

OPINION OF MR ADVOCATE GENERAL LENZ delivered on 5 December 1986 *

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*Mr President,
Members of the Court,*

A — Facts

1. The adoption of Commission Decision COM(85) 276 final of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market has given rise not only to the application for annulment in Case 97/85 but also to two references for a preliminary ruling, one by the Verwaltungsgericht (Administrative Court) Frankfurt and the other by the Landgericht (Regional Court) Frankfurt.

2. As I stated in my Opinion in Case 97/85, the four plaintiffs, margarine manufacturers who consider that their position on the

market has been adversely affected by the implementation of the Commission's measure promoting sales of butter, have also attempted to oppose the implementation of the contested operation in the national courts. The references for a preliminary ruling in Joined Cases 133 to 136/85 *Rau and Others v Bundesanstalt für landwirtschaftliche Marktordnung* arose from those proceedings.

3. The plaintiff in the main proceedings in Case 249/85 *Albako v Bundesanstalt für landwirtschaftliche Marktordnung* — a subsidiary of the plaintiff in the main proceedings in Case 136/85 — has instituted civil proceedings for an injunction

* Translated from the German.

restraining the German intervention agency from carrying out in future operations such as that promoting sales of butter on the West Berlin market.

4. Since I have already described the Community market in milk and milk products and the common organization of the market on which the former is based¹ in my Opinion on the action for damages brought by the margarine manufacturers against the Christmas butter operation 1984/85,² I no longer need consider that problem here. It is sufficient to state that the market in milk and milk products has for a number of years been characterized by surplus production and that public stocks of butter had reached approximately 1 million tonnes by 1984.

5. Those are the circumstances in which the Commission of the European Communities, the defendant in these proceedings, addressed the contested decision to the Federal Republic of Germany on 25 February 1985. The contents of that decision were essentially as follows.

6. An operation to promote the sale of butter was to be carried out on the West Berlin market from 15 April until the end of June 1985. To that end, the intervention agency of the Federal Republic of Germany was to make available for distribution free of charge 900 tonnes of butter from public stocks. That butter was intended exclusively for direct consumption and was packed in packets with a net weight of 250 grams and labelled 'free EEC butter'.

7. The intervention butter was to be marketed in a single package containing, in addition, a packet of fresh butter of the

same net weight. The price for both packets sold together was not to exceed the normal price for 250 grams of fresh butter applicable during the marketing period.

8. The operation was to be promoted by a marketing campaign and by market research to determine marginal costs and to assess the effectiveness of the operation.

9. The cost of carrying out the operation amounted to approximately 4 million ECU.

10. The Commission's decision was based on 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.³ According to Article 4 of that regulation, measures to expand the markets for milk and milk products are to be taken concerning:

- (i) the expansion of markets within the Community;
- (ii) the expansion of markets outside the Community;
- (iii) the search for new outlets and improved products.

11. Those measures are to be adopted by the Management Committee under the procedure laid down in Article 30 of Regulation No 804/68. In addition, before each period of application of the co-responsibility levy for milk products, the Commission is to inform the Council of the programme of measures which it is planning to take during the following milk year.

1 — Council Regulation (EEC) No 804/68 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).

2 — Joined Cases 279, 280, 285 and 286/84 [1987] ECR 1069 and 27 and 265/85 [1987] ECR 1129, at p. 1155.

3 — Official Journal 1977, L 131, p. 6.

12. The Berlin butter operation was in conformity with the Opinion given by the Management Committee.

such persons to bring an action under the second paragraph of Article 173 of the EEC Treaty.

13. The four plaintiffs in Joined Cases 133 to 136/85 *Rau and Others*, which between them are responsible for approximately two-thirds of sales of margarine in West Berlin, attempted initially to have the implementation of the Commission's measure restrained by the German courts. In March 1985 the plaintiffs applied to the Verwaltungsgericht (Administrative Court) Frankfurt for an injunction. By order of 20 March 1985, that court instructed the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agricultural Markets, hereinafter referred to as 'the Federal Office') not to implement the contested measures.

15. After the Verwaltungsgericht had issued the aforesaid interlocutory order, the plaintiffs brought an action before that court. It was in those proceedings that the Verwaltungsgericht referred a number of questions to the Court of Justice for a preliminary ruling (Joined Cases 133 to 136/85).

16. On 16 April 1985 the plaintiffs in Joined Cases 133 to 136/85 brought an action for annulment before the Court (Case 97/85) and simultaneously applied to the Court for an order suspending the operation of the contested decision (Case 97/85 R). That interlocutory application was dismissed by Order of the President of the Court of 3 May 1985 on the ground that the applicants were not threatened with serious damage and that suspension of the measure would cause the Commission damage comparable to that allegedly suffered by the applicants. Moreover, in his order, the President of the Court expressed serious doubts as to whether the main application was admissible.

14. The Federal Office appealed to the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hessen) which quashed that order by decision of 11 April 1985. As grounds for its decision, the Verwaltungsgerichtshof stated that the Commission had itself laid down all the detailed rules for carrying out the operation, that the Federal Office was bound by those rules, and that consequently in performing its duty to implement the measures in question the Federal Office was merely acting under private law. Since, therefore, the Federal Office was not required to adopt any rules under public law, no legal redress was available in the administrative courts. In addition to seeking redress in civil law, it might also be possible for the plaintiffs to bring an action challenging the decision of 25 February 1985 before the Court of Justice of the European Communities. Since that decision constituted a directly applicable measure which was binding on the Federal Office, the Court of Justice might also consider it to be of direct and individual concern to any persons whose rights had been adversely affected by it, and might therefore allow

17. The plaintiff in Case 249/85 *Albako*, a margarine manufacturer whose registered office is in West Berlin, sought to oppose the implementation of that measure by relying on the provisions of the German law on unfair competition.

18. In March 1985 Albako applied to the Landgericht Frankfurt for an injunction. In its judgment of 11 March 1985 the Landgericht declared that it had jurisdiction because the Federal Office was using means governed by private law to discharge the obligations imposed upon it by the

Commission's decision. However, it dismissed the application for an injunction as unfounded, inasmuch as the Federal Office was not in breach of the German law on unfair competition since it was not seeking to influence competition.

19. On appeal by Albako, the Oberlandesgericht (Higher Regional Court), Frankfurt, held on 28 March 1985 that the application must be dismissed on other grounds. Although the operation complained of infringed German competition law in certain respects, that law was inapplicable owing to the primacy of Community law.

20. After the measure had been implemented, the plaintiff in Case 249/85 finally brought an action before the Landgericht Frankfurt in which it sought to have the Federal Office prevented from disposing of the butter free of charge in the future in the contested manner.

21. In my Opinion I shall deal with the considerations which induced the two Frankfurt courts to submit the aforesaid references for a preliminary ruling and with the observations of the parties to the proceedings.

B — Opinion

22. I propose to deal first with the questions submitted by the Verwaltungsgericht Frankfurt and thereafter with the question submitted by the Landgericht Frankfurt.

I — *Reference for a preliminary ruling by the Verwaltungsgericht Frankfurt*

1. Admissibility of the reference

23. (a) To begin with, it is necessary to consider the objections to the admissibility

of the reference raised by the Commission, which considers that it must be assumed that the Hessische Verwaltungsgerichtshof would maintain, in the event of an appeal by the Federal Office against a judgment of the Verwaltungsgericht Frankfurt, the view it has expressed that the initiation of proceedings in the administrative courts is not appropriate. That would deprive the reference for a preliminary ruling made by the Verwaltungsgericht of any practical effect.

24. The Commission is of course aware that, as the Court has consistently held, it does not consider itself empowered to determine whether a reference under the procedure provided for in Article 177 of the EEC Treaty is in conformity with national rules of procedure or whether it is precluded by general considerations of procedural economy. It is necessary to determine, however, whether such a practice should be maintained.

25. (b) As the Commission has rightly pointed out, the Court's consistent practice is not to enquire whether a reference for a preliminary ruling is relevant to the settlement of the dispute. In its judgment of 15 July 1964 in Case 6/64,⁴ the Court held that Article 177 of the EEC Treaty was based upon a clear separation of functions between national courts and the Court of Justice. It cannot empower the Court either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.

26. That practice, according to which a reference for a preliminary ruling is regarded as valid as long as it has not been expressly withdrawn, should be maintained, especially as in this case it is not yet absolutely clear that proceedings may not be

⁴ — Judgment of 15 July 1964 in Case 6/64 *Costa v ENEL* [1964] ECR 585.

instituted in the German administrative courts. The decision of the Hessische Verwaltungsgerichtshof was given in interlocutory proceedings. However, a decision of that kind, given in summary proceedings, need not necessarily be maintained. Thus the possibility of instituting proceedings in the administrative courts should still not be ruled out.

27. 2. Questions 1 and 2

'1. Is Article 183 of the EEC Treaty to be interpreted as excluding the jurisdiction of the courts or tribunals of the Member States whenever an applicant is also able to claim legal protection by means of an application under Article 169 *et seq.* of the EEC Treaty, in particular the second paragraph of Article 173?

2. May an undertaking challenge, pursuant to the second paragraph of Article 173 of the EEC Treaty, a decision addressed to a Member State which lays down provisions such as those contained in the Commission's decision of 25 February 1985, if its position in relation to the traders subject to the decision is that of a direct competitor?

28. (a) The *Verwaltungsgericht Frankfurt* considers that there are two ways in which the plaintiffs can achieve their purpose and ensure that the Berlin butter operation does not take place. One way would be to bring an action against the Commission under the second paragraph of Article 173 of the EEC Treaty; the other would be to apply to the national courts for an injunction restraining the authorities of the Member State concerned from implementing the Commission's decision.

29. However, the *Verwaltungsgericht* has doubts as to whether both of those possi-

bilities are available concurrently having regard to the provisions of Article 183 of the EEC Treaty.

30. If the Court of Justice takes the view that both means of legal redress exist concurrently, Question 2 does not arise. Should it take the opposite view, however, namely that the jurisdiction of the German courts should be excluded, the question arises whether the plaintiffs may bring an action against the Commission before the Court of Justice.

31. (b) All the *parties* consider that the first question should be answered in the negative. Article 183 of the EEC Treaty does not preclude the initiation of proceedings in the national courts where a direct action may be brought before the Court of Justice, since the Community is not a party to the proceedings before the national court. The risk of conflicting decisions is averted since the national court can refer questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty. Furthermore, it follows from Articles 183 and 177 of the EEC Treaty that Community law permits proceedings to be instituted concurrently under national law and Community law.

32. (c) In view of its wording, Article 183 of the EEC Treaty is not relevant. Although that provision lays down that, save where jurisdiction is conferred on the Court of Justice by the Treaty, disputes to which the Community is a party are not on that ground to be excluded from the jurisdiction of the courts or tribunals of the Member States, it is clear that it can apply only to disputes to which the Community itself is a party. However, in this case it is not the Community but the intervention agency of a Member State that is a party to the proceedings in the national courts.

33. Moreover, it is extremely doubtful whether the two means of legal redress which the Verwaltungsgericht assumes to be available actually exist. Misgivings have already been expressed in that regard by the President of the Court of Justice in his Order of 3 May 1985 in Case 97/85 R. In the Opinion which I delivered in Case 97/85 I stated that a direct action against the Commission was not available to the applicants since the Commission's decision of 25 February 1985 was not of direct or individual concern to them.

34. Should the Court endorse my view that a direct action by the plaintiffs against the Commission would be inadmissible, an explicit answer to the first two questions submitted by the Verwaltungsgericht Frankfurt would be superfluous. It would be sufficient to point out that, in any event, proceedings may in this case be instituted in the national courts.

35. However, if the Court were to consider the application for annulment admissible, that would create a situation comparable to that which formed the basis of the Court's judgment of 27 September 1983 in Case 216/82.⁵ Those proceedings were concerned with a Commission decision addressed to the Member States concerning an application for the duty-free admission of educational, scientific or cultural materials. There too, the national court had raised the question whether the validity of a Commission decision could still be reviewed by the Court in proceedings for a preliminary ruling after the person concerned by the Commission decision had failed to challenge it within the period prescribed by the third paragraph of Article 173 of the EEC Treaty.

36. In its judgment in the aforesaid case, the Court held that, according to a general

principle of law which finds its expression in Article 184 of the EEC Treaty, in proceedings brought under national law against the rejection of his application the applicant must be able to plead the illegality of the Commission's decision on which the national decision adopted in his regard is based. That statement is sufficient to provide an answer capable of dispelling the doubts expressed by the national court without there being any need to consider the much wider issue of the general relationship between Articles 173 and 177 of the Treaty.

37. I suggest that the Court follow that case-law and, consequently, answer Question 1 in the negative. It is unnecessary to answer Question 2, the answer to which will in any case be apparent from the Court's judgment in Case 97/85.

3. Power of the Commission to adopt the decision of 25 February 1985

38. Leaving aside the questions expressly submitted by the Verwaltungsgericht Frankfurt, it is necessary in the first place to consider a problem that touches on several of those questions but has not been expressly formulated, namely whether the Commission was empowered to adopt its decision of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market.

39. For the purposes of the examination of that problem, I wish to consider first of all the arrangement whereby the intervention agency of the Federal Republic of Germany was to make 900 tonnes of butter from public stocks available to consumers *free of charge*.

⁵ — Judgment of 27 September 1983 in Case 216/82 *Universität Hamburg v Hauptzollamt Hamburg-Keßwieder* [1983] ECR 2771.

40. Since that measure was based on 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, the measure had to be financed out of the Community budget in accordance with Article 5 of the regulation. Accordingly, the distribution of intervention butter free of charge is to be regarded as aid equivalent to the full value of that butter, which was approximately of the same order at an intervention price of 319.70 ECU per 100 kilograms.⁶

41. Since the purpose of Regulation No 1079/77 was to regulate and stabilize the market in milk products and thereby to expand the existing intervention system, and since the Commission's decision of 25 February 1985 was based exclusively on that regulation, the Commission may be regarded as having been empowered by that regulation alone to grant aid equivalent to the full value of the product to be distributed. That power cannot be derived from the general system of intervention established by Regulation No 804/68. Moreover, as I explained in my Opinion on the 1984/85 butter operation, the Commission is not empowered by the general intervention arrangements to grant aid on its own initiative, but needs unequivocal authorization from the Council to do so.

42. Article 4 of Regulation No 1079/77 provides that the Commission is to adopt measures to expand the markets for milk products in accordance with the Management Committee procedure laid down in Article 30 of Regulation No 804/68. Hence it is necessary to ascertain whether measures within the meaning of Article 4 (1) of Regulation No 1079/77

also include Community aid of the kind at issue in this case.

43. In the first place, it is clear that Article 92 *et seq.* of the EEC Treaty, concerning State aid, is not directly applicable to agriculture. According to the wording of those provisions, the prohibition on the grant of aid laid down thereby and the procedure authorizing the grant of aid relate exclusively to State aid. However, the Court has recognized in its case-law that the Community institutions must also comply with fundamental provisions of the EEC Treaty, even though according to their wording such provisions are directed primarily at the Member States.⁷ Thus on the principle of the free movement of goods the Court stated, in particular in its judgment of 29 February 1984 in Case 37/83, that:

'Although it is true . . . that Articles 30 to 36 of the Treaty apply primarily to unilateral measures adopted by the Member States, the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market.'⁸

44. The Community's institutions are therefore obliged, even in the field of agriculture, to abide by the principle that the grant of aid out of public funds is forbidden in so far as the EEC Treaty does not provide or allow otherwise.

45. The EEC Treaty contains a number of special arrangements for agriculture. Thus Article 42 of the EEC Treaty provides that the provisions of the chapter relating to

⁶ — Council Regulation (EEC) No 858/84 of 31 March 1984 fixing for the 1984/85 milk year the target price for milk and the intervention prices for butter or skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheeses (Official Journal 1984, L 90, p. 17).

⁷ — See the judgment of 13 December 1983 in Case 218/82 *Commission v Council* [1983] ECR 403; and of 29 February 1984 in Case 37/83 *Rewe-Zentrale AG v Director of the Landwirtschaftskammer Rheinland* [1984] ECR 1229.

⁸ — Cited above.

rules on competition are to apply to production of and trade in agricultural products only to the extent determined by the Council, account being taken of the aims set out in Article 39. The Council may, in particular, authorize the grant of aid for the protection of enterprises handicapped by structural or natural conditions, or within the framework of economic development programmes.

46. The rule that the Community institutions are bound by the principles of the common market is to a large extent also applicable to agriculture since, according to the Court's judgment of 15 October 1969 in Case 16/69,⁹ in the case of agriculture even expressly permitted derogations from certain general provisions of the Treaty are exceptions and must be strictly construed.

47. Moreover, the first subparagraph of Article 40 (3) provides that the common organization of the markets in agriculture may include all measures required to attain the objectives of agricultural policy, in particular aids for the production and marketing of the various products.

48. Since, in accordance with the basic division of functions set out in Article 43 (2) of the EEC Treaty, the Council is to create the common organizations of the market which may, amongst other things, provide for aid, and since, moreover, according to Article 42 of the EEC Treaty, the Council may authorize the grant of aid, it follows that it is for the *Council alone* to determine whether aid is to be granted for agriculture. The Commission may regulate such matters only after being duly authorized to do so by the Council.

49. That corresponds to the scheme of Regulation No 804/68, to the practice

followed by the Community institutions in applying that regulation and to the manner in which the question of aid is dealt with in the EEC Treaty.

50. The comparable rule in Article 12 of Regulation No 804/68 states in the first place that it is for the Council to decide on the measures provided for in that article for the disposal of surpluses of butterfat and it leaves to the Commission only the task of adopting the necessary implementing provisions.

51. Thus, for the purposes of the distribution of reduced-price butter for direct consumption in Greece and Italy, which accompanied the Christmas butter operation, the Council itself decided in Regulation (EEC) No 2957/84 to grant aid for the direct consumption of butter in Greece and Italy and, at the same time, it determined the *amount* of that aid, 160 ECU per 100 kilograms. It was only afterwards that the Commission adopted Regulation (EEC) No 3029/84 laying down the relevant implementing provisions.

52. Similarly, in Regulation (EEC) No 1269/79¹⁰ the Council authorized the Member States to grant aid for butter intended for direct consumption. Once again the Council itself determined the amount of the aid and left to the Commission only the task of adopting the implementing provisions.

53. The Council has also itself adopted rules concerning the grant of aid to maintain the level of use of butter by certain categories of consumer and industry.¹¹ It also decided in Article 1 of Regulation

⁹ — Judgment of 15 October 1969 in Case 16/69 *Commission v Italy* [1969] ECR 377.

¹⁰ — Council Regulation (EEC) No 1269/79 of 25 June 1979 on the marketing of reduced-price butter for direct consumption (Official Journal 1979, L 161, p. 8).

¹¹ — Council Regulation (EEC) No 1723/81 of 24 June 1981 establishing general rules relating to measures designed to maintain the level of use of butter by certain categories of consumer and industry (Official Journal 1981, L 172, p. 14).

(EEC) No 1723/81, in the version applicable at the material time,¹² to whom the aid could be granted, namely non-profit making institutions and organizations, military forces, manufacturers of pastry products and ice-cream, and manufacturers of other foodstuffs to be determined. In Article 3, however, it left to the Commission the task of laying down detailed implementing rules for determining the amount of the aid.

54. To summarize, it is clear that in the aforesaid cases, which were not single operations but longer-term reductions in the price of butter, the Council itself decided in each case the manner in which the aid was to be implemented and sometimes also the amount of such aid.

55. The conclusion that 'measures to expand the markets for milk products', within the meaning of Regulation No 1079/77, in any event *exclude aid* is also compatible with the case-law of the Court concerning Article 155 of the EEC Treaty, that is to say the Commission's implementing powers.

56. Admittedly, in its judgment of 30 October 1975 in Case 23/75,¹³ the Court held that it follows from the context of the Treaty in which Article 155 must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. Since the Commission alone is in a position to follow trends on the agricultural markets carefully and continuously and to act with urgency when necessary, the Council may be led, in the sphere of the common agricultural policy, to confer on the Commission wide

powers of discretion and action. However, in expressing itself in those terms the Court intended merely to counter the views of one of the parties who had stated that a power conferred by the Council on the Commission to adopt implementing provisions was to be interpreted restrictively.

57. Therefore, although the Commission's powers to adopt implementing measures are not to be interpreted restrictively, the Commission cannot on its own authority grant aid which is not provided for by the Treaty or by a Council measure. That is immediately apparent from the scheme of Regulation No 804/68, the special provision in Article 23 of that regulation, which provides that Articles 92 to 94 of the Treaty are to apply save as otherwise provided, and in particular from the fundamental reserve with which the Treaty regards aid in general.

58. That reserve may be inferred from the provisions on State aid, Article 92 *et seq.* of the EEC Treaty, which, admittedly, as I said earlier, are not directly binding on the Community institutions for the purposes of the assessment of Community aid, although the basic approach reflected in those provisions is applicable to such aid.

59. Those provisions prohibit the grant of aid save as otherwise provided in the EEC Treaty. Provisions of the latter kind include Article 92 (2) and (3), which provide for kinds of aid that are either generally compatible with the common market or may be regarded as such. Furthermore, the Council may, pursuant to Article 92 (3) (d), consider other categories of aid to be compatible with the common market and, pursuant to the third subparagraph of

¹² — Council Regulation (EEC) No 863/84 of 31 March 1984 amending Regulation (EEC) No 1723/81 as regards the possibility of granting aids for the use of butter in the manufacture of certain foodstuffs (Official Journal 1984, L 90, p. 23).

¹³ — Judgment of 30 October 1975 in Case 23/75 *Rey Soda v Cassa Conguaglio Zuccheri* [1975] ECR 1279.

Article 93 (2), authorize in individual cases aid which is not permissible *per se*.

60. Naturally, in supervising the grant of aid, and in particular in examining aid which is potentially permissible under Article 92 (3) of the EEC Treaty, the Commission may exercise a power of assessment or a discretion. In principle, however, the Commission cannot overstep the bounds laid down by the EEC Treaty or by a Council measure. Accordingly, it is for the Council alone to determine whether aid going beyond those bounds is permissible.

61. The fact that the reserve with which the EEC Treaty regards aid should also apply to agriculture is also borne out by the resolution adopted at the Conference of the Member States convened in Stresa pursuant to Article 43 (1) of the Treaty with a view to laying down guidelines for a common agricultural policy, where a general consensus emerged *inter alia* on the following key issue:

'The abolition of subsidies which are contrary to the spirit of the Treaty must be considered essential.'¹⁴

62. It is necessary to determine whether the principle that only the Council may decide on the grant of aid not expressly provided for also applies in relation to agriculture. Support for the view that that principle is so applicable is to be found, as stated earlier, in the first subparagraph of Article 40 (3) and in Article 42 of the EEC Treaty.

63. Hence the principle that the grant of aid is permissible only if it is provided for by the Treaty or by a Council measure cannot be circumvented by a broad interpretation of the concept of the Commission's 'implementing powers'.

64. Accordingly, Article 4 (1) of Council Regulation No 1079/77 cannot be regarded as constituting a sufficient enabling basis for the Commission to grant aid for the expansion of the markets in milk products.

It is therefore possible to draw the following provisional conclusion:

65. Article 2 (1) of the Commission's decision of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market is not valid.

66. 4. Question 3

'3. Do the general principles of Community law, in particular the principle of freedom to pursue a trade or profession, the principle of general freedom to pursue any lawful activity, and the principle of freedom of competition, operate in such a way as to protect an undertaking from competitive disadvantages produced by Community measures which improve the competitive position of a trade rival?'

67. (a) The Verwaltungsgericht Frankfurt points out in the first place that the fundamental freedom to pursue a trade or profession has been recognized by the Court of Justice in its case-law. However, the Court has not so far defined in detail the scope of that fundamental right, although it has at least indicated that undertakings may rely on Community law to protect their economic interests by ensuring that their competitors do not receive State aid.

68. According to Article 3 (f) of the EEC Treaty, the Community has the task of ensuring that competition is not distorted. Articles 85 and 86 of the EEC Treaty contain the relevant rules, in so far as they apply to traders. Moreover, the prohibition

¹⁴ — *Amtsblatt* (Official Journal) 1958, p. 281.

of discrimination in Articles 7 and 40 (3) of the EEC Treaty shows that the Community itself and the Member States are also under an obligation not to distort competition.

69. That does not mean, however, that competition may not be restricted by the authorities, but only that any restriction requires justification. The fundamental right to freedom of competition must also be guaranteed under Community law as a consequence of the freedom to pursue a trade or profession or of the general freedom to pursue any lawful activity. The scope of that fundamental right must at least encompass all those who stand in a competitive relationship with other undertakings or the State. The plaintiffs and the commercial undertakings which are to carry out the operation involving the distribution of the intervention butter on the Berlin retail market are competitors in that sense. Even if those commercial undertakings did not gain any benefit from that operation, the Federal Office may be regarded as being in direct competition with the plaintiffs, competing with them for a share of the market and merely using the commercial undertakings as its agents. Either way, the plaintiffs' competitive position is affected and the fundamental right of freedom of competition is impaired by government action.

70. (b) According to the *plaintiffs* in the main proceedings, the general legal principles referred to in Question 3 protect undertakings from being placed at a competitive disadvantage as a result of measures adopted by the Community.

71. The fundamental freedom to pursue a trade or profession has already been recognized by the Court in its case-law; the principle of freedom of competition, which is embodied in several provisions of the Treaty, precludes the grant of aid by the Community when such aid, as in this case, adversely affects the competitive position of the undertakings concerned.

72. Furthermore, the plaintiffs consider that the principle of non-discrimination has been contravened. Butter and margarine may be substituted for one another, yet the Community lowers the price of butter by means of huge subsidies and even distributes it free of charge, whilst no such aid is granted in respect of margarine.

73. In addition, the plaintiffs consider that the Commission's measure constitutes not only a sale of goods at below cost price but a distribution free of charge. That is not permitted under the rules on unfair competition which are embodied in the legal systems of all the Member States, in any event where there is a risk that it may lead to a glut on the market or jeopardize competition. At the same time, the Commission's measure is not in conformity with the legislation on gifts.

74. The *Commission* agrees with the view taken by the Verwaltungsgericht that any restriction on the individual freedom of traders requires justification. In this case, however, it maintains that the freedom to pursue a trade or profession has not been adversely affected. No one has been prevented from carrying on business as a margarine manufacturer. The effect of intervention on the market in margarine has been negligible since it accounted for less than 0.4% of total annual consumption of margarine in the Federal Republic of Germany. Furthermore, the margarine industry has for many years benefited by comparison with butter manufacturers from the differences which exist between the organization of the market in milk and the organization of the market in oils and fats.

75. According to the Commission, the legal principles derived from the law on unfair

competition are not applicable in this case. The principles concerning obstruction of the market and those derived from the law on gifts, which are referred to by the plaintiffs, are peculiar to German law. In any event, comparable general principles cannot be identified in that form in the legal systems of all the Member States.

76. Furthermore, the Commission refers to the case-law of the Court, according to which no undertaking can lay claim to the maintenance of advantages conferred by an existing common organization of the market.

77. (c) In Question 3 the Verwaltungsgericht has raised a series of abstract problems concerning the principle of freedom to pursue a trade or profession, the principle of freedom of competition and, in the grounds of the order for reference, the principle of non-discrimination.

78. The Verwaltungsgericht has rightly pointed out that the principle of freedom to pursue a trade or profession has been recognized by the Court in its case-law. It is not the existence of that general legal principle that is open to doubt, but only the scope of the protection afforded by it.

79. In its judgments of 13 December 1979 in Case 44/79¹⁵ and of 14 May 1974 in Case 4/73,¹⁶ the Court stated that although it is true that constitutional guarantees are available in several Member States in respect of the freedom to pursue trade or professional activities, the right thereby guaranteed, far from constituting an unfettered prerogative, must also be viewed in the light of the social function of the activities protected thereunder. For this reason,

rights of this nature are protected by law subject always to restrictions based on the public interest. Within the Community legal order, likewise, it seems legitimate that these rights should, if necessary, be subject to certain restrictions based on the general aims pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to an undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

80. In that connection, reference should be made to a further principle which has been established by the Court in its decisions. An undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of a common organization of the market and which it enjoyed at a given time.¹⁷

81. That principle must also apply to the balance established by the Council between two different market organizations with the result that the plaintiffs in the main proceedings cannot claim a vested right to the maintenance of an unchanging relationship between the organization of the market in milk and milk products and the organization of the market in oils and fats.

82. However, in accordance with the basic division of functions in agricultural matters resulting from Article 43 (2) of the EEC Treaty, it is for the Council to establish the common market organizations. Accordingly, it is also for the Council to modify a market organization or the relationship between several market organizations. Until the Council does so, the Commission is bound

15 — Judgment of 13 December 1979 in Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

16 — Judgment of 14 May 1974 in Case 4/73 *Nold v Commission* [1974] ECR 491.

17 — See the judgments of 27 September 1979 in Case 230/78 *Eridania v Minister for Agriculture and Forestry* [1979] ECR 2749; and 6 December 1984 in Case 59/83 *Biovilac v EEC* [1984] ECR 4057.

by the basic framework established by the Council for the market organizations or, in this case, for the agricultural products covered by those organizations.

83. Butter and margarine are agricultural products, within the meaning of Annex II (Chapter 4 and Chapter 15.13) to the EEC Treaty, whose prices are correlated.¹⁸

84. The Council established the fundamental relationship between the market in butter and the market in margarine by adopting Regulation No 804/68 on the common organization of the market in milk and milk products and Regulation No 136/66/EEC on the establishment of a common organization of the market in oils and fats, and supplemented that relationship by adopting decisions on prices and by providing customs protection against imports by means of the Common Customs Tariff.

85. By taking such measures, the Council established what is considered to be an appropriate balance between the market in butter and the market in margarine, and that balance determines the basic conditions in which butter and margarine producers carry on business.

86. Those basic conditions and, consequently, the fundamental relationship between the market in butter and the market in margarine have been criticized by the Commission. In its view, the high price of butter, which is the result of the Council's decisions, and the prices of the raw materials used for the manufacture of margarine, which are almost as low as prices on the world market, confer on margarine manufacturers an unfair advantage or, to put it another way, place butter manufacturers at a disadvantage. In order to correct what it regarded as an imbalance, the Commission submitted to the Council several proposals to introduce a tax on oils

and fats, which, however, the Council has never accepted.

87. In order to create conditions of competition between butter and margarine which it regarded as normal, at least for a short period and for limited quantities of butter, the Commission implemented, amongst other measures, the Christmas butter operation 1984/85 and the measure contained in its decision of 25 February 1985. It therefore disregarded the fundamental relationship established by the Council between the market in butter and the market in margarine.

88. The second subparagraph of Article 40 (3) of the EEC Treaty provides that the common organization of agricultural markets is to exclude any discrimination between producers or consumers within the Community. The prohibition of discrimination laid down by that provision is a specific feature of the general principle of equal treatment, which is one of the fundamental principles of Community law. According to that principle, similar situations may not be treated dissimilarly, unless a distinction between them is objectively justified. That principle thus restricts the Community institutions' freedom of action in pursuing the agricultural policy objectives set out in Article 39 of the EEC Treaty.¹⁹

89. Since, as I said earlier, butter and margarine can at least to some extent be substituted for one another, it is necessary to determine whether the difference between the structure of the common organization of the market in milk and milk products and that of the common organization of the market in oils and fats justifies the implementation of measures promoting sales of butter, which may be detrimental to margarine manufacturers.

90. In that connection, it is clear that those market organizations provide for widely

18 — Judgment of 23 February 1983 in Case 66/82 *Fromançais v Fonds d'orientation et de régularisation des marchés agricoles* [1983] ECR 395.

19 — See the judgment of 5 July 1977 in Case 116/76 *Granaria v Hoofidproduktschap voor Akkerbouwprodukten* [1977] ECR 1247.

differing price systems. Although the raw materials used for the manufacture of margarine can by and large be obtained in the Community at a price which corresponds to the world market price, the basic product used for the manufacture of butter, namely milk, is substantially more expensive, its price being approximately 200 ECU per 100 kilograms, higher than the world market price. On the other hand, it must be stated that butter is covered by an unlimited guarantee of disposal at prices which take account of the fact that the price of milk is substantially higher than the world market price.

91. The Commission has now interfered with that price structure by distributing intervention butter free of charge, that is to say granting a subsidy for butter which is equivalent to the full price, whilst at the same time the intervention arrangements for fresh butter have been maintained and the intervention price has remained unchanged. Fresh butter available at the normal price might to some extent be displaced from the market by the distribution of intervention butter free of charge; however, although traders were deprived of the possibility of selling fresh butter direct to the consumer, it was still possible to sell the butter to the intervention agencies at the intervention price, with the result that butter manufacturers were not deprived of their sales outlets.

92. However, the position of the margarine manufacturers was different. Since there were no sales outlets for their products guaranteed by intervention arrangements, when huge subsidies were granted in respect of the competing product, butter, margarine manufacturers had to contend with a loss of outlets, for which no compensation was provided.

93. It is clear, therefore, that when the Commission subsidized intervention butter,

the disadvantages which resulted were not the same for butter and margarine producers. The fresh butter producers driven off the market were able to offer their goods without hindrance to the intervention agency, which had to buy them, whereas no such course of action was open to the margarine manufacturers. The Commission's intervention in the two markets thus produced different effects: in the case of butter manufacturers, it was at best able to raise the market price above the intervention price, which no one had wanted, whilst the margarine manufacturers were faced with a loss of turnover without receiving any compensation.

94. Since, therefore, the measures to promote sales of butter on the West Berlin market imposed a substantial burden on the margarine manufacturers, and at most a small burden on butter manufacturers, that unjust differentiation must, according to the case-law of the Court,²⁰ be regarded as discrimination against the margarine manufacturers, who are unable to benefit from the advantages of the organization of the market in milk and milk products.

95. If the prerequisite for the existence of discrimination is that a group of producers is placed at a disadvantage so as to enable another group of producers to enjoy an advantage, the result is as follows.

96. If a measure to promote sales of intervention butter has the concomitant effect of displacing margarine and fresh butter from the market, that still cannot initially be regarded as conferring a direct advantage on butter manufacturers. However, such a measure confers a substantial indirect advantage on butter manufacturers. Since

20 — See the judgments of 25 October 1978 in Joined Cases 103 and 145/77 *Royal Scholten-Honig Ltd v Intervention Board for Agricultural Produce* [1978] ECR 2037; and 5 July 1977 in Case 116/76 *Granaria* [1977] ECR 1247.

the market organization for milk and milk products is operated in such a way that a permanent milk surplus is inevitably produced owing to a virtually absolute guarantee of disposal and to prices far higher than those prevailing on the world market, the clearance of stocks, for instance by means of the Berlin butter operation, is in practice a necessity in order to maintain at least for a further period the existing system of high milk prices and a virtually unlimited guarantee of disposal. The practice of intervening in the market in milk has developed into a system which is designed to locate exceptional sales outlets. Hence the purpose of the Berlin butter operation was, albeit to a limited extent, to maintain at least for a certain period the high price of milk and the guarantee of disposal. That is why milk producers have benefited from that operation indirectly.

I therefore suggest that the Court answer Question 3 as follows:

97. The competent Community authorities may alter the competitive relationships created by the market organizations. In so doing, however, they must respect the interests of trade rivals, which are protected by the general principles of Community law, and in particular the principle of non-discrimination.

98. 5. Question 5

'5. Are the general principles of law referred to in Question 3 (fundamental rights) "subject only to limitation by law" so that they may only be restricted by, or on the basis of, a Council regulation?'

99. (a) According to the *Verwaltungsgericht*, the fundamental rights of traders may not be restricted indiscriminately even if to do so serves the purpose of attaining the

objectives of the EEC Treaty. On the other hand, not every national measure which affects fundamental rights constitutes on that account an infringement of those rights. At least the fundamental right to freedom of competition cannot be applied without restriction. The *Verwaltungsgericht* asks what the nature of those restrictions must be if they are to enjoy legal recognition, since the Court of Justice has not yet expressed a sufficiently precise view on that point. Although the Court has stated that the fundamental freedom to pursue a trade or profession is 'subject always to limitations laid down in accordance with the public interest', a more precise definition of those limitations would appear to be indispensable, in view of the requirements of constitutional law.

100. Even though in the formal sense Community law does not contain any laws, in the context of the Community order the Council is the constitutional body responsible for enacting the legal measures which it is the task of a representative legislature to enact in a democracy. Council regulations must therefore be regarded as legislative enactments and therefore as laws whereby fundamental freedoms may be restricted in accordance with Community law, but must also be enforced.

101. (b) According to the *plaintiffs* in the main proceedings, in order to be valid a Commission decision must be based directly on a provision of the Treaty or on authorization conferred by a Council regulation. That follows from the general principles of constitutional law and the separation of powers and also from the principle embodied in Article 4 (1) of the EEC Treaty of the definitive division of powers between the institutions. For those reasons the fundamental rights referred to in Question 3 may be restricted only by a measure of the Council or of the Commission acting on the basis of an authorization conferred by the Council.

102. The *Council* refers to the case-law of the Court, according to which the basic elements of a matter to be dealt with must be adopted by the Council in accordance with the procedure laid down by the EEC Treaty, whereas the provisions implementing the basic regulations may be adopted according to a different procedure either by the Council itself or by the Commission by virtue of an authorization complying with Article 155 of the Treaty. That requirement is satisfied whenever the criteria laid down in accordance with the procedure provided for in the Treaty are sufficiently precise to define without ambiguity the scope of the powers conferred upon the Commission and to ensure that the Commission abides by those criteria at the stage of implementation. In the Council's view, therefore, it must be possible for any restriction of individual rights resulting from the adoption of implementing measures by the Commission to be justified on the basis of the criteria laid down by the Council in the basic measure. That is why the general legal principles may be restricted only on the basis of a Council regulation and within the limits laid down by the Court in its case-law.

103. The *Commission* considers that the validity of the authorizations conferred upon it by the Council should be assessed by reference not to the precepts of German constitutional law but to the specific framework of the EEC Treaty. The Treaty does not define the scope of the powers which the Council may confer on the Commission pursuant to the fourth indent of Article 155 of the EEC Treaty. That provision prohibits only the grant of authorizations whereby the Council, without adopting any rules itself, comprehensively delegates to the Commission its own powers in certain areas. In contrast to Article 80 of the Grundgesetz (Basic Law), there is no requirement that 'the scope, purpose and extent' of the authorization must be clearly set out.

104. (c) Article 4 (1) of the EEC Treaty provides that each institution is to act within the limits of the powers conferred upon it by the Treaty.

105. Articles 145 and 155 give substance to that principle. Article 145 confers on the Council the power to take decisions in order to ensure that the aims set out in the Treaty are achieved in accordance with the provisions of the Treaty. Article 155 provides that, in order to ensure the proper functioning and development of the common market, the Commission is to have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly in the manner provided for in the Treaty, and is to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

106. According to those principles, which are also frequently referred to as 'the principles of limited individual authorization', every Community institution must act in conformity with the powers conferred upon it by the Treaties. None of the institutions has a general power to legislate or to take action.

107. On the other hand, it may be inferred from the third indent of Article 155 of the EEC Treaty that the relationship between the Commission and the Council is not that of a subordinate to a superior, since the EEC Treaty also confers powers of its own on the Commission.

108. Thus the Commission may, for instance, pursuant to the second sentence of the first paragraph of Article 115, authorize Member States to take protective measures within the sphere of commercial policy, which may, in individual cases, be capable of affecting the freedom of traders to carry on business.

109. However, the relationship between the Commission and the Council envisaged by

the fourth indent of Article 155 of the EEC Treaty is indeed that of a subordinate to a superior since, in adopting implementing measures, the Commission may not exceed the powers conferred upon it by the Council.

110. Thus, in the case of measures adopted pursuant to the fourth indent of Article 155 of the EEC Treaty, the Commission may restrict the scope of the general legal principles only if it is authorized to do so by a Council regulation. According to the third indent of Article 155 of the Treaty, however, the Commission may adopt restrictive measures of that kind in the exercise of its own powers, that is to say if it is directly authorized to do so by the EEC Treaty.

111. In both cases, however, the Commission is obliged, in restricting fundamental rights, to abide by the principles laid down by the Court, in particular in its judgment of 14 May 1974 in Case 4/73, cited earlier.

112. It follows from the foregoing considerations that the answer to Question 5 should be as follows:

The competent Community authorities may restrict the protection afforded by general legal principles, provided they act in the exercise of their own powers.

If, however, the Commission acts in the exercise of the implementing powers which have been conferred upon it by the fourth indent of Article 155 of the EEC Treaty, it must do so on the basis of a Council measure.

113. 6. Question 4

'4. Does the measure provided for in the Commission's decision of 25 February 1985 (COM(85) 276 final) serve the objectives of

the EEC Treaty and is it a measure in accordance with the Treaty within the meaning of Article 145 of the Treaty?'

114. (a) The Verwaltungsgericht doubts whether the measure providing for the disposal of butter still serves to fulfil the aims of the Treaty. The operation does not contribute towards increasing agricultural productivity, nor towards ensuring a fair standard of living for the agricultural community, whose income is protected by the guaranteed intervention price alone. The distribution of intervention stocks on the market can never contribute towards the attainment of that objective.

115. Nor does the measure contribute towards stabilizing the markets, as it leads only to an artificial reduction in the price of butter for the benefit of the consumer, without bringing about market equilibrium.

116. Nor does the measure help to ensure that supplies reach consumers at reasonable prices, since the reasonable price level is established by the price-fixing mechanism of the common organization of the market itself.

117. The only rational purpose which may be deduced, according to the Verwaltungsgericht, is that the measure is intended to dispose of stocks of old butter from national storage depots. It is in fact an ancillary fiscal measure, comparable to the construction or rental of new warehouses. Although such measures fall clearly within the scope of the Community's powers, the Verwaltungsgericht considers that the Community cannot be entitled to restrict the fundamental rights of traders in the interests of such measures.

118. (b) The *plaintiffs* in the main proceedings also take the view that the contested measure does not serve to attain any of the objectives of agricultural policy set out in Article 39 of the EEC Treaty.

119. In particular, the principle of ensuring a fair standard of living for the agricultural community cannot be relied upon. It is clear from the Special Report of the Court of Auditors on sales of reduced-price butter within the Community²¹ that selling butter at reduced prices does not really increase sales.

120. The *Commission* shares the view that the Berlin butter operation does not serve either to increase agricultural productivity, or to ensure a fair standard of living for the agricultural community, or to ensure that supplies reach consumers at reasonable prices. However, it considers that the operation pursues another objective, that of market stabilization.

121. In order to restore the balance between supply and demand at least in the medium term, in view of the substantial increase in milk production and the only moderate rise in consumption, the Community could not take action in the production sector alone but has also endeavoured to go beyond long-established traditional operations involving reduced-price sales and to find ways of expanding outlets for the disposal of butter. The permanent task of finding such measures was entrusted to the Commission by the Council on the basis of Article 4 of Regulation No 1079/77 in connection with the introduction of the co-responsibility levy. In particular, that provision authorized the Commission to adopt, under the management committee procedure, any kind of measure aimed at expanding the markets for milk and milk products inside or outside the Community or searching for new outlets and improved products.

122. In the Commission's view, there is no doubt that the distribution of 900 tonnes of

intervention butter free of charge and the connected sale of a further 900 tonnes of fresh butter contributed to a very minor extent towards restoring the balance on the market, which had been upset. However, the Commission's main concern was not to dispose of 900 tonnes of surplus butter, but to conduct a survey of consumer behaviour in the event of a substantial fall in prices over an extended period.

123. (c) Thus the only objective referred to in Article 39 of the EEC Treaty that still remains to be considered is the stabilization of markets, since there are no grounds for disputing the explanations furnished by the Verwaltungsgericht and by all the parties that the measure providing the disposal of the butter did not serve to attain the other objectives referred to in Article 39 of the EEC Treaty.

124. The concept of market stabilization, as I have already explained in my Opinion concerning the Christmas butter operation, encompasses two factors: the stabilization of the market in a single product, in this case butter, and the stabilization of the markets in different products where, as in this case, those products can be substituted for one another.

125. With regard to the stabilization of the market in butter it should be noted, as stated earlier, that the implementation of the organization of the market in milk and milk products has led to a situation in which for years surpluses have been produced which cannot be disposed of on the market. Market stabilization has been consistently neglected in favour of other objectives, in particular that of ensuring a fair standard of

²¹ — Official Journal 1982, C 143, p. 1.

living for the agricultural community. That led to structural production surpluses and the balance on the market in butter was completely upset as a result.

126. In a situation of that kind, the task entrusted by the Council to the Commission of searching for measures capable of restoring the balance on the market is designed to serve the aim set out in Article 39 of the EEC Treaty, namely market stabilization. Any corresponding measures taken by the Commission must therefore be intended to restore the balance on the market. The question whether that purpose is achieved is unimportant for legal purposes since it is impossible to determine whether a measure designed to explore new sales outlets has been successful and, consequently, appropriate until after it has been implemented.

127. In that respect, the Commission has argued quite plausibly that its aim was to explore consumer behaviour in an operation carried out on a large scale involving a reduction in the price of butter, and in particular to determine the precise costs of a further butter disposal operation and the limits thereof.

128. The measure promoting sales of butter was therefore appropriate for the purpose of attaining the objective of stabilizing the market in butter.

129. However, since the concept of market stabilization involves a second factor, namely the relationship between markets in products that can be substituted for one another, it is necessary to determine whether it was permissible for the Commission to adopt a measure interfering with the fundamental relationship between the market in milk and milk products and the market in oils and fats. In principle, the Commission must abide by the fundamental relationship established by the Council between the two aforesaid market organizations. Moreover, traders operating on both

sides of the market in edible oils and fats were able to proceed on the assumption that the fundamental relationship between the two organizations of the market would not be altered, in any event abruptly, that is to say it would not be altered without the adoption of transitional measures.

130. According to the Verwaltungsgericht, in 1984 a total of 13 297 tonnes of margarine was consumed in Berlin. That corresponds to an average monthly consumption of 1 108 tonnes or, for the two-and-a-half month period in which the operation involving the disposal of reduced-price butter was to be carried out, to a total consumption 2 770 tonnes.

131. If the additional disposal of 900 tonnes of intervention butter had been wholly to the detriment of sales of margarine, such sales would have declined by 22.5% over the two-and-a-half-month period. However, calculated on the basis of sales of margarine in Berlin for the whole of 1984, the fall in sales was only around 6.8%.

132. Furthermore, it must be borne in mind that at least the plaintiffs in the main proceedings in Cases 133 to 136/85 operate not only on the Berlin market but also on the West German market as a whole. At the hearing in Case 97/85 R, they stated that the quantity of butter offered free of charge for the implementation of the measure in question represented 0.4% of the total sales of margarine in the Federal Republic of Germany.

133. In view of the fact that the decrease in turnover was so negligible, I cannot as yet conclude that there was any substantial interference with the fundamental relationship established by the Council between the market in milk and milk products and the market in oils and fats. It should also be pointed out that in Article 4 of Regulation No 1079/77 the Council empowered the Commission to adopt measures to expand the markets for milk

products even within the Community, with the result that the Council did not rule out the possibility of at least minor interference with the fundamental relationship between the two market organizations. The legal basis for the Christmas butter operation contains no such provision.

134. On the whole, it is clear that the Commission's decision of 25 February 1985 was not contrary to the aim of market stabilization laid down in Article 39 of the EEC Treaty.

135. Consequently, Question 4 should be answered as follows:

The measure provided for by the Commission's decision of 25 February 1985 is not inconsistent with one of the objectives of agricultural policy laid down in Article 39 of the EEC Treaty.

136. 7. Question 6

'6. Is the measure provided for in the Commission's decision of 25 February 1985 a measure relating to the search for new outlets or a measure for expanding the markets within the meaning of Article 4 (2) 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)?'

137. (a) The *Verwaltungsgericht* doubts whether the measure promoting sales of butter can be based on Article 4 of Regulation No 1079/77. It raises the question whether the references to outlets and the expansion of markets can also have been

intended to cover the disposal of intervention products held in public storage. The measures referred to in Article 4 are financed by the co-responsibility levy. The purpose of the levy and of the measures to be financed by it is to establish a balance between production and market requirements. The measures to be financed do not form part of the intervention system but are intended to improve the existing intervention system by restoring the balance between supply and demand.

138. According to the *Verwaltungsgericht*, that statement of the purpose of Regulation No 1079/77 makes it clear that 'outlets' for the purposes of Article 4 of that regulation can only refer to the sale of open-market products, that is to say, milk products which have never been covered by intervention measures. Only if the market for those products is expanded can the balance between supply and demand be restored. If, however, the outlets for intervention products were to be improved, the distribution of intervention butter free of charge would drive some of the open-market butter off the market and into intervention warehouses. To finance such a measure by means of the co-responsibility levy is to distort the levy's purpose.

139. (b) According to the *plaintiffs*, the measure complained of is not covered by Article 4 of Regulation No 1079/77. The search for new outlets does not warrant the distribution of 900 tonnes of butter free of charge since the desired information could not be provided by a market research institute. For the reasons given by the *Verwaltungsgericht*, the expansion of markets can only concern fresh open-market butter. The decision to distribute butter from the Community's intervention stocks free of charge is incompatible with the organization of the market in milk. The role of the intervention agencies with regard to the storage and sale of butter is governed

by Regulation No 804/68, and in particular by Article 6 (3) thereof. The measures for the expansion of the markets within the Community, referred to in Article 4 of Regulation No 1079/77, can only be measures other than the disposal of butter bought in by the intervention agencies.

expediency and effectiveness of a measure are subject only to limited review by the Court. Only if a measure is patently unsuited to the objective which the competent institution seeks to pursue may this affect its legality. In that regard, the Court must take into consideration the fact that the relevant Community institution has broad discretionary powers at its disposal.²²

140. The *Commission* challenges the reasoning of the *Verwaltungsgericht* as regards the scope of Article 4 of Regulation No 1079/77. That provision authorizes the Commission in general terms to adopt measures for expanding the markets in milk and milk products. There is nothing in the regulation to support the view that the expansion of the markets should, on the basis of Article 4, only concern fresh market products. The statement in the final recital in the preamble to the regulation to the effect that the measures provided for are designed to supplement the existing intervention system means not that intervention products may never be used for the purpose of expanding the markets within the meaning of Article 4 but only that the measures provided for by that article are to supplement the existing intervention system. The measure complained of also contributed towards expanding the market in fresh butter since the fresh butter packed in a single package with the intervention butter proved far easier to sell than would have been possible under normal market conditions. Accordingly, there can be no question of the meaning of Regulation No 1079/77 having been distorted.

142. To be sure, it must be acknowledged that the plaintiffs are entitled to raise doubts about the need for, and the expediency of, a measure concerning the search for new outlets which entails the distribution of 900 tonnes of butter free of charge. A survey carried out by an opinion research institute might have yielded the same results. Furthermore, it is pointed out in the two market surveys conducted pursuant to Article 7 of the decision of 25 February 1985 that only limited conclusions could be drawn, which were unable to satisfy all the requirements of a methodically rigorous analysis. In particular, having regard to the fact that the request for a survey to be carried out was not made until approximately one month before the commencement of the operation and that it was therefore impossible to collect sufficient data relating to an earlier period for purposes of comparison, and in view of the fact that the market that was tested — West Berlin — has certain specific features which are not generally typical of the rest of the Federal Republic of Germany, still less of the Community, the results of the survey cannot be regarded as wholly satisfactory.

141. (c) The views expressed by the plaintiffs in the main proceedings, to the effect that the measure adopted by the Commission cannot constitute a measure concerning the search for new outlets, relate essentially to the expediency and usefulness of the Berlin butter operation. However, the

143. However, notwithstanding those flaws in the preparation of the operation which has cost the Community budget approxi-

22 — See the judgment of 21 February 1979 in Case 138/78 *Stölting v Hauptzollamt Hamburg-Jonas* [1979] ECR 713, in which the Court upheld the legality of Regulation No 1079/77.

mately 4 million ECU, and notwithstanding the inapt choice of West Berlin as the market to be tested, I do not believe that the measure in question can be described as 'patently inappropriate'. In the event, the Commission was able to derive certain information concerning the cost of the additional disposal of butter and the extent of the necessary price reduction from the conduct of the operation and the accompanying market surveys, even though that information was only of limited value.

