quantity, Mr Schlebusch leased out the original reference quantity and, between April 1992 and February 1993, produced 14 272 kg of milk solely as the special reference quantity which he had been granted provisionally.

16 Mr Schlebusch then ceased all deliveries of milk.

17 By decision taken, according to the information in the documents in the main proceedings, on 6 July 1994, the HZA refused to allocate to Mr Schlebusch definitively the special reference quantity on the ground that he had not delivered any milk on the strength of the reference quantity provisionally allocated to him ('the contested decision'). The HZA considered that the prohibition on leasing out the provisional special reference quantity in Article 3a(4) of Regulation No 857/84, as amended by Regulation No 1639/91, would be undermined if the person to whom that provisional quantity is allocated were permitted to lease out the original reference quantity to which he is additionally entitled.

18 Following the failure of his action challenging the contested decision before the Finanzgericht (Finance Court) Rheinland-Pfalz, Mr Schlebusch brought proceedings for review on a point of law before the Bundesfinanzhof. That court decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the first sentence of Article 3a(3) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 1639/91, to be interpreted as meaning that a milk

producer is to be allocated a definitive special reference quantity even where, in the period laid down in that provision, he did not use the special reference quantity provisionally allocated to him for a corresponding increase in his milk production, but temporarily transferred to another business that part of his milk quota corresponding to the original reference quantity held by his business in addition to the provisionally allocated special reference quantity?'

The applicable provisions

19 The Commission contends that the national court's question ought to refer to the first sentence of Article 4(3) of Regulation No 3950/92 and not to the provision at issue since, it submits, the contested decision was taken on 6 July 1994, that is to say, a date on which Regulation No 3950/92 was already in force.

20 It must be stated that, while neither the national court in its order nor Mr Schlebusch in his written observations mentions the date on which the HZA took the contested decision, it is apparent from the documents in the main proceedings that that date was 6 July 1994. It is so stated in the judgment of the Finanzgericht Rheinland-Pfalz, which was moreover given on the basis of Regulation No 3950/92.

21 Consequently, it was with full knowledge of the facts that the Bundesfinanzhof, which could not be unaware of the date of the contested decision, found it necessary to question the Court concerning the interpretation of the provision at issue.

22 It should be borne in mind that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to

establish the consequences which they have for the judgment which it is required to deliver (see, for example, Case C-435/97 *World Wildlife Fund (WWF) and Others* v *Autonome Provinz Bozen and Others* [1999] ECR I-5613, paragraph 32). Similarly, it is not for the Court to assess whether questions referred to it by the national court are relevant (see, for example, Case C-347/89 *Freistaat Bayern* v *Eurim-Pharm* [1991] ECR I-1747, paragraph 16).

23 It must be added that, as the Commission has pointed out, and also the Advocate General at sections 17 and 18 of his Opinion, Article 3a(3) of Regulation No 857/84, as amended by Regulation No 1639/91, and Article 4(3) of Regulation No 3950/92 are the same.

24 There are therefore no grounds on which the Court could construe the Bundesfinanzhof's question otherwise than as referring to the provision at issue.

The interpretation of Article 3a(3) of Regulation No 857/84, as amended by Regulation No 1639/91

25 According to the second indent of the first subparagraph of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 1639/91, a special reference quantity could be granted provisionally only where, regardless of the other conditions, the applicant already held an original reference quantity for the same holding. Thus, under Community law, a milk producer could not lawfully obtain a special reference quantity in addition to the original reference quantity.

26 The special reference quantity thus being reserved exclusively to SLOM producers who had not previously obtained an original reference quantity and accordingly had no production, it could be definitively allocated only on

condition that the SLOM producer supplied proof that he had resumed at least 80% of production during the last 12 months. It follows that that condition had been laid down in the light of and in accordance with the rule against overlapping.

27 In consequence, the wording of the provision at issue does not make it possible to determine what, at the material time, were the conditions that had to be satisfied with a view to the definitive allocation of a special reference quantity in circumstances, such as those in the case in the main proceedings, where original and special reference quantities are cumulative, such accumulation being contrary to the Community rules then in force.

28 That interpretation of the provision at issue cannot be affected by the judgment in *Wehrs*. In the presence of a complex system such as that of reference quantities, the state of the law relevant to the case in the main proceedings, as it was following the ruling in *Wehrs* that the anti-accumulation rule was invalid but before Regulation No 2055/93 was adopted, did not of itself, that is to say without readjustment of the system, permit the allocation of a special reference quantity to a producer (Case C-127/94 *R* v *MAFF, ex parte Ecroyd* [1996] ECR I-2731, paragraph 59).

29 Consequently, it must be held that the wording of the provision at issue did not cover the situation which is the subject of the case in the main proceedings.

The principle governing the grant of a special reference quantity

30 For the first time since the rules on the additional levy on milk entered into force the grant of a special reference quantity in addition to an original reference

quantity is permitted, subject to certain conditions, in accordance with Article 1 of Regulation No 2055/93, which entered into force on 1 August 1993. The conditions imposed include the obligation on the part of the producer to prove that he is in a position to increase his production on his holding by an amount equal to the special reference quantity applied for. In consequence, as the Commission points out, the producer himself must be able to produce all the quantities of milk granted by way of cumulative reference quantities.

31 The Commission contends that Regulation No 2055/93, even though it is not applicable in the present case, provides extremely precise information on the basis of which the question referred to the Court can be answered. It is therefore necessary to consider whether the condition laid down in the last indent of Article 1(1) of that regulation is not the expression of a general principle governing the system for the definitive grant of special reference quantities, even before the anti-accumulation rule was repealed.

32 Recital No 7 in the preamble to Regulation No 2055/93 makes it clear that the condition laid down in Article 1(1) thereof requiring a SLOM producer seeking to obtain a special reference quantity to establish that he is able to increase production on his holding by the amount of the special reference quantity applied for represents a necessary adjustment of the conditions contained in the provision at issue.

33 Those conditions are based *inter alia* on the fact that the producer or the transferee of a premium granted under Regulation No 1078/77 who applies for a special reference quantity must actually resume the milk production activity which he had had to give up completely. A transferee who, like Mr Schlebusch, is

an active milk producer cannot therefore be subjected, with regard to the allocation of a special reference quantity, to the same conditions as those laid down by the provision at issue.

34 Even before Regulation No 2055/93 was adopted, it was clear from recitals Nos 3, 5 and 6 in the preamble to Regulation No 764/89, adopted by the Council in order to comply with the *Mulder* and *Von Deetzen I* judgments, cited above, and from recital No 8 in the preamble to Regulation No 1639/91, that the allocation of a special reference quantity is intended simply to enable its recipient actually to produce on his own holding the quantities of milk granted on that basis and in consequence to carry on the business of a milk producer. It was, moreover, in order to preserve that objective that Article 3a(4) of Regulation No 857/84, as amended by Regulation No 1639/91, prohibited all transfers, even temporary and partial, of that quantity.

35 Since, quite apart from the other conditions imposed, the ruling in *Mulder*, cited above, entitled SLOM producers to receive a special reference quantity only when they might legitimately expect to carry on the business of milk producer under the additional-levy-on-milk system also, that reference quantity cannot, without doing violence to the precise and limited objective of that ruling, be definitively granted to a SLOM producer who neither intends nor is able to produce on his own holding the quantities allocated.

36 If the holder of an original reference quantity applies for a special reference quantity in addition to that first quantity, the limited nature of the objective mentioned in the previous paragraph would be jeopardised if such a milk

producer could use the latter quantity for a purpose other than to increase his current production.

37 That would be so in particular in the case of a producer who, like Mr Schlebusch, leases out his original reference quantity after obtaining a special reference quantity in addition, instead of himself increasing the current production of his holding.

38 That interpretation of the special reference quantity rules is borne out by settled case-law, according to which SLOM producers cannot expect to have conferred on them a commercial advantage in the form of a special reference quantity which does not derive from their occupational activity (Case C-44/89 *Von Deetzen* v *Hauptzollamt Oldenburg* [1991] ECR I-5119, paragraph 21, '*Von Deetzen II*'). Such an advantage would be conferred, at least indirectly, on producers if, where they received both an original reference quantity and a special reference quantity, they were permitted to produce on their own holdings only the special reference quantity, especially when that quantity alone cannot guarantee the viability of the holding, which is the situation in the case in the main proceedings, as Mr Schlebusch himself has stated.

39 Since the interpretation adopted is plainly in keeping with the objective pursued by the additional-levy-on-milk system, which is to reduce imbalances between the supply of and demand for milk and milk products and the structural surpluses thus created, a producer who has received a provisional special reference quantity in breach of the SLOM II rules could not legitimately expect to receive an

advantage which must be regarded as unjustified inasmuch as he used that quantity for purposes other than that of increasing his current production.

40 It follows from all the foregoing considerations that the provision at issue must be interpreted in the light of the principles governing the system for the grant of a special reference quantity as meaning that a producer holding an original reference quantity who provisionally receives a special reference quantity in addition may not be definitively allocated that special reference quantity, regardless of the other conditions required, when he himself has not used it in order to increase current milk production on his holding. That is the case where such a producer leases out his original reference quantity and produces on his holding only his provisional special reference quantity of milk.

Costs

41 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 14 May 1998, hereby rules:

The first sentence of Article 3a(3) 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 1639/91 of 13 June 1991, must be interpreted in the light of the principles governing the system for the grant of a special reference quantity as meaning that a producer holding an original reference quantity who provisionally receives a special reference quantity in addition may not be definitively allocated that special reference quantity, regardless of the other conditions required, when he himself has not used it in order to increase current milk production on his holding. That is the case where such a producer leases out his original reference quantity and produces on his holding only his provisional special reference quantity of milk.

Schintgen Hirsch Skouris

Delivered in open court in Luxembourg on 25 May 2000.

R. Grass

Registrar

R. Schintgen

President of the Second Chamber