JUDGMENT OF THE COURT (First Chamber)

5 May 2011 *

In Joined Cases C-230/09 and C-231/09,

REFERENCES for a preliminary ruling under Article 234 EC, from the Bundesfinanzhof (Germany), made by decision of 31 March 2009, received at the Court on 25 June 2009, in the proceedings

Hauptzollamt Koblenz (C-230/09)**,**

v

Kurt Etling und Thomas Etling in GbR,

intervening parties:

Bundesministerium der Finanzen,

and

* Language of the case: German.

Hauptzollamt Oldenburg (C-231/09)**,**

v

Theodor Aissen,

Hermann Rohaan,

intervening parties:

Bundesministerium der Finanzen,

THE COURT (First Chamber),

composed of A. Tizzano, President of Chamber, A. Borg Barthet, M. Ilešič (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 May 2010,

after considering the observations submitted on behalf of:

— Hauptzollamt Koblenz, by C. Busse, Regierungsdirektor,

— Kurt Etling und Thomas Etling in GbR, by G. Zulauf, Rechtsanwalt,

— Hauptzollamt Oldenburg, by A. Kramer and W. Uhlig, Regierungsdirektoren,

— Mr Aissen, by A. Enninga, Rechtsanwalt,

— Mr Rohaan, by D. Schuhmacher, Rechtsanwalt,

— the European Commission, by G. von Rintelen and H. Tserepa-Lacombe, acting as Agents.

after hearing the Opinion of the Advocate General at the sitting on 14 September 2010,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector (OJ 2003 L 270, p. 123), as amended by Council Regulation (EC) No 2217/2004 of 22 December 2004 (OJ 2004 L 375, p. 1; 'Regulation No 1788/2003').

2 The references were made in disputes between, in Case C-230/09, the Hauptzollamt Koblenz (principal customs office, Koblenz) and Kurt Etling und Thomas Etling in GbR, and, in Case C-231/09, between the Hauptzollamt Oldenburg (principal customs office, Oldenburg) and Mr Aissen and Mr Rohaan, respectively concerning, first, determination of the reference quantity by reference to which the amount of the dairy premium is fixed, and, secondly, determination of the basis on which participation in the reallocation of the unused part of the national reference quantity allocated to deliveries is to be fixed.

Legal context

European Union legislation

The legislation on the levy in the milk sector

3 In 1984, by reason of a persisting imbalance between supply and demand in the milk sector, an additional levy system in that sector, based on the principle that a levy is due for quantities of milk and/or milk equivalent exceeding a reference quantity to be determined, was established 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).

4 The same day saw the adoption 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).

5 The additional levy system was extended on a number of occasions, notably 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 was amended several times.

6 With a view in particular to simplification and clarification, that latter regulation was repealed and replaced by Regulation No 1788/2003, which was in turn repealed and

replaced by Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products ('Single CMO' Regulation) (OJ 2007 L 299, p. 1), with effect from 1 April 2008. The disputes in the main proceedings nevertheless remain governed *ratione temporis* by Regulation No 1788/2003.

7 The fourth, tenth and fourteenth recitals of Regulation No 1788/2003 were worded as follows:

'(5) The levy should be set at a dissuasive level and be payable by the Member States as soon as the national reference quantity is exceeded. The Member State should then divide the burden of payment among the producers who have contributed to the overrun. The latter must be liable vis-à-vis the Member State for payment of their contribution to the levy due for the mere fact of having overrun their available quantity.

…

(10) … The sum of the quantities allocated to the producers by the Member States may not exceed the national reference quantities. …

…

(14) In order to ensure that administration of the scheme remains sufficiently flexible, the Member States should be authorised to reallocate unused reference quantities at the end of a period, either nationally or among purchasers.'

8 Regulation No 1788/2003 established rules for allocating each national reference quantity between producers, in the form of individual reference quantities.

9 Article 4 of that regulation provided:

'The levy shall be entirely allocated, in accordance with the provisions of Articles 10 and 12, among the producers who have contributed to each of the overruns of the national reference quantities referred to in Article 1(2).

Without prejudice to Article 10(3) and Article 12(1), producers shall be liable vis-à-vis the Member State for payment of their contribution to the levy due, calculated in accordance with the provisions of Chapter 3, for the mere fact of having overrun their available reference quantities.'

10 Article 5 of Regulation No 1788/2003 provided:

'For the purposes of this Regulation:

…

(i) "national reference quantity" means the reference quantity fixed in Annex I for each Member State;

(j) "individual reference quantity" means a producer's reference quantity at 1 April of any twelve-month period;

(k) "available reference quantity" means the reference quantity available to producers on 31 March of the twelve-month period for which the levy is calculated, taking account of all transfers, sales, conversions and temporary re-allocations provided for in this Regulation which have taken place during that twelve-month period.'

11 According to Article 6(5) of Regulation No 1788/2003:

'Individual reference quantities shall be modified, where appropriate, for each of the twelve-month periods concerned, so that, for each Member State, the sum of the individual reference quantities for the deliveries and that for the direct sales does not exceed the corresponding part of the national reference quantity adapted in accordance with Article 8, taking account of any reductions made for allocation to the national reserve as provided for in Article 14.'

