# JUDGMENT OF THE COURT (Sixth Chamber)

20 June 2002 *

In Case C-401/99,

REFERENCE to the Court under Article 234 EC by the Schleswig-Holsteinisches Oberverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

**Peter Heinrich Thomsen**

and

**Amt für ländliche Räume Husum,**

joined parties:

**Helga Henningsen,**

**Ute Henningsen**

and

**Peter Henningsen,**

* Language of the case: German.

on the interpretation of Articles 7(2) and 9(c) of 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),

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann and V. Skouris (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— P. Thomsen, by U. Jensen, Rechtsanwalt,

— the Amt für ländliche Räume Husum, by B. Mildenstein, acting as Agent,

— H. Henningsen and U. Henningsen as well as P. Henningsen, by A. Piltz, Rechtsanwalt,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Thomsen, of the German Government and of the Commission at the hearing on 7 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

## Judgment

1 By order of 22 September 1999, received at the Court Registry on 18 October 2000, the Schleswig-Holsteinisches Oberverwaltungsgericht (Higher Regional Court, Schleswig-Holstein) referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 7(2) and 9(c) of 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).

2 Those questions were raised in proceedings between Mr Thomsen and the Amt für ländliche Räume (Office for Rural Areas), Husum concerning a decision of the latter which, on the expiry of the lease, attributed reference quantities attached to a dairy holding leased by Mr Thomsen to the joined parties who had become the owners of that holding by inheritance.

## The legal framework

### *The Community provisions*

3 In 1984, on account of a persistent imbalance between supply and demand in the milk sector, a system of additional levies on milk was introduced by 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). In accordance with Article 5c 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, an additional levy is payable for quantities of milk in excess of a reference quantity to be determined.

4 The general rules for the application of the additional levy are laid down in 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 No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13).

5 Regulation No 857/84 was repealed by Regulation No 3950/92 which extended the additional levy system until 1 April 2000 although that system was initially intended to apply only until 1 April 1993.

6 The second paragraph of Article 5 of Regulation No 3950/92 provides:

'... reference quantities available to producers who have not marketed milk or other milk products for one of the 12-month periods shall be allocated to the national reserve and may be reallocated in accordance with the first subparagraph. Where the producer resumes production of milk or other milk products within a period to be determined by the Member State, he shall be granted a reference quantity in accordance with Article 4(1) no later than 1 April following the date of his application.'

7 Article 7 of Regulation No 3950/92 provides:

'1. 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.

...

2. Where there is no agreement between the parties, in the case of rural leases due to expire without any possibility of renewal on similar terms, or in situations involving comparable legal effects, the reference quantities available on the holdings in question shall be transferred in whole or in part to the producers taking them over, in accordance with provisions adopted or to be adopted by the Member States, taking account of the legitimate interests of the parties.'

8 The first indent of the first paragraph of Article 8 of Regulation No 3950/92 enables the Member States to 'grant compensation in one or more annual instalments to producers who undertake to abandon definitively all or part of their milk production and place the reference quantities thus released in the national reserve'.

9 Article 9(c) of Regulation No 3950/92, as amended by Council Regulation (EEC) No 1560/93 of 14 June 1993 (OJ 1993 L 154, p. 30) defines the notion of producer as follows:

'For the purposes of this Regulation:

...

(c) "producer" means a natural or legal person or a group of natural or legal persons farming a holding within the geographical territory of a Member State:

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

and/or

— supplying the purchaser'.

*The national provisions*

10 The Federal Republic of Germany regulated the transfer of reference quantities by the Milchgarantiemengenverordnung (German regulation on guaranteed milk quantities) of 21 March 1994 (BGBl. 1994 I, p. 586), as amended by the 31st Änderungsverordnung (amendment regulation) of 3 August 1994 (BGBl. 1994 I, p. 2050) and the 32nd Änderungsverordnung of 26 September 1994 (BGBl. 1994 I, p. 2575; hereinafter the 'MGV').

11 In accordance with Paragraph 7(2) of the MGV, in the event of a transfer of a part of a holding on the basis of a lease, a proportionate reference quantity shall be transferred to the lessee. That quantity corresponds to the ratio between the land pertaining to the transferred part of the holding which is used for milk production and the total area of the holding.

