JUDGMENT OF THE COURT
21 May 1987 *

In Case 97/85

1. **Union Deutsche Lebensmittelwerke GmbH,** a company incorporated under German law, having its registered office in Hamburg,

2. **Walter Rau Lebensmittelwerke,** a company incorporated under German law, having its registered office in Hilter,

3. **Westfälisches Margarinewerk Wilhelm Lindemann KG,** a company incorporated under German law, having its registered office in Bünde,

4. **Heinrich Hamker Lebensmittelwerke GmbH & Co KG,** a company incorporated under German law, having its registered office in Bad Essen-Lintorf,

all represented by Modest, Gündisch and Partners, Rechtsanwälte in Hamburg, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 B rue Philippe-II,

applicants,

v

Commission of the European Communities, represented by Mr Karpenstein and Mr Jansen, members of the Commission's Legal Department, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 25 February 1985 (COM(85) 276 final) on measures for the promotion of sales of butter on the West Berlin market,

* Language of the Case: German.

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot, C. Kakouris and F. Schockweiler (Presidents of Chambers), T. Koopmans, U. Everling, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: C. O. Lenz
Registrar: K. Riechenberg, acting as Administrator

having regard to the Report for the Hearing as supplemented further to the hearing on 4 June 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 December 1986,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 April 1985 four margarine manufacturers having their registered offices in the Federal Republic of Germany brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of a decision which the Commission addressed to the Federal Republic of Germany on 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market.

2 That decision was adopted by the Commission on the basis of Article 4 of Council Regulation (EEC) No 1079/77 of 17 May 1977 on a co-responsibility levy and on measures for expanding the markets in milk and milk products (Official Journal 1977, L 131, p. 6), which authorized the Commission to adopt measures to expand the markets for milk products.

3 In order to study the manner in which consumers react to a fall in the price of butter, the Commission provided in that decision for the organization, on the West Berlin market and for the period from 15 April 1985 to 30 June 1985, of an operation to promote sales of butter, the marginal cost and effectiveness of which

were to be assessed by an independent research institute. Nine hundred tonnes of butter from public stocks were to be packaged in packets of 250 grams, each stamped with the words 'free EEC butter'. Those packets were subsequently to be marketed in a package also containing one packet of open-market butter of the same weight, and the price of the packets thus sold together was not to exceed the price chargeable for 250 grams of open-market butter during the marketing period. To that end, the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agricultural Markets, hereinafter referred to as 'the Federal Office'), the competent intervention agency for milk and milk products, was to make available free of charge 900 tonnes of butter from public stocks to certain commercial undertakings which it was to select and which were to pledge themselves by contract to package the butter covered by the operation and to sell it through retailers.

4 The applicants, who supply a substantial proportion of the margarine sold on the West Berlin market, each brought an interlocutory action before the Verwaltungsgericht (Administrative Court) Frankfurt am Main for an injunction restraining the Federal Office from carrying out that operation. By four orders of 20 March 1985, the Verwaltungsgericht upheld the applicants' claims. When the appeal lodged by the Federal Office came before it, the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hessen) concluded that the disputes fell within the jurisdiction of the civil courts as the Federal Office was implementing only measures governed by private law in order to carry out the operation, and it therefore quashed the four orders. However, the applicants brought four main actions before the Verwaltungsgericht Frankfurt am Main in order to restrain the Federal Office from carrying out the contested operation. In those proceedings, the Verwaltungsgericht referred several questions to the Court for a preliminary ruling on the validity of the decision of 25 February 1985 (Cases 133 to 136/85, see p. 2289). The operation was subsequently carried out as from 6 May 1985.

5 In support of their application, the applicants allege a breach of the legal principles regarding freedom to carry on business, market stabilization, non-discrimination, protection of legitimate expectation and proportionality. Next, they contend that the Commission's decision is invalid inasmuch as it requires the German intervention agency to act in a manner which is contrary to the German law on unfair competition, since the decision in question is not one of those which may be taken in the context of the common organization of the markets. Finally, the applicants contend that the contested decision is not covered by Council Regulation No 1079/77 and, in addition, is vitiated by an infringement of essential procedural requirements.

6 Reference is made to the Report for the Hearing for a more detailed exposition of those submissions and of the arguments put forward by the Commission in its defence.

7 The Commission challenges the admissibility of the application. In that regard it contends that the contested decision is neither of direct nor of individual concern to the applicants. It is not of direct concern to them because it does not impose any obligations upon them. Nor is it of individual concern to them as other undertakings supply, or may decide to supply, margarine on the West Berlin market. Moreover, the applicants could seek legal protection of their rights by challenging the national measures implementing the decision of 25 February 1985 before the national courts and requesting the latter to refer questions to the Court of Justice for a preliminary ruling, or by bringing an action for damages against the Commission on the basis of the second paragraph of Article 215 of the EEC Treaty. Accordingly, it is unnecessary to examine in detail the conditions for the admissibility of the application for annulment. In any event, the applicants have no legitimate interest in pursuing the application as the operation will have been carried out by the time the Court gives judgment.

8 In response to those arguments, the applicants state that the contested decision is of direct concern to them because it was the decision itself which settled all the details of the contested operation. The contested decision is also of individual concern to them as the number of producers who supply margarine on the West Berlin market was known at the time of its adoption and was hardly likely to change before its implementation. Furthermore, the application should be held to be admissible in order to ensure that the applicants' rights are accorded full legal protection. The questions submitted to the Court by the Verwaltungsgericht Frankfurt am Main for a preliminary ruling in Cases 133 to 136/85 relate only to some of the allegations which the applicants have set out in support of this application and exclude the allegation that the Commission was not empowered to require the intervention agency to act in a manner contrary to the German law on unfair competition.

9 It should be noted that, according to the second paragraph of Article 173 of the EEC Treaty, proceedings instituted by a natural or legal person against a decision addressed to another person are admissible only if that decision is of direct and individual concern to the applicant.

10 The Court has consistently held, since its judgment of 15 July 1963 in Case 25/62 *Plaumann* [1963] ECR 95, that a decision addressed to a Member State is of direct and individual concern to natural or legal persons only if that decision affects them

by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

11 In this case it must be stated that the contested decision does not apply to a closed circle of persons who were known at the time of its adoption and whose rights the Commission intended to regulate. Although the contested decision affects the applicants, that is only because of the effects it produces on their position on the market. In that regard, the decision is of concern to the applicants just as it was to any other person supplying margarine on the West Berlin market while the contested operation was in progress, and it is not therefore of individual concern to them for the purposes of the second paragraph of Article 173 of the EEC Treaty.

12 The applicants' argument to the effect that this application should be declared admissible so as to enable them to enjoy full legal protection must be rejected. It must be pointed out that, in support of an action challenging a national measure implementing a Community decision, the applicant may plead the illegality of that decision and thereby require the national court to adjudicate on all the allegations formulated in that respect, if necessary after making a reference to the Court of Justice for a ruling on the validity of the decision in question. The fact that the national court is empowered to determine which questions it intends to submit to the Court is an inherent feature of the system of means of redress established by the Treaty and is not therefore an argument which is capable of justifying a broad interpretation of the conditions of admissibility laid down in the second paragraph of Article 173 of the EEC Treaty.

13 In the light of the foregoing considerations, the application must be held to be inadmissible.

Costs

14 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the applicants have been unsuccessful in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the applicants to pay the costs.

Mackenzie Stuart Galmot Kakouris Schockweiler

Koopmans Everling Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 21 May 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President