# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 23 May 1996 *

1. The Verwaltungsgericht Düsseldorf has referred the following question to the Court of Justice for a preliminary ruling:

'Could the milk reference quantity allocated on 2 April 1984 to a German milk producer with a farm in Germany and with leased land in Germany and the Netherlands who delivers to a German purchaser be attached in part to the land leased by that milk producer in the Netherlands, with the result that, on termination of the lease, the corresponding reference quantity falls to the lessor, or could the quota allocated to the German milk producer be attached only to land in Germany?'

## Facts

2. According to the documents, the plaintiff in the main action, the Katholische Kirchengemeinde St. Martinus Elten, is a German parish which owns a farm of 20.2123 hectares, 17.69 of which are situated in the Netherlands and the remainder in Germany. The farm is a dairy farm and was leased before 1984 to a German farmer, Mr Jansen, whose farm also included 1.07 hectares of his own land.

In 1983 Mr Jansen delivered his milk production to a German dairy cooperative and he continued to do so until his death in 1989. On the basis of those deliveries the German authorities allocated him a reference quantity of 182 000 kg.

3. After Mr Jansen's death, his daughter and sole heir, Elke Jansen, formed a civil partnership (GbR) with Mr Derksen with the object of jointly working their respective farms. The defendant Director of the Landwirtschaftskammer Rheinland, acting on behalf of the Land, subsequently certified, by decision of 23 March 1990, that her deceased father's reference quantity of 192 933 kg of milk had been transferred to Ms Jansen by inheritance with effect from 15 March 1989.

* Original language: Spanish.

4. By separate decisions of 30 January 1990 the defendant authority certified, upon application, that a reference quantity of 192 933 kg (from the Jansen farm) and 953 510 kg (from the Derksen farm) had been transferred to Derksen and Jansen GbR. These amounts were reduced to 191 004 kg and 943 975 kg respectively by separate amending decisions of 13 June 1990. The partnership subsequently worked both farms although neither the plaintiff's permission nor its consent to an underlease were obtained.

5. The partners Derksen and Jansen agreed to wind up their partnership on 15 November 1990, after the plaintiff brought an action against Ms Jansen before the chamber for agricultural leases of the Kantongerecht Arnhem (Netherlands) which led to the termination of the lease granted by the plaintiff to Ms Jansen.

6. On 13 December 1990 Mr Derksen purchased by notarial act the land owned by Ms Jansen, 1.07 hectares in area, and the milk quota which had been transferred to her by inheritance. On the same date he applied for the transfer to himself of the milk quotas of Derksen and Jansen GbR. The defendant authority granted the application and, by separate decisions of 12 March 1991, confirmed the transfer to Mr Derksen of the reference quantities of 191 004 kg and 943 975 kg.

7. On 5 December 1991 the plaintiff applied to the defendant for a certificate pursuant to Article 9(2), no. 3, of the Verordnung über die Abgaben im Rahmen von Garantiemengen im Bereich der Marktorganisation für Milch und Milcherzeugnisse (Regulation on the levies payable in the context of guaranteed quantities under the common organization of the market in milk and milk products) acknowledging the plaintiff's right to the portion of the reference quantity of the Jansen farm corresponding to the land situated in the Netherlands, as the lease had ended. The transfer of use of the farm had taken place on 1 February 1991.

8. The defendant refused the application by decision of 19 March 1992 on the ground that, because of the allocation of total guaranteed quantities to the Member States, the link between quota and the land used provided for by Community law was limited to the territory of the respective Member State. According to the defendant, the transfer of individual reference quantities together with the corresponding land could ensure the consistent allocation of reference quantities to each Member State only if the principle of tying quotas to the land used was limited to national territory. As the land in issue was in the Netherlands, a German milk quota could not be tied to that land even if the farm management changed hands between Germans.

9. The plaintiff lodged an administrative objection to that decision on the ground that it could not be said, having regard to the Community measures to restrict milk production in Council Regulation (EEC) No 856/84 of 31 March 1984 [1] and Council Regulation (EEC) No 857/84 of 31 March 1984, [2] that the principle of tying quotas to land was limited to national territory. Article 12(d) of Regulation No 857/84 clearly defined the term 'holding' as 'all the production units operated by the producer and located within the geographical territory of the Community'. In the plaintiff's opinion, the important point was to establish which national quota should include the milk production of the Jansen farm during the reference year, 1983. Since that milk production had been delivered to a German dairy cooperative, the quota fixed at that time of 182 000 kg was included in the total guaranteed quantity of the Federal Republic of Germany. The administrative objection was dismissed by the defendant on 19 May 1992.

10. On 11 June 1992 the plaintiff brought an action against that decision before the Verwaltungsgericht Düsseldorf, seeking a certificate to the effect that a portion of the reference quantity formerly allocated to Mr Jansen should be transferred to it. The grounds relied on were in essence those adduced in the previous administrative procedure.

1 — Regulation amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10).

2 — Regulation 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).

## The relevant legislation

11. The Court of Justice is very familiar with the Community measures applicable to the present case. They are Regulation No 856/84, which introduced the additional levy, Regulation No 857/84, which laid down basic rules for the application of the levy, [3] and Commission Regulation (EEC) No 1371/84 of 16 May 1984, [4] which laid down detailed rules for the application of the levy and was repealed by Commission Regulation (EEC) No 1546/88, [5] which reformed the measures applying in this field. All these regulations were adopted in order to remove the structural surpluses in the market for milk and milk products by collecting an additional levy on milk production. Under this system, farmers were allocated an individual reference quantity based on their production during a specified period (the 'reference period') in such a way that the additional levy is charged on production exceeding the reference quantity.

12. With the object of restoring so far as possible a balance between supply and demand in relation to products of the milk sector, Regulation No 856/84 introduced for

3 — In the version of Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) 804/68 in the milk and milk products sector (OJ 1985 L 68, p. 1).

4 — Regulation 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).

5 — 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).

five years an additional levy on milk deliveries exceeding a guarantee threshold which was originally fixed at 97.2 million tonnes of milk for the entire Community. [6] For this purpose Regulation No 856/84 added an Article 5c to the basic regulation for the milk and milk products sector. [7] Under paragraph 1 of this Article, for five consecutive twelve-month periods commencing on 1 April 1984 an additional levy was imposed on producers or purchasers of cows' milk if they exceeded a reference quantity which was to be determined. [8] This levy is calculated according to a formula A, which applies to producers, and a formula B, which applies to purchasers.

Formula A, which is relevant to the present case, is worded as follows:

'Every producer of milk shall pay a levy on the quantities of milk and/or milk equivalent delivered to a purchaser which, during the twelve-month period in question, exceed a reference quantity to be determined.'

Under paragraph 3 of Article 5c, the total reference quantities referred to by paragraph 1 must not, subject to paragraph 4, exceed a total guaranteed quantity equal to the total quantities of milk delivered to enterprises which process or convert milk or other milk products in each Member State during the 1981 calendar year, plus 1%. Each Member State was allocated a total guaranteed quantity, which in Germany's case was 23 248 000 tonnes.

13. Implementing rules concerning this system are laid down in Regulation No 857/84. Under Article 2(1), where formula A is chosen, the reference quantity will be equal to the quantity of milk or milk equivalent supplied by the producer during the 1981 calendar year, plus 1%.

However, under Article 2(2):

'... the Member States may provide that on their territory the reference quantity referred to in paragraph 1 is to be equal to the quantity of milk or milk equivalent delivered ... during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity defined in Article 5c of Regulation No 804/68.'

6 — Fourth and fifth recitals in the preamble.

7 — Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

8 — Council Regulation (EEC) No 1109/88 of 25 April 1988 (OJ 1988 L 110, p. 27) amends Article 5c of Regulation No 804/68 and extends the system of additional levies to eight twelve-month periods.

The Federal Republic of Germany opted for formula A and chose 1983 as the reference year.

14. The transfer of reference quantities in the event of the sale, lease or transfer of a farm by inheritance is regulated by Article 7 of Regulation No 857/84. As originally worded, paragraph 1 of this provision established the principle of tying the quota to the land as follows:

'Where an undertaking 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.'

15. However, one year later Regulation No 590/85 amended Regulation No 857/84 and Article 7 was reworded. According to the sixth recital in the preamble to Regulation No 590/85, the application of the said article 'may in certain cases lead to difficult situations in the economic and social field; ... therefore it is appropriate, in order that a lessee whose lease of a holding is due to expire can continue milk production elsewhere, to authorize the Member States to put at his disposal all or part of the reference quantity corresponding to the holding which he is leaving'.

Article 7(4), as amended, provides as follows:

'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.'

16. Regulation No 1371/84, which laid down detailed rules for the application of the additional levy, was, as already mentioned, replaced by Regulation No 1546/88. Article 5 of Regulation No 1371/84 was incorporated into Article 7 of Regulation No 1546/88, as follows:

'For the purposes of applying Article 7 of Regulation (EEC) No 857/84, and without prejudice to paragraph 3 of that article, the following rules shall apply to the transfer of reference quantities granted to producers ... in application of formulas A ...:

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. 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 ... .

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 ... Article 7(4) of Regulation (EEC) No 857/84 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 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 lease expired.'

17. Finally, Article 12(c) and (d) of Regulation No 857/84 define the terms 'producer' and 'holding' respectively as follows:

'producer: a natural or legal person or group of natural or legal persons farming a holding located within the geographical location of the Community:

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

— supplying the purchaser;

holding: all the production units operated by the producer and located within the geographical territory of the Community'.

The legislation in force at the date of termination of the lease granted by the plaintiff to Ms Jansen is contained in Regulation No 857/84, as amended by Regulation No 590/85, and in Regulation No 1546/88.

**The question submitted by the national court**

18. In the order for reference the national court expresses doubt concerning the legality of the refusal by the defendant authority of the certificate requested by the plaintiff. The court observes firstly that, in accordance with the abovementioned Community regulations, German law lays down the principle of tying reference quantities to land even where parts of a holding used for the production of milk revert to the lessor at the end of a lease. Secondly, neither the German nor the Community legislation applicable makes any distinction according to whether the land which reverts to the lessor at the end of the lease is in Germany or another Member State. Thirdly, it may be inferred from the definition of holding in Article 12(d) of Regulation No 857/84, according to which a holding is 'all the production units operated by the producer and located within the geographical territory of the Community', that the location of some of the land in another Member State is irrelevant for that purpose. Finally, the national court states that the transfer of reference quantities beyond national frontiers may call into question the allocation of guaranteed milk quantities fixed specifically for each Member State.

19. The plaintiff in the main proceedings and Mr A. Derksen, as an interested party, and also the Commission have submitted observations to the Court. In addition the defendant in the main proceedings appeared at the hearing, repeating the arguments in the contested administrative decision.

The plaintiff contends that the principle of tying the quota to the land does not mean that milk quotas may be tied only to land used for milk production within a Member State nor does it mean that, in the case of a holding which extends over a national border, the milk quota tied to the land must count towards two different national guaranteed milk quantities. Since the Federal Republic of Germany opted for formula A and for 1983 as the reference year and as Mr Jansen delivered his entire milk production to a German cooperative in that year, that production served not only as the basis for allocating a certain reference quantity to him, but was also taken into account in the calculation of the national guaranteed quantity for that Member State. The plaintiff adds that if the proportion of the quota corresponding to the land of the holding situated in the Netherlands which had never been included in the national guaranteed quantity of that Member State were to be added to it now, the Netherlands would now be compelled to pay the Community a levy for exceeding the national guaranteed quantity without having been able to do anything to avoid the excess, which would be incompatible with the purpose of Regulations Nos 856/84 and 857/84 and would be contrary to the definition of 'holding' in Article 12(d) of Regulation No 857/84.

20. In his observations Mr Derksen takes the view that the principle of tying the quota to the land can only be applied within the limit of the national guaranteed quantities of the individual Member States and for that reason the reference quantity of a German producer, as part of the total guaranteed quantity of the Federal Republic of Germany, must remain tied to the land situated on German territory.

21. The Commission contends that the refusal by the German authority of the plaintiff's request for recognition of the right, on termination of the lease, to part of the reference quantity in proportion to the land situated in the Netherlands on the ground that the land in question was situated in another Member State amounts to unequal treatment.

22. To determine whether this unequal treatment may be justified for reasons inherent in the additional levy system established by Regulation No 856/84, the Commission carried out an interpretation of the rules in force at the date of termination of the lease and observes, firstly, that Regulation No 856/84 fixed the total guaranteed quantities of the Member States by reference to the total quantities of milk delivered to enterprises which process or convert milk in each Member State in a specified period, without laying down any conditions as to the origin of the milk. Secondly, the Commission observes that, according to the definitions of 'producer' and 'holding' in Article 12(c) and (d) of Regulation No 857/84, it is only necessary for the production units to be situated in the 'geographical territory of the Community'.