12 Pursuant to Paragraph 7(4) of the MGV, if the lessee is not entitled to renewal of the lease and wishes to continue milk production, one half of the relevant reference quantity, subject to a maximum of 2 500 kg per hectare, is to be transferred to the lessor. That limitation does not apply where the lessor requires reference quantities in order to produce milk for himself, his spouse or his children.

13 In accordance with Paragraph 9 of the MGV, the milk producer must provide the purchaser with a certificate issued by the competent authority for the Land concerned, in the present case, the Amt für ländliche Räume Husum, which indicates the transferred reference quantity, the date of transfer, the transferring milk producer and the fat content of the transferred quantity.

14 If the lessor immediately transfers the land to a new lessee, the transfer of the former lessee's reference quantities to the lessor will be certified first of all and, subsequently, a second certificate will be issued by the competent authority in respect of the transfer of the lessor's reference quantities to the new lessee.

## The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Mr Thomsen carried on dairy production from 1 July 1982, initially together with his father in the form of a civil law partnership and then, after dissolution of that partnership, as a sole proprietor. Under an agreement dated 30 April 1981, Mr Thomsen's father leased farmland extending to 34.29 hectares from Mr Henningsen for a period ending on 30 September 1993. Mr Henningsen died in 1991 and his heirs Helga, Ute and Peter Henningsen, joined parties in the main proceedings, by letter of 20 August 1993 gave notice terminating the tenancy agreement with immediate effect. Following the conclusion of a settlement approved by the competent Landwirtschaftsgericht (agricultural tribunal) which provided, *inter alia*, for an extension of the lease to 30 September 1995, Mr Thomsen surrendered to Mr Henningsen's heirs on that date the land which had been let.

16 In response to an application made by those heirs on 24 November 1995, the Amt für ländliche Räume Husum, by decision of 16 January 1996, certified that, with effect from 1 October 1995, a reference quantity of 85 725 kg had been

transferred to the heirs as lessors of a part of a holding, which quantity was proportionate to a net area of 34.29 hectares of agricultural land. That decision was taken on the basis of Paragraph 7(2) and (4) of the MGV.

17 Following an unsuccessful objection brought before the authority which is the defendant in the main proceedings, Mr Thomsen brought an action before the competent Verwaltungsgericht (Administrative Court) for annulment of the decision of 16 January 1996 in the form of the decision on the objection of 14 February 1996. He submitted that, in accordance with the relevant provisions of Community law, a reference quantity can be transferred only to a milk producer. According to him, Mr Henningsen's heirs have never been milk producers and do not intend to carry on milk production on the land concerned in the future.

18 By judgment of 23 March 1998, the Verwaltungsgericht dismissed Mr Thomsen's action on the grounds that, in light of the other provisions of Regulation No 3950/92, the notion of 'producer' in Article 7(2) thereof must be interpreted widely to include both former and potential producers. According to this ruling, 'milk producer' must be understood as meaning any person entitled to a reference quantity even if that person neither sells nor delivers milk at the date to be taken into consideration.

19 Mr Thomsen appealed against that judgment before the court making the reference. That court observes that, according to the Verwaltungsgericht's interpretation, the notion of 'producer' for the purposes of Article 9(c) includes both former milk producers and future, or potential, 'producers'.

20 The national court is uncertain whether that interpretation is correct. It considers that the wording of Article 9(c) of Regulation No 3950/92 is clear and that the result of a literal interpretation of that provision is that there can be a transfer of

reference quantities under Article 7 of Regulation No 3950/92 only if the person taking over the holding is a producer at the time of the transfer or, at any rate, becomes a producer at that time.

21 Conversely, the criteria for application of Article 7 of Regulation (EEC) No 3950/92 are not satisfied where parts of a holding to which reference quantities are allocated, are transferred by purchase, lease or surrender of leased land to a person who is not a producer and who does not intend to take up milk production or to pass on the land to third parties for that purpose. In that regard, the national court added that, when Regulation No 857/84 was in force, the Bundesverwaltungsgericht (German Federal Administrative Court) held that, under that regulation, there could also be a 'transitory acquisition' of reference quantities which could be attested. It is difficult to reconcile such an interpretation with the wording of Regulation No 3950/92.

