other purchaser, the producer's production exceeded the individual reference quantity allocated to him for the current financial year. Such a division enables the principle of freedom to choose with whom to do business implied by the free pursuit of economic activities guaranteed by Community law as one of its general principles 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.

REPORT FOR THE HEARING
in Case C-307/91 *

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 (OJ 1984 L 90, p. 10) introduced for a period of five years an 'additional levy' on quantities of milk delivered which exceed a reference quantity to be determined. That system is implemented in accordance with one of the following formulas:

— Under Formula A (producer formula), the levy is payable by milk producers on the quantities of milk delivered to purchasers in excess of a reference quantity to be determined;

— Under Formula B (purchaser formula), the levy is payable by purchasers of milk on the quantities of milk delivered by producers in excess of 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 (OJ 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

* Language of the case: French.

on their territory the reference quantity 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 situations when fixing reference quantities or allocating specific or additional reference quantities.

Article 7(2) of Regulation No 857/84 provides as follows:

'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.

...'

(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 (OJ 1984 L 132, p. 11). Article 6 of that regulation provides as follows:

'1. 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.'

2. *Legislation implementing the Community provisions in the Grand Duchy of Luxembourg*

The scheme of the additional levy on milk was implemented in the Grand Duchy of Luxembourg by the following law and regulations:

— Grand-Ducal Regulation of 7 July 1987 concerning the application, in the Grand Duchy of Luxembourg, of the arrangements for the additional levy on milk, as amended by Grand-Ducal Regulation of 23 December 1987;

— Law of 27 August 1987 rendering applicable to milk years prior to the 1987/88 milk year the provisions of the Grand-Ducal Regulation of 7 July 1987;

— Grand-Ducal Regulation of 2 October 1987 laying down certain additional implementing rules.

The Grand-Ducal Regulation of 7 july 1987 opted for formula B (purchaser formula).

3. *The main proceedings*

The main proceedings relate to the calculation of the additional levy passed on by the dairy to a milk producer in respect of a 12 month period during which he left his initial purchaser and became affiliated to another purchaser.

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

On 30 January 1990, the Luxlait association brought proceedings against Mr Hendel in the Tribunal de Paix (Magistrates' Court), Luxembourg, for payment of the sum of LFR 17 977 by way of additional levy, on the ground that Mr Hendel delivered excess milk between 1 April and 31 December 1985.

Mr Hendel contests the amount of additional levy claimed by Luxlait. He considers that the excess milk he delivered to Luxlait during the first nine months of the 1985/86 financial year should be offset by the shortfall he made in deliveries to Procola over the rest of the financial year, that is to say, 1 January to 31 March 1986.

Considering that its decision turned on a question concerning the 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?'

4. *Procedure before the Court*

The national court's judgment was received at the Court Registry on 29 November 1991.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Victor Hendel, the defendant in the main proceedings, represented by Fernand Entringer, of the Luxembourg Bar, and by

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

On 21 October 1992, the Court decided to remit the case to the Third Chamber pursuant to Article 95 of the Rules of Procedure and to open the oral procedure without any preliminary inquiry.

II — Written observations

1. *Victor Hendel* considers that the question raised essentially seeks to establish what is the effect on a producer's quota of his having changed purchaser during the milk year.

He submits that if a producer delivered his product to more than one purchaser in the course of a financial year, Article 7(2) of Regulation No 857/84 is applicable. That provision provides that the basic quota for the reference year is to be divided between the two dairies.

In Mr Hendel's view, that provision is applied in practice as if, where the purchaser is changed in the course of the financial year, the producer had two quotas to comply with, that is to say, one for each of the periods concerned with each of the purchasers. In his view, that practice is wrong, since a producer who changes his dairy does not increase his milk production and therefore does not exceed the quota allocated to him for the financial year in question; hence it is not justified to penalize him by refusing to allow him to carry out offsetting.

Moreover, in Mr Hendel's view, prohibition of offsetting as between the two deliveries stands in the way of the producer's freedom to choose his purchaser, which is contrary to the general principles of Community law (see Joined Cases C-90/90 and C-91/90 *Neu* [1991] ECR I-3617, paragraphs 13 and 14).

In conclusion, Mr Hendel suggests that the reply to the national court's question should be that it is permissible to offset a shortfall against over-production in the event of a change of purchaser.

2. The *Commission* maintains that a change of affiliation on the part of a producer subject to formula B cannot call in question the general scheme of that formula (under which, on the one hand, the levy is payable by the purchaser and, on the other, 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) by making the levy payable by the producer and payable by him only in respect of quantities of milk delivered to one purchaser which — over the 12 month period in question — exceed the reference quantity allocated to him.

In the Commission's view, however, the question arises as to the definition of the producer's individual quantity to be taken into consideration by each successive purchaser over the 12 months in which he changed his affiliation for the purposes of calculating any levy chargeable to him. The Commission observes in this connection, first, that milk production is non linear over

any 12 month period and, secondly, that the major variations recorded — both over time and from producer to producer but also as regards the quantity of milk produced and its fat content — are due to numerous factors (breed of the herd, its age and health, cattle feed, stock management, etc. ...).

The Commission infers from this that, in order that the choice of business partner may be made under reasonably satisfactory conditions, it appears essential that the reference quantity of a producer who changes his affiliation over the 12 months of the financial year should be divided between his successive purchasers, taking account as far as possible of the actual profile of deliveries made. To that end, it might be considered taking as the basis the delivery profile for the period immediately proceeding the 12 month period during which he changed his affiliation.

In so far as such an approach is based on a single year during which various events capable of having affected the rate of his deliveries may have occurred, it is open — the Commission considers — to the criticism that its representativeness is not sufficiently well guaranteed. However, this criticism should be able to be overcome by taking an average profile based on the deliveries made over the three preceding periods.

This should reasonably safeguard the producer's freedom to choose with whom to do business (see *Neu*) where he changes his affiliation over the 12 months of the marketing year, since his reference quantity will be divided between his successive purchasers in proportion to the duration of his different affiliations over the period in question on the basis of the average profile of his actual deliveries over the previous three marketing years.

In conclusion, the Commission suggests that the answer to the national court's question should be as follows:

'Under formula B of the "milk quota" scheme established by Article 5(c) of Regulation (EEC) No 857/68, a producer who changes purchaser in the course of a 12 month period is bound to pay his successive purchasers the additional levy imputable to each of them, provided that the conditions laid down to that end are satisfied, without there being any need to overset his deliveries to each of them over that period. To that end, the reference quantity is to be divided between his successive purchasers in proportion to the duration of his different affiliations over the period in question on the basis of the average profile of his actual deliveries over the three preceding periods.'

M. Zuleeg

Judge-Rapporteur