OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 2 May 1991 *

Mr President,
Members of the Court,

1. The market in milk is governed by complex rules aimed in particular at controlling the significant structural surpluses in production while taking into account the individual circumstances of certain categories of producers.

2. The principal features of that mechanism are, for the purposes of the instant case,

— the reference quantities or 'milk quotas' imposed on both producers and their purchasers, that is the dairies; if the milk quotas are exceeded, a levy is payable; this levy, described as an 'additional' levy since it is added to the co-responsibility levy, is payable either by the producer (formula A) or by the purchaser (formula B), according to the decision of the Member State in question; the total of the reference quantities, fixed on the basis of the production allowed for 1981, may not exceed in each Member State a specified overall quantity, known as the 'guaranteed quantity';

— the 'national reserve', constituted by each Member State within the guaranteed quantity, with a view, in particular, to being able to grant a specific reference quantity to certain categories of producers who, in view of their special circumstances, would be penalized by the criterion of reference to production in 1981: young farmers, producers who have adopted development plans or those whose production has been significantly affected by an exceptional event occurring before or during the reference year.

3. The reference quantities may be transferred in whole or in part from one producer to another or from one purchaser to another on the conditions laid down in Article 7 of Council Regulation (EEC) No 857/84 of 31 March 1984,[1] as amended by Council Regulation (EEC) No 590/85 of 26 February 1985,[2] the relevant provisions of which, so far as these proceedings are concerned, are the following:

'*Article 7*

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.

* Original language: French.

1 — Regulation adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13).

2 — OJ 1985 L 68, p. 1.

...

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 in Article 6(3), as the case may be.

...'

4. The Grand Duchy of Luxembourg, having opted for formula B, adopted on 7 July 1987 a regulation which provides in the first paragraph of Article 9 that '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.'

5. Thirteen milk producers established in the Grand Duchy decided to supply to the agricultural association Procola the milk which they had hitherto sold to its competitor, Luxlait. By decisions of 22 February 1988 the Secretary of State refused to transfer in full to Procola the basic reference quantity of those producers' milk deliveries and the additional individual reference quantity of eleven of them.

6. Those decisions were the subject of proceedings before the Conseil d'Etat of the Grand Duchy of Luxembourg, which has asked the Court two questions aimed essentially at ascertaining:

— first, whether Article 7(3) applies 'when a producer changes his purchaser';

— secondly, whether, in those circumstances, an irreversible transfer to the national reserve of 10% of the quota in question is contrary both to Articles 39 and 110 of the EEC Treaty and to the principle of freedom to choose whom to do business with.

7. The first question should not occupy the Court's attention for long. Contrary to the plaintiffs' contention, Article 7(3) applies not only to situations where a holding is 'sold, leased or transferred by inheritance', as laid down in paragraph 1 of that article, but equally to those described in paragraph 2, namely where a producer changes purchaser, without its being necessary to distinguish whether such a replacement has taken place on the initiative of the purchaser, for example by transfer, merger or concentration, or on the initiative of the

producer, who, on the expiry of a contract between himself and a dairy, decides to change purchaser.

8. First of all, I wish to consider two arguments based on the wording of the provisions in question.

9. On 31 March 1984, at the same time as Regulation (EEC) No 856/84 inserted in Regulation (EEC) No 804/68 Article 5C introducing the additional levy and laying down formulas A and B, the Council incorporated the first version of Article 7 in Regulation No 857/84, which was adopted for the application of that levy. That provision consisted of two paragraphs, also dealing with a situation 'where an undertaking is sold, leased or transferred by inheritance', and with a situation where a purchaser, 'under formula B . . . replaces, wholly or in part, one or more purchasers'. Those two paragraphs were followed, initially, not by a paragraph 3 but by a final *subparagraph* worded as follows: 'Member States may provide that a part of the quantities be added to the reserve referred to in Article 5.' The argument that the final provision did not apply to the situation envisaged in paragraph 2 is untenable.

10. Article 7 was amended by Regulation No 590/85. The sixth recital in the preamble to that regulation justifies that amendment by referring to the situation of certain lessees whose lease is due to expire and to that of certain producers who are affected because their land is transferred to public authorities or for purposes of public use. There is no question here of excluding a producer who changes purchaser from the scope of the adjustment of quotas for the benefit of the national reserve.

11. Furthermore, as both the Luxembourg Government and the Commission point out, the applicability of Article 7(3) to the situations envisaged by paragraph 2 is expressly mentioned by Article 6 of Commission Regulation (EEC) No 1371/84 of 16 May 1984,[3] which 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*'.[4]

12. The Court has already drawn certain conclusions based on those provisions in its case-law. In that regard, the Commission emphasizes the relevance of the Court's judgment in *Klensch*,[5] which lays down that

'Article 7(2) of Regulation No 857/84 in conjunction with Article 6(1)(d) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 . . . provides that, under formula B, the purchaser's reference quantity is to be adjusted, *inter alia*, in order to take account of changes by

3 — OJ 1984 L 132, p. 11. The provisions of that regulation, on this point, were fully incorporated in Regulation (EEC) No 1546/88 of 3 June 1988 (OJ 1988 L 139, p. 12).

4 — Emphasis added.

5 — Joined Cases 201/85 and 202/85 [1986] ECR 3477.

producers from one purchaser to another, subject to Member States being able to provide that a part of the quantities in question be added to the reserve referred to in Article 5 of Regulation No 857/84 (the national reserve)'.[6]

13. The second question submitted by the Conseil d'Etat, Luxembourg, raises a more delicate issue. It is necessary to determine whether the national court seeks only the interpretation of the Community rules to which it refers or whether it also seeks an assessment of the validity of Article 7(3), having regard to those rules, in that that provision allows a part of the quotas in question to be allocated once and for all to the national reserve.

14. The irreversible nature of that allocation is in keeping with the rationale behind Article 7(3), as I have interpreted it. The national reserve is designed to mitigate the rigidity of the system of milk quotas, so that the situation of certain special categories of producers can be taken into account. Is it conceivable that the specific reference quantities allocated to them from the national reserve can be withdrawn from such producers, for example young farmers setting up after 31 December 1980,[7] solely in order for the original quotas of the farmers concerned to be restored? Most certainly not since, contrary to the *ratio legis*, that would be to jeopardize the viability of their holdings. Nor, as the Luxembourg Government points out, do the relevant Community regulations impose any temporal restriction on the transfer to the national reserve of a part of the reference quantity.

6 — Paragraph 19.

7 — Article 3(2) of Regulation No 857/84.

15. In that sense, therefore, the second question seeks an assessment of the validity of Article 7(3). For the rest, as regards the 10% threshold adopted by the Luxembourg legislation, it must be treated as a question on the interpretation of the rules and principles mentioned therein. I shall examine those two points in turn.

16. With regard to the validity of Article 7, let me at once dismiss the reference to Article 110 of the Treaty. As the Luxembourg Government rightly points out, that provision is without relevance here since it is concerned with the common commercial policy in relation to non-member countries. The plaintiffs in the main proceedings have themselves stated that all the milk which they produce is processed and marketed in Germany.

17. Article 39 is relied upon in so far as its aim is to ensure a fair standard of living for farmers. However, it cannot be interpreted as aiming to perpetuate certain existing situations to the detriment of a dynamic agricultural policy. Producers are not compelled to change purchasers. If they do so, it is because they expect to gain by it, which, from the viewpoint of the objectives pursued by the common agricultural policy and the wide discretion which the Community institutions enjoy in that sphere,[8] may place them under an obligation with regard to other producers whose situation calls for support. The Commission very rightly points out that Article 7(3) pursues an objective of reallocation in favour of priority producers. Besides, those producers are also affected by Article 39(1)(b) of the EEC Treaty.

8 — Judgment in Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau* v *Commission* [1987] ECR 1069, paragraph 14; judgment in Case C-359/89 *SAFA* [1991] ECR I-1677, paragraph 16.

Accordingly, that provision, which cannot be interpreted as an obstacle to the irreversible nature of the adjustment of the reference quantities complained of, does not affect the validity of Article 7 of Regulation No 857/84.

18. For the same reasons, the validity of that article does not appear to be vitiated by the principle of freedom to choose whom to do business with. That principle, so formulated, does not appear in the Court's case-law.[9] It is doubtless just one manifestation of the principle of freedom to pursue a trade or profession, which forms part of the general principles of Community law.[10] While the choice of trader is not prejudiced by Article 7(3) of Regulation No 857/84, the actual freedom to change contractors, which is one of the conditions necessary for freedom of economic activity, is restricted by that provision. It would seem, however, that such a restriction can be justified.

19. Let me point out that, as the Court has already held in its judgment in *Schrader*,

'both the right to property and the freedom to pursue a trade or profession ... do not constitute an unfettered prerogative, but must be viewed in the light of the social function of the activities protected thereunder. Consequently, the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.[11]

20. As I have just emphasized, the possibility of allocating to the national reserve a part of the previous reference quantity, and of doing so permanently, is designed to correct the harmful consequences that a rigid application of the system of milk quotas would inevitably produce with regard to certain categories of milk producers, who are themselves equally entitled to rely on the benefit of both Article 39 of the EEC Treaty and the principle of freedom to pursue an economic activity. Such a possibility is not a 'disproportionate and intolerable interference' which encroaches upon the 'very substance of the rights guaranteed'. In its judgment in *Eridania*,[12] where the introduction of basic quotas for sugar was criticized in the light of the same principle, the Court stated that

'an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time. In those circumstances a reduction in such an advantage cannot be considered as consti-

9 — Even if it is implicit in many cases concerning Article 86 of the EEC Treaty; see, for example, the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 80.

10 — Judgment in Case 44/79 *Hauer* [1979] ECR 3727, paragraph 32; judgment in Case 265/87 *Schrader* [1989] ECR 2237, paragraph 15.

11 — Paragraph 15.

12 — Judgment in Case 230/78 [1979] ECR 2749.

tuting an infringement of a fundamental right'. [13]

21. Although the very principle of allocating to the national reserve a part of the previous reference quantity would thus appear to be beyond criticism, that partial reallocation of the quotas within the guaranteed quantity of each of the Member States by means of the national reserve does not substantially jeopardize, over and above the requirements of due solidarity through reallocation, the normal development of milk-producing units. It is here that the problem arises of the assessment of the 10% threshold provided for not in the relevant Community regulations but in the national measure.

22. In fixing such a threshold, national rules must, first and foremost, in accordance with the requirements of Article 40(3) of the EEC Treaty and, more generally, by virtue of the general principle of equality which is one of the fundamental principles of Community law, exclude any discrimination between producers. [14] They must also comply with the principle of proportionality.

23. There is little to say on the first point. Domestic rules such as those at issue in this case, provided they apply to every change of purchaser, without reference to the identity of the producers or the dairies concerned, and provided they are actually applied in that way, would not appear to lead to discrimination between producers.

24. There is not doubt that the second point is more delicate. It cannot be ruled out that the fixing of a significant threshold may seriously hinder the freedom to pursue the economic activity in question. It is thus for the national legislature, when it decides to make use of the possibility given to it by Article 7 of Regulation No 857/84, to comply with both the abovementioned principle and those to be deduced from Articles 39 and 40 (3) of the EEC Treaty. [15] The restrictions imposed on those principles must therefore not exceed what is strictly necessary to achieve the objectives pursued.

25. The question whether the establishment of a 10% threshold complies with the principle of proportionality comes within the jurisdiction of the national court. The structure of the market in question must be examined. If that market is characterized by very strong competition between different dairies, the advantages which a milk producer might obtain by changing purchaser should not be seriously jeopardized by the allocation of a significant part of his quota to the national reserve. The national court, which is in a position to carry out that economic analysis, must take into consideration the number of dairies operating on the market, including those established in other Member States, and the degree of competition on that market; above all, it must weigh up the size of the adjustment of the reference quantities imposed by the national legislation against the advantages which a change of purchaser would bring to a producer, in order to ascertain whether the percentage deducted has an appreciable effect on the conditions of competition between the various dairies. The national court must also examine whether the allocation of a part of the

13 — Paragraph 22.

14 — Judgments in Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753 and Joined Cases 124/76 and 20/77 *Moulins de Pont-à-Mousson* [1977] ECR 1795.

15 — Judgment in Joined Cases 196/88 to 198/88 *Cornée* [1989] ECR 2309, paragraph 14; judgment in *Klensch*, above, paragraph 10; judgment in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19.

reference quantity to the national reserve applies to each change of purchaser, as would appear to be the case under the Luxembourg rules, or whether only a single change during a given period gives rise to such an allocation.

26. In the light of those observations, I propose that the Court rule as follows:

'(1) Article 7(3) of Council Regulation (EEC) No 857/84, as amended by Council Regulation (EEC) No 590/85, must be interpreted, in conjunction with Article 6 of Commission Regulation (EEC) No 1371/84 in force at the time, as meaning that it is applicable to a situation where a purchaser replaces one purchaser with another, even where such replacement comes about of the producers' own volition, and even though the resultant adjustment of the reference quantities is permanent.

(2) An examination of the aforesaid provision has disclosed no factor of such a kind as to call in question its validity.

(3) It is for the national court to ascertain whether, in exercising the powers conferred upon the Member States by Article 7(3), national rules comply with the principle of non-discrimination laid down in the second subparagraph of Article 40(3) of the EEC Treaty and the principle of proportionality; in that regard it is for the national court to take into consideration the number of purchasers operating on the market in question, including those established in other Member States, and competition between them, to weigh up the advantage for the producer in resorting to a change of purchaser against the drawback resulting from the adjustment of the reference quantity, and finally to consider whether or not that adjustment applies to successive replacements of purchasers, no matter how long the period over which they may occur.'