1. The prohibition of discrimination laid down in Article 40 (3) of the Treaty is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. It requires that similar situations shall not be treated differently unless differentiation is objectively justified. It covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down and, consequently, is also binding on the Member States when they are implementing the said common organization. In particular it precludes a Member State from choosing 1981 as the reference year pursuant to Article 2 of Council Regulation No 857/84 on the application of the additional levy on milk 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 on the application of the additional levy on milk 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. 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.

4. Council Regulation No 857/84 on the application of the additional levy on milk 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.

REPORT FOR THE HEARING
delivered in Joined Cases 201 and 202/85 *

I — Facts and written procedure

1. *The applicable Community rules*

(a) Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (Official Journal 1984, L 90, p. 10) amended Regulation No 804/68 by adding Article 5c. That provision introduced an additional levy payable by producers or purchasers of cows' milk in order to

* Language of the Case: French.

curb the increase in milk production while permitting the structural developments and adjustments required.

Under Article 5c (1) the levy system is to be implemented in each region of the territory of the Member States in accordance with one of the following formulas:

Under formula A, the levy is payable by milk producers on the quantities of milk which they have delivered to a purchaser and which exceed a reference quantity to be determined;

Under formula B, the levy is payable by purchasers of milk or other milk products (dairies) on the quantities of milk which have been delivered by producers and which exceed a reference quantity to be determined. For his part, the purchaser liable to the levy is to pass on the burden of the levy solely to those producers who have increased their deliveries, in proportion to their contribution to the purchasers' reference quantity being exceeded.

Regulation No 856/84 also introduced a Community reserve with a view to supplementing the guaranteed quantities of the Member States in which implementation of the levy system raised particular difficulties liable to affect their supply or production structures (Article 5c (4)).

(b) The complementary Council Regulation 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) fixed the levy at 75% of the target price for milk where formula A was applied and at 100% of the target price for milk where formula B was applied (Article 1 (1)).

Regulation No 857/84 also fixed the reference quantity referred to in the basic regulation. Article 2 provides as follows:

'1. The reference quantity referred to in Article 5c (1) of the abovementioned regulation [Regulation No 804/68] shall be equal to the quantity of milk or milk equivalent delivered by the producer during the 1981 calendar year (formula A), or to the quantity of milk or milk equivalent purchased by a purchaser during the 1981 calendar year (formula B), plus 1%.

2. However, Member States may provide that on their territory the reference quantity referred to in paragraph 1 shall be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity defined in Article 5c of Regulation (EEC) No 804/68. This percentage may be varied on the basis of the level of deliveries of certain categories of persons liable for the levy, of the trend in deliveries in certain regions between 1981 and 1983 or of the trend in deliveries of certain categories of persons liable during this same period, under conditions to be determined according to procedures provided for in Article 30 of Regulation (EEC) No 804/68.

3. . . .'.

In connection with the restructuring of milk production, Member States are authorized to grant compensation to producers undertaking to discontinue milk production definitively and, in certain circumstances, to grant producers an additional reference quantity. Reference quantities freed are, as

necessary, to be added to the reserve constituted by the Member State within its guaranteed quantity (Article 4 (1) and (2) and Article 5 of Regulation No 857/84). In addition, Member States may, in certain circumstances and for a limited period, allocate the non-utilized reference quantities of producers or purchasers to producers or purchasers who have exceeded their own reference quantities (Article 4a of Regulation No 857/84, as inserted by Council Regulation No 590/85 of 26 February 1985, Official Journal 1985, L 68, p. 1).

Lastly, where formula B is applied (levy payable by purchasers), Member States may, in certain circumstances, take the necessary steps making it possible for the purchasers of milk and milk products to manage the reference quantities allocated to them including the allocation and re-allocation of their producers' quantities (Regulation No 857/84, Article 8 (1) in conjunction with Article 10).

(c) In Regulation No 1371/84 of 16 May 1984 (Official Journal 1984, L 132, p. 11), the Commission laid down detailed rules for the application of the additional levy on the basis of the Council regulations.

2. *The Luxembourg rules for the implementation of the Community rules*

The Community rules referred to above were implemented in the Grand Duchy of Luxembourg by, *inter alia*, the Grand-Ducal Regulation of 3 October 1984 concerning the application within the Grand Duchy of Luxembourg of the arrangements for the additional levy on milk (*Mémorial* 1984, p. 1486).

That regulation opts for formula B (Article 1). It determines purchasers' reference quantities on the basis of the quantities purchased in 1981; however, those basic quantities are weighted by coefficients which take account of the trend in the quantities of milk delivered to the various purchasers between 1981 and 1983 in relation to the average trend of deliveries in Luxembourg (Article 2).

The Grand-Ducal Regulation also lays down the procedures for passing on to producers any levy payable by the purchaser in the event of his reference quantity being exceeded. The underlying principle is that the producer's basic individual quantity is fixed by reference to the deliveries effected by him in 1981, although that quantity is adjusted in the light of deliveries made in 1983. In the event that the total individual reference quantities calculated in that way exceed the purchaser's reference quantity, the shortfall is borne by all the individual reference quantities in proportion to their size. In contrast, the amount of the purchaser's reference quantity which is unallocated constitutes a 'purchaser's reserve', which the purchaser may assign only in accordance with rules to be fixed by Grand-Ducal Regulation (Article 3).

There are specific rules on the passing-on of the burden of the levy to producers to cover cases where a supplier transfers from one purchaser to another and where a supplier completely discontinues deliveries to a purchaser. In the first case, a quantity corresponding to the quantity allocated to the supplier is deducted from the reference quantity of the initial purchaser and added to that of the new purchaser. In contrast, in the second case, the reference quantity allocated to a supplier who has discontinued deliveries completely is allocated to the reserve of the last purchaser to whom that

supplier delivered milk for a continuous period of at least two years (Article 7).

3. *The main proceedings*

The applicants in the main proceedings in Case 201/85, Marthe Kipgen, née Klensch, trading under the name Laiterie Ekabe at Eschweiler and Association agricole pour la promotion de la commercialisation laitière Procola, Stolzembourg, and Association agricole pour la promotion de la commercialisation laitière Corelux, Berdorf, are purchasers of milk within the meaning of the above rules. They brought an action before the Conseil d'État du grand-duché de Luxembourg [State Council of the Grand Duchy of Luxembourg] for the annulment of Orders Nos 1666/84, 1668/84 and 1669/84 of 10 October 1984 of the State Secretary for Agriculture and Viticulture laying down their reference quantities for the purposes of the application of the Community arrangements for the additional levy on milk. In addition to the annulment of the aforementioned Orders Nos 1666 and 1668/84, Mrs Kipgen also seeks the annulment of Order No 1667/84 of the State Secretary for Agriculture and Viticulture of 10 October 1984 in so far as those orders fix the reference quantities of purchasers competing with Ekabe.

The applicant in the main proceedings in Case 202/85, Société civile Exploitation agricole de Niederterhaff, Bertrange, is a milk producer. By its action brought before the Luxembourg Conseil d'État, it seeks, on the one hand, the annulment of the aforementioned Order No 1669/84 fixing Ekabe's reference quantity, in so far as that order effectively determined the reference quantities applicable to the applicant's output, and, secondly, the annulment of the administrative decision of the Ministry of Agriculture indicating the individual reference quantity allocated to it as a supplier of Ekabe.

In support of those applications, the applicants assert, in addition to several arguments based on the infringement of the Luxembourg Constitution and Luxembourg law and the European Convention on Human Rights, that there has been a breach of the prohibition of discrimination between producers and purchasers of milk, as laid down in Article 40 (3) of the EEC Treaty and of several provisions of the Community rules governing the additional levy on milk.

In order to assess the latter argument based on the infringment of Community law the Luxembourg Conseil d'État stayed the proceedings and referred the following questions, which are identical in both cases, to the Court for a preliminary ruling, under Article 177 of the EEC Treaty:

'(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 857/84, 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?'

4. *Proceedings before the Court*

The judgments requesting a preliminary ruling were received at the Court Registry on 1 July 1985.

By order of 10 July 1985 the Court decided to join the cases for the purposes of the procedure and judgment.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the applicants in the main proceedings in Case 201/85, Mrs Marthe Kipgen, represented by Yves Prussen, of the Luxembourg Bar, and by the Associations agricoles pour la promotion de la commercialisation laitière Procola and Corelux, both represented by Fernand Entringer, Avocat-Avoué at Luxembourg; by the Luxembourg Government, represented by Ferdinand Hoffstetter, conseiller de direction adjoint at the Ministry of Agriculture and Viticulture, acting as Agent; and by the Commission of the European Communities, represented by Denise Sorasio, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided on 4 March 1986 to refer the matter to the Fifth Chamber, under Article 95 of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry. Nevertheless, the Court decided to put written questions to the Commission.

II — Written observations

1. *The situation on the milk market in Luxembourg*

(a) Mrs *Kipgen*, contends that the organization of the market in milk products in Luxembourg is characterized by the fact that there are only two undertakings engaged in the pasteurization and processing of milk products, namely the Association agricole Luxlait, to which the great majority of Luxembourg milk producers belong, and the private undertaking Ekabe. In 1983 Luxlait's share of milk production was 71.5% and Ekabe's share 15.3%. In addition, two agricultural associations, Procola and Corelux, arranged

the sale to the Federal Republic of Germany of milk products produced by member farms.

For several years Luxlait's share of the market in milk products has been decreasing, owing to its members' dissatisfaction with its price policy. As a result, numerous members of Luxlait have left that organization to become suppliers of Ekabe, Corelux or Procola.

The producers belonging to the latter undertakings are among the most active farmers. In contrast, a particularly high number of small farmers (producing less than 80 000 litres annually) belong to Luxlait. 92.3% of small farmers are associated with Luxlait whereas only 7.3% of small farmers are suppliers of Ekabe.

It is also apparent that by far the largest number of farms which are in the process of disappearing are suppliers of Luxlait. Consequently, the production of Ekabe's suppliers between 1981 and 1983 increased by an average of 15% whereas the production of Luxlait's suppliers increased on average by a mere 9.36%.

(b) *Procola* and *Corelux* state that until they were set up in August 1978 and in May 1982 respectively there were only two purchasers of milk in Luxembourg, that is to say Luxlait and Ekabe.

Dissension arose within Luxlait owing to the lack of transparency of its accounts, which was used to camouflage the financing of loss-making activities by economically prosperous sectors like the milk industry. For that reason, a number of producers left Luxlait over the years to set up their own agricultural associations under the name of Procola and Corelux. In 1981 the four purchasers marketed the following quantities:

Luxlait: 191 743 204 kg;

Ekabe: 38 186 362 kg;

Procola: 25 869 253 kg;

Corelux: 6 001 468 kg.

Luxlait producers have continued to leave since the setting-up of Procola and Corelux: with effect from 31 December 1985 several producers, accounting for a total of some 4 500 tonnes of milk, have announced their intention to leave Luxlait and join Procola or Corelux.

(c) The *Luxembourg Government* points out that the introduction of a quota system was particularly hard for the Luxembourg dairy industry in so far as it restricted the market. In Luxembourg, milk production accounts for more than 45% of the total final production of the agricultural sector. As a result, it is one of the main pillars of Luxembourg agriculture and, consequently, is an important source of income for numerous undertakings.

Moreover, farming in Luxembourg suffers from certain natural handicaps (Luxembourg is classed as an underprivileged area) and there is virtually no economically acceptable alternative form of production. Furthermore, when the quota system was introduced many farms were suffering from a major structural lag in so far as either they had not yet begun to develop or they had only recently started restructuring.

The Community authorities took those difficulties into account by allocating part of the Community reserve to Luxembourg.

(d) The *Commission* states that, in 1981, 261 800 tonnes of milk were delivered to treatment and processing undertakings in Luxembourg. As a result, the 'guaranteed total quantity' was fixed at 268 000 tonnes for the initial period of implementation of the additional levy system and at 265 000 tonnes for each of the four following periods, that is to say approximately at a level corresponding to the quantities actually delivered in 1981 plus 1% (Article 5c (3) of Regulation No 804/68, as amended by Regulation No 856/84).

In addition, Luxembourg was allocated 25 000 tonnes of the Community reserve, amounting in total to 393 000 tonnes, which increased the guaranteed total quantity for Luxembourg to 293 000 tonnes (see Article 1 of Regulation No 1371/84). Furthermore, milk deliveries in Luxembourg amount to 291 000 tonnes, that is to say below the ceiling set.

According to information published in the specialist press, the quantities allocated to the four purchasers in Luxembourg are as follows:

Luxlait: 212 500 tonnes;

Ekabe: 44 700 tonnes;

Procola: 29 000 tonnes;

Corelux: 7 000 tonnes.

The Luxembourg authorities also implemented the Community rule which authorized Member States, for the first period of 12 months, to allocate the non-utilized reference quantities of certain categories of persons liable for the levy to persons liable for the levy who had exceeded their own reference quantity. In view of the fact that other purchasers in Luxembourg had not used a total of 2 813 tonnes of their reference quantities, the reference quantities initially allocated to Procola and Corelux were increased by 606 and 264 tonnes respectively, corresponding to the amounts by which they had been exceeded.

As a result of that measure, no purchaser and, hence, no producer in Luxembourg had in fact to pay the additional levy for the period in question.

2. *The first question*

The applicants in the main proceedings consider that the first question should be answered in the affirmative, whereas the Luxembourg Government suggests that the answer should be in the negative. The Commission took up a qualified position.

(a) *Mrs Kipgen* considers that, because of the way in which the market developed, the choice of reference year results in manifest distortion. The resultant unequal treatment was not removed by adapting the reference quantity in the light of the increase in production between 1981 and 1983.

Luxlait had shown the smallest increase in production in the years preceding the introduction of the system of milk quotas and had been granted a reference quantity equal to 105.01% of its 1983 production. Ekabe's reference quantity was 104.1% of its 1983 production whereas the other two purchasers had been granted reference quantities of 96.34% and 103.49% of their 1983 production. The upshot was that Luxlait had not used up its quota whereas the other three purchasers had exceeded theirs. As a result, the mechanisms applied have the effect of benefiting one purchasing undertaking to the detriment of competing

undertakings and their suppliers. Numerous agricultural undertakings which are associated with the three other purchasers have been obliged to cut back their production by 15 to 20%.

Such a development constitutes discrimination prohibited by Article 40 (3) of the Treaty. According to decided cases of the Court, that provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. It follows that a system which imposes a discriminatory distribution of burdens cannot be justified for the purpose of attaining the objectives of the common agricultural policy. What is more, such a system is in breach of the principle of proportionality, which complements the prohibition of discrimination.

(b) *Procola* and *Corelux* contend that the choice of 1981 as the reference year subtly favours Luxlait to the detriment of other purchasers. Owing to producers having discontinued production since 1981, Luxlait enjoys the biggest reserve over and above its basic quota, which it can use for the benefit of producers associated with it, who, as a result, are not affected by the reductions in production. Luxlait's reserve amounts to 3.67% of its basic quota whereas Ekabe's and Procola's reserves amount only to 1.28% and 0.27% of their respective basic quotas; Corelux has no such reserve.

Inequalities exist also as regards the effects of the rules on producers. Luxlait's purchases increased by 4.74% over 1983, whilst Ekabe's purchases increased by only 3.75%. Procola's and Corelux's purchases even decreased by 3.17% and 5.83% respectively.

Such inequalities are without objective justification and are contrary both to Article 40 (3) of the Treaty and to the principle of an open market, on which the common organizations of the agricultural markets are based.

(c) The *Luxembourg Government* states that while the Community system of milk quotas lays down a general framework, it leaves certain choices concerning implementation to the Member States. One choice left to the Member States is whether to take 1981, 1982 or 1983 as the reference year; for its part, the Luxembourg Government opted for 1981.

In making that choice, the Luxembourg Government had endeavoured to find a solution which took account of all the interests at stake. However, the various dairies are structured differently as regards the milk production of their associates. Their situation depends on the proportion of small milk producers, the proportion of medium-sized and large producers and the proportion of producers whose production significantly varied over the years. Consequently, the application of the selected formula for allocating the quotas does not have the same effect on the various purchasers. However, that difference in effects was the result not of an arbitrary choice but of the structure of the purchasers' suppliers.

As regards producers, it was inevitable, irrespective of the reference year selected, that a limitation system would entail different treatment depending on the state of development of their milk production. However, that difference corresponds to an

inequality in their situations at the time when the quota system was applied.

Those explanations make it clear that in choosing 1981 the Luxembourg Government was guided by objective criteria such as to respect the dynamism of the developed farms and allow for the restructuring of small and medium-sized farms. Such a policy is compatible with Article 40 (3) of the Treaty, as that provision has been interpreted by the Court. In its judgment of 27 September 1979 in Case 230/78 (*Eridania* [1979] ECR 2749) the Court held that 'discrimination within the meaning of Article 40 of the Treaty cannot occur if inequality in the treatment of undertakings corresponds to an inequality in the situations of such undertakings'.

(d) The *Commission* considers that all that is necessary to answer the national court's question relating to the choice of reference year is to be found in Article 2 of Regulation No 857/84 itself.

Under that provision, the Member States are authorized to fix the reference quantities of persons liable to the levy, in this case purchasers (formula B), either on the basis of the quantities of milk purchased in 1981, plus 1%, or on the basis of the quantities purchased in 1982 or 1983, weighted by a percentage which enables the same overall quantitative result to be attained at the national level as if they had chosen the 1981 figure + 1%, it being understood that that percentage is necessarily uniform for all those liable to the levy.

The principle is therefore that reference quantities should be fixed on the basis of 1981. The use of the figures for 1982 or 1983 is an exception and, at the same time, an option which is freely available to the Member States. *A fortiori*, choice of the first solution is not conditional on complying with any requirements. Hence, use of 1981 as the reference year cannot be regarded as being lawful only in particular eventualities or in particular circumstances. On the contrary, that formula has all the characteristics of a rule that is part of the ordinary law and is applicable automatically by the national authorities.

It follows that the possibility open to Member States of choosing 1981 cannot be contested on the basis of the principle of equal treatment without calling into question the validity of Article 2 (1) of Regulation No 857/84. Since that issue was not raised by the national court, the Commission merely states that the great diversity of structures for milk production and collection within the Community, together with differences in the pace of development in recent years, affords sufficient justification for having Community rules — which are by definition general and moreover extremely restrictive for those subject to them — which leave the national authorities to choose between different formulas as regards a number of aspects of the new arrangements.

Nevertheless, when choosing one of the options available to them the Member States must at the same time observe all the provisions of the rules which are of general application. That is true of those provisions which stipulate that, for the purposes of determining the purchaser's reference

quantity, account should be taken of the situation of the producers delivering milk to him and, in particular, of the provisions governing changes by producers from one dairy to another.

The Commission points out in this connection that Article 6 of implementing Regulation No 1371/84 gives an exhaustive list of specific cases in which the purchaser's reference quantity must be adjusted, including the case of changes by producers from one purchaser to another. That article should be interpreted as also covering changes from one purchaser to another between the reference year and the coming into effect of the new arrangements.

Consequently, if a Member State opts for the quantities actually delivered to purchasers in 1981, plus 1%, in order to determine purchasers' reference quantities, it should adjust those quantities to take account of changes by producers from one purchaser to another and of the appearance, disappearance or amalgamation of purchasers which took place between 1981 and the entry into force of the new rules.

In conclusion the Commission suggests that the first question should be answered as follows:

'Article 2 (1) of Council Regulation (EEC) No 857/84 does not subject to any particular condition a Member State's decision to fix the reference quantities of persons subject to the additional levy system at the level of milk deliveries actually attained in 1981 plus 1%; this is without prejudice to the observance of the other provisions of the Community rules which require certain developments occurring after 1981, notably changes by producers from one purchaser to another, to be taken into account.'

3. *The second question*

The Luxembourg Government considers that the second question should be answered in the affirmative. For its part, the Commission proposes that the question be answered in the negative. The applicants in the main proceedings did not submit separate observations on that question.

(a) The *Luxembourg Government* concedes that a literal construction of Article 2 (1) and (2) of Regulation No 857/84 might lead one to conclude that variation of reference quantities is permissible only in the event that 1982 or 1983 has been chosen as the reference year. However, no provision of that regulation formally precludes the possibility of such variation in the event of 1981 having been chosen. Indeed, such weighting seems to be consistent with the aims of the Community rules. It is plain from the preambles and provisions of the regulations that, by setting up a very complex system of quotas, the Council sought to take account of the diversity of milk production structures and, thereby, to avoid excessively abrupt effects.

(b) In contrast, the *Commission* considers that no variation of reference quantities according to categories of persons liable for the levy can be effected where the Member State has opted for 1981 as the reference year.

It is clear from the very wording of the provision in question that the possibility of varying the reference quantity is available to national authorities only if they selected 1982 or 1983 as the reference year. Hence, where the Member State selected 1981 as the reference year there is no possibility of

varying the percentage weighting for actual deliveries made in 1982 or 1983 on the basis of the trend in deliveries in certain regions or of the trend in deliveries of certain categories of persons liable for the levy.

Moreover, that provision fits consistently into the whole system: either the Member State chooses to determine the reference quantities on the basis of 1981 and, as a result, leaves later developments out of account, or it takes a reference year closer to the entry into force of the new system, which enables it to take account of developments in production and collection up to that time.

Consequently, any national rules which in some way mix the two formulas, which are clearly distinct under the Community rules, cannot be regarded as being consistent with the Community rules. This applies to the taking into consideration of the development of purchasers' collections after 1981 or of the level of deliveries attained by producers after 1981.

In conclusion, the Commission proposes that the second question be answered as follows:

'Where a Member State has chosen 1981 as the reference year under Article 2 (1) of Regulation (EEC) No 857/84, Article 2 of that regulation does not permit the purchasers' reference quantities defined therein to be weighted by a percentage which varies according to the category of person liable for the levy in accordance with the second sentence of Article 2 (2), which applies solely where a Member State has chosen 1982 or 1983 as the reference year.'

4. *The third question*

The applicants in the main proceedings propose that the third question should be answered in the negative, whereas the Luxembourg Government and the Commission consider that it should be answered in the affirmative.

(a) *Mrs Kipgen* considers that the provision in the Grand-Ducal Regulation whereby the reference quantities of a farm which has ceased trading completely or curtailed its activities are assigned to the dairy to be added to the reserve available to all suppliers of that dairy constitutes a special advantage for suppliers of a particular purchaser to the detriment of suppliers associated with other purchasers. It thereby constitutes a factor distorting competition, since the differences between the various prices paid by purchasers to their suppliers are offset by the attraction at present afforded by association with Luxlait of being able to produce in excess of the official quota. The aim of that measure is to dissuade producers associated with Luxlait from leaving that agricultural association in order to supply one of the other purchasers.

Consequently, Regulation No 857/84 precludes a Member State which has opted for formula B from adding 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.

(b) *Procola* and *Corelux* argue that the aim of the regulations in question is to reduce surpluses so as to balance production and consumption. To this end, a common milk policy and a national milk policy complementary thereto are indispensable.

Consequently, the individual reference quantity of a producer who discontinues production should revert to the national reserve so as to provide the political authorities with the means to implement an agricultural policy which, in accordance with the provisions of Community law, should be designed to increase the earnings of persons engaged in agriculture.

(c) The *Luxembourg Government* maintains that the answer to the third question can be derived from Article 8 (1) of Regulation No 857/84, which provides that 'where formula B is applied, Member States may take the necessary steps making it possible for the purchasers of milk and milk products to manage the reference quantities allocated to them including the allocation and re-allocation of the quantities mentioned in Article 10'. It follows that the quantities made available as a result of a supplier's discontinuing production remain with the purchaser and are therefore allocated to his reserve, since the purchaser can allocate them only in accordance with a national regulation.

That argument is borne out by the fact that Article 4 (1) (a) and Article 4 (2) of Regulation No 857/84 expressly provide for individual reference quantities freed to be added to the national reserve where Member States grant compensation to producers undertaking to discontinue milk production.

(d) In the *Commission*'s view, where 1981 is chosen as the reference year purchasers' reference quantities must be fixed in the light of the quantities actually collected during that year, except where provisions to the contrary require or authorize subsequent events, such as transfers of producers from one purchaser to another, to be taken into account. In view of the fact that the Community rules do not refer to cases where production is discontinued spontaneously or reduced, there is no legal basis for reducing the purchaser's quantity on the basis of such factors.

Moreover, the very characteristics of the formula based on purchasers (formula B) does in fact enable automatic offsetting to take place at the purchasing undertaking between producers increasing deliveries and producers reducing or wholly discontinuing them. Besides, it is in order to take that situation into account that the rate of the levy is 100% of the target price for milk in the case of formula B yet 75% in the case of formula A. The scheme of the additional levy system therefore implies that where formula B is applied reductions in production by some producers will accrue to the other producers delivering to the same purchaser.

Furthermore, the sources of the national reserve, which is intended to enable additional quantities to be allocated in certain cases (Article 5 of Regulation No 857/84), are exhaustively listed. They include in particular the uniform abatement of the reference quantities of all persons liable to the levy and cases where milk production is discontinued definitively following the entry into force of the new system pursuant to a national incentive scheme involving compensation for the producer. Such cases of production being discontinued are totally different from those referred to in this question.

