JUDGMENT OF THE COURT (Third Chamber)
16 December 1993 *

In Case C-307/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Paix de Luxembourg for a preliminary ruling in the proceedings pending before that court between

Association Agricole Luxlait

and

Victor Hendel

on the interpretation, in particular, of 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 (OJ 1984 L 90, p. 13),

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, F. Grévisse and M. Zuleeg, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

* Language of the case: French.

— Victor Hendel, by Fernand Entringer, of the Luxembourg Bar,

— the Commission of the European Communities, by Dierk Booss and Gérard Rozet, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff in the main proceedings and the Commission at the hearing on 26 November 1992,

after hearing the Opinion of the Advocate General at the sitting on 3 February 1993,

gives the following

Judgment

1 By judgment of 24 September 1991, received at the Court on 29 November 1991, the Tribunal de Paix de Luxembourg (Magistrates' Court, Luxembourg) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of 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 (OJ 1984 L 90, p. 13).

2 That question arose in proceedings between Mr Hendel, a farmer, and Association Agricole Luxlait concerning the calculation of additional levy in the event of a change of purchaser in the course of the financial year.

3 Until 31 December 1985, Mr Hendel, a farmer in the Grand Duchy of Luxembourg, delivered the milk produced on his farm to Luxlait, an agricultural association of which he was a member. On 1 January 1986 he left Luxlait to join the Procola dairy, to which he subsequently delivered the milk he produced.

4 On 30 January 1990 Luxlait brought an action against Mr Hendel in the Tribunal de Paix for the payment of LFR 17 977 by way of additional levy which it had paid for the period from 1 April to 31 December 1985 in respect of the excess deliveries made by Mr Hendel in that period. Mr Hendel contests the amount of the additional levy which Luxlait seeks to pass on to him. He considers that the amount of his excess deliveries to Luxlait in the first nine months of the 1985/86 financial year should be offset by the low level of deliveries which he made to Procola during the remainder of the financial year, that is to say, from 1 January to 31 March 1986.

5 Taking the view that its decision turned on a question of interpretation of Community law, the Tribunal de Paix stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does the Community legislation governing milk quotas, in particular Article 7(2) of Regulation (EEC) No 857/84, provide that under formula B a producer, when he changes from one purchaser to another during the course of a milk year, has two separate quotas to comply with and two fines to pay, with no possibility that a shortfall in deliveries to one purchaser may be offset against excess deliveries to the other purchaser so that a fine applies only if the total quota allocated to the producer is exceeded regardless of how that quota is divided up between the two purchasers?'

6 Under the second subparagraph of Article 5c(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), as amended by Council Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), the levy scheme is to be implemented in each region of the territory of

the Member States in accordance with formula A (producer formula) or formula B (purchaser formula). The Grand Duchy of Luxembourg has opted for formula B.

7 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant Community provisions, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The national court's question essentially seeks to ascertain the method of distribution, under Article 7(2) of Regulation No 857/84, of the individual reference quantity as between the first and the second dairy when a producer changes his affiliation during the current financial year, together with the financial consequences of the method of distribution upheld by the Court, in the event that the individual reference quantity is exceeded.

9 Article 7(2) of Regulation No 857/84 provides that where a purchaser replaces, wholly or in part, one or more purchasers, his annual 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'.

10 Article 6(1) 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 (OJ 1984 L 132, p. 11) specifies that, in the case of formula B, purchasers' reference quantities are to be adjusted, *inter alia*, 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'.

11 In Joined Cases 201/85 and 202/85 *Klensch* v *Secrétaire d'État* [1986] ECR 3477, the Court held that Article 7(2) of Regulation No 857/84 covers, not only the complete or partial replacement of one purchaser by another, but also a change of purchaser effected of the producer's own volition.

12 In the Grand Duchy of Luxembourg, Article 7(2) of Regulation No 857/84 is interpreted as meaning that the annual reference quantity individually allocated to the producer by the first dairy to which he was affiliated must be divided between that dairy and the other dairies to which he is subsequently affiliated in proportion to the period of time for which he was affiliated to each of them during the current financial year.

13 That interpretation, which at first sight is faithful to the wording of the Community provision in question, cannot be accepted.

14 As appears from the judgment in Joined Cases C-90/90 and C-91/90 *Neu and Others* [1991] ECR I-3617, freedom to choose with whom to do business, as a specific expression of the freedom to pursue a trade or profession which forms part of the general principles of Community law, would not be guaranteed if a change in dairy by a producer, of his own volition, were capable of leading to a reduction in his individual reference quantity, when no such reduction can be made where the producer continues to supply the same dairy.

15 The Court finds that, although the proposed interpretation does not inevitably give rise to a reduction in the annual reference quantity, it is liable to penalize a producer who changes his diary in the course of the financial year. It follows from the third indent of the second subparagraph of Article 5c(1) of Regulation No 804/68, as amended by Regulation No 856/84, that the first dairy may pass on to the producer the additional levy payable by it even where, in view of the low level of deliveries made to the second purchaser, the producer in question will not exceed his annual reference quantity.

The solution proposed by Mr Hendel, which would result in the excess deliveries to the first purchaser being offset by a lower level of deliveries to the second purchaser without taking any account of the length of time for which he was supplying those two purchasers, cannot be accepted either. Reference is made in this regard to Case C-61/87 *Thevenot* v *Centrale Laitière de Franche-Comté* [1988] ECR 2375, from which it appears that offsetting the amount by which reference quantities have been exceeded is limited in the case of formula B (purchaser formula) to the individual reference quantities of producers affiliated to the same purchaser.

17 The same applies to the Commission's proposal that the producer's individual quantity to be taken into account by each successive purchaser from him may be based on the actual ceiling of the deliveries made by him during the three preceding financial years. That solution would not eliminate the abovementioned risk of the producer's being penalized on account of his change of dairy.

18 Accordingly, where a producer changes from one purchaser to another, the producer's individual reference quantity allocated by the first purchaser for the current financial year must be divided between the former purchaser and the new purchaser in such a way that, first, the annual reference quantity to be allocated to the first purchaser is equal to the quantity of milk actually delivered during the period when he was affiliated to that purchaser and, secondly, the annual reference quantity to be allocated to the second purchaser consists of the remaining quantity represented by the difference between the annual reference quantity and the quantity of milk delivered. Such a division enables the principle of freedom to choose with whom to do business to be reconciled with the rule to the effect that offsetting is possible in the case of formula B only between producers affiliated to the same purchaser.

19 The reply to the question referred by the Tribunal de Paix de Luxembourg should therefore be that Article 7(2) of Regulation No 857/84 must be interpreted as meaning that, where a producer changes his dairy in the course of a financial year, the producer's individual reference quantity allocated by the first purchaser for the current financial year should be divided between the successive purchasers in such a way that, for the first purchaser, it is equal to the quantities actually delivered to

it and, for the second, to the producer's annual reference quantity less the quantities delivered to the first purchaser. Accordingly, the individual reference quantity will be exceeded only in so far as, irrespective of affiliation to one or other purchaser, the producer's production exceeded the individual reference quantity allocated to him for the current financial year.

Costs

20 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber)

in answer to the question referred to it by the Tribunal de Paix de Luxembourg, by judgment of 24 September 1991, hereby rules:

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 must be interpreted as meaning that, where a producer changes his dairy in the course of a financial year, the producer's individual reference quantity allocated by the first purchaser for the current financial year should be divided between the successive purchasers in such a way that, for the first purchaser, it is equal to the quantities actually delivered to it and, for the second, to the producer's annual reference quantity less the quantities delivered to the first purchaser. Accordingly, the individual reference quantity will be exceeded only in so far as, irrespective of affiliation to one or other purchaser, the producer's production exceeded the individual reference quantity allocated to him for the current financial year.

Moitinho de Almeida Grévisse Zuleeg

Delivered in open court in Luxembourg on 16 December 1993.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber