JUDGMENT OF THE COURT (Sixth Chamber)
17 April 1997 *

In Case C-15/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Grande Instance, Morlaix, France, for a preliminary ruling in the proceedings pending before that court between

EARL de Kerlast

and

Union Régionale de Coopératives Agricoles (Unicopa) and

Coopérative du Trieux

on the interpretation of Article 40(3) of the EC Treaty, Article 1 of Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10) and Articles 3a, 7 and 12(c) 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),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J. L. Murray, President of the Fourth Chamber, acting as President of the Sixth Chamber, C. N. Kakouris, P. J. G. Kapteyn, G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— EARL de Kerlast, by Evelyne Brulé, of the Morlaix Bar,

— the French Government, by Edwige Belliard, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Jean-Louis Falconi, Foreign Affairs Secretary in the same directorate, acting as Agents,

— the Council of the European Union, by Arthur Brautigam, Legal Adviser, acting as Agent, and

— the Commission of the European Communities, by Gérard Rozet, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of EARL de Kerlast, represented by Jean-Noël Moal, of the Morlaix Bar; of the French Government, represented by Frédéric

Pascal, Administrative Attaché in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by Gérard Rozet, Legal Adviser, acting as Agent, at the hearing on 20 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1996,

gives the following

Judgment

1 By judgment of 14 December 1994, received at the Court on 18 January 1995, the Tribunal de Grande Instance (Regional Court), Morlaix, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 40(3) of the EC Treaty, Article 1 of Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10) and Articles 3a, 7 and 12(c) 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).

2 Those questions were raised in proceedings brought by EARL de Kerlast, a limited-liability agricultural undertaking, against Coopérative du Trieux, a dairy, and Union Régionale de Coopératives Agricoles ('Unicopa'), to which Coopérative du Trieux is affiliated, concerning the imputation to EARL de Kerlast's reference quantity of quantities of milk which it had produced in the context of a *société en participation* (a form of joint adventure) formed with Mr Kergus, another producer with his own reference quantity.

3 EARL de Kerlast is a milk producer and, as such, has an individual reference quantity of 363 045 litres of milk. Mr Kergus is both a farmer and a lorry driver. In his capacity as a farmer, he had an individual reference quantity of 144 245 litres.

4 On 11 September 1992, by unauthenticated agreement, EARL de Kerlast and Mr Kergus formed a *société en participation* ('the SEP') to 'allow Mr Kergus's milk reference to be used ...'. According to the national court's judgment, in French law, a *société en participation* is a form of company without legal personality which has no standing vis-à-vis third parties and is unpublicized. The SEP then opened a bank account into which the proceeds of its sales of milk to Coopérative du Trieux in the 1992/93 milk year were paid. Approximately 20% of the amount thus credited to the account was withdrawn by Mr Kergus.

5 Coopérative du Trieux terminated that arrangement in October 1993. This was because it was charged, as purchaser, additional levy for exceeding its reference quantity as a result, at least partially, of the quantity of milk that it had purchased from the SEP. Coopérative du Trieux then imputed the whole of that quantity to EARL de Kerlast's account, causing it to bear the burden of the additional levy in respect of the deliveries in question. EARL de Kerlast then had to pay fines for exceeding its individual reference quantity.

6 On 1 April 1994, EARL de Kerlast brought an action against Coopérative du Trieux and Unicopa before the Tribunal de Grande Instance, Morlaix, in which it sought retroactive annulment of the decision to impute the quantities of milk produced by the SEP to its account, together with payment for all its milk production and damages.

7 Taking the view that resolution of the case before it called for an interpretation of Community law, the Tribunal de Grande Instance, Morlaix, stayed proceedings and sought a preliminary ruling under Article 177 of the EC Treaty on the following three questions:

'1. On a proper construction of Article 7 of Community Regulation No 857/84, are producers precluded from forming *sociétés en participation* — which have no legal personality, have no standing vis-à-vis third parties and are unpublicized — in so far as they constitute a disguised form of quota-leasing, or are such arrangements authorized as required structural adjustments within the meaning of Article 1 of Regulation No 856/84?

2. Must Article 12(c) of Regulation No 857/84 and Article 3a of Regulation No 764/89 be interpreted as requiring actual resumption of production by the person concerned?

3. Does Article 40(3) of the EEC Treaty preclude a decision by a Member State, pursuant to Regulation No 857/84 of 31 March 1984 as amended by Regulation No 764/89 of 20 March 1989, prohibiting *sociétés en participation* and authorizing partial GAECs [*groupements agricoles d'exploitation en commun* — collective farming groups] confined to dairy farming (Circular No 4019 of 20 November 1989 DPE/SPM/C 89 and Circular No 7051 of 14 November 1991 DEPSE/SDSA C 91)?'