22 The national court considers that a literal application of Article 7 in conjunction with Article 9(c) of Regulation (EEC) No 3950/92 is compatible with the aims of that regulation. At the same time, the legislative aim, as it appears in the MGV, of allocating reference quantities to producers who need them in order to be able to use their land must be taken into consideration. However, the implementing provisions of the MGV indicate that Article 7 of Regulation No 3950/92 is construed differently by the German legislature.

23 It is against this legal and factual background that the Schleswig-Holsteinisches Oberverwaltungsgericht considered it appropriate to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 7(2) of Council Regulation (EEC) No 3950/92, of 28 December 1992, establishing an additional levy in the milk and milk products sector to

be construed as meaning that, on the expiry of rural leases, the reference quantities available on the holdings in question may be transferred in whole or in part in accordance with provisions adopted or to be adopted by the Member States, taking account of the legitimate interests of the parties, only if at the time of surrender the lessors are producers as defined in Article 9(c) of Regulation No 3950/92?

(2) If the notion of producer in Article 7(2) is to be understood in a broader sense, is a transfer in such cases also possible where the lessors do not envisage taking up the marketing of milk but are desirous of transferring the reference quantities together with the land to third parties?

(3) If the answer to (2) is affirmative, must the third parties to whom the reference quantities are to be transferred be producers as defined in Article 9(c) of Regulation No 3950/92?'

## The questions referred

24 By its three questions, which it is appropriate to consider together, the national court is essentially asking whether, on a proper construction of Article 7(2) of Regulation No 3950/92, on the expiry of a rural lease of a dairy holding, the transfer in whole or part to the lessor of the reference quantity attached to that holding is possible not only where the lessor is a milk producer at the time of the expiry of the lease but also where he undertakes to become a milk producer or transfers the reference quantity available to a third party who is a milk producer.

*Observations submitted to the Court*

25 Mr Thomsen submits that, in accordance with Article 7(2) of Regulation No 3950/92, upon expiry of a rural lease, the reference quantities available on the holdings concerned can be transferred to the lessor only if he himself is a producer within the meaning of Article 9(c) of that regulation.

26 In his view, even if a broader interpretation of the notion of producer deviating from the definition in Article 9(c) of Regulation No 3950/92 could be envisaged, this could only be to avoid legal consequences which were not expressly considered by the Community legislature. However, that is not the case in the dispute in the main proceedings. In that regard, Mr Thomsen points out that it is clear from several provisions of Regulation No 3950/92 that the aim of that regulation is, firstly, to leave unchanged the milk production existing before its enactment and, secondly, to strengthen the competitive position of active holdings which are capable of being developed. The Regulation is intended neither to increase the assets of landowners nor to provide them with additional assets where, as in the case of Mr Henningsen's heirs, they are not milk producers and do not intend to start milk production.

27 The Amt für ländliche Räume Husum, Mr Henningsen's heirs and the German Government essentially submit that Article 7(2) of Regulation No 3950/92 authorises the Member States to adopt provisions pursuant to which, upon expiry of rural leases, the reference quantities available are transferred to the lessors even if they, at the time of expiry of the lease, are not milk producers. They consider that the notion of producer in Article 7(2) must be interpreted as covering both former and future milk producers. In support of that argument, they rely, in particular, on the second subparagraph of Article 5 and the first indent of the first

subparagraph of Article 8 of Regulation No 3950/92 which, they maintain, make it clear that, subject to conditions, reference quantities can also be transferred to future producers.

28 Mr Henningsen's heirs add that the aim of Article 9(c) of Regulation No 3950/92 is not to limit rights on the surrender of land or to establish the persons to whom a reference quantity may be transferred. In fact, the definition of producer in that provision serves only to establish the persons liable for payment of the additional levy. They claim that the principle of the ancillary nature of reference quantities in relation to leased areas and, therefore, the principle of the transfer of reference quantities to the lessor in the case of the surrender of leased areas are justified by the principle of protection of legitimate expectations because a lessor may, when concluding a lease agreement, consider the possibility of continuing milk production after surrender of the areas covered by that agreement.

29 They conclude therefore that, in accordance with Article 7(2) of Regulation No 3950/92, upon expiry of rural leases, the reference quantities attached to the areas in question are transferred to the lessors even if, at that time, those lessors are not milk producers and do not intend to produce milk and even if they intend to transfer the areas, by way of sale or lease, to a third party who, at the time of that transaction, is not a producer.

30 By contrast, in that regard, the German Government does not support the interpretation applied by Mr Henningsen's heirs. It submits that a transfer of reference quantities to the lessor is possible where he does not intend to continue milk production himself but only if he intends to transfer the reference quantities together with the land to a third party. In that case, the final lessee must be a producer within the meaning of Article 9(c) of Regulation No 3950/92.

31 Referring principally to the case-law of the Court and, in particular, to Cases C-341/89 *Ballmann* [1991] ECR I-25 and C-15/95 *EARL de Kerlast* [1997] ECR I-1961, the Commission proposes that the answer to the three questions referred for a preliminary ruling should be that, in the case of a rural lease due to expire, the reference quantity available on the holding in question can be transferred in whole or in part to the person taking it over — irrespective of whether that person is the lessor or a new lessee — in accordance with provisions adopted or to be adopted by the Member States and taking account of the legitimate interests of the parties, only where, at the time of the takeover, that person is a producer within the meaning of Article 9(c) of Regulation No 3950/92.

*Findings of the Court*

32 It must be pointed out, first, that the general scheme of the provisions concerning the additional levy on milk shows that a reference quantity can be allocated to a farmer only if he has the status of a producer. Consequently, in order to answer the questions submitted, the concept of 'producer' within the meaning of the provisions at issue must first be considered (*Ballmann* judgment, cited above, paragraph 9). In this case, that notion is defined in Article 9(c) of Regulation No 3950/92.

33 It is apparent from the case-law of the Court that, in the case of a lease within the meaning of Article 7(1) 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 9(c) of that regulation. 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 (see, to this effect, the judgment in *EARL de Kerlast*, cited above, paragraph 24).

34 Although that case-law was developed in respect of the first subparagraph of Article 7(1) of Regulation No 3950/92, which is the sole provision governing the transfer of reference quantities to the lessee in the case of a rural lease and to the transferee in the case of sale or transfer by way of inheritance, it must be conceded that that provision and Article 7(2) cannot allow a different interpretation with respect to the rules on the transfer of reference quantities.

35 The fact remains, first, that both the first subparagraph of Article 7(1) and Article 7(2) of Regulation No 3950/92 refer explicitly to the reference quantities available on a holding (on the holdings in question) 'to the producers taking them [it] over'. It would run counter to the principle of legal certainty to interpret differently two provisions worded in an essentially identical manner and which, moreover, appear in the same article of a Community regulation.

36 Second, that analogous interpretation of the two paragraphs of Article 7 of Regulation No 3950/92 is also supported by the fact that the purchaser and the heir of a holding, referred to in the first subparagraph of Article 7(1), are in virtually the same position as a lessor since a lessor is generally the owner of the holding.

37 Third, the term 'producer' within the meaning of Article 7(2) cannot be considered to cover a different notion from that appearing in Article 9(c) of the same regulation, given that it is stated in the latter provision that the definitions contained in it are provided 'for the purposes of this Regulation'.

38 Fourth, contrary to the submission of Mr Henningsen's heirs and the German Government, the principle laid down in Article 7(1) of Regulation No 3950/92

that a reference quantity is transferred only with the transfer of the holding to which it is attached does not lead to the conclusion that the lessor's being a producer is not a condition of the transfer to that lessor of the reference quantity previously held by the lessee.

39 On the contrary, that principle is not a necessary corollary of the fundamental principle arising from the general scheme of the provisions concerning the additional levy on milk, mentioned in paragraph 32 of this judgment, that a reference quantity can be allocated to a farmer only if he has the status of a milk producer. In other words, the purpose of the principle that the reference quantity is not transferred except with the holding to which it is attached is to prevent reference quantities being used not to produce or market milk but, rather, to obtain purely financial advantages by relying on the market value of those reference quantities (see to this effect, Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraph 30).

40 As to the argument of the German Government that it is clear from the judgment in Case C-463/93 *St. Martinus Elten* [1997] ECR I-255 that, on expiry of a lease, the reference quantity attached to the holding in question reverts to the lessor without its being necessary that the lessor should have the status of a producer within the meaning of Article 9(c) of Regulation No 3950/92, it will suffice to point out that, in that judgment, the Court was asked only to answer a question relating to the rules applicable to reference quantities where, on expiry of a lease, the lessee did not intend to continue milk production. That judgment therefore cannot be considered relevant to the dispute in the main proceedings.

41 It must therefore be concluded that, in accordance with Article 7(2) of Regulation No 3950/92, on expiry of a rural lease of a milk production holding, the reference quantity attached thereto, in principle, reverts in whole or part to the lessor only where he has the status of a producer within the meaning of Article 9(c) of that regulation.

42 However, Article 7(2) cannot be interpreted in such a way as to preclude the lessor from transferring the holding to a third party with the reference quantities attached to that holding where he himself does not intend to continue the production or marketing of milk on expiry of the lease. It should be pointed out that that article does not refer specifically to 'lessors' but, rather, to 'producers' taking over the holding. It follows that that provision does not exclude the possibility that a lessor, on the date of expiry, may transfer to a third party the holding, together with all or part of the reference quantities attached thereto, in particular by way of sale or lease. In such a case, the third party 'taking over' the holding within the meaning of Article 7(2) of Regulation No 3950/92 must have the status of a producer within the meaning of Article 9(c)of that regulation.

43 However, it must be added in that regard that, if, in the absence of specific provisions in Regulation No 3950/92, the rules governing such a transfer must be defined by laws of the Member States, a temporary acquisition of reference quantities by the lessor is permissible under Community law only in so far as it is necessary and for as short a time as possible. Permitting a temporary attribution of reference quantities for a long period to lessors who do not intend to produce milk would run counter to the general scheme of the provisions concerning the additional levy on milk and to the principle that a reference quantity can be attributed to a farmer only if he has the status of a milk producer.

44 Finally, in order to answer fully the questions of the national court, it is also necessary to examine the issue of the precise date from which a lessor taking over a dairy holding after expiry of a lease and intending to produce milk must have the status of a producer within the meaning of Article 9(c) in order to be entitled to the reference quantities attached to that holding.

45 Admittedly, Regulation No 3950/92 contains no express provision governing that issue. However, it should be pointed out that Article 7(2) of that regulation cannot be interpreted as requiring that lessors should have the status of milk

producers at the precise date of expiry of the lease in order to be able to take over the holding concerned with the reference quantities attached thereto. Taking particular account of the main purpose of that provision, which is to avoid the attribution of reference quantities to persons wishing to obtain a purely financial advantage therefrom, it is sufficient that, on the abovementioned date, the lessor can show that he is preparing in a definite manner to take up milk production as soon as possible.

46 Having regard to all the above considerations, the answer to the questions referred must therefore be that, on a proper construction of Article 7(2) of Regulation No 3950/92, upon expiry of a rural lease of a dairy holding, the transfer in whole or part to the lessor of the reference quantity attached to that holding is possible only where the lessor has the status of a 'producer' within the meaning of Article 9(c) of that regulation or, at the date of expiry of the lease, transfers the reference quantity available to a third party who has that status. For the purposes of the attribution of the relevant reference quantities to lessors under Article 7(2) of Regulation No 3950/92, it is sufficient that, on the abovementioned date, the lessor can show that he is preparing in a definite manner to take up as soon as possible the activity of a 'producer' within the meaning of Article 9(c) of that regulation.

## Costs

47 The costs incurred by the German Government and by the Commission, 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 Schleswig-Holsteinisches Oberverwaltungsgericht by order of 22 September 1999, hereby rules:

**On a proper construction of Article 7(2) of Council Regulation (EEC) No 3950/92, of 28 December 1992, establishing an additional levy in the milk and milk products sector, upon expiry of a rural lease of a dairy holding, the transfer in whole or part to the lessor of the reference quantity attached to that holding is possible only where the lessor has the status of a 'producer' within the meaning of Article 9(c) of that regulation or, at the date of expiry of the lease, transfers the reference quantity available to a third party who has that status. For the purposes of the attribution of the relevant reference quantities to lessors under Article 7(2) of Regulation No 3950/92, it is sufficient that, on the abovementioned date, the lessor can show that he is preparing in a definite manner to take up as soon as possible the activity of a 'producer' within the meaning of Article 9(c) of that regulation.**

Colneric Gulmann Skouris

Delivered in open court in Luxembourg on 20 June 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber