JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
30 January 1997 *

In Case T-117/95,

N. Corman SA, a company governed by Belgian law, established in Goé-Limbourg (Belgium), represented by Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by Gérard Berscheid, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Article 1(4) of Commission Regulation (EC) No 455/95 of 28 February 1995 amending Regulation (EEC) No 1547/87 and (EEC) No 1589/87 as regards the buying-in of butter by the intervention agencies and Regulations (EEC) No 2191/81 and (EEC) No 570/88 as regards the grant of aid for the purchase and sale of butter at a reduced price to certain categories of consumers and industries (OJ 1995 L 46, p. 31),

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Palacio, Administrator,

having regard to the written procedure and further to the hearing on 5 November 1996,

gives the following

Judgment

Relevant legislation

1 On 16 February 1988, as a measure intended to promote consumption of butter, the Commission adopted Regulation (EEC) No 570/88 on the sale of butter at reduced prices and the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1988 L 55, p. 31).

2 Article 1 of Regulation No 570/88 sets out the conditions for the grant of aid for butter or concentrated butter.

3 It originally provided:

'Subject to the conditions laid down hereinafter, butter bought in pursuant to Article 6(1) of Regulation (EEC) No 804/68 and taken into storage before a date to be determined shall be sold and special aid shall be granted for the use of butter and concentrated butter as referred to in the second paragraph.

Only the following may qualify for aid:

(a) butter which, in the Member State of manufacture, meets the definition and grading requirements laid down in Article 1(3)(b) of Regulation (EEC) No 985/68 and the packaging of which is marked accordingly;

(b) concentrated butter produced from butter or cream at an establishment approved in accordance with Article 10 and meeting the specifications laid down in Annex IV.'

4 When Regulation No 570/88 came into force, Article 1 of Council Regulation (EEC) No 985/68 of 15 July 1968 laying down general rules for intervention on the market in butter and cream (OJ, English Special Edition 1968 (I), p. 256), as amended by Council Regulation (EEC) No 2714/72 of 19 December 1972 (OJ, English Special Edition 1972 (28-30 December), p. 15) and Council Regulation (EEC) No 1897/87 of 2 July 1987 (OJ 1987 L 182, p. 35), was worded as follows:

'(1) Intervention agencies shall buy in only such butter as:

(a) is produced by an approved undertaking,

(b) meets the definition and classification contained in paragraph 3(a) and (b),

(...)

(2) Until the date of implementation of the provisions adopted pursuant to Article 27 of Regulation (EEC) No 804/68 an undertaking shall only be approved if it manufactures butter meeting the requirements laid down in paragraph 3(a) and (b).

(3) Until the date referred to in paragraph 2, the butter referred to in paragraph 1:

(a) must have the following composition and characteristics:

(aa) — a minimum butterfat content, by weight, of 82%,

— a minimum water content, by weight, of 16%,

— be manufactured from sour cream;

or

(bb) — a minimum butterfat content, by weight, of 82%,

— a minimum water content, by weight, of 16%,

— be manufactured from sweet cream;

(b) must be:

graded "beurre marque de contrôle", as regards Belgian butter;

(...)'.

5 Article 9 of Regulation No 570/88 also provided that it was possible for aid to be granted 'if the concentrated butter or the butter, to which tracers have or have not been added, is incorporated at an intermediate stage in products other than the final products and in an establishment other than that of final processing'. It subjected that aid to various conditions concerning, *inter alia*, approval of the establishment of intermediate processing and the requirement that the packaged product should be marked 'intermediate product'.

6 Regulation No 570/88 was amended by Commission Regulation (EEC) No 1813/93 of 7 July 1993 (OJ 1993 L 166, p. 16) which entered into force on 1 August 1993. The second recital in the preamble to this regulation noted that the concept of intermediate products had been interpreted differently in some Member States, making it necessary to lay down criteria to allow those products to be identified in an objective and transparent manner.

7 Accordingly, Regulation No 1813/93 inserted into Article 9 of Regulation No 570/88 the requirement that the intermediate products themselves must be approved, approval being subject to the obligation to show that incorporation into those intermediate products is justified for the manufacture of the final products.

8 It also inserted into Regulation No 570/88 Article 9a, worded as follows:

'The intermediate products referred to in Article 9 shall, without prejudice to Article 4, be products other than the products falling within CN codes 0401 and 0405.

However,

(a) products with a butterfat content of not less than 82% manufactured exclusively from the concentrated butter referred to in point (b) of the second paragraph of Article 1 at an establishment approved to that effect in accordance with Article 10, on condition that the tracers referred to in Article 6(1) have been added to them, shall be considered as intermediate products; in this case, the minimum selling price paid and the maximum amount of aid granted shall correspond respectively to the minimum selling price and the maximum amount of aid fixed in accordance with Article 18 in respect of traced butter with a fat content of 82%;

(b) the mixtures referred to in Annex VIII shall not be considered as intermediate products.'

9 The purpose of that new article is to define which products made from concentrated butter may be regarded as intermediate products and as eligible for the aid provided for by Regulation No 570/88 in respect of those products.

10 Article 1 of Commission Regulation (EEC) No 2443/93 of 2 September 1993 (OJ 1993 L 224, p. 8), applicable as from 1 August 1993, amended Regulation No 570/88 in the following terms:

'The introductory phrase to the second paragraph of Article 1 of Regulation (EEC) No 570/88 ("Only the following may qualify for aid:") is replaced by the following:

"Notwithstanding Article 9a(a), only the following may qualify for aid:".'

11 The reason for that amendment is explained in the first recital in the preamble to the regulation:

'(...) there has been found to be some ambiguity with regard to the wording of the aid application for the products referred to in Article 9a(a), bearing in mind the wording of Article 1; (...) for reasons of legal certainty, it should be specified that, with effect from 1 August 1993, aid may be requested for the products referred to in Article 9a(a), even if such products are not covered by Article 1, and that the aid must correspond to the aid applicable to traced butter with a fat content of 82%'.

12 Article 1(4) of Commission Regulation (EC) No 455/95 of 28 February 1995 amending Regulations (EEC) No 1547/87 and (EEC) No 1589/87 as regards the buying-in of butter by the intervention agencies and Regulations (EEC) No 2191/81 and (EEC) No 570/88 as regards the grant of aid for the purchase and

sale of butter at a reduced price to certain categories of consumers and industries (OJ 1995 L 46, p. 31, 'the contested regulation'), applicable as from 1 March 1995, amended Regulation No 570/88 to the effect that only butter produced directly and exclusively from pasteurized cream was to qualify for the grant of aid.

13 As a result of that amendment, the new Article 1(a) of Regulation No 570/88 provides:

> '(a) [B]utter produced directly and exclusively from pasteurized cream and which, in the manufacturing Member State, satisfies the conditions laid down in Article 6(2) of Regulation (EEC) No 804/68 and the requirements of the national quality class listed in Annex II to Regulation (EC) No 454/95 and the packaging of which is marked accordingly.'

14 Commission Regulation (EC) No 454/95 of 28 February 1995 laying down detailed rules for intervention on the market in butter and cream, referred to in the last-mentioned provision, replaced in part Regulation No 985/68, which was repealed as from 1 March 1995 by Council Regulation (EC) No 2807/94 of 14 November 1994, amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1994 L 298, p. 1). As regards Belgian butter, Annex II thereto lists: 'beurre de laiterie; qualité extra; melkerijboter; extra kwaliteit'.

The facts

15 The applicant, a company governed by Belgian law, forms part of a French dairy group. Since 1959 it has been developing technical butter-making processes. Its work in that field has enabled it since 1987 to manufacture its first 'technical butter'.

16 This new product, BITA ('beurre industriel technologiquement adapté' — technologically adapted industrial butter), was developed by means of a process based on selection of raw materials, physical fractionation of the oils and fats and recomposition of the various fractions depending on the technical qualities required. The raw materials used by the applicant — 65% butter and 35% cream — are first concentrated. The pure fat so obtained is stored. It is then fractionated and the various fractions recomposed according to the products and applications desired (for example, manufacture of low melting-point products for ice-cream manufacturers and high melting-point products for producers of croissants and similar products).

17 This process makes it possible to obtain standardized butter containing 82% fat, 16% water and 2% fat-free dried milk extract, which is very stable and much sought after by manufacturers of pastry products since it can in addition be used directly in those manufacturers' automatic industrial extrusion lines which are designed for using margarine.

18 The applicant's technical or recomposed butter has received aid since 1989 under Article 9 of Regulation No 570/88, which covers intermediate products.

19 As from 1 August 1993, the date on which Regulation No 1813/93 inserting Article 9a into Regulation No 570/88 became applicable, the applicant's technical butter could no longer qualify for the aid provided for by the latter regulation unless it was traced.

20 The purpose of adding tracers is to make it easy to identify products which are the subject of Community aid by means of taste or colour, in order to prevent fraud. Article 6(1) of Regulation No 570/88 requires the use of two tracers to be chosen from three chemical tracers and five organoleptic tracers.

21 According to the applicant, tracers have certain disadvantages linked to their taste and smell. For that reason, since 1 August 1993, the date on which Article 9a imposing the requirement of adding tracers to the products concerned — including the applicant's technical butter — was inserted into Regulation No 570/88, the applicant has endeavoured to seek from the Belgian authorities recognition of its technical butter as 'beurre marque de contrôle', so as to be able to carry on marketing its products under Regulation No 570/88 and to qualify for the aid provided for by Article 1(a).

22 In 1990 and 1991, the French customs authorities informed the Commission that a Belgian company — the applicant — had brought into France butter with a butterfat content of 82% reconstituted out of concentrated butter and that it was claiming in respect of that product the aid provided for intermediate products within the meaning of Article 9 of Regulation No 570/88. They asked the Commission to inform them whether such butter could possibly be regarded as an intermediate product within the meaning of that provision.

23 After a negative response at first, the Commission faxed a request for information to the Belgian Ministry of Agriculture on 10 June 1991, stating that in its view reconstituted butter was not eligible for aid under Regulation No 570/88 but that it was awaiting the result of its enquiry.

24 By fax of 1 July 1991, the Belgian Ministry of Agriculture informed the Commission that the Belgian supervisory authorities considered that the product in question was to be regarded as an intermediate product in accordance with Article 9 of Regulation No 570/88. To that fax it annexed a description of the manufacturing process and the product's specifications. This described the product as 'an intermediate product with a butterfat content of 82%, specially adapted for the multilayered pastry industry (small pastry cakes and flaky pastries) for cakes and biscuits etc.'. It was obtained after several stages including physical fractionation and

recomposition. The description concluded that the product so obtained contained 82% butterfat, 16% water and 2% fat-free dried milk extract and that, although the product in question was 'an intermediate product within the meaning of Regulation No 570/88, its composition [was] similar to that of traditional butter'.

25 By fax of 3 July 1991, the Commission informed the French customs authorities that the product about which it had been consulted had been examined by the Belgian authorities, and that it could be regarded as an intermediate product in accordance with Article 9 of Regulation No 570/88. It added: 'However, I must point out that the product is not regarded as butter and that it may in no circumstances be classified as butter under Article 1(3)(b) of Regulation (EEC) No 985/68'.

26 By fax of 22 August 1991, the Belgian Ministry of Agriculture wrote to the Commission as follows:

'We have been informed of your fax of 3 July 1991 (the fax sent by the Commission to the French customs authorities).

From the terms of that fax we understand that the product in question may be considered to be an intermediate product and that, so long as the rules of the Member State of production so permit, there is nothing to prevent that product (in this case recomposed butter) from being designated as butter (the Royal Decree of 6 May 1988, in particular Article 1, includes butter obtained by recomposition within the definition of butter).

However, it does not qualify for classification in one of the categories referred to in Article 1(3)(b) of Regulation (EEC) No 985/68, that is to say, as regards Belgium, "beurre marque de contrôle", and consequently it cannot *inter alia* be bought in or be the subject of a private storage contract.

(...)'

27 On 28 February 1994, despite the statement contained in that fax, the technical butter manufactured by the applicant was classified by the Belgian authorities as 'beurre marque de contrôle' in the category 'beurre de laiterie: qualité extra'. Accordingly, the applicant's technical butter, which had hitherto qualified for the aid under Article 9a of Regulation No 570/88, began to receive Community aid under Article 1 of Regulation No 570/88, although there had not been any amendment of the applicable Community rules or any change in the product involved.

28 According to Article 2 of Regulation No 570/88, the aid is to be granted by means of a standing invitation to tender organized by the intervention agency of each Member State.

29 Since the contested regulation came into force, the applicant's technical butter has been designated as an 'intermediate product' and qualifies for the aid provided for in Article 9a of Regulation No 570/88. There is no difference in amount between the aid provided for in Article 1 and the aid provided for in Article 9a of Regulation No 570/88. The difference is that the product referred to in Article 9a, being an intermediate product, must be directly incorporated in a final product, must be traced and its packaging must be marked 'intermediate product'. By contrast, the butter referred to in Article 1 may be incorporated either in an intermediate product or in a final product. It is subject to a less onerous verification procedure and may be called 'butter'.

Procedure and forms of order sought by the parties

30 By application lodged at the Registry of the Court of First Instance on 10 May 1995, the applicant brought this action.

31 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided, first, to adopt measures of organization of procedure pursuant to Article 64 of the Rules of Procedure, by requesting the parties to answer certain questions and to produce certain documents and, second, to open the oral procedure. The applicant and the Commission replied to the Court's request on 28 June and 2 July 1996 respectively.

32 The parties presented oral argument and replied to the Court's questions at the hearing in open court on 5 November 1996.

33 The applicant claims that the Court should:

— annul Article 1(4) of the contested regulation;

— order the defendant to pay the costs.

34 The defendant claims that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the claim as unfounded;

— order the applicant to pay the costs.

35 In its reply, the applicant asks the Court to order the Commission to produce the minutes of the management committee meeting at which the wording of the regulation at issue was discussed.

Admissibility

Arguments of the parties

36 The Commission maintains that the action is inadmissible in that the applicant has no legal interest in bringing proceedings.

37 According to the Commission, Article 1(a) of Regulation No 570/88, as amended by Article 1(4) of the contested regulation, merely confirms the previous situation in which butter, in order to qualify for aid, must be produced from cream. In accordance with the system applicable before the disputed amendment, butter, as one of the primary products referred to in Article 1 of Regulation No 570/88, had, 'in the Member State of manufacture [to meet] the definition and grading requirements laid down in Article 1(3)(b) of Regulation (EEC) No 985/68' and its

packaging 'marked accordingly'. That provision of Regulation No 985/68 requires Belgian butter to be of the kind graded 'beurre marque de contrôle'. However, in accordance with Article 1 of Regulation No 570/88, the butter must in addition correspond to a certain definition of butter. That definition is set out in Article 1(3)(a) of Regulation No 985/68, which requires butter to be made of cream, either sweet or sour.

38 The fact that the technical requirement that butter must be made of cream (Article 1(3)(a) of Regulation No 985/68) was combined with the requirement that it should be marked with its grade (Article 1(3)(b)) was moreover the result of Article 8(4)(1) of Regulation No 985/68 — as amended by Regulation No 2714/72 — since the intervention agency may buy in butter only if it fulfils both requirements.

39 In the Commission's view, the regulation at issue did not in any way change the existing situation as regards recomposed butter of the kind produced by the applicant. In particular, it did not alter the conditions to be met for an intermediate product such as this type of butter to qualify for Community aid.

40 The Commission also maintains that the applicant cannot in any case rely on the fact that the Belgian authorities had graded its recomposed butter as 'extra' — contrary to both the previous and the present rules — and in particular in order to demonstrate that it has an interest in bringing proceedings against the Commission. In 1994 the Belgian authorities graded the butter as 'extra' when they were aware that butter with those characteristics could not be so graded, as those authorities had moreover expressly conceded in 1991. The Commission takes issue with the applicant's claim that the institution had been informed of the grade awarded by the Belgian authorities. At no time was it aware of those facts. It had consistently taken the view that recomposed butter could not be classed as butter in one of the categories referred to in Article 1(3)(b) of Regulation No 985/68.

That view was supported by the fact that one and the same product cannot, under one and the same regulation, be regarded as both a primary and an intermediate product. In those circumstances, a Member State, bound by Community law as regards the exclusion of recomposed butter from Article 1(a) of Regulation No 570/88, cannot, merely by unilaterally conferring a certain grade, make such butter eligible for the aid referred to in that provision, and exempt it from the requirement that it should be traced, as laid down in Article 9a of that regulation.

41 In order to permit products receiving aid to be easily identified, and to combat fraud, the addition of tracers gives products a particular taste or colour. Nevertheless, Regulation No 570/88 gives traders a fairly wide choice, since it requires two tracers to be chosen from three chemical and five organoleptic tracers. In practice, tracing ought not to pose any problems, since in the case of cream, which is a highly sensitive product, producers and consumers appear to accept tracing. The designation 'intermediate product' should not cause problems either for an undertaking whose principal customers, according to its own statements, are specialist firms. They assess the product in terms of its own technical characteristics and are not in any way deterred by the designation complained of.

42 According to the Commission, even on the assumption that the other conditions are satisfied as far as concerns the applicant, the contested act is only a confirmatory measure and an action to annul it is inadmissible (see Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16).

43 In any event, the Commission claims that the applicant has no direct interest, since a measure must necessarily have been adopted by the national authorities in between the contested provision and a situation enabling the applicant to make a successful claim for the aid. In addition to the condition concerning the origin and technical nature of the raw material, it is necessary for the applicant's product to have been graded in the category 'extra' by a positive act on the part of the Belgian authorities (which was, moreover, contrary in that respect to Community law).

Furthermore, the aid is granted in accordance with the tendering procedure organized by each intervention agency. Since the national authorities are responsible for operating that procedure, action on their part is necessary.

44 Nor, in the Commission's view, does the applicant have an individual interest. The contested provision is a rule of entirely general application and excludes (or rather, confirms the exclusion of) any trader who does not satisfy the objective conditions, in particular that of producing butter directly and exclusively from cream. It points out that while the applicant, a large dairy firm at national level, may be the only trader manufacturing the specific product BITA, it is far from being the only undertaking to manufacture recomposed butter on the Community market. In the circumstances of the case, the measure applies to any trader who does not use fresh cream and it is perfectly suited to the purpose of the act, which is to encourage a rapid turnover of stocks and at the same time to take measures to combat fraud. That is why, by contrast with the situation which gave rise to Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, invoked by the applicant, the latter may not rely on the existence of an individual right of which it has been deprived by the Commission.

45 In reply to the applicant's argument that, unlike its competitors, it was not in a position to secure a systematic supply of milk or cream, the Commission observes that the applicant has not furnished proof of its allegedly special situation. The defendant concedes that an undertaking which is not involved in the collection of milk must by definition be dependent on the fluctuating state of the market, at least in respect of the quantities it is unable to obtain from within its own group. Prudent traders would endeavour to guard against that situation by means of long-term contracts and would diversify their sources of supply.

46 In reliance upon the case-law of the Court of Justice and the Court of First Instance, the applicant considers that a trader to whom Community rules apply may challenge the validity of those rules where they fail to take account of his specific situation and where their effect is to deprive him of a right and to cause

him damage, especially where the legal position of the trader in question is adversely affected by circumstances which differentiate him from all other persons and distinguish him individually in the same way as the person to whom the measure is addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, and *Codorniu*, cited above, paragraph 20; Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 20, and Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 21). The applicant considers itself to form part of 'a closed class the members of which are identifiable', namely traders, whose specific rights are affected (Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, paragraph 8, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 10, and Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 17; Case T-99/94 *Asocarne* v *Council* [1994] ECR II-871, paragraphs 20 and 21; *Unifruit*, cited above, paragraph 23).

47 The contested regulation introduced the requirement that butter should be produced directly and exclusively from cream in order to be eligible for aid. Previously there was no such requirements in the Community rules. The applicant points out that in the version in force prior to the regulation in dispute, Article 1(a) of Regulation No 570/88 provided that only 'butter which, in the Member State of manufacture, meets the definition and grading requirements laid down in Article 1(3)(b) of Regulation (EEC) No 985/68 and the packaging of which is marked accordingly' qualified for aid and that, in accordance with the latter provision of Regulation No 985/68, Belgian butter only had to be of the kind graded 'beurre marque de contrôle'.

48 According to the applicant, the new conditions laid down for aid for butter intended for use in the manufacture of pastry products are definitely not confirmatory of an earlier measure, as ever since the common organization of the market in milk was established, the system of buying-in for public storage has always been different from the system of Community aid for the use of butter in various sectors, in particular in the manufacture of pastry and other foodstuffs. The purpose of public storage is to preserve the quality of the butter by providing excellent

storage conditions. By contrast, the purpose of the regulations concerning the disposal of butter is to promote possible outlets for butter and, in the case of butter used in the manufacture of pastry products, to compete with vegetable oils.

49 The Community rules do not contain a single definition of butter according to which it must be made directly and exclusively from cream. For example, the definition of butter for export appearing in the Combined Nomenclature is different from that relied on by the Commission. Accordingly, it is necessary to look for the definition of butter which applies in this case, in the specific context of butter for use in the manufacture of pastry products, ice-cream and other foodstuffs, that is to say in the context of Regulation No 570/88 which, before the amendment introduced by the contested regulation, merely required butter to meet the definition and the grading requirements laid down in Article 1(3)(b) of Regulation No 985/68 in the Member State of manufacture.

50 The contested regulation introduced into the Community rules a stricter definition of butter than that in Council Regulation (EC) No 2991/94 of 5 December 1994 laying down standards for spreadable fats (OJ 1994 L 316, p. 2), which ranks higher and includes recomposed butter within the definition of butter. Recomposed butter met with approval at the time when the adoption of Regulation No 2991/94 was discussed. All the delegations considered that the product was of good quality and should be treated as such. For that reason, the Belgian technical regulation was amended in order to allow recomposed butter to be graded as 'beurre de qualité'.

51 The applicant claims that, before the amendment made by the contested regulation, the butter it produced met all the conditions needed in order to qualify for aid under Article 1 of Regulation No 570/88 since, entirely in accordance with Belgian and Community law, it had obtained from the Belgian authorities the grade referred to in Article 1(3)(b) of Regulation No 985/68, namely 'beurre de laiterie

qualité extra'. In that respect, in the absence of harmonization at Community level, it is for the Member State alone to lay down the criteria and methods for grading butter.

52 The applicant acknowledges that recomposed butter can also be regarded as an intermediate product within the meaning of Article 9a of Regulation No 570/88, but it points out that under the Community rules intermediate products must be traced and its product has to be called an 'intermediate product'. In its view, Article 9a ought also to authorize a non-traced version of recomposed butter and the use of the designation 'butter', although it would be easier and clearer simply to authorize the product under Article 1 of that regulation. It claims that tracing always leaves a characteristic taste or colour, for which reason it is not popular with customers. Both tracing and the designation 'intermediate product' have caused the applicant to lose numerous customers, major industrial manufacturers who have since turned to competitors producing butter by the traditional churning method or to those producing margarine. Finally, the designation 'intermediate product' has adverse effects on exports from the Community of goods which incorporate the applicant's product.

53 The applicant considers that it is directly concerned by the contested measure since no implementing measure is required and the act entered into force on 1 March 1995.

54 It also considers itself to be individually concerned by the contested measure. There are a number of features which distinguish the applicant from its competitors. It is the only undertaking in the European Union to process butterfat without being tied in any way to a dairy. That leads to a significant result in the circumstances of this case, namely the practical impossibility of obtaining enough cream to supply its factory plant, given that its annual production requires

3 500 000 000 litres of milk, a volume of consumption roughly equal to Belgium's annual production. Furthermore, cream is difficult to transport and keeps only a very short time. Unlike its competitors in the European Union, it does not have the benefit of milk regularly collected close to its manufacturing premises.

55 The applicant's activity in Europe, which represents 75% of its total annual sales, consists of marketing the surplus fat produced within the Community, amounting to 70 000 tonnes out of a total of 450 000 tonnes a year for the Community. As much of its raw material is intervention butter, the applicant helps in that way to reduce the Community's butter stocks and to regulate the market by spreading excess butter production over the whole calendar year.

56 The applicant draws attention to another specific feature. It is the only undertaking in the European Union which operates almost exclusively and primarily in the butterfat sector, whereas that is a secondary activity for its competitors. Consequently, it is the only undertaking in the European Union to have invested heavily in research and development, enabling it to discover a secret process for fractionating, recomposing and standardizing butter. As a result of that discovery, it invested in production lines in order that they could process butter (which requires safety measures in processing on account of bacteriological risks) and produce a perfectly standardized 'technical' butter with a fat content of 82%. The product is manufactured from a mixture of which 65% is butter of the highest quality and 35% is cream. The applicant states that it would be impossible to operate its plant with just one of the two ingredients. Moreover, using cream alone does not make it possible to obtain standardized butter since the consistency of cream cannot be controlled and varies from season to season. Furthermore, cream can be kept for a short time only whereas the object of the kind of production in which the applicant is engaged is precisely to regulate the butter market which undergoes seasonal variations in terms of both quantity and quality, whilst household consumption is linear. That regulation of the market requires storage periods which can be contemplated only for butter and not for cream.

57 The contested provision affects 30% of the applicant's production. The suddenness of the change has made it impossible for the applicant to recoup the investment in its production lines, to honour its undertakings and to plan how to use its stocks of butter.

58 The new butter is competitive as compared with various vegetable oils in terms of its price, when it receives Community aid, and as regards its texture, which enables it to be used on the automatic extrusion lines designed for using margarine. In addition, its qualities are highly appreciated by pastry product and ice-cream manufacturers. Accordingly, in the last two years before the amendment at issue the applicant acquired many new customers in that area. Those customers are looking for butter as a base product and not as an intermediate product of the kind defined in other regulations.

59 The applicant states that its particular situation in the butter sector is well known to both the Belgian authorities (three of whose officials permanently monitor its production) and the Community authorities. Commission officials have visited its factories on several occasions and the Court of Auditors devoted a report to the relevant sector in 1988/89. The applicant made its position clear to the Belgian Ministry of Agriculture, which laid emphasis on that point at working meetings and management committee meetings where the change in the rules was explained by the Commission and discussed with national representatives. Consequently, the Commission ought to have taken account of the applicant's special position.

60 The applicant concludes that those highly specific circumstances differentiate it from all other traders in the same sector with respect to the contested provision, for which reason its application is admissible, particularly in the light of recent decisions of the Court of Justice (*Codorniu* v *Council*, cited above, paragraph 19), according to which even if the contested provision is, by nature and by virtue of its scope, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.

Findings of the Court

61 First of all it is necessary to consider the technical question of the definition of the applicant's product in the light of Regulation No 570/88.

62 According to the description given by the applicant, the product in issue consists of 82% butterfat, 16% water and 2% fat-free dried milk extract. The raw materials used — 65% butter and 35% cream — are first concentrated and the pure fat so obtained, that is to say the concentrated butter, then undergoes fractionating and recomposition in order to yield BITA. Accordingly, the applicant's product is a product which has a butterfat content of at least 82% and is manufactured exclusively from concentrated butter.

63 That description of the product in question corresponds exactly to the definition of intermediate products in Article 9a of Regulation No 570/88, inserted by Regulation No 1813/93.

64 Furthermore, the applicant has acknowledged that BITA can be regarded as an intermediate product within the meaning of that article and that, from 1989 until the Belgian authorities graded it on 24 February 1994, it qualified for the aid provided for by Articles 9 and 9a of Regulation No 570/88 in favour of intermediate products. The applicant has also conceded that the product has continued to receive aid under Article 9a since the regulation at issue entered into force.

65 None the less, the applicant objects to the requirement that it should add tracers and call the product an 'intermediate product'.

66 It should be noted that tracing, the purpose of which is to prevent fraud, is not a necessary process in the manufacture of the product but a condition imposed by Article 9a of Regulation No 570/88 in order for an intermediate product to have access to Community aid under that regulation. Accordingly, failure to incorporate tracers does not alter the actual nature of the product, but merely makes it ineligible for Community aid.

67 In addition, the requirement introduced by Regulation No 1813/93 that the products referred to in Article 9a should be traced is not in any way affected by the regulation in dispute. The applicant cannot therefore challenge that requirement in this action.

68 The same holds for the designation 'intermediate product', which is merely a consequence of the fact that the product described in Article 9a is one of the 'intermediate products referred to in Article 9', which Regulation No 570/88 has required to be marked 'intermediate product' since it entered into force.

69 The fact remains that the applicant's product, BITA, is a product referred to in Article 9a, and not a product referred to in Article 1, of Regulation No 570/88. Since the regulation at issue amended only Article 1, it does not concern the intermediate product manufactured by the applicant.

70 That conclusion is not invalidated by the applicant's argument that the grade conferred by the Belgian authorities has the effect of bringing its product within the scope of Article 1 of Regulation No 570/88. In response to a question from the Court at the hearing, the applicant has acknowledged that the composition of the product had undergone absolutely no change, but that the reason for the Belgian grading was the amendment of the Belgian technical regulation concerning butter and the opinion which emerged from the discussions that led to the adoption of Regulation No 2991/94, which contains a much wider definition of butter than that in Regulation No 570/88. The fact that an intermediate product may be

classified as butter under the legislation of one Member State cannot displace the conditions laid down by Article 9a(a) of Regulation No 570/88 in order for one of the products referred to therein to qualify for aid under that regulation.

71 In addition, it is clear from the wording of Article 1 of Regulation No 570/88, as drafted before the contested regulation was adopted and as amended by it, that the products referred to in Article 9a(a) constitute an exception to the general prohibition on granting aid under Regulation No 570/88 to products other than those mentioned in the second paragraph of Article 1. The first recital in the preamble to Regulation No 2443/93 amending the introductory phrase to that provision (see paragraph 11 above) states in this regard that the purpose of introducing Article 9a(a) into Regulation No 570/88 is to enable the products referred to in that article to qualify for aid under Regulation No 570/88 'even if such products are not covered by Article 1'.

72 Consequently, in accordance with the wording of Article 1 of Regulation No 570/88, a product referred to in Article 9a(a), such as that of the applicant, does not qualify for the aid provided for in respect of the products referred to in Article 1 of that regulation.

73 For the sake of completeness, the amendment made to Article 1(a) of Regulation No 570/88 must, as the Commission correctly maintains, be regarded as merely confirming the existing situation so far as concerns the requirement that butter must be produced from cream in order to qualify for aid.

74 Prior to the amendment made by the contested regulation, the product referred to in that article was butter which met the definition and grading requirements laid down in Article 1(3)(b) of Regulation No 985/68 in the Member State of manufacture.

75 Although Article 1(a) of Regulation No 570/88 thus makes express reference only to Article 1(3)*(b)* of Regulation No 985/68 on the grading of butter, it requires that the product should meet a certain 'definition' as well.

76 It should be borne in mind that Article 1(1)(b) of Regulation No 985/68 provides:

'Intervention agencies shall buy in only such butter as:

(...)

(b) meets the definition and classification contained in paragraph 3(a) and (b)'.

77 It follows from that wording that the 'definition' of butter is set out in Article 1(3)*(a)* while its grading is specified in Article 1(3)*(b)* of Regulation No 985/68.

78 In that context, although Article 1(a) of Regulation No 570/88 does not refer to both Article 1(3) *(a) and (b)* of Regulation No 985/68, the

'definition' to which it does refer is that laid down in Article 1(3)*(a)* of Regulation No 985/68.

79 That definition refers to technical conditions for the production and composition of butter. In particular, it refers to the production of butter from cream, either sweet or sour.

80 Accordingly, the term 'butter' used in Article 1(a) of Regulation No 570/88 has a precise meaning as regards the technical characteristics of butter eligible for the grant of aid under that article, characteristics which the applicant's product does not possess since it has always been manufactured from butter (65%) and from cream (35%).

81 The applicant cannot to any purpose maintain that the broader definition of butter in Regulation No 2991/94 includes recomposed butter. That regulation does not fall within the scope of the intervention measures intended to encourage the disposal of Community butter surpluses. Its objective is to protect and inform consumers. It is designed to make it easier for the consumer to choose between products which are comparable as regards fat content in general but differ as regards the plant and/or animal fats used (seventh recital in the preamble to the regulation). Furthermore, in order to avoid confusing the consumer, the terms 'butter' and 'margarine' are to be used solely for certain categories of products which it defines (ninth recital). Besides, the applicant admitted at the hearing that, even if the definition of butter in Regulation No 2991/94 is applicable to its product, that definition also includes many other products which are not eligible for aid under

Regulation No 570/88, irrespective of the amendment introduced by the contested regulation.

82 Consequently, the contested regulation does not concern the product manufactured by the applicant, which has always been covered by the definition of intermediate product laid down in Article 9a of Regulation No 570/88.

83 In those circumstances, the applicant cannot claim to be concerned by the contested regulation, with the result that it has no legal interest in bringing proceedings for annulment under the fourth paragraph of Article 173 of the Treaty.

84 The application must therefore be dismissed as inadmissible, without there being any need to accede to the applicant's request for the production of documents or to consider further the other arguments put forward by the applicant and the Commission.

Costs

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs.

García-Valdecasas Azizi Jaeger

Delivered in open court in Luxembourg on 30 January 1997.

H. Jung R. García-Valdecasas

Registrar President