12 Article 10(3) of the same regulation allowed for the possibility of carrying out a reallocation of the unused part of the national reference quantity allocated to deliveries. It provided:

'Each producer's contribution to payment of the levy shall be established by decision of the Member State, after any unused part of the national reference quantity allocated to deliveries has or has not been re-allocated, in proportion to the individual reference quantities of each producer or according to objective criteria to be set by the Member States:

(a) either at national level on the basis of the amount by which each producer's reference quantity has been exceeded,

(b) or firstly at the level of the purchaser and thereafter at national level where appropriate.'

13 Articles 15 to 20 of Regulation No 1788/2003 laid down certain conditions under which individual reference quantities could be transferred.

14 The first subparagraph of Article 16(1) of that regulation provided:

'By the end of each twelve-month period, Member States shall authorise, for the period concerned, any temporary transfers of part of individual reference quantities which the producers who are entitled thereto do not intend to use.'

15 Article 17(1) of that regulation provided:

'The individual reference quantities shall be transferred with the holding to the producers taking it over when it is sold, leased, transferred by actual or anticipated inheritance or any other means involving comparable legal effects for the producers, 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. The part of the reference quantity which, where applicable, has not been transferred with the holding shall be added to the national reserve.'

16 Article 18(1) of Regulation No 1788/2003 provided:

'With a view to successfully restructuring milk production or improving the environment, Member States may, in accordance with detailed rules which they shall lay down taking account of the legitimate interests of the parties concerned:

…

(b) determine on the basis of objective criteria the conditions on which producers may obtain, in return for payment, at the beginning of a twelve-month period, the re-allocation by the competent authority or a body designated by that authority of individual reference quantities released definitively at the end of the preceding twelve-month period by other producers in return for compensation in one or more annual instalments equal to the abovementioned payment;

…

(e) determine, on the basis of objective criteria, the regions or collection areas within which the permanent transfer of reference quantities without transfer of the corresponding land is authorised, with the aim of improving the structure of milk production;

(f) authorise, upon application by a producer to the competent authority or a body designated by that authority, the definitive transfer of reference quantities without transfer of the corresponding land, or vice versa, with the aim of improving the structure of milk production at the level of the holding or to allow for extensification of production.'

The legislation on direct support in the context of the common agricultural policy

17 With a view in particular to ensuring a fair standard of living for the agricultural population, Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1) as amended by Commission Regulation (EC) No 118/2005 of 26 January 2005 (OJ 2005 L 24, p. 15; 'Regulation No 1782/2003') established the system of single payment and other support systems making provision for direct payments, including that concerning the dairy premium and additional payments. That regulation was repealed and replaced by Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16). Nevertheless, the dispute in the main proceedings in Case C-230/09 remains governed *ratione temporis* by Regulation No 1782/2003.

18 The system established by that latter regulation was based, in particular, on the principles of moving from support of production to support of the producer, by introducing a system disconnected from income support for each agricultural holding, and on the combining of a number of direct payments made under various schemes into a single payment, determined on the basis of previous entitlements during a reference period.

19 The final sentence of the twenty-ninth recital of that regulation stated that the single payment was to be established at farm level.

20 Article 62 of Regulation No 1782/2003 concerned the regional implementation of the single payment system. That article provided:

'the Member State may decide that the amounts resulting from dairy premiums and additional payments, provided for in Articles 95 and 96, shall be included, in part or in full, in the single payment scheme starting from 2005. Entitlements established under this paragraph shall be modified accordingly.

The reference amount for those payments shall be equal to the amounts to be granted according to Articles 95 and 96 calculated on the basis of the individual reference quantity for milk available on the holding on 31 March of the year of inclusion, in part or in full, of those payments in the single payment scheme.

…'

21 Article 95 of Regulation No 1782/2003 provided:

'1. From 2004 to 2007, milk producers shall qualify for a dairy premium. It shall be granted per calendar year, per holding and per tonne of individual reference quantity eligible for premium and available on the holding.

…

Individual reference quantities which have been the subject of temporary transfers in accordance with Article 6 of … Regulation (EEC) No 3950/92 […]or Article 16 of … Regulation (EC) No 1788/2003 … on 31 March of the calendar year concerned shall be deemed to be available on the holding of the transferee for that calendar year.

…'

National legislation

22 Paragraph 14(1) of the Order concerning the levy on milk [Verordnung zur Durchführung der EG-Milchabgabenregelung (Milchabgabenverordnung)] of 9 August 2004 (BGBl. I, p. 2143; 'the MilchAbgV') provided:

'The purchaser may allocate delivery reference quantities which have not been used during the relevant 12-month period (under-deliveries) to other milk producers whose deliveries have exceeded the delivery reference quantities which were allocated to them (deliverers of excess quantities). Allocation of unused delivery reference quantities to the deliverer of excess quantities concerned shall be effected in accordance with the following formula:

Total of the under-deliveries x delivery reference quantity of the deliverer of excess quantities

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Total of the delivery reference quantities of all the deliverers of excess quantities'

…'

23 In accordance with Article 2(1) of the law applying the single payment system [Gesetz zur Durchführung der einheitlichen Betriebsprämie (Betriebsprämiendurchführungsgesetz), BGBl. I 2004, p. 1868)] of 26 July 2004, the Federal Republic of Germany implemented the single payment system at regional level as from 1 January 2005.

