known at the time of its adoption and whose rights the Commission intended to regulate. Although the contested decision affects those producers, that is only because of the effects it produces on their position on the market. The decision is thus of concern to them just as it was to any other person supplying margarine on the West Berlin market whilst the implementation of the aforesaid measures 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.

2. 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, in pursuance of the need for full legal protection, a broad interpretation of the conditions of admissibility laid down in the second paragraph of Article 173 of the EEC Treaty.

REPORT FOR THE HEARING
delivered in Case 97/85 *

I — Facts and procedure

The Community market in milk and milk products has for several years been characterized by surplus production. Public stocks of butter have exceeded one million tonnes since 1984. The measures adopted by the Community to restore the balance on the market have as their purpose to reduce production as well as to increase consumption of the products concerned.

The decision which, on 25 February 1985, the Commission addressed to the Federal Republic of Germany concerning the measures to be adopted on the West Berlin market for the promotion of sales of butter is a measure designed to increase consumption.

That decision was adopted 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 provides that:

'1. Measures to expand the markets for milk products shall be taken in accordance with the procedure referred to in Article 6.

2. The measures referred to in paragraph 1 shall be measures concerning:

the expansion of markets within the Community;

the expansion of markets outside the Community;

* Language of the Case: German.

the search for new outlets and improved products.'

The following measures had to be adopted in order to give effect to the decision: during a period of two and a half months, from 15 April to 30 June 1985, certain commercial undertakings with which the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agricultural Markets, hereinafter referred to as 'the Federal Office'), the German Federal intervention agency, had concluded contracts to that effect governed by private law were to make available to consumers free of charge on the West Berlin market a quantity of 900 tonnes of butter from public stocks. That butter, which was exclusively intended for direct consumption, was to be packaged in packets of a net weight of 250 grams, each stamped with the words 'free EEC butter'. The butter was to be marketed as a single package containing one packet of free EEC butter and one packet of open-market butter of the same net weight, and the price of those two packets sold together was not to exceed the price chargeable for 250 grams of open-market butter during the marketing period. An independent research institute was to conduct at all levels, including that of consumption, an in-depth market survey to assess the marginal cost and effectiveness of the measure in question, and was to submit to the Commission a detailed report before 1 September 1985.

The four applicant companies, which are margarine producers established in the Federal Republic of Germany, claim that approximately two-thirds of sales of margarine in West Berlin are made by them.

The applicants first applied to the German administrative courts for an injunction restraining the Federal Office from implementing the contested measure.

In March 1985 they each applied for an injunction to the Verwaltungsgericht (Administrative Court) Frankfurt am Main. That court considered that it had jurisdiction to hear the applications on the ground that the Federal Office was required to adopt measures going beyond the mere implementation of the decision. Taking the view that the decision was contrary to Community law in several respects and that the operation would cause irreparable damage to the applicants, the Verwaltungsgericht, by orders of 20 March 1985, issued an injunction restraining the Federal Office from implementing the contested measure.

When the appeal lodged by the Federal Office came before it the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hessen) quashed those injunctions by orders of 11 April 1985. It pointed out that, in its contested decision, the Commission had itself laid down all the detailed rules for the operation, that those rules were binding on the intervention agency and that the latter was using only measures governed by private law in order to give effect to the measures which it was required to implement. The Verwaltungsgerichtshof concluded that the dispute came within the jurisdiction of the civil courts and not that of the administrative courts.

Having failed to obtain an injunction in the interlocutory proceedings instituted in the administrative courts, the applicants instituted further proceedings some days later.

In the first place, they each brought an action before the Verwaltungsgericht Frankfurt am Main in which they also sought an order restraining the implementation of the contested measure. On 15 April 1985, without expressing any doubts concerning its jurisdiction, that court made

a number of orders referring to the Court of Justice for a preliminary ruling questions concerning in particular the compatibility of the Commission's decision of 25 February 1985 with various general principles and asking whether that decision was founded on a valid enabling basis (Joined Cases 133 to 136/86 *Rau and Others* [1987] ECR 2289).

Secondly, on 16 April 1985 the applicants brought this application for the annulment of the Commission's decision of 25 February 1985. At the same time, they applied to the Court for an order suspending the operation of the contested decision (Case 97/85 R [1985] ECR 1331). By order of 3 May 1985 the Court dismissed that application on the ground that there was no imminent threat of serious damage and that to suspend the operation of the decision would cause the Commission damage comparable to that allegedly sustained by the applicants.