Legislative background

8 According to the second sentence of the first subparagraph of Article 5c(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 176), as amended by Regulation No 856/84, the objective of the additional levy introduced by the latter regulation 'shall be to curb the increase in milk production while at the same time permitting the structural developments and adjustments required'.

9 The second subparagraph of Article 5c(1) provides that the levy system is to be implemented in each region of the territory of the Member States in accordance with Formula A (the producer formula) or Formula B (the purchaser formula). Under Formula B, a levy is payable by every purchaser of milk or other milk products on the quantities of milk or milk equivalent which have been delivered to him by a producer and which, during the 12 months concerned, exceed a reference quantity to be determined. The French Republic opted for Formula B and chose 1983 as reference year.

10 With regard to transfers of such reference quantities, Article 7(1) of Regulation No 857/84, as amended by Council Regulation (EEC) No 590/85 of 26 February 1985 (OJ 1985 L 68, p. 1), provides: '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'.

11 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 (OJ 1988 L 139, p. 12) provides in that regard:

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

2. ...

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

12 Finally, Article 12(c) of Regulation No 857/84 contains the following definition of 'producer':

'(c) producer: 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'.

13 Those provisions were implemented in France in particular by Decree No 84-661 of 17 July 1984 (*Journal Officiel de la République Française*, 21 July 1984, p. 2373), repealed by Decree No 91-157 of 11 February 1991 (*Journal Officiel de la République Française*, 13 February 1991, p. 2199), and Decree No 87-608 of 31 July 1987 on transfers of milk reference quantities (*Journal Officiel de la République Française*, 8 August 1987, p. 8727).

14 Under those decrees, administrative authorization is required for quotas to be transferred; in the case of particular categories of transfer, including the type at issue in the main proceedings, a percentage is deducted and added to the national reserve.

The first question

15 By its first question, which is in two parts, the national court seeks to establish whether Article 7 of Regulation No 857/84 must be interpreted as meaning that the formation of *sociétés en participation* by milk producers may be equated with leasing and, if not, whether that provision applies to the formation of such a company viewed as a required structural adjustment within the meaning of Article 5c of Regulation No 804/68 as amended by Regulation No 856/84.

16 In so far as that question requires an examination of the legal status under national law of the company concerned, it should first be pointed out that although the Court has no jurisdiction under Article 177 of the Treaty to apply the relevant rule of Community law to a particular dispute and thus to judge a provision of national law by reference to that rule it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question (Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 5).

The first part of the first question

17 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 (see, to that effect, Case C-463/93 *Katholische Kirchengemeinde St Martinus Elten* v *Landwirtschtskammer Rheinland* [1997] ECR I-255, paragraph 24, Case C-98/91 *Herbrink* v *Netherlands* [1994] ECR I-223, paragraph 13, and Case C-189/92 *Le Nan* v *Coopérative Laitière de Ploudaniel* [1994] ECR I-261, paragraph 12).

18 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 has been applicable from 1 April 1993, implemented that principle when the system of reference quantities was renewed. The first subparagraph of Article 7(1) provides: 'Reference quantities ... shall be transferred with the holding in the case of sale, lease or transfer by inheritance to the producers taking it over ...'.

19 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.

20 As the Commission has pointed out, the Community legislature has provided for exceptions to that principle in a number of situations. It is common ground, however, that none of those situations obtains in the present case. In particular, the system of temporary transfer of reference quantities which Member States may authorize under Council Regulation (EEC) No 2998/87 of 5 October 1987 amending Regulation (EEC) No 804/68 (OJ 1987 L 285, p. 1) cannot be applied to French producers, since the French Republic has not availed itself of that possibility.

21 With regard to the formal requirements and other conditions to which transfers of reference quantities are subject, it should be noted that Article 7 of Regulation No 857/84 and Article 7 of Regulation No 1546/88 mention only the sale, lease or transfer by inheritance of the holding, and operations which have comparable legal effects. It is for the national court to determine, under the rules of its internal law, whether the operation which it has to consider can be classified as a sale or a lease or whether it has comparable effects within the meaning of those regulations (see, to that effect, *Katholische Kirchengemeinde St Martinus Elten*, cited above, paragraph 32).

22 However, the Court has held in that regard that the term 'lease' implies a change in the possession of the production units in question within the contractual relations created by the lease and refers to any transfer, for consideration, of the right to use the holding, irrespective of the legal form taken by the transfer (see Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paragraph 15, and Case C-44/89 *Von Deetzen* v *Hauptzollamt Oldenburg* [1991] ECR I-5119 ('*Von Deetzen II*'), paragraph 37).

23 In accordance with point 3 of the first paragraph of Article 7 of Regulation No 1546/88, any operation, irrespective of the legal form in which it is effected, which has effects comparable to those of a lease may also be regarded as a lease for present purposes. Such operations may therefore include, *inter alia*, transactions concluded in respect of the holding in the context of the formation of an association or group of persons, provided that the terms of the transaction are such that, according to its purpose and subject-matter, the main intention is that the holding should continue to be exploited by the association or group of persons, and that the association or group was not formed for the sole purpose of realizing the marketable value of the holding (see, for operations similar to inheritance, *Von Deetzen II*, cited above, paragraph 38). That exclusion of transactions solely intended to realize marketable value, which hitherto has only been considered by the Court in cases concerning lessees, must also apply, for the same reasons and with the same purpose, to an owner and lessor.

24 In the case of a lease within the meaning of Article 7 of Regulation No 857/84 and Article 7 of Regulation No 3950/92, the lessee can have the benefit of the reference quantity attaching to the land forming part of the holding only in so far as he has, as a farmer, the status of a producer within the meaning of Article 12(c) of Regulation No 857/84. With regard to the grant of a reference quantity, the Court made it clear in Case C-341/89 *Ballmann* v *Hauptzollamt Osnabrück* [1991] ECR I-25 that it follows from the general scheme of the provisions concerning the additional levy on milk that a reference quantity can be allocated to a farmer only if he has the status of producer. By the same token, where a reference quantity has already been allocated, a transferee who takes over the land must have the same status of a producer in order for him to qualify for transfer of the reference quantity attaching thereto. Consequently, the transfer by lease of a reference quantity together with the land to which it attaches can be effected in accordance with point 1 of the

first paragraph of Article 7 of Regulation No 1546/88 and the first subparagraph of Article 7(1) of Regulation No 3950/92 only if the transferee has the status of a producer.

25 As the Court has held, the concept of producer given by the definitions in Article 12(c) and (d) of Regulation No 857/84, taken together, refers to a farmer who operates, for the purposes of milk production, a set of production units for which he is himself responsible (*Herbrink*, cited above, paragraph 20). If the lease takes the form of the formation of an association or group of natural and legal persons in the circumstances set out above, all the persons making up the association or group must satisfy the necessary conditions to be met by a producer (*Herbrink*, paragraph 21).

The second part of the first question

26 Whilst the objective of Article 5c of Regulation No 804/68, as amended by Regulation No 856/84, is to permit the required structural adjustments to be made, that aim may none the less be pursued only in the ways and subject to the specific conditions laid down to that end by the milk levy system. Otherwise there would be a danger that the uniform application of the system might be jeopardized as a result of divergences between national rules.

27 As the Advocate General has noted at point 32 et seq. of his Opinion, none of the provisions of the levy system allows a producer in the position of the plaintiff in the main proceedings to use, for the purpose of making a required structural adjustment, a reference quantity allocated to another producer in a manner other than those provided for by Article 7 of Regulation No 857/84.

28 On the basis of the above considerations, the answer to the first question must be that Article 7 of Regulation No 857/84 must be interpreted as meaning that the formation of a company under national law may not be equated to a lease if its purpose and effect are to realize — by transferring only the reference quantities of one of its members, without transferring the land of the holding to which they are attached — the marketable value of those quantities for the benefit of some of those members and if those members, in their capacity as producers, do not have the intention of continuing to operate the holding. Equally, Article 7 of Regulation No 857/84 cannot apply to the formation of such a type of company viewed as a required structural adjustment within the meaning of Article 5c of Regulation No 804/68, as amended by Regulation No 856/84.

The second question

29 The second question, which concerns the interpretation of Article 12(c) of Regulation No 857/84 and of Article 3a of that regulation, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989 (OJ 1989 L 84, p. 2), in so far as those provisions require actual resumption of production by the person concerned, is irrelevant to the extent that it relates to Article 3a of Regulation No 857/84, as amended.

30 It is clear from Case C-314/89 *Rauh* v *Hauptzollamt Nürnberg-Fürth* [1991] ECR I-1647, paragraph 10, that the latter article seeks essentially to ensure that, in certain circumstances, producers who did not deliver milk during the reference year, pursuant to an undertaking entered into under Council 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), obtain a special reference quantity.

31 It is common ground, however, that Mr Kergus does not fall within that category of producers.

32 In so far as the second question concerns a lessee's obligation actually to resume production personally, reference is made to paragraph 25 of this judgment.

33 The answer to the second question must therefore be that Article 12(c) of Regulation No 857/84 must be interpreted as requiring in principle actual resumption of production by the person concerned.

The third question

34 By its third question, the national court asks essentially whether the principle of equal treatment set forth in the second subparagraph of Article 40(3) of the Treaty precludes a Member State from authorizing, for the purpose of carrying on milk production, recourse to certain forms of company under national law, such as partial *groupements agricoles d'exploitation en commun* (hereinafter 'GAECs') confined to dairy farming, whilst prohibiting recourse to other forms of company such as *sociétés en participation*.

35 It has been consistently held that the second subparagraph of Article 40(3) of the Treaty, the aim of which is to prohibit discrimination in the field of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, a fundamental principle of Community law, which requires that comparable situations are not to be treated differently and different situations are not to be treated alike unless such treatment is objectively justified (Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25).

36 The Court has also consistently held that, since Member States are bound by the fundamental principles of Community law when they implement Community legislation, that rule applies to national provisions, such as those in issue in this case, which determine, pursuant to the Community legislation on milk, the forms of joint exploitation of milk quantities (Case C-351/92 *Graff* v *Hauptzollamt Köln-Rheinau* [1994] ECR I-3361, paragraph 17, and Case C-2/92 *The Queen* v *Ministry of Agriculture, Fisheries and Food* ex parte *Bostock* [1994] ECR I-955, paragraph 16).

37 In the present case, French Ministry of Agriculture Circulars No 7051 of 14 November 1991 concerning transfers of milk reference quantities and No 7008 of 25 March 1993 concerning partial GAECs confined to dairy farming, issued in pursuance of the decrees mentioned in paragraph 13 of this judgment, treat producers who have combined in a *société en participation* differently from those who have combined in a partial GAEC confined to dairy farming, in that only the former are prohibited from engaging in milk production.

38 That difference in treatment cannot constitute a breach of the prohibition of discrimination. The situations appertaining to those two forms of company are not comparable since, as the Advocate General notes at point 45 of his Opinion, the members of a partial GAEC confined to dairy farming actually and personally take part in the work of milk production, whereas in a *société en participation* a single member may be made responsible for that work. The latter form of company may therefore favour forms of production which are not in compliance with the Community regulation in issue.

39 In that regard, it must be held that, in order to permit effective administrative control of the application of the system, a Member State must be in a position to exclude certain forms of company which facilitate operation in a manner not in compliance with the Community rules, without thereby running the risk of infringing the prohibition of discrimination.

40 The answer to the third question must therefore be that the second subparagraph of Article 40(3) of the Treaty does not preclude a Member State from authorizing, for the purpose of carrying on milk production, recourse to certain forms of company under national law, such as partial GAECs confined to dairy farming, whilst prohibiting recourse to other forms of company, such as *sociétés en participation*, in so far as the latter may favour forms of production which are not in compliance with Community legislation.

Costs

41 The costs incurred by the French Government, the Council of the European Union and the Commission of the European Communities, which have 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 (Sixth Chamber),

in answer to the questions referred to it by the Tribunal de Grande Instance, Morlaix, by judgment of 14 December 1994, hereby rules:

1. Article 7 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 must be interpreted as meaning that the formation of a company under national law may

not be equated to a lease if its purpose and effect are to realize — by transferring only the reference quantities of one of its members, without transferring the land of the holding to which they are attached — the marketable value of those quantities for the benefit of some of those members and if those members, in their capacity as producers, do not have the intention of continuing to operate the holding. Equally, Article 7 of Regulation No 857/84 cannot apply to the formation of such a type of company viewed as a required structural adjustment within the meaning of Article 5c of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, as amended by Council Regulation (EEC) No 856/84 of 31 March 1984.

2. Article 12(c) of Regulation No 857/84 must be interpreted as requiring in principle actual resumption of production by the person concerned.

3. The second subparagraph of Article 40(3) of the Treaty does not preclude a Member State from authorizing, for the purpose of carrying on milk production, recourse to certain forms of company under national law, such as partial GAECs confined to dairy farming, whilst prohibiting recourse to other forms of company, such as *sociétés en participation*, in so far as the latter may favour forms of production which are not in compliance with Community legislation.

Murray Kakouris Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 17 April 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber