OPINION OF ADVOCATE GENERAL DARMON

delivered on 3 February 1993 *

Mr President,
Members of the Court,

1. What is the effect on the milk quotas allocated to a producer of a change in purchaser in the course of the 'milk year'? This is in essence the question raised by the Tribunal de Paix (Magistrates' Court), Luxembourg.

2. The milk market is subject to complex Community rules pursuing two aims: remedying the structural imbalance between supply and demand and taking account of the specific situation of certain producers.

3. Council Regulation (EEC) No 856/84 of 31 March 1984 [1] amended Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products [2] by adding an Article 5c introducing an additional levy payable by producers or purchasers of cows' milk.

4. Accordingly, where milk is produced in excess of a ceiling, known as a reference quantity, which is imposed both on producers and on purchasers from them, an additional levy is charged to cover the cost of disposal on the excess quantities. [3]

5. The total reference quantities for each Member State may not exceed a guaranteed quantity. In order to mitigate the rigidity of the system, a 'national reserve' enables Member States to allocate a specific reference quantity to certain categories of producer.

6. The additional levy is due either *from the producer* in respect of quantities of milk delivered to a purchaser which exceed, over a 12 month period, a reference quantity equal to the deliveries made by the person concerned during the reference year opted for by the Member State in question (formula A) or *from the purchaser* (formula B). The latter formula is defined by Article 5c(1) of Regulation No 804/68, as amended by Article 1 of Regulation No 856/84, in the following terms:

'— A levy shall be payable by [4] every purchaser of milk or other milk products on the quantities of milk or milk equivalent which have been delivered to him by a producer and which during the 12 months concerned, exceed a reference quantity to be determined.

* Original language: French.

1 — 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 (OJ 1984 L 90, p. 10).

2 — OJ, English Special Edition 1968(I), p. 176.

3 — See the first recital in the preamble to Regulation (EEC) No 857/84.

4 — See corrigendum published in OJ L 123 of 9 May 1984.

— The purchaser liable to the levy shall pass on the burden in the price paid to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded.' [5]

7. Formula B differs fundamentally from formula A in several respects. First, the additional levy is payable by the dairy in the event that the reference quantity allocated to it is exceeded: individual production is fungible in that the only relevant criterion is whether the purchaser's reference quantity has been exceeded. In itself, the fact that the individual quantity allocated to each producer has been exceeded has no bearing on whether the levy is triggered. [6] Secondly, the dairy passes on the levy to producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity having been exceeded. [7] Thirdly, within a given dairy, in so far as producers' deliveries exceed their reference quantity, they may be offset against the deliveries of producers with a 'shortfall', provided that the dairy's reference quantity is not exceeded. [8]

8. Thus, whilst under formula A the additional levy is payable by the producer in respect of any excess production over his reference quantity, under formula B the consequences of an increase in deliveries by a producer will depend on the overall situation of the dairy to which he delivers his milk. [9]

9. Consequently, under formula B there is a sort of 'socialization of risks', which enables the quotas to be administered more flexibly and utilized in an optimum manner. This is why, originally, the levy was higher in the case of formula B than in the case of formula A. [10]

10. In other words, under formula B, offsetting takes place at two levels. [11] *At the level of the purchaser*, excess deliveries from a producer may be set against shortfalls in deliveries from another producer, provided that the reference quantity allocated to the purchaser is not exceeded. [12] *At the level of the producer*, excess production at one time of the year may be covered by a shortfall at

5 — The reference quantity allocated to dairies constitutes the total quantity of milk purchased over a given year. See Article 2 of Regulation No 857/84. The last indent of Article 5c(1) was amended by Article 1 of Council Regulation (EEC) No 773/87 of 16 March 1987 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1987 L 1987 L 78, p. 1). That regulation is inapplicable *ratione temporis* to this case.

6 — See section 16 of my Opinion in Case 61/87 *Thevenot* [1988] ECR 2375.

7 — Third indent of the second subparagraph of Article 5c(1) of Regulation No 804/68, as supplemented by Article 1 of Regulation No 856/84.

8 — See paragraph 11 of the judgment in *Thevenot*, cited above.

9 — See D. Sorasio, Le nouveau régime de maîtrise de la production dans le secteur du lait et des produits laitiers, *Revue du Marché Commun* No 291, November 1985, p. 544.

10 — See the first paragraph of Article 1 of Regulation No 857/84. At present, the levy is 115% of the target price for milk irrespective of the formula chosen. See Article 1 of Council Regulation (EEC) No 3880/89 of 11 December 1989 amending Regulation (EEC) No 857/84 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 1989 L 378, p. 3).

11 — I shall not discuss the offsetting carried out at the larger levels of the region and the country (Article 4a of Regulation No 857/84).

12 — There do, however, exist exceptions to the principle of offsetting within a dairy: where the quantity allocated to a producer is exceeded by a large amount, the whole of that quantity may be penalized, even if the producer concerned is affiliated to a dairy which has not exceeded its reference quantity — which is tantamount to applying formula A (see Article 1 of Council Regulation (EEC) No 773/87 of 16 March 1987 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1987 L 78, p. 1).

another time of the year, provided that the producer's individual reference quantity for the year is not exceeded.

11. Consequently, under formula B it can be of great practical interest for a producer to change his purchaser in the course of a year: producers attached to a dairy in danger of exceeding its reference quantity might be inclined to change their purchaser and choose a dairy which is not at such a risk because its suppliers' production has decreased. [13]

12. The case where, under formula B, a purchaser is changed in the course of a year is provided for by Article 7(2) 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, [14] which provides that in such case the reference quantity is to 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,

— ...'.

13 — In this case, such a practice was ruled out by the period of notice which had to be given for leaving the first dairy.

14 — OJ 1984 L 90, p. 13.

13. Lastly, Article 6(1) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 [15] provides that '... 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'.

14. The case of *Neu* [16] was concerned with the Luxembourg legislation, which adopted formula B and provided that, in the event that of a change of purchaser in the course of a year, a reference quantity equal to that allocated to the supplier had to be deducted from the first purchaser's reference quantity and added to the new purchaser's reference quantity, less 10% which was allocated to the national reserve. [17]

15. The Court held that that deduction was contrary to the principle of freedom to choose with whom to do business: to decrease the reference quantity in the event of a change of purchaser might discourage producers from changing purchasers in order to supply the dairy offering them the most favourable conditions. The Court stated that such a reduction is particularly unjustified where no additional quantity of milk is marketed.

15 — 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 (OJ 1984 L 132, p. 11).

16 — Joined Cases C-90/91 and C-91/91 *Neu and Others* [1991] ECR I-3617.

17 — See Article 9 of the Grand-Ducal Regulation of 7 July 1987 on the application in the Grand Duchy of Luxembourg of the scheme of the additional levy on milk, *Mémorial*, p. 850.

16. Consequently, a change in purchaser cannot have the effect of disadvantaging the producer. [18]

17. The national court's question in this case is also concerned with the difficulties raised by a change in purchaser and with the interpretation of Article 7 of Regulation No 857/84.

18. The facts are as follows. Mr Hendel, the defendant in the main proceedings, is a milk producer in the Grand Duchy of Luxembourg. On 1 January 1986 he stopped delivering his milk to Luxlait and started supplying Procola instead.

19. After paying an additional levy for the year in question, Luxlait sued Mr Hendel for the sum of LFR 17 977, constituting the share to be passed on to its former member for the milking period 1 April to 31 December 1985.

20. The national court essentially asks the following question. [19] Under formula B, may excess deliveries to one purchaser be offset by a shortfall in deliveries to the purchaser which replaced it, with the result that no fine is payable unless the total quota allocated to the producer is exceeded, irrespective of the allocation of that quota between the two purchasers?

21. A prior question arises: does Article 7(2) of Regulation No 857/84 [20] cover a case where, under formula B, a milk producer changes of his own volition the dairy which it supplies without there having been a transfer of an undertaking as between the purchasers?

22. It seems at first sight that there is no need to draw a distinction where the law makes no distinction and that there is also a replacement of a purchaser within the meaning of Article 7(2) where the replacement takes place of the producer's own volition.

23. In addition, Article 6 of Regulation (EEC) No 1371/84 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*'. [21]

24. In its judgment in *Klensch*, [22] interpreting Regulation No 857/84, in particular Article 7(2) thereof, the Court held that, where a producer subject to formula B spontaneously ceases trading, his individual reference quantity does not remain at the disposal of the purchaser, but should be allocated to the

18 — *Neu*, paragraph 13.

19 — The exact wording of the question may be found in the Report for the Hearing (Section I, 4).

20 — Paragraph 2 of Article 7 was not amended by the version of that article introduced by Article 1 of Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 laying down 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 1985 L 68, p. 1).

21 — My emphasis. See also Article 9(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68. That regulation recast the rules applicable in this sphere (see the second recital in the preamble).

22 — Joined Cases 201/85 and 202/85 *Klensch* v *Secrétaire d'État* [1986] ECR 3477.

national reserve. Moreover, the Court ruled out an interpretation which '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'. [23]

25. It is clear therefore that Article 7(2) covers generally all cases in which a purchaser is partly or wholly replaced by another, including the case of a change of purchaser of the producer's own volition.

26. In order to interpret that provision, account must be taken of three essential rules:

— first, control of milk production: this basic principle of the milk quota system requires any overshooting of his reference quantity by the producer to give rise to the charging of additional levy:

— secondly, free choice of business partner: this is the main principle contained in the judgment in *Neu*;

— lastly, solidarity as between producers: it is effective only within the same dairy. [24]

27. I shall now examine in turn the interpretation of this article as it emerges from the way in which is applied in Luxembourg, as it is proposed by Mr Hendel and as it proposed by the Commission.

28. Article 7(2) is applied as follows in Luxembourg: the producer's annual reference quantity is divided between purchasers proportionately to the time for which the producer has been affiliated to each of them.

29. That solution, which at first sight seems to be faithful to the wording of the provision, appears to me to be consistent neither with its spirit nor with the Court's case-law.

30. The producer may in fact be penalized by contributing to the additional levy payable by the first purchaser when, owing to the fact that there was a shortfall in his deliveries to the second purchaser, he will not exceed his individual reference quantity. He might therefore be dissuaded from changing his dairy in the course of the financial year and be constrained as a result to forgo more advantageous economic conditions.

31. It appears from *Neu* [25] that the principle of the free choice of business partner means that a producer who decides to change his purchaser in the course of the year must not be placed in a less favourable situation that a producer who has not changed his dairy. [26] The Court held that this was quite particu-

23 Paragraph 22.

24 *Thevenot*, paragraph 11.

25 In particular at paragraph 11

26 Paragraph 13.

larly true where the change in purchaser did not entail the marketing of any additional quantity of the products in question. [27]

32. Consequently, in the same way that it cannot justify a decrease in the reference quantity, where the annual quantity delivered is the same, a change in purchaser cannot result in the payment of additional levies where such payment would not have been due if there had been no such change of purchaser.

33. Mr Hendel, for his part, suggests a change in the Luxembourg system. He argues that the excess deliveries to Luxlait between 1 April 1985 and 31 December 1985 may be offset by a 'shortfall' in deliveries made to Procola between 1 January 1986 and 31 March 1986. He bases this view in particular on the principles set out in the judgment in *Neu*: a change in purchaser in the course of the financial year must not disadvantage a producer making such a change as compared with a producer who remained with the same purchaser.

34. That solution is also unacceptable.

35. Admittedly, the possibility of reabsorbing temporary excess production enables the producer — by means of a species of offsetting within his farm — to keep within the limits of his individual reference quantity.

36. But in order to reach this conclusion, the defendant is, in my view, altering the nature of the system of offsetting as between producers introduced by formula B. The defendant proposes offsetting the quantities delivered to different purchasers. This would come down to replacing offsetting as between producers within a same dairy by offsetting between purchasers, hence between dairies, which would be contrary to the *rationale* of the regulation.

37. Lastly, the Commission suggests that the reference quantity should be divided between successive purchasers in proportion to the duration of the various affiliations during the marketing year 'taking account of the average profile of deliveries made during the preceding three years'. This would take account of two imperative factors:

— milk production is non-linear but subject, over the year as a whole, to variations which ought to be taken into account;

— producers are entitled — within the relevant 12-month period — to individual reference quantities which have not been used by other producers affiliated to the same purchaser.

38. I am unable to concur with that solution either.

39. The producer's annual individual reference quantity would be divided between successive purchasers on the basis of average production over the last three years. This presupposes that the last three years are representative, and would not enable the reference quantity of a producer who changes purchaser to be divided if he had less than three years' trading behind him.

27 — Paragraph 14.

40. Then again, that interpretation of Article 7(2) would have the same drawback as the interpretation applied by the Grand Duchy of Luxembourg: the producer might be liable to pay additional levy even if he had not exceeded his reference quantity over the year.

41. The various interpretations put forward illustrate the difficulty of reconciling free choice of business partner (a producer who changes his dairy should not be disadvantaged by comparison with a producer who does not change his dairy) and the rule relating to offsetting as between producers belonging to the same dairy (reference quantities not used by producers of a given dairy can be used only to offset excess deliveries by producers belonging to that same dairy).

42. Those principles do seem to be capable of being reconciled, however, if the producer's reference quantity is divided differently between purchasers.

43. A system may be envisaged which takes account of the quantities *actually* delivered to the first purchaser.

44. The reference quantity granted to the first purchaser would be equal to the quantity of milk actually delivered to it up to the limit of the producer's annual reference quantity. [28]

45. The reference quantity granted to the second purchaser would be equal to the balance, that is to say, the difference between the producer's individual annual reference quantity and the quantities delivered by him to the first purchaser.

46. This solution has a number of advantages.

47. The producer cannot be held liable to additional levy in respect of the period during which he was affiliated to the first purchaser unless he exceeded his annual individual reference quantity.

48. Within that limit, the more the deliveries of the producer concerned increase, the more the purchaser's reference quantity increases. Whilst the producer concerned does not make the unused reference quantities available to other producers, neither is he using the quantities not used by the other producers to offset excess deliveries. As a result, the change in the situation of the producer concerned has no effect on the other producers affiliated to the first purchaser.

49. If, in the context of the deliveries made to the first purchaser, the producer should exceed his annual individual reference quantity, he would logically be liable to contribute towards additional levy in respect of that dairy if the excess deliveries were not offset against quantities unused by the other producers.

50. In the event that there was a shortfall in his deliveries to the second purchaser, the unused quantities would be available to the

28 — That reference quantity is the one which would have been allocated to the purchaser if the producer had not changed his dairy.

other producers affiliated to that purchaser. This would mean that there would be no offsetting as between dairies.

51. In concluding, I consider it worth recalling the Court's settled case-law, according to which:

'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 provisions of the Treaty and the general principles of Community law'. [29]

52. However, I would not pretend that the solution which I am proposing would not push to extreme limits the expression 'on a pro rata basis of the time still to run' which appears in Article 7(2).

53. I have resolved to put forward this solution given that, on the one hand, compliance with the principles which I mentioned above led the Court in *Neu* to adopt a very comprehensive interpretation of Article 7(3) and, on the other hand, the Commission itself is proposing in view of that judgment an equally bold interpretation of the provision in question.

54. I therefore propose that the Court should rule as follows:

Under formula B of the scheme of the additional levy on milk established by Article 5c of Regulation (EEC) No 856/84, a producer who changes purchaser within a 12-month period cannot be held liable to pay additional levy unless, during the year, he exceeded the reference quantity allocated to him. To that end, that quantity should be divided between successive purchasers from him in such a way that, for the first purchaser, it is equal to the quantities which he actually delivered to it and, for the second, to the producer's annual reference quantity less the quantities delivered to the first purchaser.

29 — *Neu*, paragraph 12. See also *Klensch*, paragraph 21.