The contested operation, which was initially intended to begin on 15 April 1985, was not in fact set in motion until 6 May 1985 owing to the injunction issued by the Verwaltungsgericht Frankfurt am Main on 20 March 1985 which had restrained the implementation of the operation.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The applicants claim that the Court should:

1. Annul the Commission's decision of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market;

2. Order the defendant to pay the costs.

The Commission contends that the Court should:

1. Primarily, declare the application inadmissible;

2. Alternatively, dismiss the application as unfounded;

3. Order the applicants to pay the costs.

III — Submissions and arguments of the parties

A — *Admissibility*

1. The applicants

The applicants consider that, although the Commission's decision of 25 February 1985 is addressed to the Federal Republic of Germany, it is of direct and individual concern to them within the meaning of the second paragraph of Article 173 of the EEC Treaty.

The applicants explain in the first place in what way the contested decision is of direct concern to them. Since butter and margarine are interchangeable, any promotion of sales of butter is necessarily to the detriment of sales of margarine. The contested decision itself settled all the details of the operation and is therefore the cause of the damage suffered by the applicants.

Next, the applicants maintain that the contested decision is of individual concern to them. The persons or undertakings adversely affected by the Commission's decision are clearly determined: there are 16 margarine manufacturers established in the Federal Republic of Germany and that number is unlikely to change before the implementation of the contested decision. Furthermore, imports account for a wholly

negligible proportion of margarine consumption on the West Berlin market. Since approximately two-thirds of margarine sales on that market are made by the applicants, the contested decision is of individual concern to them.

The applicants also contend that if this application were to be declared inadmissible, they would be partially deprived of legal protection. In that regard, they recall their failure to obtain an injunction in the interlocutory proceedings which they instituted before the administrative courts, since the Hessischer Verwaltungsgericht concluded that the problem came within the jurisdiction of the civil courts. They also recall that the interlocutory proceedings instituted by other margarine producers before the Landgericht (Regional Court) and the Oberlandesgericht (Higher Regional Court) Frankfurt am Main were also unsuccessful since the Oberlandesgericht relied on the primacy of Community law as a ground for dismissing the application. The applicants also state that they have brought an action before the Verwaltungsgericht Frankfurt am Main, which has referred a number of questions to the Court for a preliminary ruling; the applicants regret, however, that those questions are limited in scope since they do not address the issue of the Commission's lack of power to require the intervention agency to act in a manner contrary to the German law on unfair competition. The need to provide individuals with effective legal protection and the inadequacy of the national means of redress available in that respect militate in favour of the admissibility of the present application.

2. The Commission

The Commission challenges the admissibility of the application on the basis of the following arguments.

The contested decision is not of direct concern to the applicants and does not impose any obligations upon them one way or the other. The Court has consistently held that the mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure (judgment of 10 December 1969 in Joined Cases 10 and 18/68 *Eridania* [1969] ECR 459, at p. 481).

Nor is the decision at issue of individual concern to the applicants since it does not apply to them in the same way as it does to the addressee. Many other margarine producers and importers supply, or may at any time decide to supply, margarine on the Berlin market.

The applicants' argument that to declare this application inadmissible would amount to a denial of justice is devoid of substance. The applicants have already been partially successful in their action before the Verwaltungsgericht Frankfurt am Main since the latter has referred to the Court of Justice for a preliminary ruling a number of questions on the validity of the contested decision. If the applicants had brought an action in the civil courts, as other margarine producers have done, they might have succeeded in having a question referred to the Court for a preliminary ruling on the relationship between the contested decision and the German law on unfair competition. Moreover, the applicants could bring an action for damages against the Commission on the basis of the second paragraph of Article 215 of the EEC Treaty.

Finally, the Commission emphasizes that the operation complained of will in all

likelihood have been carried out before the Court can give judgment in these proceedings. Hence the applicants have no interest in maintaining their application which, for that reason as well, should be declared inadmissible.

B — *Substance*

1. Breach of the general legal principle of freedom to carry on business

The *applicants* consider that the contested decision is contrary to the general legal principle of freedom to carry on business. In its judgments of 14 May 1974 in Case 4/73 *Nold* [1974] ECR 491 and of 13 December 1979 in Case 44/79 *Hauer* [1979] ECR 3727, the Court confirmed the existence of that principle in Community law. That freedom may be restricted only on the basis of overriding requirements in the general interest and on clear legal foundations, neither condition being met in this case. Furthermore, the applicants recall that the Court bases itself on the constitutional traditions common to the Member States in order to delineate the scope of the general principles of the Community's legal system. They emphasize that an operation such as that provided for in the contested decision is contrary, under German law, to several provisions of the Grundgesetz (Basic Law), namely Article 12 (1), which guarantees freedom to carry on business, Article 2 (1), which embodies the principle of general freedom of competition, and Article 3 (1), which lays down the principle of equality. It follows from those infringements of the Grundgesetz that the contested operation must also be held to be contrary to the general principles of Community law.

The *Commission* states that the legal basis of the contested decision lies in Article 4 of Council Regulation No 1079/77, cited above, which expressly authorizes the adoption of measures to expand the markets for milk products and to promote the search for new outlets. Furthermore, the operation is justified by overriding requirements pertaining to the public interest. Finally, margarine producers have been able to carry on their trade without the slightest hindrance and if the contested measure places them at a disadvantage in some respects, they must, like any individual, bear the consequences of operations carried out by the public authorities.

2. Breach of the principle of market stabilization

The *applicants* allege a breach of the principle of market stabilization, laid down in Article 39 (1) (c) of the EEC Treaty and referred to in Article 6 (3) 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 (Official Journal, English Special Edition, 1968 (I), p. 176) and in the preamble to Council Regulation No 1079/77, referred to earlier. Stabilizing the market entails adjusting production to demand within the Community. Instead, the measure complained of seeks to maintain market prices at an artificially high level by means of substantial public subsidies. For that reason, it is contrary to the principle of market stabilization. Moreover, the operation complained of is contrary to the rules of fair competition inasmuch as it consists in supplying goods on a massive scale with the aid of public funds with a view to driving a competitor off the market. That disregard of the rules of fair competition also constitutes a breach of the principle of market stabilization.

The *Commission* states that the contested operation was intended, on the contrary, to help restore stability on the market in butter. In view of the surpluses which characterize that market, it can be stabilized only by reducing production or by increasing demand. The operation complained of constitutes in fact an experiment designed to increase demand since its purpose is to establish to what extent and at what cost it is possible to achieve an increase in butter consumption. The applicants' argument that the operation concerned destabilizes the market is devoid of substance since it prejudges the results of the survey. Moreover, market stabilization is only one of the objectives referred to in Article 39 of the EEC Treaty, between which the Community institutions must establish a balance (judgment of 6 December 1984 in Case 59/83 *Biovilac* [1984] ECR 4057). Another objective referred to in Article 39 of the Treaty is to ensure a fair standard of living for the agricultural community. The contested measure helps to achieve that objective and is not therefore open to criticism.

3. Breach of the principle of non-discrimination

The *applicants* consider that the principle of non-discrimination, laid down in Article 40 (3) of the EEC Treaty, has been contravened. In their view, they have been placed generally at a disadvantage in relation to milk producers, whose products are sold at reduced prices with the aid of public subsidies and qualify for guaranteed disposal. The Commission cannot justify the grant of subsidies to reduce the price of butter by the consideration that those subsidies compensate for the lower cost of the raw materials used by margarine producers. In reality, the organization of the markets in butter and margarine operates in favour of butter, as is clear from the fluctuations recorded over the last three decades in production, consumption and prices. Above all, the applicants argue that the contested decision introduces into those market organizations, which are admittedly unfavourable to the applicants but have been organized in a stable manner for many years, a measure which is fundamentally at variance with the policy hitherto pursued by the Commission.

The *Commission* considers that as margarine producers, the applicants are in a situation which is entirely different from that of producers of milk products and that, consequently, the essential basis of comparison for considering whether unequal treatment exists is lacking. Margarine manufacturers can purchase their raw materials at world market prices. Producers using milk products, however, must purchase their raw materials at a price increased by the levies applicable to imports from non-member countries. The result, from the point of view of the consumer, is a difference in price which operates in favour of margarine and to the detriment of butter. Accordingly, the applicants have no justification for criticizing the planned operation, which merely compensates for the effects of the situation described above for a limited period and to a limited extent.

4. Breach of the principle of the protection of legitimate expectation

The *applicants* recall that they have organized themselves on the basis of the market organizations which have been in existence for many years. The operation for the distribution of butter free of charge is contrary to the principle of the protection of legitimate expectation because it is fundamentally at variance with the policy hitherto pursued by the Commission. Unlike the operations which have taken place in the past, the operation in question distributes butter free of charge for the first time. Moreover, the Berlin operation is viewed as a 'pilot scheme', which shows that the Commission intends to extend that measure to the Community as a whole if it proves successful.

In its exposition of the facts, the *Commission* has argued that the operation complained of in no way constituted a free offer of butter but an offer of two packets for the price of one, that is to say at half-price. The words 'free EEC butter', which, according to Article 3 (2) of the contested decision, are to be stamped on one of the two packets of butter, is at the most a form of publicity. Even a more substantial price reduction would have been lawful since there is no acquired right to the maintenance of advantages resulting from the establishment of a common organization of the market. Moreover, the existence of butter surpluses, which is a well-known fact, and the measures provided for by Regulation No 1079/77, cited earlier, presaged the adoption of new measures for the promotion of sales of butter.

5. Breach of the principle of proportionality

The *applicants* recall their arguments in the 'Christmas butter' cases (279, 280, 285 and 286/84) to the effect that sales of butter at reduced prices are essentially to the detriment of sales of fresh butter, which must be stored in its turn. The surveys carried out on the 'Christmas butter' operations, in particular the Special Report of the Court of Auditors of 13 April 1982 (Official Journal 1982, C 143, p. 1), establish that butter exports are the only effective way of reducing stocks. That conclusion applies to the present distribution of butter free of charge. Although the distribution of butter free of charge may be more popular with consumers than sales at reduced prices, the appreciably higher cost of such an operation divests it of any practical impact. Furthermore, the developing countries need large quantities of milk products, in particular butteroil. The Community should give more thought to outlets such as food aid, the cost of which is the same as that of distributing butter free of charge within the Community.

The *Commission* considers that the aforesaid allegations quite clearly do not concern the individual rights of the applicants. The right to make a critical appraisal of the cost-utility ratio of the operation is exclusively a matter for the Court of Auditors and the European Parliament in connection with the annual review of accounts and the discharge to be given to the Commission. Moreover, it was essential to carry out an experimental operation in order to reach new categories of consumers, as the measures implemented hitherto did not prevent a disturbing increase in butter stocks. Only action on prices is likely to bring about an increase in the consumption of butter. Moreover, the halving of prices, which is the result of the operation complained of, coincides with the reduction provided for in connection with the 'Christmas butter' operation for 1984/85.

6. The Commission's lack of power to require action to be taken which is contrary to the German law on unfair competition

The *applicants* explain in the first place how the contested decision requires the commercial undertakings concerned to act in a manner which is contrary to the German law on unfair competition. They maintain first of all that the operation complained of is contrary to Article 1 of the German law on unfair competition. Although marketing goods free of charge is not generally prohibited, it is unlawful where, as in this case, it is intended to attract customers in defiance of genuine

competition based on the quality of the services provided and where its effect is to hinder rivals or disturb the market. Next, the operation complained of is contrary to Article 1 (3) of the Zugabeverordnung (Regulation on Bonus Offers) inasmuch as the contested decision provides for the packets of intervention butter to be stamped with the words 'free EEC butter'. The aforesaid article precludes a bonus from being described as a free gift even in cases where the offer or announcement of a bonus is authorized. Finally, the operation infringes Article 7 of the Rabattgesetz (Law on Discounts), which authorizes quantity discounts only if they are in conformity with commercial practice having regard to their nature and their size. That is certainly not the case here, as the offer of a packet of butter free of charge on the purchase of a second packet cannot be regarded as in conformity with commercial practice in Germany. It follows from those considerations that the contested decision must encourage a commercial undertaking which benefits thereunder to take unlawful action, which, moreover, is penalized in the Federal Republic of Germany as an offence (Article 3 (1) (2) of the Zugabeverordnung). Article 44 (2) (5) of the Verwaltungsverfahrengesetz (Law on Administrative Procedure) provides that an administrative measure which requires such unlawful action to be taken is null and void.

Next, the applicants maintain that a Commission decision cannot have the effect of rendering the German law on unfair competition inapplicable. Admittedly, regulations and, in certain cases, directives are directly applicable in all the Member States and override, in principle, conflicting provisions of national law. However, that does not hold true for the decision at issue which regulates a situation that is limited in time and space. Moreover, the opposite approach would be open to criticism, not only from the point of view of relations between the Community institutions but above all from the point of view of relations between those institutions and the Member States.

Finally, apart from the question of the form it takes, a provision of Community law cannot displace national law on unfair competition. In that sphere, no powers have been transferred to the Community institutions and the Member States therefore retain their sovereign powers. Moreover, in this case, the German law on unfair competition is of fundamental importance to the national legal system since it is based on a long-standing legal tradition and, if it were to be displaced by the measure complained of, the awareness which German traders have of the law would be profoundly affected.

The *Commission* maintains that the infringements of the German law on unfair competition, which, according to the applicants, are the result of the implementation of the decision, have in no way been established. In any event, the Court has consistently held that Community law stems from an independent source of law and its validity can only be judged in the light of the Community's legal system. The primacy of Community law over national law is justified not by the need to ensure the uniform application of Community law in all the Member States, as the applicants maintain, but by the concern to ensure its effectiveness. Community law takes precedence over national law, whatever its ranking, and even over constitutional law. *A fortiori,* it should take precedence over the German law on unfair competition, which has in no way been shown to lay down general principles which Community law must adhere to.

The primacy of Community law extends to decisions, as is clear from the Court's judgments of 21 October 1970 in the so-called 'Leberpfennig' cases (Case 9/70 *Grad* [1970] ECR 825; Case 20/70 *Lesage* [1970] ECR 861; and Case 23/70 *Haselhorst* [1970] ECR 881). A decision is binding on those to whom it is addressed and the

binding force of the decision is guaranteed only where the latter must be complied with independently of any provisions of national law that may be contrary to it. The Commission also points out that it adopted the contested decision under the management committee procedure laid down in Article 4 (1) of Regulation No 1079/77, that is to say under the same rules as those governing the adoption of a regulation.

7. Absence of an enabling basis

According to the *applicants,* the operation complained of does not correspond to any of the three objectives mentioned in Article 4 (2) of Regulation No 1079/77, to which the contested decision refers as an enabling basis. One of those three objectives, the expansion of markets outside the Community, is automatically excluded. If the objective pursued is the expansion of markets within the Community, the decision is contrary to Article 6 (3) of Regulation No 804/68 of the Council, which provides that the disposal of intervention products must take place 'in such a way as to avoid disturbing the balance of the market and to ensure equal access to the products for sale and equal treatment of purchasers', which was not the case in this instance. With regard to the search for new outlets, the attainment of that objective did not warrant the sacrifice of such a large quantity of butter.

In response, the *Commission* states that the purpose of the operation complained of is the search for new outlets, as is clear from Article 7 of the contested decision, according to which an in-depth market survey must be carried out and a report must be submitted to the Commission on completion of the operation. Moreover, the quantity of butter, 900 tonnes, is entirely negligible if compared with the quantity — 72 000 tonnes — involved in the smallest of the 'Christmas butter' operations. Finally, the reference to Article 6 (3) of Regulation No 804/68 is irrelevant since Article 12 of that regulation and Regulation No 1079/77, on which the decision complained of is based, derogate from that provision.

8. Infringement of essential procedural requirements

The *applicants* state that, contrary to Article 4 (3) of Regulation No 1079/77, the Commission failed to give the Council prior notice of its intention to carry out the contested operation. That is an important rule since it enables the Member States to be informed, through their representatives within the Council, of any measures that are planned. The Member States may thus give instructions, in full knowledge of the facts, to their representatives on the management committee referred to in Article 30 of Regulation No 804/68, which is involved in the procedure for the adoption of the decision. The Commission cannot claim to have discharged that obligation by means of the 'Ninth communication from the Commission to the Council concerning the programme for the use of funds derived from the co-responsibility levy in the milk sector for the 1985/86 milk marketing year' of 4 December 1984 (COM(84) 675 final). In that communication the Commission merely proposes to allocate a certain sum for the purpose of assessing the effectiveness of measures for the promotion of sales, but makes no reference whatsoever to measures which are entirely new, such as those forming the subject-matter of the contested decision.

The *Commission* maintains that the obligation to submit a programme to the

Council constitutes an obligation to provide information and not a formal rule to be complied with in connection with the adoption of measures. The Council is not entitled to take part in drafting the measures referred to in Article 4 of Regulation No 1079/77. In any event, the Commission duly informed the Council in its aforesaid 'Ninth communication' of 4 December 1984. Moreover, that communication was discussed in detail on 30 January 1985 within the Council's working party on milk. On that occasion, the planned 'Berlin butter' operation was explained in clear and unequivocal terms, which the Commission offers to demonstrate by calling one of its officials to give evidence.

R. Joliet
Judge-Rapporteur