would lay themselves open if such a right were conferred on Member States would be such as to discourage producers from changing purchaser in order to supply the dairy offering them the most favourable conditions and would, for that very reason, be incompatible with the principle of freedom to pursue a trade or profession, which includes freedom to choose whom to do business with.

REPORT FOR THE HEARING
in Joined Cases C-90/90 and C-91/90 *

I — Facts and procedure

1. The applicable Community provisions

(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) introduced for a period of five years an 'additional levy' payable on the quantities of milk delivered which exceed a reference quantity to be determined.

(b) The general rules for the application of the additional levy are laid down in Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (Official Journal 1984 L 90, p. 13).

Article 2(1) of Regulation No 857/84 determines the reference quantity referred to in the basic regulation, No 856/84, that is the quantity exempt from the additional levy. In principle, that quantity is to be equal to the quantity of milk or milk equivalent delivered by the producer during the 1981 calendar year (formula A) or purchased by a purchaser during the 1981 calendar year (formula B), plus 1%. Pursuant to Article 2(2), however, Member States may provide that on their territory the reference quantity referred to in paragraph 1 is to be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity. In addition, pursuant to Articles 3, 3a, 4 and 4a of that regulation, as amended, Member States may take into account certain special circumstances when fixing reference quantities or allocating specific or additional reference quantities.

* Language of the case: French.

Article 7 of Regulation No 857/84, as amended by Council Regulation (EEC) No 590/85 of 26 February 1985 (Official Journal 1985 L 68, p. 1), provides as follows:

'1. Where a holding is sold, leased or transferred by inheritance, all or part of the corresponding reference quantity shall be transferred to the purchaser, tenant or heir according to procedures to be determined.

...

2. Under formula B, where a purchaser replaces, wholly or in part, one or more purchasers, his annual reference quantity shall be established:

— for the end of the current 12-month period, by taking into account all or part of the reference quantities on a pro rata basis of the time still to run;

— for the following period of 12 months, by adopting all or part of the reference quantities of the purchaser or purchasers whom he replaces.

3. Member States may provide that part of the quantities concerned shall be added to the reserve referred to in Article 5 or to that referred to in Article 6(3), as the case may be.

...

5. The detailed implementing rules for this article shall be adopted under the procedure laid down in Article 30 of Regulation (EEC) No 804/68.'

c) The detailed rules for implementing the system were adopted by 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). Article 5 of that regulation, as amended by Commission Regulation (EEC) No 1681/87 of 16 June 1987 (Official Journal 1987 L 157, p. 11),[1] provides in its third paragraph that:

'In the event of the application of the first subparagraph of Article 7(3) of Regulation (EEC) No 857/84 and within the limit laid down therein, the Member States may vary that part of the reference quantity added to the reserve, in accordance with the criteria on the size of the holdings concerned.'

Article 6(1) of that regulation, as amended, provides that 'where formula B is applied, purchasers' reference quantities shall be adjusted to take account of:

...

d) replacements as referred to in Article 7(2) of Regulation (EEC) No 857/84, including changes by producers from one purchaser to another'.

1 — Regulation (EEC) No 1371/84 has since been consolidated by Commission Regulation (EEC) No 1546/88 of 3 June 1988 (OJ 1988 L 139, p. 12).

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

The abovementioned Community rules were implemented in the Grand Duchy of Luxembourg in particular by the Grand-Ducal Regulation of 7 July 1987 concerning the application, within the Grand Duchy of Luxembourg, of the arrangements for the additional levy on milk (*Mémorial* A, 1987, p. 850). That regulation opts for formula B (the 'purchaser' formula) and determines purchasers' reference quantities on the basis of the quantities of milk delivered in 1983, weighted by a coefficient.

Article 9(1) of the Grand-Ducal Regulation is worded as follows:

'If a supplier changes from one purchaser to another, a quantity corresponding to that allocated to the supplier in application of Articles 3, 5, 6, 8 and 13 of this regulation shall be deducted from the reference quantity of the first purchaser; up to 90% of this quantity shall be added to the reference quantity of the new purchaser and 10% to the national reserve provided for in Article 4 of this regulation.'

3. The disputes in the main proceedings

The plaintiffs inthe main proceedings are milk producers established in the Grand Duchy of Luxembourg. In proceedings before the Conseil d'Etat du Grand-Duché de Luxembourg (State Council of the Grand Duchy of Luxembourg), they seek the annulment of a decision of the State Secretary for Agriculture and Viticulture of 22 February 1988 by which, following a change of purchaser by the plaintiffs, the State Secretary refused, in application of Article 9(1) of the Grand-Ducal Regulation, to transfer in full to the new purchaser the individual reference quantity of those producers with their original purchaser.

In support of their action, the plaintiffs in the main proceedings emphasize, inter alia, that Article 9 of the Grand-Ducal Regulation is contrary to Article 7 of Regulation No 857/84. In their view, the transfer to the national reserve of part of the individual reference quantities, provided for in Article 7(3) of Regulation 857/84, does not apply to a case where producers change from one purchaser to another. In addition, the reduction of the individual reference quantities that such a change entails cannot be definitive. Finally, that reduction infringes the principle of freedom to choose whom to do business with, and the principle of the free movement of agricultural products, by penalizing in a discriminatory manner the producers' choice of a more favourable purchaser.

In the light of those arguments the Conseil d'Etat du grand-duché de Luxembourg stayed the proceedings and referred to the Court the following questions, identical in both cases, for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Is Article 7 of Council Regulation (EEC) No 857/84 to be interpreted as meaning that, under Article 7(3) of the regulation, a Member State may provide in its national law that when a producer changes his purchaser (formula B) a part of his quota must be transferred to the national reserve instead of being apportioned between the old and the new

purchaser or transferred in full to the new purchaser pursuant to Article 7(2) of Regulation No 857/84, thus penalizing any change of purchaser made by a producer?

(2) Do Articles 39 and 110 of the Treaty of Rome and the principle of freedom to choose whom to do business with allow a Member State to reduce indefinitely by 10% the individual additional production quota of a producer merely because he changes purchaser and obtains a better selling price, thereby improving his farming income?'

4. Procedure before the Court

The orders for references were lodged at the Court Registry on 27 March 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main proceedings, represented by Fernand Entringer, Avocat-Avoué in Luxembourg, by the Luxembourg Government, represented by Ferdinand Hofstetter, Conseiller de Direction Première Classe at the Ministry of Agriculture, Viticulture and Rural Development, acting as Agent, and by the Commission of the European Communities, represented by Patrick Hetsch, a member of its Legal Department, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, by decision of 5 December 1990, to assign the case to the Third Chamber, pursuant to Article 95 of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry.

By an order of the same date, the Court decided to join Cases C-90/90 and C-91/90 for the purposes of the oral procedure and the judgment.

II — Written observations

1. *Question 1*

(a) The *plaintiffs in the main proceedings* point out that Article 7(1) of Regulation No 857/84 governs the effects on the quota allocated to a producer where the rights in the ownership or the use of the holding are transferred, whether for consideration or otherwise. Article 7(2) refers, under formula B, to the apportionment of quotas between two successive purchasers, where a producer has changed dairy during the year. However, those rules make no provision for a 10% reduction in the production rights of a producer.

The plaintiffs take the view that, in those circumstances, Article 7(3) of Regulation No 857/84, which allows Member States to add a part of the quantities in question to the national reserve, must be understood as referring only to paragraph 1 of that article, which lays down that 'all or part' of the reference quantity is to be transferred to the purchaser, tenant or heir.

Article 7(2) does not use similar terms in the event of a change of purchaser. Besides, the situations referred to in paragraph 1 are quite different from those provided for in paragraph 2, so that any reasoning by analogy is excluded.

The plaintiffs in the main proceedings conclude therefrom that a provision such as Article 9 of the Grand-Ducal Regulation of 7 July 1987 was adopted in breach of Community law.

(b) The *Luxembourg Government* explains that Article 7(2) and (3) of Regulation No 857/84 must be read in conjunction with Article 6(1) of Regulation No 1371/84, as amended, from which it follows that, where formula B is applied, purchasers' reference quantities are adjusted in particular to take account of replacements as referred to in Article 7(2) of Regulation No 857/84, including changes by producers from one purchaser to another.

It follows, in the opinion of the Luxembourg Government, that paragraphs 2 and 3 of Article 7 of Regulation No 857/85 apply not only to transfers of reference quantities on the initiative of a purchaser (the replacement of one purchaser by another), but equally to transfers on the initiative of a producer as a result of a change of purchaser. That interpretation is all the more cogent since a change by a producer to another purchaser leads to the new purchaser taking over the milk deliveries of the purchaser who has been abandoned, thereby replacing him.

The Luxembourg Government also recalls that, in its judgment in Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paragraph 19, the Court stated that, pursuant to the abovementioned provisions, '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 national reserve'. It follows that the provisions at issue allow the Member States to remove part of the reference quantity to be transferred where there is a change of purchaser by a producer in order to add that part to the national reserve.

The Luxembourg Government therefore takes the view that the answer to Question 1 should be in the affirmative.

(c) The *Commission* considers that Question 1 raises the problem of the applicability of Article 7(3) of Regulation No 857/84 in the event of a change by a producer from one purchaser to another.

In the Commission's opinion, Article 7(2) of that regulation includes, generally, all cases of partial or total replacement of one purchaser by another, no distinction being made according to the nature of the replacement. The purpose of that provision is to lay down the conditions in which the annual reference quantities of the purchasers in question must be adjusted in order to take account of new arrangements, whether they are the result of a merger, a concentration, a transfer or a simple change of dairy by one or more producers. In all

these situations, including that in which producers change their purchaser on their own initiative, the reference quantity of the first purchaser will be reduced by the part corresponding to the individual reference quantities of the outgoing producers, that part being added to the reference quantity of the purchaser to whom they have chosen to supply milk in future.

Not only is the applicability of Article 7(2) where replacement is the result of a decision by producers to change their purchaser in keeping with the purpose of that provision, but it also complies with the very wording of Article 6(1)(d) of Regulation No 1371/84, which was adopted within the framework of the detailed rules for the application of the system.

According to the Commission, it follows from the foregoing, and also from the judgment in Joined Cases 201/85 and 202/85, paragraph 19, that the Member States' right to allocate a part of the reference quantities to the national reserve, conferred by Article 7(3) of Regulation No 857/84 for all cases of transfers envisaged in the first two paragraphs, also applies where producers change from one purchaser to another. The allocation thus determined is permanent in the sense that the reference quantity of the new purchaser is fixed once and for all, for each of the periods in which the levy is applicable, after deduction of the part allocated to the national reserve.

In conclusion, the Commission suggests the answer to Question 1 should be that Article 7(3) of Regulation No 857/84 is applicable where there is a replacement of one purchaser by another, including where a producer chooses to deliver his products to another purchaser.

2. *Question 2*

(a) The *plaintiffs in the main proceedings* point out that according to the preamble to Regulation (EEC) No 804/68 (Official Journal, English Special Edition 1968 (I), p. 176), that regulation is aimed at removing all obstacles to the free movement of the products in question within the Community. To that end, Article 22 prohibits in particular any quantitative restrictions or measures having equivalent effect in intra-Community trade, and Article 33 requires that appropriate account be taken of the objectives set out in Articles 39 and 110 of the EEC Treaty.

Article 39 lays down that one of the objectives of the common agricultural policy is to ensure a fair standard of living for agricultural producers. That objective cannot be achieved, according to the plaintiffs in the main proceedings, by a reduction in the production quota of 10% which is not dictated by any requirement of Community law.

As for Article 110, the plaintiffs contend that that provision is infringed in so far as the 10% reduction constitutes a customs barrier affecting the free movement of goods, in this case milk, between Luxembourg and the Federal Republic of Germany.

(b) The *Luxembourg Government* points out as a preliminary observation that the reference to Article 110 of the EEC Treaty is without relevance in the case in point, since that article deals with the common commercial policy with regard to non-member countries.

Next, the Luxembourg Government observes that neither Article 7 of Regulation No 857/84 nor Article 6 of Regulation No 1371/84 provides for any temporal restriction whatsoever as regards the transfer to the national reserve of a part of the reference quantity. Taking account of the rigid and explicit character of the Community rules concerning milk quotas, therefore, the conclusion to be drawn is that such a restriction is contrary to those rules.

On the other hand, on the assumption that a restriction on the reduction in the reference quantity following a change of purchaser were allowed, that restriction would, in the opinion of the Luxembourg Government, oblige the Member States to restore to the producers in question, after one or more milk years, the part of their reference quantity which was transferred to the national reserve, by making use of reference quantities available to that reserve. Since the allocation of the reference quantities available to the national reserve is strictly controlled by the Community rules on milk quotas, which do not provide for any such restoration, it follows, according to the Luxembourg Government, that such a possibility would be contrary to the letter and the spirit of those rules.

With regard to the validity of Article 7 of Regulation No 857/84, the Luxembourg Government recalls that, as the Court has recognized, so far as the rules of the common organization of the markets are concerned, the Community institutions have a wide discretion as to the nature and the scope of the measures to be taken, with the result that the legality of such provisions is subject to review only in the event of error or serious and manifest abuse of power. In its view, the limits of that discretion have not been exceeded in the case in point.

Accordingly, the Luxembourg Government considers that a temporal restriction on the transfer of reference quantities to the national reserve, in application of Article 7(3) of Regulation No 857/84, is incompatible with the Community rules on milk quotas, and that the argument alleging that Article 7(3) is in breach of Article 39 of the EEC Treaty, and of the principle of freedom to choose whom to do business with, cannot be upheld.

(c) The *Commission* points out, as a preliminary observation, that the national reserve, constituted within the 'national quota', is designed to enable the Member States to grant additional or specific quantities to so-called 'priority' producers, such as those involved in a development plan, young farmers, farmers practising farming as their main occupation and producers who are victims of exceptional events. The national reserve is sustained in particular by the quantities resulting from the reduction by the Member State of the individual reference quantities of its producers or purchasers.

Although the producers in question are thus required to bear a reduction in the reference quantity, the fact remains that a change of

purchaser, decided upon by one or more producers, can mean that some quantities not hitherto utilized by the new purchaser are, owing to the way in which the various quantities are offset within the dairy, fully utilized in future. That outcome could deprive other purchasers of the advantage of the reallocation of those quantities.

The Commission points out, furthermore, that Article 7(3) allows only a 'part' of the reference quantity transferred to be added to the national reserve. That restriction reflects the need to observe, when implementing Article 7(3), a certain balance between the objective pursued, namely to contribute to the effort made in favour of priority producers, and the situation of the producers or purchasers in question. Accordingly, the part retained by the Member State must not be so excessive as to prevent those concerned from making such transfers.

Furthermore, according to the Commission, a reduction for the purpose of allocating to the national reserve the reference quantity transferred does not, in principle, affect the right of the producers in question to continue production on their own holdings. Nor does it prejudice their freedom to choose a purchaser, since it applies simply on account of the transfer without any condition being attached as to his identity or his activities. For the same reason, it cannot of itself bring about any restriction in trade.

The Commission adds that, in accordance with the Court's case-law, the Member States are required, when exercising the option offered by Article 7(3), to comply with the objective for which that measure was laid down, the principles of proportionality and non-discrimination, as well as the requirements arising from the protection of fundamental rights. Those requirements appear to be complied with in the case in point, since the part retained for the national reserve tallies with the aim of solidarity pursued by Article 7(3), and since it is confined to 10% of the quantity transferred and applies generally to every replacement of one purchaser by another.

In conclusion, the Commission suggests that the answer to Question 2 should be that Article 7(3) of Regulation No 857/84 must, in the light of the principle of proportionality, the prohibition of discrimination in Article 40(3) of the Treaty and compliance with the requirements concerning the protection of fundamental rights, be interpreted as meaning that it does not preclude national rules laying down that, where a producer changes from one purchaser to another, 10% of the reference quantity so transferred is to be allocated to the national reserve.

M. Zuleeg
Judge-Rapporteur