24 Paragraph 6 of the Order concerning the premium for milk products [Verordnung über die Durchführung der Milchprämie und der Ergänzungszahlung zur Milchprämie (Milchprämienverordnung)] of 18 February 2004 (BGBl. I, p. 267; 'the Milch-PrämV') was made applicable to the calculation of the single payment by virtue of Paragraph 34(1) of the Order on the integrated management and control system [Verordnung über die Durchführung von Stützungsregelungen und gemeinsamen Regeln für Direktzahlungen nach der Verordnung (EG) Nr. 1782/2003 im Rahmen des Integrierten Verwaltungs- und Kontrollsystems sowie zur Änderung der Kartoffelstärkeprämienverordnung (InVeKoS-Verordnung)] of 3 December 2004 (BGBl. I, p. 3194).

25 Paragraph 6 of the MilchPrämV provided:

‘1. The reference quantities determinant for the granting of the dairy premium and the additional payment, which the milk producer holds on 31 March of the year of the application, shall be attested by a certificate …, in the case of “delivery” reference quantities for the buyer designated in paragraph 2, point 2, issued by the competent customs office (main customs office) (certificate determining the reference quantities).

2. The certificate determining the reference quantities shall at the same time indicate

(1) the quantities of milk or milk equivalent which have been actually delivered or marketed by the milk producer during the twelve-month period ending on 31 March of the year of the application...

…’

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

Case C-231/09

26 The reference for a preliminary ruling in Case C-231/09 concerns two sets of proceedings pending before the referring court, one initiated by Mr Aissen and the other

by Mr Rohaan, both of whom are milk producers who made deliveries during the twelve-month period 2004/2005. Each of them took over, during that period, a holding producing milk, with a reference quantity transferred with the holding, but which had been partially used for that period by the previous farmer.

27 They both asked the competent authority to certify that the reference quantity of the previous farmer had been transferred to them in its entirety. The authority issued a certificate to that effect to each of them, but specified therein that, in the event of transfer during the twelve-month period, the dairy must indicate to the new farmer the reference quantity remaining to be delivered, taking account of the amount already delivered by the previous farmer during the same period.

28 On the basis of those certificates and information provided by the dairy concerned, the Hauptzollamt Oldenburg recalculated the reference quantities of Mr Aissen and Mr Rohaan, and allocated to each of them, for the twelve-month period 2004/2005, only the part of the transferred reference quantity for which milk had not been delivered by the previous farmer, the other part being left to the latter for that period.

29 Mr Aissen and Mr Rohaan having both exceeded their reference quantities allocated to the respective deliveries, the Hauptzollamt Oldenburg determined the contribution of each of them to the levy.

30 In determining the levy, the Hauptzollamt Oldenburg proceeded to reallocate the unused part of the national reference quantity allocated to deliveries, provided for in Article 10(3) of Regulation No 1788/2003. For that reallocation, both in the case of Mr Aissen and that of Mr Rohaan, it did not take account of the part of the reference

quantity corresponding to the holding taken over during the period concerned which had already been used by the previous farmer.

31 Mr Aissen and Mr Rohaan brought actions against the notices determining their respective contributions to the levy.

32 The Finanzgericht Hamburg (Finance Court, Hamburg) upheld the actions, taking the view that the whole of the reference quantity corresponding to the holding taken over should be taken into account, in favour of the new farmer, on the reallocation of the unused part of the national reference quantity allocated to deliveries, without taking account of milk deliveries made by the previous farmer.

33 The Hauptzollamt Oldenburg brought an action on a point of law ('Revision') before the Bundesfinanzhof (Federal Finance Court).

34 According to the latter, it follows from Article 5(k) of Regulation No 1788/2003 that account must be taken of transfers, sales, conversions and temporary re-allocations of reference quantities which took place during a twelve-month period when examining, after the expiry of that period, whether the producer delivered more milk exempt of the levy than he was entitled to do. That right was exhausted once used. The transfer of a reference quantity already used once could not, therefore, whatever the legal context in which it took place, restore the right to deliver milk exempt of the levy during the relevant twelve-month period.

35 The Bundesfinanzhof considers, however, that a concept of the reference quantity as an abstract right might be envisaged. In that respect, EU law does not provide, in the case of a transfer of a holding during a twelve-month period, for the determination or calculation of a second reference quantity, but provides for account to be taken of a single reference quantity, the use of which is, however, at the disposal first of one producer and then the other, the latter being able to use it only in so far as it has not already been exhausted by reason of milk deliveries made by the former. It does not therefore appear to the Bundesfinanzhof that the reference quantity should be split in accordance with some method between successive producers.

36 The Bundesfinanzhof thus found it conceivable, when reallocating the unused part of the national reference quantity, that account might be taken, in the case of the transfer of a holding during a twelve-month period, of the total individual reference quantity at the disposal of the new farmer at the expiry of that period, even if the latter had never held the full right to deliver that quantity of milk exempt from levy.

37 On the other hand, the Bundesfinanzhof does not exclude the possibility that, particularly by reason of the risk of speculative transfers likely to be made solely for the purpose of obtaining a better position on the reallocation of the unused part of the national reference quantity, such a conceptual dissociation between the use of the individual reference quantity and the taking into account of that reference quantity in the context of the reallocation as the 'available reference quantity' within the meaning of Article 5(k) of Regulation No 1788/2003, might be contrary to the letter and spirit of EU law, including the general principles on the organisation of the milk market.

38 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must [EU] law, in particular Article 5(k) of Regulation No 1788/2003, be interpreted as meaning that the reference quantity of a producer who, in the course

of an ongoing 12-month period, took over an agricultural holding from another producer does not include the quantity in respect of which, during the 12-month period concerned, milk was delivered by that other producer prior to the transfer of the holding?

2. Do provisions of [EU] law or general principles governing the common organisation of the market in milk and milk products preclude a rule of national law which, in the framework of the scheme provided for in Article 10(3) of Regulation No 1788/2003 for offsetting excess deliveries against the unused portion of the national reference quantity, allows the producer in the situation at issue in the first question, who has taken over the agricultural holding in the course of the 12-month period, to participate in the allocation of that unused portion on the basis of a quantity which includes the portion of the reference quantity already delivered by the other producer?'

Case C-230/09

39 The German civil law company Kurt und Thomas Etling in GbR produces milk. For the milk marketing year 2004/2005, that company was allocated a reference quantity for deliveries of 553 678 kg, taking account, in particular, of the fact that, since the year 2000, it had leased a part of its reference quantity allocated to deliveries in the amount of 50 000 kg. The lease was terminated during February 2005, so that that part of the reference company was transferred to the said company as from 1 March 2005.

40 At the request of the latter, the competent agricultural authority issued a certificate that a reference quantity allocated to deliveries of 50 000 kg was transferred to it as from 1 March 2005, in which it was however stated that, for the twelve-month period

2004/2005, the only part of the reference quantity which could be used was that which was not yet exhausted, that part to be determined by the dairy.

41 The outgoing lessee had, before the termination of the lease, already delivered 50 000 kg of milk for that twelve-month period. On the basis of the certificate referred to above and information provided by the dairy, the Hauptzollamt Koblenz, for the purposes inter alia of establishing the levy due, recalculated the reference quantity for the deliveries of Kurt und Thomas Etling in GbR and that of the said lessee, and considered that, as the reference quantity transferred had been fully exhausted by the latter, it had to be entered, for the said twelve-month period, on the account of the latter, and not on the account of Kurt und Thomas Etling in GbR.

42 For the purposes of calculating the dairy premium, the Hauptzollamt Koblenz issued to that company a certificate in which account was not taken of the taking over of the reference quantity previously leased, so that only the reference quantity of 553 678 kg was indicated there.

43 Its complaint against that certificate having been rejected, Kurt und Thomas Etling in GbR brought an action before the Finanzgericht Rheinland-Pfalz (Finance Court Rheinland-Pfalz), which that court upheld, taking the view that, in the circumstances at issue in the main proceedings, the obtaining of such a premium by virtue of Regulation No 1782/2003, did not depend on deliveries which might have been made by the lessee.

44 The Hauptzollamt Koblenz brought a 'Revision' action against that decision before the Bundesfinanzhof.

45 That court considered that it might be possible, in the context of Article 95(1) of Regulation No 1782/2003, which provides that the calculation of the dairy premium is to be made by reference, inter alia, to the individual reference quantity eligible for that premium and available in the holding, to allocate that premium, in the case of the transfer of an individual reference quantity during a twelve-month period, by reference to the total individual reference quantity at the disposal of the acquirer of the reference quantity transferred at the end of that period, even if the latter had never held the full right to deliver that quantity of milk exempt from levy.

46 The Bundesfinanzhof does not, however, exclude the possibility that such a conceptual dissociation between the use of the individual reference quantity and the taking into account of that reference quantity in the context of the calculation of the dairy premium as the 'available reference quantity' within the meaning of Article 5(k) of Regulation No 1788/2003, might be contrary to the letter and spirit of EU law, including the general principles on the organisation of the milk market.

47 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Must [EU] law, in particular Article 5(k) of Regulation No 1788/2003, be interpreted as meaning that the reference quantity of a producer, in the 12-month period in which a reference quantity was transferred to that producer from another producer, does not include the quantity in respect of which, during the 12-month period in question, milk was already delivered by that other producer?'

48 By order of the President of the Court of 6 August 2009, Cases C-230/09 and C-231/09 were joined for the purposes of the written and oral procedures and of the judgment.

The questions referred for a preliminary ruling

Preliminary observations

49 Regulation No 1788/2003 made provision for various cases of transfer, between producers, of individual reference quantities or parts thereof. In that respect, the legislature thought it appropriate, first, to provide for exceptions to the principle that the reference quantity for a farm is transferred with the farm, and, secondly, to maintain temporary transfer or reallocation mechanisms designed to enable certain producers to increase the quantity of milk marketed, within the limits of the national reference quantity, exempt from the levy for a given twelve-month period. One such mechanism was that provided for in Article 10(3) of Regulation No 1788/2003, which allowed reallocation of the unused part of the national reference quantity to producers who had overdelivered during a twelve-month period.

50 That regulation further made provision, in Articles 17 and 18, for transfers of reference quantities which, whilst taking place during that period or at the beginning of it, habitually affected the reference quantity of a producer beyond the end of that period. With regard to those transfers, it follows from the general system of Regulation No 1788/2003, from the objective pursued by the latter of re-establishing the balance between supply and demand on the milk market, characterised by structural surpluses, by means of a limitation on milk production which that regulation is designed to ensure, and from the principle set out in the tenth recital of the regulation and enacted in Article 6(5) thereof, according to which the sum of the quantities allocated to producers by a Member State and those allocated by the latter to the national reserve may not exceed the national reference quantity, that the individual reference quantity forming the subject-matter of such a transfer may allow the transferee producer to

market milk exempt from the levy for the same period only in so far as the former holder of that reference quantity has not used it.

The two questions in Case C-231/09

51 By its two questions in Case C-231/09, which need to be examined together first, the referring court asks, in essence, under what conditions it is permitted to determine the participation in the reallocation of the unused part of the national reference quantity allocated to deliveries, provided for in Article 10(3) of Regulation No 1788/2003, of a producer who has delivered in excess, where that producer has taken over, during the relevant twelve-month period, a farm with an individual reference quantity and in which milk has been produced and delivered for that same period by the producer who previously operated it.

52 It should be noted at the outset that Article 10(3) of Regulation No 1788/2003 gave Member States the choice whether or not to proceed to a reallocation of the unused part of the national reference quantity allocated to deliveries to producers who had overdelivered before establishing, in accordance with the rules in point (a) or point (b) of that provision, the contribution of each of those producers to payment of the levy due for the relevant twelve-month period.

53 It should next be noted that the operation of reallocating the unused part of the national reference quantity allocated to deliveries and the operation of establishing the contribution of producers to payment of the levy due constitute two distinct

operations, even if they are linked, in so far as the first is an optional precursor of the second and affects the result of the latter.

54 Moreover, it follows from the very wording of Article 10(3) of Regulation No 1788/2003 that the rules laid down in point (a) or point (b) of that provision refer only to the operation for establishing the contribution of producers to payment of the levy due.

55 It follows that, contrary to the view of the European Commission, the criterion of 'the amount by which each producer's reference quantity has been exceeded' laid down in Article 10(3)(a) of Regulation No 1788/2003 does not relate to the operation for reallocating the unused part of the national reference quantity allocated to deliveries.

56 In any event, the available reference quantity, as defined in Article 5(k) of Regulation No 1788/2003, cannot constitute a criterion for the purposes of that reallocation. It follows from that definition that that quantity is determined, in particular, taking account of 'temporary re-allocations provided for in this Regulation', which includes the reallocation provided for in Article 10(3) of the said regulation. The available reference quantity, within the meaning of Article 5(k), is thus not known until after that reallocation, in so far as the latter has taken place.

57 However, it is necessary to examine whether other criteria laid down in Article 10(3) are applicable in the event of a Member State deciding to carry out such a reallocation.

58 In that respect, in the German, French, Portuguese and Slovene versions of that provision, the legislature has used, respectively, the formulation 'Neuzuweisung …, die proportional zu den Referenzmengen der einzelnen Erzeuger oder nach objektiven,

von den Mitgliedstaaten festzulegenden Kriterien erfolgt' ('reallocation made proportionally to the reference quantities of each producer or according to objective criteria to be determined by the Member States'), the formulation 'après réallocation ou non, proportionnellement aux quantités de référence individuelles de chaque producteur ou selon des critères objectifs à fixer par les États membres, de la partie inutilisée de la quantité de référence nationale affectée aux livraisons' ('after reallocation or not, proportionately to the individual reference quantities of each producer or in accordance with objective criteria to be determined by the Member States, of the unused part of the national reference quantity allocated to deliveries'), and the formulation 'após eventual reatribuição — proporcionalmente às quantidades de referência individuais de cada produtor ou de acordo com critérios objectivos a definir pelos Estados-Membros — da parte não utilizada da quantidade de referência nacional afectada às entregas' ('after possible reallocation, proportionately to the individual reference quantities of each producer or in accordance with objective criteria to be defined by the Member States, of the unused part of the national reference quantity allocated to deliveries'), and the formulation 'porazdeljen ali ne, v sorazmerju z individualnimi referenčnimi količinami vsakega proizvajalca ali skladno z objektivnimi merili, ki jih določijo države članice' ('reallocated or not, proportionately to the individual reference quantities of each producer or in accordance with objective criteria determined by the Member States'.

59 It appears however from other language versions of Regulation No 1788/2003, such as the Bulgarian, English and Dutch versions, that the terms 'proportionately to the (individual) reference quantities of each producer or in accordance with objective criteria to be determined by the Member States' contained in Article 10(3) of that regulation, refer not to the possible reallocation of the unused part of the national reference quantity allocated to deliveries, but to the establishment of the contribution of producers to payment of the levy due.

60 According to settled case-law, the wording used in one language version of an EU provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. (see, in particular, Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 23; Case C-239/07 *Sabatauskas*

and Others [2008] ECR I-7523, paragraph 38). The various language versions of a text of EU law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see, to that effect, *Endendijk*, cited above, at paragraph 24, and Case C-340/08 *M and Others* [2010] ECR I-3913, paragraph 44).