In conclusion the Commission proposes that the third question be answered as follows:

'The Community rules on the system of the additional levy contain no provision permitting quantities corresponding to the

discontinuance of deliveries by a producer to any purchaser occurring between the reference year and the entry into effect of the additional levy scheme to be deducted from a purchaser's reference quantity.'

5. *The fourth and fifth questions*

The applicants in the main proceedings suggest that the fourth question should also be answered in the negative, which would mean that the fifth question would become devoid of purpose. In contrast, the Luxembourg Government proposes that the fourth and fifth questions be answered in the affirmative. The Commission considers that the fourth question should be answered in the affirmative and the fifth question in the negative.

(a) *Mrs Kipgen* contends that, for reasons already put forward in connection with the third question, Regulation No 857/84 — and more particularly Article 4 (2) thereof considered in the context of Articles 39 and 40 of the Treaty — does not permit a Member State to add to the reserve of the last purchaser the individual reference quantity of a supplier who has discontinued production, plus additional quantities drawn from the national reserve.

(b) *Procola* and *Corelux* argue that the quantity of an individual producer may be made up of two distinct elements, of which one comes from the national reserve. In their opinion, the individual reference quantity or, in the alternative, at least the supplementary part coming from the national reserve must revert to the national reserve if the producer discontinues production altogether.

In any event, in so far as the national rules provide for a requirement of deliveries over a two-year period in the case of a change of purchaser, they are arbitrary and without any objective justification.

(c) The *Luxembourg Government* considers that, in order to answer the fourth question, reference must be made to Article 6 (1) of the implementing regulation, Regulation No 1371/84. Article 6 (1) provides that, where formula B is applied, purchasers' reference quantities are to be adjusted to take account, *inter alia*, of additional quantities assigned to producers under Articles 3 and 4 of Regulation (EEC) No 857/84. It therefore lays down the principle that the additional quantities allocated to producers who have adopted milk production development plans are to be added to the purchaser's reference quantity. As a result, the additional quantities are subject to the general rules applicable to the purchaser's reference quantity.

The fifth question is concerned with a provision of the national rules, under which the reference quantities released as a result of a producer's discontinuing production are added to the reserve of the last purchaser to whom the producer has delivered his milk for a continuous period of at least two years. That requirement was introduced in order to avoid a situation in which financial inducements were offered to producers wishing to discontinue production to change their dairy shortly before stopping production so that their quota went to the new dairy. Although no formal provision was made for such a national provision in the Community rules, it cannot for that reason alone be regarded as being in conflict with Community law.

(d) The *Commission* states that the fourth and fifth questions are concerned with the possible effect on the purchaser's reference quantity of a producer's totally discontinuing deliveries.

It appears from the answer given to the third question that, in so far as cases of production being discontinued spontaneously are concerned, the corresponding

quantities cannot be added to the national reserve but remain part of the purchaser's reference quantity. That also takes account of the need to safeguard the producer's right to his individual quantity. Indeed, such spontaneous discontinuance of production is inherently reversible and nothing prevents such a producer who has given up trading from resuming production later. In that event, he would continue to be entitled to his individual quantity as previously fixed.

The fact that the producer in question initially received an additional quantity under Article 4 of Regulation No 857/84 does not affect that assessment. All cases of deliveries being discontinued other than those expressly covered by the Community rules have no impact on the purchaser's reference quantity.

The Commission considers that there is no basis in the Community regulations for the requirement that only a purchaser to whom the producer delivered milk for a continuous period of at least two years should be allocated the quantities which become unused as a result of the discontinuance of deliveries. The case of transfers from one purchaser to another are governed by provisions which expressly refer to the rules governing the replacement of one purchaser by another (Article 7 (2) of Regulation No 857/84). Those rules in fact provide that account should be taken of a change of situation taking place within a twelve-month period on a pro rata basis of the time still to run.

It is therefore contrary to the logic of the system that the individual quantity of a producer should be deducted from the reference quantity of the purchaser to whom he was actually delivering at the time of discontinuing production, to be either added to the national reserve or notionally added to the reference quantity of a purchaser to whom he had previously delivered for a continuous period of at least two years. The national authorities are not entitled to leave out of account a transfer from one producer to another which takes place during the period of application of the system even if it is followed by the discontinuance of deliveries during that period.

In conclusion, the Commission proposes that the fourth and fifth questions should be answered as follows:

'By virtue of Article 4 (2) of Regulation (EEC) No 857/84 reference quantities freed as a result of producers discontinuing milk production under Article 4 (1) (a) can only be added to the national reserve; other cases of deliveries being discontinued to any purchaser subsequent to the commencement of the operation of the additional levy system do not affect the purchaser's reference quantity even if the producer who has discontinued production received additional or specific quantities under Articles 3 and 4 of Regulation No 857/84; the Community rules do not allow the imposition of a requirement that a producer had delivered to a purchaser for a certain minimum period as a condition for the purchaser's reference quantity remaining unaffected'.

III — Answers to questions put by the Court

In answer to questions put by the Court the *Commission* stated as follows:

(a) 1981 was adopted as reference year in the Community rules because the guarantee threshold introduced in the milk and milk products sector itself is fixed on that basis.

By Regulation No 1183/82 of 18 May 1982 (Official Journal 1982, L 140, p. 1), inserting Article 5b in basic Regulation No 804/68, the Council decided that each year a guarantee threshold for milk would be fixed in order to 're-direct production and thus lighten the burden on the Community budget' (preamble). Accordingly, Article 2 of Council Regulation No 1184/82 of 18 May 1982 (Official Journal 1982, L 140, p. 2) fixed the guarantee threshold for 1982 'at the level of the quantity of milk supplied to undertakings treating or processing milk in the calendar year 1981, increased by 0.5%', an increase corresponding to the forecast normal annual increase in consumption. A similar procedure was followed the next year in Article 2 of Council Regulation No 1205/83 of 17 May 1983 (Official Journal 1983, L 132, p. 1), which fixed the guarantee threshold for 1983 'at the level of the quantity of milk supplied to undertakings treating or processing milk in calendar year 1981, increased by 1%', that is to say the level adopted for 1982 was increased by 0.5%.

When the additional levy system was adopted in 1984 the guarantee threshold for 1983, that is to say 1981 + 1%, was taken as the basis for determining the overall guaranteed amount per Member State. It was considered that an additional annual increase of 0.5% was not appropriate in view of the apparent stabilization of consumption.

The possibility of adopting 1982 or 1983 as reference years for determining the reference quantities of persons liable for the levy (producers or purchasers) was introduced in order to allow account to be taken of the diversity of production and milk collection structures existing in the Member States and, in particular, of the differing trends observed after 1981.

Provision was made for the adjustment within a Member State of the percentage weighting for deliveries so as to take account, in particular, of the structural changes which had taken place after 1981. In this regard, it was deemed necessary not only that the Community rules should define the objective general criteria for that differentiation but, furthermore, that they should make the use of that formula conditional on the taking into account of the most recent factual data, that is to say of the factual data which were most representative of individual situations.

(b) As regards the compatibility of the 1981 option with the requirements of Article 40 (3) of the Treaty, the Commission observes that the choice of reference year 1981 as the basis for the additional levy system is closely connected with the aim of stabilizing markets set out in Article 39 (1) (c) of the Treaty and with the fixing of a guarantee threshold for milk, which gave rise to that choice of reference year. Furthermore the decision taken in 1982 to adopt a guarantee threshold for milk was of such a kind as to alert all producers to the fact that the market situation was already seriously in danger and that the Community would have to introduce new measures to control milk production. Consequently, in so far as it ensured uniform treatment for all those liable to the levy, the choice of 1981 precluded any discrimination between producers in the Community.

Finally the provision for that formula alongside the 1982 and 1983 options, which

themselves could be adjusted by the definition of different categories of persons liable for the tax, enables the Member States to adopt the most appropriate option having regard to their production or collection structures and the possible evolution of those structures since 1981.

(c) As regards the choice of option by the Member States (with the exception of Spain and Portugal), the Commission replies that only two Member States (Greece and Luxembourg) have adopted 1981 as the reference year, the other eight Member States having opted for 1983. Four Member States (Germany, Belgium, Italy and the Netherlands) have opted for formula A (the producers' formula); five Member States (Denmark, France, Greece, Ireland, Luxembourg) have opted for formula B (the purchasers' formula). One Member State (the United Kingdom) initially chose formula A for one of its regions (Northern Ireland) and formula B for the rest of its territory but, as from 1 April 1985, it opted for formula B for the whole of its territory.

U. Everling
Judge-Rapporteur