# JUDGMENT OF THE COURT (Fifth Chamber)
25 November 1986 *

In Joined Cases 201 and 202/85

REFERENCE to the Court under Article 177 of the Treaty by the Conseil d'État du grand-duché de Luxembourg [State Council of the Grand Duchy of Luxembourg] for a preliminary ruling in the proceedings pending before that court between

(1) **Marthe Kipgen, née Klensch,** a widow, trading under the name Laiterie Ekabe, Eschweiler,

(2) **Association agricole pour la promotion de la commercialisation laitière Procola,** Stolzembourg,

(3) **Association agricole pour la promotion de la commercialisation laitière Corelux,** Berdorf,

and

**Secrétaire d'État à l'Agriculture et à la Viticulture** [State Secretary for Agriculture and Viticulture], Association agricole Luxlait, Luxembourg, intervening (Case 201/85)

and between

**Société civile Exploitation agricole de Niederterhaff,** Bertrange,

and

**Secrétaire d'État à l'Agriculture et à la Viticulture,** Laiterie Ekabe, Eschweiler, intervening (Case 202/85),

on the interpretation of Article 40 (3) of the EEC Treaty and of various provisions 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 (Official Journal 1984, L 90, p. 13), as amended by Council Regulation (EEC) No 590/85 of 26 February 1985

* Language of the Case: French.

(Official Journal 1985, L 68, p. 1) and by Council Regulation (EEC) No 1305/85 of 23 May 1985 (Official Journal 1985, L 137, p. 12),

THE COURT (Fifth Chamber)

composed of: Y. Galmot, President of the Chamber, G. Bosco, U. Everling, R. Joliet and J. C. Moitinho de Almeida, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Marthe Kipgen, née Klensch, by Yves Prussen, of the Luxembourg Bar,

Association agricole pour la promotion de la commercialisation laitière Procola and Association agricole pour la promotion de la commercialisation laitière Corelux, by Fernand Entringer, avocat-avoué, Luxembourg,

Société civile Exploitation agricole de Niederterhaff, by Yves Prussen, of the Luxembourg Bar,

the Luxembourg Government, by Ferdinand Hoffstetter, conseiller de direction adjoint at the Ministry of Agriculture and Viticulture,

Commission of the European Communities, by Denise Sorasio, a member of its Legal Department,

having regard to the Report for the Hearing and further to the hearing on 27 May 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 July 1986,

gives the following

# JUDGMENT

1 By judgments of 21 June 1985, which were received at the Court on 1 July 1985, the Conseil d'État du grand-duché de Luxembourg [Council of State of the Grand Duchy of Luxembourg] referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty five questions, which are identical in the two joined cases, on the interpretation of Article 40 (3) of the EEC Treaty and of various provisions 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 (Official Journal 1984, L 90, p. 13).

2 The questions were raised in actions brought by three dairies, namely that of Mrs Kipgen, trading under the name Laiterie Ekabe, at Eschweiler, Association agricole pour la promotion de la commercialisation laitière Procola, Stolzembourg, and Association agricole pour la promotion de la commercialisation laitière Corelux, Berdorf (Case 201/85), and by a milk producer, Société civile Exploitation agricole de Niederterhaff, Bertrange (Case 202/85), against the Secrétaire d'État à l'Agriculture et à la Viticulture of the Grand Duchy of Luxembourg.

3 They brought those actions for the annulment of various orders of the State Secretary for Agriculture and Viticulture laying down the reference quantities for the purposes of the application of the Community arrangements for the additional levy on milk. In support of their conclusions, the applicants in the main proceedings assert, among other things, that there has been a breach of the prohibition of discrimination between producers and purchasers, as laid down in Article 40 (3) of the EEC Treaty, and of a number of provisions of the Community regulations on the additional levy on milk.

4 Reference is made to the Report for the Hearing for the relevant Community rules, the Luxembourg legislation implementing those rules and the observations submitted by the applicants in the main proceedings and by the Luxembourg Government and the Commission, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 For the purposes of assessing the compatibility of the national legislation with Community law, the Luxembourg Conseil d'État stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does Article 40 (3) of the Treaty of Rome, which provides that the common organization of agricultural markets is to exclude any discrimination between producers within the Community, prohibit a Member State from choosing as the reference year for the determination of the reference quantity referred to in Article 5c (1) of Regulation (EEC) No 804/68, pursuant to Article 2 of Council Regulation (EEC) No 857/74, the year referred to in Article 2 (1) of Regulation No 857/84, if that choice in fact has the effect of according an advantage to a purchaser, and hence to milk producers making deliveries to that purchaser, to the detriment of other producers and purchasers supplied by them?

(2) Where a Member State has chosen 1981 as the reference year, does Article 2 (1) and (2) of Council Regulation No 857/84 permit the reference quantity referred to in Article 2 (1) to be weighted by a percentage which varies on the basis of the level of deliveries of certain categories of those subject to the levy despite the fact that Article 2 (2) expressly provides for that possibility only where the Member State has chosen the 1982 or 1983 calendar year as the reference year?