61 In that respect, it is important to note, first, that as the fourteenth recital of Regulation No 1788/2003 states, the legislature wished to give a certain flexibility to the management of the levy system in the milk and dairy sector by authorising Member States to reallocate unused reference quantities at the end of a period.

62 It does not however appear that that possibility was an innovation in relation to the previous system or that a notable modification of the latter was made by the legislature on this point.

63 On the contrary, the seventh recital of Regulation No 3950/92, which Regulation No 1788/2003 replaced, already provided that 'in order to keep the management of the scheme sufficiently flexible, provision should be made for individual overruns to be equalled out over all the individual reference quantities of the same type within the territory of a Member State'. In the same way, the second subparagraph of Article 2(1) of Regulation No 3950/92, corresponding to Article 10(3) of Regulation No 1788/2003, provided that '[i]n accordance with a decision of the Member State, the contribution of producers towards the levy payable shall be established, after the unused reference quantities have been reallocated or not, either at the level of the purchaser, in the light of the overrun remaining after unused reference quantities have been allocated in proportion to the reference quantities of each producer, or at

national level, in the light of the overrun in the reference quantity of each individual producer'.

64 It is clear from all the language versions of that latter provision that it was indeed the allocation of unused reference quantities which was to be carried out 'in proportion to the reference quantities of each producer' and that the contribution of producers to the payment of the levy due was, for its part, established by reference to the overrun of the reference quantity of each individual producer.

65 Secondly, if Article 10(3) of Regulation No 1788/2003 had to be interpreted as meaning that the words 'in proportion to the individual reference quantities of each producer or according to objective criteria to be set by the Member States' relate to the establishment of the contribution of producers to payment of the levy due, the criteria contained in that formulation would be additional to that laid down in point (a) of Article 10(3), namely 'on the basis of the amount by which each producer's reference quantity has been exceeded', which would, at the very least, unnecessarily complicate the application of the levy system.

66 It follows from the above that the criteria contained in that formulation apply to the reallocation of the unused part of the national reference quantity allocated to deliveries.

67 As for the precise scope of those criteria, it should be noted that the German version of Article 10(3) of Regulation No 1788/2003 used the term 'Referenzmengen' ('reference quantities').

68 As stated in paragraph 60 of this judgment, the wording used in one language version of an EU provision cannot serve as the sole basis for the interpretation of that provision.

69 In this case, the language versions of Article 10(3) other than the German version used the words 'individual reference quantities', which were moreover defined in Article 5(j) of Regulation No 1788/2003 as 'a producer's reference quantity at 1 April of any twelve-month period'.

70 In those circumstances, as the Hauptzollamt Koblenz and the Hauptzollamt Oldenburg argue, Article 10(3) of Regulation No 1788/2003 must be interpreted as meaning that the reallocation of the unused part of the national reference quantity allocated to deliveries must be carried out in proportion to the individual reference quantity of each producer having overdelivered, namely that determined at 1 April of the relevant twelve-month period, or according to objective criteria to be set by the Member States.

71 In that respect, it is for the referring court to verify whether, in adopting Paragraph 14(1) of the MilchAbgV, the Federal Republic of Germany intended to apply the option, provided for in Article 10(3) of Regulation No 1788/2003, whereby that reallocation is carried out in proportion to the individual reference quantity of each producer which has overdelivered, or whether that Member State intended, by having recourse to the option also provided by that provision to set other objective criteria for the purposes of that reallocation, to allow such a producer who, during the relevant twelve-month period, has had transferred to him a reference quantity under which milk had already been produced and delivered for that same period by the producer who previously held it, to participate in that reallocation by including some or all of that reference quantity.

72 If the Federal Republic of Germany opted for the first solution, it should be noted that the concept of individual reference quantity, as defined in Article 5(j) of Regulation No 1788/2003, in that it refers to the starting date of the relevant twelve-month period, does not in any event allow transfers of reference quantities during that period to be taken into account.

73 If the Federal Republic of Germany opted for the second solution, it should be noted that, by providing for the possibility of the Member States establishing, for the purposes of reallocating the unused part of the national reference quantity allocated to deliveries, objective criteria other than that of the individual reference quantity, the EU legislature left them, for that purpose, a fairly wide margin of discretion. The fact remains, however, that the Member States were not empowered to introduce any kind of criteria at all in that respect.

74 When adopting measures to implement EU legislation, Member States must exercise their discretion in compliance with the general principles of EU law (Case C-313/99 *Mulligan* [2002] ECR I-5719, paragraph 35, Case C-495/00 *Azienda Agricola Giorgio, Giovanni and Luciano Visentin* [2004] ECR I-2993, paragraph 40), which include the principles of legal certainty, the protection of legitimate expectations, proportionality and non-discrimination. Similarly, such implementing measures must comply with fundamental rights, such as the right to property (*Mulligan*, paragraph 36).

75 Moreover, having regard to the fact that the adoption of national legislation such as that at issue in the main proceedings forms part of the common agricultural policy, such legislation cannot be established or applied in such a way as to compromise the objectives pursued by that policy, and more particularly those envisaged by the

common organisation of the markets in the milk sector (*Mulligan*, paragraph 33). Reference should be made in particular, on that subject, to the principles of the functioning of the levy system, established by Regulation No 1788/2003, including those concerning the transfer of reference quantities.

76 In that respect, although the principle mentioned in paragraph 50 of this judgment that the sum of the quantities allocated to producers by a Member State and those allocated by the latter to the national reserve must not exceed the national reference quantity affects the right of a producer who has taken a transfer of an individual reference quantity that has already been used in whole or in part to deliver milk exempt from the levy, that principle cannot have any impact on the reallocation operation provided for in Article 10(3) of Regulation No 1788/2003. In so far as the only purpose of that operation is to allow Member States to allocate, at the end of a twelve-month period, the unused part of the national reference quantity allocated to deliveries between producers who have overdelivered, it has no impact on the volume of that unused part and is thus not capable of affecting the equality between, on the one hand, the sum of the individual reference quantities and the reference quantities allocated by the Member State concerned to the national reserve, and, on the other hand, the national reference quantity.

77 It was therefore lawful for Member States, when implementing the option provided for by Article 10(3) of Regulation No 1788/2003, to set 'objective criteria' to allow those producers, who had received a transfer, during the relevant twelve-month period, of a reference quantity under which milk had already been delivered for that same period by the producer who had previously held it to participate in that reallocation by including some or all of that reference quantity, provided that legislation complies with the other imperatives mentioned in paragraphs 74 and 75 of this judgment.

78 Member States must however ensure that such legislation is established in such a way as not to give rise to transfers which, while formally complying with the conditions laid down by Regulation No 1788/2003, are intended solely to allow certain overdelivering producers to obtain a more favourable position on the reallocation of the unused part of the national reference quantity allocated to deliveries. The case-law of the Court shows that the application of EU regulations cannot be extended to cover abusive practices of economic operators (Case C-206/94 *Paletta* [1996] ECR I-2357, paragraph 24 and case-law cited, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 51).

79 Having regard to the whole of the above considerations, the answers to the questions in Case C-231/09 are as follows:

— Article 10(3) of Regulation No 1788/2003 must be interpreted as meaning that the reallocation of the unused part of the national reference quantity allocated to deliveries must be carried out in proportion to the individual reference quantity of each producer having overdelivered, namely that determined at 1 April of the relevant twelve-month period, or according to objective criteria to be set by the Member States. The concept of individual reference quantity used in that provision does not allow transfers of reference quantities during that period to be taken into account.

— National legislation implementing the option, provided for in Article 10(3) of Regulation No 1788/2003, of setting objective criteria according to which the reallocation of the unused part of the national reference quantity allocated to deliveries is to be carried out must comply, in particular with general principles of EU law and the objectives pursued by the common agricultural policy, especially those concerning the common organisation of the markets in the milk sector.

— Those objectives do not preclude national legislation, adopted in the context of the implementation of that option, which allows overdelivering producers, who have, in accordance with the provisions of Regulation No 1788/2003, received a transfer, during the relevant twelve-month period, of an individual reference quantity under which milk has already been delivered for that same period by the producer who previously held it, to participate in that reallocation by including some or all of that reference quantity. Member States must however ensure that such legislation does not give rise to transfers which, while formally complying with the conditions laid down by that regulation, are intended solely to allow certain overdelivering producers to obtain a more favourable position on that reallocation.

The question in Case C-230/09

80 It is apparent from the order for reference in Case C-230/09 that the dispute in the main proceedings in that case concerns the determination of the reference quantity by reference to which the amount of the dairy premium enjoyed by Kurt und Thomas Etling in GbR was to be fixed. In that respect, the referring court seeks an interpretation of Article 5(k) of Regulation No 1788/2003 only in so far as it considers that Article 95(1) of Regulation No 1782/2003, which governed the calculation of that premium at the time of the facts in the main proceedings, referred, on the subject of that calculation, to the said Article 5(k).

81 In those circumstances, the question of the referring court must be interpreted as asking, in essence, whether the expression 'individual reference quantity eligible for premium and available on the holding' in Article 95(1) of Regulation No 1782/2003 must be interpreted as meaning that, where a producer has received a transfer, during the relevant twelve-month period, of a reference quantity already used by its previous

holder during the same period, that expression also includes that latter reference quantity.

82 It needs to be examined first whether the premiss that Article 95(1) of Regulation No 1782/2003 referred to the concept of 'available reference quantity' as defined in Article 5(k) of Regulation No 1788/2003 is correct.

83 As has been pointed out both by the Commission in its pleadings and by the Advocate General in points 19 and 20 of his Opinion, Article 95(1) of Regulation No 1782/2003 did not use exactly the words 'available reference quantity' defined in Article 5(k) of Regulation No 1788/2003. The fact remains, however, that, in so far as the said Article 95(1) used the expression 'individual reference quantity', recourse to the part 'available on the holding' would have been devoid of purpose if the legislature had intended to refer to the concept of the 'individual reference quantity', referred to in Article 5(j) of Regulation No 1788/2003.

84 In addition, it follows from Article 95(3) of Regulation No 1782/2003 that individual reference quantities having formed the subject-matter of temporary transfers under Article 16 of Regulation No 1788/2003 on 31 March of the calendar year are to be regarded as being available to the farm of the transferee. It is thus at that date that the situation of a producer capable of benefiting from the dairy premium must be assessed for the purposes of calculating that premium.

85 It is the 'available reference quantity' which, in accordance with Article 5(k) of Regulation No 1788/2003, is determined by reference to the said date.

86 Having regard to those considerations, it must be held that, in Article 95(1) of Regulation No 1782/2003, the legislature effectively envisaged the concept of 'available reference quantity' as defined in Article 5(k) of Regulation No 1788/2003.

87 It next needs to be examined whether, when a producer has received a transfer, during the relevant twelve-month period, of a reference quantity already used by the previous holder during the same period, that concept also includes that latter reference quantity.

88 The term 'available reference quantity', defined in Article 5(k) of Regulation No 1788/2003, designates 'the reference quantity available to producers on 31 March of the twelve-month period for which the levy is calculated, taking account of all transfers, sales, conversions and temporary re-allocations provided for in [that] regulation which have taken place during that twelve-month period'. It thus plays a particular role in the system of the said regulation, and, therefore, cannot be analysed outside that context.

89 It is apparent from the wording of the fifth recital of Regulation No 1788/2003 and from that of Articles 4, second paragraph, and 10(3)(a) thereof, that that reference quantity serves solely as the basis for determining possible overdeliveries made by producers and thus the amount of the levy due, the words 'available reference quantity' not being used in any other provision of that regulation.

90 In that respect, if an individual reference quantity or a part of it could, in the case of a transfer, be used by a producer in order to make deliveries exempt from the levy for a period of twelve months and, subsequently, by the transferee producer in order to include it in his available reference quantity and thus reduce his overdelivery for that same period, a single reference quantity would be used twice for the

same twelve-month period, which would go against the principle mentioned in paragraph 50 and recalled in paragraph 76 of this judgment, according to which the sum of the quantities allocated to producers by the Member States and those allocated to the national reserve may not exceed the national reference quantity.

91 That solution also conforms with the general system of Regulation No 1782/2003, in so far as it avoids the risk of a dairy premium being granted, for one and the same period, to two different producers on the basis of the same available reference quantity.

92 Thus, the concept of an available reference quantity cannot be dissociated from the use which producers make of it, and cannot therefore cover an individual reference quantity which has been transferred, or a part of the latter, which has already been used by another producer for the same twelve-month period.

93 Therefore, having regard to the whole of the above considerations, the answer to the question referred in Case C-230/09 is that the expression 'individual reference quantity eligible for premium and available on the holding' contained in Article 95(1) of Regulation No 1782/2003, which corresponds to the expression 'available reference quantity' contained in Article 5(k) of Regulation No 1788/2003, must be interpreted as meaning that, where a producer has received a transfer, during the relevant twelve-month period, of a reference quantity under which milk has already been delivered by the transferor during the same period, that expression does not cover, as regards the transferee, the part of the transferred reference quantity under which milk has already been delivered exempt from the levy by the transferor.

Costs

94 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 10(3) of Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector, as amended by Council Regulation (EC) No 2217/2004 of 22 December 2004, must be interpreted as meaning that the reallocation of the unused part of the national reference quantity allocated to deliveries must be carried out in proportion to the individual reference quantity of each producer having overdelivered, namely that determined at 1 April of the relevant twelve-month period, or according to objective criteria to be set by the Member States. The concept of individual reference quantity used in that provision does not allow transfers of reference quantities during that period to be taken into account.**

2. **National legislation implementing the option, provided for in Article 10(3) of Regulation No 1788/2003, as amended by Regulation No 2217/2004, of setting objective criteria according to which the reallocation of the unused part of the national reference quantity allocated to deliveries is to be carried out must comply, in particular with general principles of EU law and**

the objectives pursued by the common agricultural policy, especially those concerning the common organisation of the markets in the milk sector.

3. Those objectives do not preclude national legislation, adopted in the context of the implementation of that option, which allows overdelivering producers, who have, in accordance with the provisions of Regulation No 1788/2003, as amended by Regulation No 2217/2004, received a transfer, during the relevant twelve-month period, of an individual reference quantity under which milk has already been delivered for that same period by the producer who previously held it, to participate in that reallocation by including some or all of that reference quantity. Member States must however ensure that such legislation does not give rise to transfers which, while formally complying with the conditions laid down by that regulation, are intended solely to allow certain overdelivering producers to obtain a more favourable position on that reallocation.

4. The expression 'individual reference quantity eligible for premium and available on the holding' contained in Article 95(1) of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, as amended by Commission Regulation (EC) No 118/2005 of 26 January 2005, which corresponds to the expression 'available reference quantity' contained in Article 5(k) of Regulation No 1788/2003, as amended by Regulation No 2217/2004, must be

interpreted as meaning that, where a producer has received a transfer, during the relevant twelve-month period, of a reference quantity under which milk has already been delivered by the transferor during the same period, that expression does not cover, as regards the transferee, the part of the transferred reference quantity under which milk has already been delivered exempt from the levy by the transferor.

[Signatures]