The Commission adds that this system takes account of the normal situation where producers deliver milk to enterprises in the Member State where their land is situated. If, however, exceptionally a producer delivered milk to an enterprise on the other side of the border, as in the present case, those deliveries were included in the calculation of the total guaranteed quantity of that Member State and therefore it is not permissible to authorize the subsequent transfer of part of the individual reference quantity to another Member State, since the principle of allocating the guaranteed quantity at Community level must be maintained. Otherwise producers in the State to which the quota was transferred would be placed at a disadvantage in relation to those of the State from which the quota was deducted.

The Commission concludes that since in 1983 the lessee delivered his milk production exclusively to a German cooperative and those deliveries were included in the total guaranteed quantity for Germany and, in return, the competent authority of that Member State allocated the lessee an individual reference quantity, the latter quantity could be transferred under Article 7(1) of Regulation No 1546/88 provided that the transfer was within the limit of the total guaranteed quantity for Germany. Therefore

the refusal by the national authorities to permit such transfer on the ground that part of the land is in the Netherlands is, in the Commission's opinion, unequal treatment for which there is no justification.

23. To reply to the question from the German national court, I shall first consider the possibility of transferring to the lessor, together with the land on the termination of the lease, part of the reference quantity originally allocated to Mr Jansen, and then go on to examine the possible effect of the fact that the land is situated in another Member State.

24. On the same day that the Council adopted Regulation No 856/84 introducing the additional levy on quantities of milk exceeding a reference quantity, it also adopted Regulation No 857/84, Article 7 of which laid down the general principle that every reference quantity (that is, the quantity exempt from the additional levy) should be transmitted together with the land which gave rise to its allocation. According to the interpretation given by the Court in the *Twijnstra* judgment, 'the entire reference quantity scheme is based on the general principle, set out in Article 7 of Regulation No 857/84 ... that in the event of the transfer of part of a holding the reference quantity is allocated to the transferee in proportion to the area transferred'. [9]

25. In the *Wachauf* judgment the Court stated: 'According to Article 7(1) of Regulation No 857/84, as amended by Council Regulation No 590/85 ... "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." However, paragraph (4) of that article provides that "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." It is apparent from the provisions quoted, considered as a whole, that the Community legislature intended that at the end of the lease the reference quantity should in principle return to the lessor who retakes possession of the holding, subject, however, to the Member States' power to allocate all or part of the reference quantity to the departing lessee.' [10]

The question in that case was whether Article 5(3) of Regulation No 1371/84 was applicable to the surrender, upon the expiry of the lease, of all the agricultural production units leased, even though those units, as leased, had neither dairy cows nor the technical facilities necessary for milk production and the lease provided for no obligation on the part of the lessee to engage in milk production.

9 — Case C-81/91 *Twijnstra* [1993] ECR I-2455, paragraph 25.

10 — Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, paragraph 13.

The Court held:

'The surrender of a tenanted holding upon the expiry of a lease has comparable legal effects, within the meaning of Article 5(3) of Regulation No 1371/84 [which from 4 June 1988 became Article 7(3) of Regulation No 1546/88], to those brought about by the transfer of the holding upon the grant of the lease, for both transactions entail a change in the possession of the production units in question within the contractual relations created by the lease. Consequently, the surrender, upon the expiry of the lease, of leased agricultural production units is a case covered by Article 5(3) of Regulation No 1371/84, provided that upon the grant of the lease their transfer falls under Article 5(1), which is the case when a "holding" within the meaning of Article 12(d) of Regulation No 857/84 ... is involved.' [11]

26. In view of this case-law I am of the opinion, like Advocate General Mischo in the *Kühn* case, [12] that when a stock-farming tenant leaves a holding, in principle the reference quantities which were available to him revert to the owner who, by granting a lease to another tenant, will transfer them to the latter, unless the Member States have exercised their option under Article 7(4) of Regulation No 857/84 and point 4 of the first paragraph of Article 7 of Regulation No 1546/88 and have provided that all or part of the reference quantity shall be put at the disposal of the departing lessee 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 lease expired.

27. Must a different conclusion be reached if the land which reverts to the owner after the termination of a lease is situated in a Member State other than that whose total guaranteed quantity included the reference quantity allocated to the producer lessee in 1984?

28. I think that for various reasons the answer must be in the negative. Firstly, because the rule concerning the transfer of reference quantities in force at the time when the lease between the plaintiff and Ms Elke Jansen ended did not distinguish according to whether or not the entire holding was situated in one Member State.

29. Secondly, as I have already said, the reference quantity is transferred together with the holding, which is defined by Article 12(d) of Regulation No 857/84 specifically for the purpose of that legislation as 'all the

11 — Cited in footnote 10, paragraph 15.

12 — Case C-177/90 *Kühn* v *Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, in particular p. I-55, point 43.

production units operated by the producer and located within the geographical territory of the Community'.

30. Therefore the reference quantity or part thereof can be transferred together with the land provided that the latter forms part of a holding within the meaning of Regulation No 857/84 which is situated within the geographical territory of the Community. This interpretation, which is applicable to the present case, is borne out by Council Regulation (EEC) No 1560/93, [13] which, with effect from 28 June 1993, when it came into force, amended the definition of 'holding' to mean 'all the production units operated by the producer and located within the geographical territory of one Member State'.

31. Furthermore, I agree with the Commission that the defendant authority's refusal to certify the transfer of part of the reference quantity previously allocated to Mr Jansen together with the part of the land recovered on the termination of the lease, on the ground that the land in question is situated in another Member State, amounts to discriminatory treatment prohibited by the second subparagraph of Article 40(3) of the EC Treaty.

32. Under that provision, the common organization of agricultural markets must be 'limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Community'. This was interpreted by the Court in the *Graff* judgment as follows:

'the prohibition of discrimination laid down in that provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law; that principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified.' [14]

In the same judgment the Court added that 'according to well-established case-law, the requirements flowing from the protection of fundamental rights and principles in the Community legal order are also binding on Member States when they implement Community rules and the Member States must therefore, as far as possible, apply those rules in accordance with those requirements. ... In particular, Article 40(3) of the EEC Treaty covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down. Consequently, it is also binding on

13 — Regulation of 14 June 1993 amending Regulation (EEC) No 3950/92 establishing an additional levy in the sector of milk and milk products (OJ L 154, p. 30).

14 — Case C-351/92 *Graff* v *Hauptzollamt Köln Rheinau* [1994] ECR I-3361, paragraph 15.

the Member States when they are implementing the said common organization.' [15]

33. In the present case the defendant's refusal, on the termination of the lease, is prejudicial to the lessor which is recovering its land situated on the other side of the German border, by comparison with another lessor who in the same circumstances recovers part of a holding the whole of which is situated on German territory. Since these are comparable situations which are being treated differently, it is necessary to ascertain whether the difference in treatment by reason of the geographical location of the land is objectively justified in relation to the additional levy system.

34. According to the detailed rules of this system adopted by the Community legislature, the total guaranteed quantity for the Community was distributed among the Member States by reference to the quantities delivered in their territory in a particular year and that quantity limits the production of milk in that State in such a way that the reference quantities allocated individually to producers must not exceed that limit. As Advocate General Van Gerven observed in his Opinion in the *Graff* case, [16] the Community system of milk quotas takes as its premiss a guaranteed total quantity, calculated specifically for each Member State. He added that it is apparent from the fifth recital in the preamble to Regulation No 856/84, 'as well as from Article 5c(3) of Regulation No 804/68, that the focus of the additional levy scheme is *essentially* the territory of the various Member States since it is based for each State on the quantities of milk or other milk products delivered on the territory of the Member State concerned in 1981'.

35. In my opinion, due regard to the general structure of this system does not preclude all or part of the reference quantity from being transferred together with the holding on the termination of the lease even if part of the land is situated in another Member State, provided that the transfer is within the limit of the total guaranteed quantity of the Member State which included the reference quantity allocated to the lessee producer in 1984.

36. Therefore, like the Commission in its written observations, I take the view that the specific nature of the reference quantities system does not justify the difference in treatment by the defendant by reason of the place where the land is situated, and

15 — Cited in footnote 14, paragraphs 17 and 18.

16 — Case cited in footnote 14, point 13.

that, on the termination of the lease, the reference quantity allocated in 1984 to the producer Mr Jansen, which forms part of the total guaranteed quantity of the Federal Republic of Germany, must revert in part to the owner together with the land, although it is situated in another Member State, provided that such transfer complies with the general structure of the system, that is, it is made within the limit of the total guaranteed quantity for Germany.

I therefore propose that the question from the national court be answered as follows:

The reference quantity allocated on 2 April 1984 to a German milk producer who worked a farm situated in Germany and certain land leased in Germany and in the Netherlands, and who supplied milk to a German purchaser, may be tied partly to the land leased in the Netherlands by that producer, with the result that the corresponding reference quantity is transferred to the lessor on the termination of the lease.