(3) Does the general scheme of Council Regulation No 857/84, and in particular Articles 2 (2), 4 (2) and 8 (1) thereof, permit a Member State which has opted for formula B to add the individual reference quantity of a producer who has discontinued deliveries as a result of ceasing trading to the reserve of the purchaser to whom that producer made deliveries of milk, instead of adding that quantity to the national reserve?

(4) Does Council Regulation No 857/84, and more particularly Article 4 (2) thereof, permit a Member State to add to the reserve of the last purchaser the individual reference quantity of a supplier who has discontinued production, even where additional quantities drawn from the national reserve have been added thereto?

(5) If Question 4 is answered in the affirmative, does Council Regulation No 857/84 permit that reference quantity to be added to the reserve of the last purchaser to whom the former supplier has delivered milk for a continuous period of at least two years?'

## The first question

6 In its first question the national court essentially asks whether the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty precludes a Member

State from choosing 1981 as the reference year within the meaning of Article 2 of Council Regulation No 857/84 of 31 March 1984, if the implementation of that option in its territory leads to discrimination between producers in the Community.

7 The applicants in the main proceedings maintain that, as a result of the development of the Luxembourg market in milk products since 1981, the choice of 1981 as the reference year has the effect of favouring the biggest purchaser, that is to say Luxlait, to the detriment of the other purchasers. For its part, the Luxembourg Government argues that in opting for 1981 as the reference year it took account of the fact that dairies in Luxembourg are structured differently as regards the milk production of their producers. In its view, the application of either formula for allocating the quotas is bound to have the effect of distributing the burdens unevenly amongst the various operators, depending on the stage of development of the businesses concerned. The Commission points out that the possibility for Member States to opt for one of several reference years enabled them to choose the most appropriate year in the light of production and collection structures in their territory.

8 Under Article 40 (3) of the EEC Treaty the common organization of the agricultural markets to be established in the context of the common agricultural policy must 'exclude any discrimination between producers or consumers within the Community'. That provision 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 the Member States when they are implementing the said common organization of the markets.

9 That finding is borne out by a consistent line of cases (judgments of 19 October 1977 in Joined Cases 117/76 and 16/77 *Ruckdeschel & Co. and Hanse Lagerhaus Stroh & Co.* v *Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, and in Joined Cases 124/76 and 20/77 *SA Moulins et Huileries de Pont-à-Mousson* v *ONIC* [1977] ECR 1795), in which the Court held that the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. That principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

10 Consequently, where Community rules leave Member States to choose between various methods of implementation, the Member States must comply with the principle stated in Article 40 (3). That principle applies, for instance, where several options are open to the Member States as in this case, where they may choose as the reference year 1981, or, subject to certain conditions, either 1982 or 1983.

11 It follows that in such circumstances a Member State may not choose an option whose implementation in its territory would be liable to create, directly or indirectly, discrimination between the producers concerned, within the meaning of Article 40 (3) of the Treaty, having regard to the specific conditions on its market and, in particular, to the structure of the agricultural activities carried out in its territory.

12 For those reasons it should be ruled in answer to the national court's first question that the prohibition of discrimination laid down in Article 40 (3) of the Treaty precludes a Member State from choosing 1981 as the reference year pursuant to Article 2 of Council Regulation No 857/84 of 31 March 1984 if, owing to the particular conditions on the market of that State, the implementation of that option in its territory leads to discrimination between producers within the Community.

## The second question

13 In its second question the national court essentially asks whether Article 2 of Council Regulation No 857/84 of 31 March 1984 permits a Member State which has chosen 1981 as the reference year pursuant to that provision to determine purchasers' reference quantities by weighting the quantity of milk purchased by them during that year by a percentage which varies on the basis of the level of deliveries of certain categories of persons liable for the levy.

14 It is clear from the very wording of Article 2 of Regulation No 857/84 that the option to vary the reference quantities in accordance with the categories of person liable for the levy, which is provided for in order to take account of structural changes which took place after 1981, is available to Member States only if they adopted 1982 or 1983 as the reference year.

15 That interpretation, which is based on the wording of the provision at issue, is also consistent with the general scheme of the system established. As the Commission has rightly pointed out, Article 2 of Regulation No 857/84 sets out to give Member States a choice between two methods of determining reference quantities. They may take as the basis either 1981 — in which case they must leave later developments out of account, except for certain specific circumstances which are exhaustively listed in the regulations — or a reference year closer to the entry into force of the system — in which case they must take account of developments in production and collection up to that time. Since, however, those two methods are clearly distinct, it is not possible to combine parts of each.

16 The answer to the second question must therefore be that Article 2 of Council Regulation No 857/84 of 31 March 1984 precludes, except for those cases expressly provided in the rules, a Member State which has chosen 1981 as the reference year pursuant to that provision from determining purchasers' reference quantities by weighting the quantity of milk purchased by them during 1981 by a percentage which varies on the basis of the level of deliveries of certain categories of persons liable for the levy.

**The third and fourth questions**

17 In the third and fourth questions the national court essentially asks whether Council Regulation No 857/84 of 31 March 1984 enables a Member State which has opted for formula B to assign the individual reference quantity of a producer who has discontinued production to the reference quantity of the purchaser to whom that producer was delivering milk at the time of his ceasing production, instead of adding that quantity to the national reserve, even where additional quantities drawn from the national reserve have been added to that producer's individual reference quantity.

18 The applicants in the main proceedings maintain that national legislation of the kind in force in Luxembourg, whereby the individual reference quantities of firms which have ceased production are assigned to their dairies, is liable to create an unjustified advantage for the suppliers of those dairies to the detriment of suppliers of other dairies. For their part, the Luxembourg Government and the Commission

argue that under the Community rules purchasers' reference quantities must be fixed in the light of the quantities actually collected during the reference year, except where a specific provision to the contrary authorizes subsequent events to be taken into account.

19 It must be borne in mind in that connection that Article 7 (2) of Regulation No 857/84 in conjunction with Article 6 (1) (d) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (Official Journal 1984, L 132, p. 11) provides that, under formula B, the purchaser's reference quantity is to be adjusted, *inter alia*, in order to take account of changes by producers from one purchaser to another, subject to Member States' being able to provide that a part of the quantities in question be added to the reserve referred to in Article 5 of Regulation No 857/84 (the national reserve). Furthermore, Article 4 (1) (a) and Article 4 (2) of Regulation No 857/84 provide for the addition to the national reserve of reference quantities freed where Member States grant compensation to producers who undertake to discontinue milk production definitively.

20 But there is no provision in the relevant Community rules for the adjustment of reference quantities in the event that a producer discontinues production spontaneously. It must therefore be considered whether, even in the absence of an express provision to that effect, such an eventuality must be treated in the same way as the cases mentioned in the aforesaid provisions.

21 In this connection it is appropriate to point out that, in its judgment of 13 December 1983 in Case 218/82 *Commission* v *Council* [1983] ECR 4063, the Court took the view that when it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty; in this case regard must be had specifically to the requirement not to discriminate between producers within the Community which is laid down in Article 40 (3) of the EEC Treaty.

22 To interpret the regulation as meaning that the individual reference quantity of a producer who ceased trading spontaneously should remain at the disposal of the purchaser would create discrimination between producers. The purchaser would be

able to re-allocate that quantity to his producers and thus favour the latter unjustifiably by comparison with producers supplying other purchasers. Furthermore, that interpretation would have the result of binding to his previous purchaser a producer who had discontinued production but wished to start up again and would not allow him to choose another purchaser in that event. However, such an effect can be avoided by interpreting the aforementioned provisions of Regulation No 857/84 as meaning that the system of adjusting reference quantities applies, *mutatis mutandis*, where a producer has ceased production spontaneously. Moreover, the discussion before the Court has not shown any reason why cases of producers' ceasing production after having been granted compensation should be treated differently from cases of producers' ceasing production spontaneously.

23 Those considerations apply *a fortiori* where the producer in question was initially granted a supplementary quantity drawn from the national reserve pursuant to Article 3 or Article 4 of Regulation No 857/84, for example, in the context of the implementation of a development plan.

24 It should therefore be ruled in reply to the third and fourth questions that Council Regulation No 857/84 of 31 March 1984 precludes a Member State which has opted for formula B from adding the individual reference quantity of a producer who has ceased production to the reference quantity of the purchaser to whom that producer was supplying milk at the time when he ceased production, instead of adding it to the national reserve.

## The fifth question

25 Since the fifth question applies only if the fourth question is answered in the affirmative, it does not have to be answered.

## Costs

26 The costs incurred by the Luxembourg Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in reply to the questions submitted to it by the Conseil d'État du grand-duché de Luxembourg by judgments of 21 June 1985, hereby rules:

(1) The prohibition of discrimination laid down in Article 40 (3) of the Treaty precludes a Member State from choosing 1981 as the reference year pursuant to Article 2 of Council Regulation No 857/84 of 31 March 1984 if, owing to the particular conditions on the market of that State, the implementation of that option in its territory leads to discrimination between producers within the Community.

(2) Article 2 of Council Regulation No 857/84 of 31 March 1984 precludes, except for those cases expressly provided for in the rules, a Member State which has chosen 1981 as the reference year pursuant to that provision from determining purchasers' reference quantities by weighting the quantity of milk purchased by them during 1981 by a percentage which varies on the basis of the level of deliveries of certain categories of persons liable for the levy.

(3) Council Regulation No 857/84 of 31 March 1984 precludes a Member State which has opted for formula B from adding the individual reference quantity of a producer who has ceased production to the reference quantity of the purchaser to whom that producer was supplying milk at the time when he ceased production, instead of adding it to the national reserve.

Galmot Bosco

Everling Joliet Moitinho de Almeida

Delivered in open court in Luxembourg on 25 November 1986.

P. Heim
Registrar

Y. Galmot
President of the Fifth Chamber