144. Accordingly, notwithstanding the flaws which have been established, the Commission's measure must be regarded as a measure designed to identify new outlets.

145. Nor can the view be endorsed that intervention stocks can in no circumstances be used for the purposes of a measure to expand the markets in milk products.

146. If the fixing of intervention prices by the Community and the concomitant guarantee of disposal for butter are to be regarded as forming part of the workings of the market, then the possibility of selling butter to the intervention agencies at the intervention price must also be regarded as such. However, in view of its nature, intervention cannot have the effect of removing certain quantities of agricultural products from the market for any length of time. Instead those quantities must at a suitable moment again be released on the market if the intervention system is to remain operative. After all, intervention serves to support prices and not to remove agricultural products from the market for long periods.

147. Accordingly, it is impossible to draw between open-market butter and inter-

vention butter a distinction as sharp as that made by the Verwaltungsgericht and the plaintiffs in the main proceedings. No such division of butter into two separate categories can be inferred from the wording of Council Regulation No 1079/77 of 17 May 1977.

148. Nor are there any grounds for alleging that Regulation No 1079/77 has been distorted, if the proceeds of the co-responsibility levy are also used to pay for the disposal of intervention butter. It cannot be inferred from Regulation No 1079/77 that the proceeds of the co-responsibility levy are to be used exclusively to pay for measures to expand the markets in milk products which have not yet been subjected to intervention arrangements. As is clear from the second recital in the preamble to the regulation, the collection of the co-responsibility levy is designed to ensure that milk producers bear part of the considerable financial burden which surpluses represent for the Community. Moreover, according to Article 5 of the regulation, with regard to the financing of the common agricultural policy, the co-responsibility levy and the measures for expanding the markets are to be regarded as forming part of the measures to stabilize agricultural markets. That establishes the close connection between the general intervention arrangements, on the one hand, and the co-responsibility levy and the measures for expanding the markets, on the other. This corresponds to the final recital in the preamble to the regulation, which states that all the measures provided for in the regulation are designed to stabilize the market in milk products and thus to supplement the existing intervention system.

149. To summarize, the measure promoting sales of butter, provided for by the Commission in its decision of 25 February

1985, would be covered by Article 4 of Regulation No 1079/77 if it were not unlawful on other grounds.

150. I therefore suggest that the answer to Question 6 should be as follows:

The measure provided for by the Commission's decision of 25 February 1985 is a measure concerning the search for new outlets within the meaning of Article 4 (2) 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.

151. 8. Question 7

'7. Does Article 4 (1) and (2) of Council Regulation No 1079/77 accord with constitutional requirements relating to the principle that there must be a sufficient degree of legislative precision?'

152. (a) The Verwaltungsgericht has raised this question only in the event of the Court taking the view that the contested measure is covered by Article 4 of Regulation No 1079/77. Should the Court take that view, the Verwaltungsgericht raises the question whether that provision is framed too broadly and thus fails to accord with the constitutional requirements of the principle that there must be a sufficient degree of legislative precision. The principle of administrative legality entails for the adoption of administrative measures not just any grant of authorization but one which is defined and limited in precise terms. Authorization must not be framed so loosely that in the last analysis it is not the legislature but the executive which defines the specific limitations on freedom. Since Article 4 of Regulation No 1079/77 gives the Commission such a broad discretion that it is no longer

possible to ascertain how the Commission is to exercise that power — that is to say, what is to be the specific content, purpose and scale of its actions — that provision is not sufficiently precise. It is not made clear that the Community may also achieve the expansion of the markets by giving away to the final consumer an amount of butter equivalent to half of the quantity he buys. It may indeed be asked how the gratuitous disposal of butter can expand markets, since the word 'markets' is an economic term whilst the giving away of products cannot be regarded as an economic activity.

153. (b) According to the *plaintiffs* in the main proceedings, the principle that there must be a specific authorization for the adoption of lower-ranking rules of law is an expression of the principle of the rule of law and the principle of the separation of powers. If an administrative authority had unlimited power to take action and to legislate, that would be manifestly contrary to the constitutional principle that all the activities of the State must be governed by the rule of law. If the authorization granted by a regulation of the Council were to apply to measures of any kind, it would be contrary to the requirement that any act of the Community institutions must be based on the Treaty and on the principles of the rule of law and the separation of powers. If the word 'measure' were to be interpreted in genuinely broad terms, the Commission could be authorized not only to give milk and milk products away free of charge, but also to impose, for instance, a requirement that such products must be disposed of. A prohibition on the disposal of competing products, for instance margarine as opposed to butter, would then likewise constitute a measure capable of expanding the markets. Those examples show that the concepts referred to in Article 4 of Regulation No 1079/77 constitute a sufficiently precise authorization only if they are given a strict and restrictive interpretation which accords with their meaning and purpose.

154. The *Council* considers that Article 4 of Regulation No 1079/77 is in conformity with the EEC Treaty. The aim of that provision is to empower the Commission, on the terms laid down therein, to adopt measures for the expansion of the markets in milk and milk products. The aim pursued is thus framed in precise terms. Furthermore, the markets on which the Commission is to operate and the relevant implementing measures, namely the expansion of sales outlets and the search for improved products, were laid down in the regulation adopted by the Council. Those criteria were supplemented by the preamble to the regulation, which states that provision should be made for specific measures linked to the levy in order to encourage the expansion of markets and the disposal of surpluses on the Community and world markets. The Commission has thus been furnished with a set of criteria which set limits to the powers conferred upon it.

155. The *Commission* emphasizes that, according to the fourth indent of Article 155 of the EEC Treaty, it must exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. However, Article 155 does not specify the extent to which the Council must itself adopt the necessary measures. In any event, the wording of Article 155 only prohibits the grant of an authorization whereby the Council comprehensively delegates some of its own powers to the Commission without adopting any measures itself.

156. In this case, the Commission maintains that the Council has not only defined in Article 4 (1) of Regulation No 1079/77 the scope of the authorization conferred on the Commission, but has also laid down in Article 4 (2) the purposes for which such authorization may be used. Moreover, it is wrong to assume that, in the light of the

principle of lawful administration, the Commission requires not just any grant of authorization but one that is defined and limited in precise terms.

157. (c) In connection with what I said earlier concerning Question 5, it is necessary in the first place to point out once again that, although the fundamental relationship between the Commission and the Council is not that of a subordinate to a superior, the Commission must remain within the framework of the rules laid down by the Council where the latter confers implementing powers on the Commission pursuant to the fourth indent of Article 155 of the EEC Treaty.

158. Furthermore, it is necessary to determine how specific the task conferred on the Commission by the Council must be.

159. It is clear from the case-law of the Court on this problem that the transfer of powers provided for by Article 155 of the EEC Treaty must not be construed restrictively. Thus, the Court has held that this authority is not restricted to powers other than those of drawing up regulations.²³ In its judgment of 30 October 1975 in Case 23/75 *Rey Soda v Cassa Conguaglio Zuccheri* [1975] ECR 1279, the Court even stated that it followed from the context of the Treaty in which Article 155 must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. In that judgment the Court also emphasized that when the Council has thus conferred extensive power on the Commission the limits of this power must be judged with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling word.

23 — See the judgment of 15 July 1970 in Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661.

160. Having regard to the principal aims of the organization of the market in milk and milk products — establishing a balance between supply and demand and guaranteeing a reasonable level of prices — and in view of the express reference in the preamble to Regulation No 1079/77 to the need to restore equilibrium between production and market requirements and to reduce the heavy costs incurred by the Community as a result of the present situation and in particular of the large surpluses which exist, the authorization contained in Article 4 of Regulation No 1079/77 is in my view sufficiently precise. That authorization states that the aim of the measures to be adopted is the expansion of the markets and it makes clear that both the Community's domestic market and the external market are intended. It refers to the search for new outlets and improved products as the second aim of those measures. Moreover, that authorization is further restricted by Article 4 (2) of Regulation No 1079/77, which requires the Commission before each period of application of the co-responsibility levy to inform the Council of the programme of measures which it is planning to take during the following milk year. The Council is thus able to exercise a kind of preliminary supervision over the manner in which the Commission proposes to use the authorization conferred upon it by the Council. If necessary, therefore, the Council is in a position to take action if, in its view, there is a risk that the Commission may exceed such authorization.

161. Moreover, in its capacity as part of the budget authority, the Council has a further means of control at its disposal since the budget authority decides each year the use to which the co-responsibility levy is to be put.²⁴

²⁴ — See the General Budget of the European Communities for 1984 (Official Journal 1984, L 12, pp. 438 to 439) and for 1985 (Official Journal 1985, L 206, p. 454 *et seq.*), Item 207 of the Commission's budget.

162. In my view, the authorization conferred by Article 4 of Regulation No 1079/77 is sufficiently precise, having regard to the aforesaid limitations. It should also be noted in that connection that the measures for expanding the markets in milk products take priority. An instrument for the development of which the relevant institution must first and foremost use its imagination cannot, in the nature of things, already be defined in every detail in the basic authorization.

163. Finally, it should be added that an authorization conferred in the aforesaid manner is by no means unlimited. To begin with, it is subject to the provision that the general principles of Community law, including fundamental rights, are respected. Secondly, the Commission may not avail itself of any means it chooses in making use of the authorization, as the grant of aid has shown precisely in that connection. For those reasons, therefore, the authorization cannot be used in the same manner as that in which it was used in the examples referred to by the plaintiffs since certain fundamental rights would undoubtedly be infringed as a result.

164. I therefore suggest that Question 7 should be answered as follows:

Paragraphs (1) and (2) of Article 4 of Regulation No 1079/77 accord with constitutional requirements relating to the principle that there must be a sufficient degree of legislative precision.

165. 9. Question 8

'8. Is the measure provided for by the Commission's decision compatible with the principle of proportionality if the expansion of the markets or the search for new outlets may be achieved by means of less far-reaching interference with the workings of the market?'

166. (a) The *Verwaltungsgericht* takes the view that a legal measure which interferes with the fundamental freedom to exercise a trade or profession cannot be justified merely by any reasonable consideration pertaining to the public interest. Such interference is permissible only if it is demanded by considerations pertaining to the public interest that are of such importance as to override the fact that undertakings are hindered in the pursuit of their business. If the purpose of the measure is to bring about an expansion of the market by reducing intervention stocks, the question arises whether the same result could not be achieved by measures which have a far less significant impact on the workings of the market. If, however, the operation was part of the search for new outlets, the question arises whether it is in fact capable of yielding useful results. To say the least, there are serious doubts as to whether the market that was tested — West Berlin — can support any generalization for the German market as a whole, still less for the markets of other Member States. A measure which interferes with fundamental rights, yet is unfitted to achieve its objective, can never be justified by important considerations pertaining to the public interest.

167. (b) The *plaintiffs* in the main proceedings agree with the *Verwaltungsgericht*. They, too, consider that the financial burden imposed by that measure is disproportionate.

168. If the purpose of the operation was to reduce intervention stocks of butter, it could have been achieved far more effectively by other measures. Thus the distribution of 900 tonnes of butter over a longer period or in a larger area would have had a less disruptive effect on the market. Moreover, export in the course of trade and export by way of food aid would be a less onerous solution

for the Community and would not be so detrimental to the plaintiffs.

169. If the purpose of the measure was to carry out a test, the operation selected for the purpose was also inappropriate. In the first place, in view of its surface area and certain socio-demographic characteristics, Berlin displays certain specific features which seem to be atypical not only for the Federal Republic of Germany but also for the Community as a whole. Secondly, it was unnecessary to distribute 900 tonnes of butter free of charge for the purposes of a test which could just as well have been carried out by means of an opinion poll.

170. The *Commission*, on the other hand, submits that the views of the *Verwaltungsgericht* concerning the principle of proportionality are based on the assumption that the sole purpose of the operation was to reduce German intervention stocks. However, that assumption is incorrect. The purpose of the operation was the search for new outlets.

171. In order to keep the cost of the test to a minimum, and at the same time obtain fairly representative results, the Commission had to find a market that was as isolated as possible. A part of the Berlin market (i.e. West Berlin) was selected primarily because of its singularly isolated location within the Community, which therefore made it possible to carry out a sufficiently reliable survey at relatively low cost.

172. (c) I have already expressed doubts as to whether the measure promoting sales of butter in West Berlin was appropriate as part of the search for new outlets for butter (see paragraph 142). However, I acknowledged that the Commission was able at least to derive certain information from that operation, with the result that the

measure concerned cannot be regarded as wholly inappropriate.

176. II — *Reference for a preliminary ruling by the Landgericht Frankfurt am Main*

173. In my view, the decisive factor for the purpose of determining whether the Commission has contravened the principle of proportionality, which forms part of Community law, is the fact that the plaintiffs in the main proceedings have not alleged, still less established, that their economic activity has suffered lasting damage.

174. To be sure, this matter will have to be carefully investigated in the proceedings before the national court but it is clear that in their written observations of 23 August 1985, that is to say after the measure had already been implemented, the plaintiffs were still unable to establish that there had been a lasting fall in turnover in the case of the margarine industry in Berlin. At the hearing in Case 97/85 R, they also acknowledged that the quantity of butter used for the implementation of the measure in question represented only 0.4% of total margarine consumption in the Federal Republic of Germany. Accordingly, in view of the at best negligible damage to the plaintiffs' position on the market, I am unable to conclude that the burden imposed on the margarine manufacturers was excessive.

175. I therefore suggest that the Court should answer Question 8 as follows:

The measure provided for by the Commission's decision of 25 February 1985 is compatible with the principle of proportionality.

'Is the fourth paragraph of Article 189 of the EEC Treaty to be interpreted as meaning that a decision of the Commission of the European Communities such as the decision of 25 February 1985 on the promotion of sales of butter on the West Berlin market precludes a court of the Federal Republic of Germany from restraining conduct which is contrary to German legislation on unfair competition on the part of an undertaking which, although not a direct addressee of the decision, is involved in the implementation thereof?'

177. (a) According to the *Landgericht*, the action should be allowed under national law. The German rules on unfair competition are applicable because, in order to fulfil its tasks, the Federal Office has used means which are governed by private law and is therefore also subject to the relevant provisions of private law. Since the measures adopted by the Federal Office in implementation of the Commission's decision were intended to promote sales of butter and thereby necessarily to make it more difficult to sell margarine, the Federal Office was seeking to influence competition.

178. The *Landgericht* regards the distribution of 900 tonnes of butter free of charge as being contrary to the general rules of fair trading because it created a glut on the market by unfair means. In any event the butter distributed free of charge covered a considerable proportion of the total demand for emulsion fats on the part of the inhabitants of Berlin. Giving away goods in that quantity creates a serious risk that competition in those goods will be largely eliminated.

179. At the same time, the measure in question provides an extravagant enticement for the consumption of butter, which is inconsistent with the general rules of fair trading. Moreover, the butter released from storage and expressly described as 'free EEC butter' constitutes a bonus offered with the open-market butter for the purposes of the Zugabeverordnung (Regulation on Bonus Offers). Such bonuses are not permitted since open-market butter and intervention butter cannot be regarded as identical goods in view of the difference in their fitness for storage.

180. The action against the Federal Office can only fail on the ground that the measure adopted by the latter was based on a Commission decision. That factor is relevant only if that decision takes precedence over the competition law of the Federal Republic of Germany.

181. According to Article 189 of the EEC Treaty, a decision of the Commission, unlike a regulation, does not have general application: it is binding in its entirety only upon those to whom it is addressed. The fact that the decision is binding on the Member State to which it is addressed does not, however, automatically lead to the conclusion that national competition law is necessarily displaced as regards the relationship between the parties to these proceedings by the rules which that decision lays down.

182. The Court of Justice has consistently held that the direct applicability of a measure is to be distinguished from its direct effect. Only if the measure produces direct effect must all bodies concerned with the application of the law in the States concerned, including therefore the courts,

observe the provisions of Community law in the same manner as they are obliged to comply with national law, in which case, if there is a substantive conflict between a rule of national law and a rule of Community law which has direct effect, the latter takes precedence.

183. The circumstances in which a decision of the Commission, within the meaning of Article 189 of the EEC Treaty, has direct effect have not yet been conclusively defined by the Court of Justice. Admittedly the Court has not ruled out the possibility, in particular cases, that decisions may have direct effect inasmuch as third parties who have an interest in the implementation of a decision may themselves be able to assert claims arising out of the decision. However, the detailed requirements which a decision must satisfy in order for it to be recognized as having direct effect in general terms have not yet been laid down by the Court in its decisions. For those purposes, recourse might at most be had to the views expressed by the Court on the question of the direct effect of Treaty provisions. The Court has stated that the obligation imposed on the Member States must be sufficiently clear, precise and unconditional. In addition, the provision concerned must be so framed that no further action on the part of the Member State is required for its implementation or for it to take effect.

184. However, it is doubtful whether those principles can be automatically applied to the question whether decisions have direct effect under Article 189 of the EEC Treaty. Moreover, it is not clear whether a decision of the kind at issue in this case satisfies the aforesaid requirements. On the one hand, further measures are required on the part of the national authorities, who must conclude appropriate supply contracts with commercial undertakings in order to carry

out the distribution of butter free of charge. On the other hand, however, the State to which the decision is addressed has practically no discretion with regard to the nature and the scope of the measures to be adopted, since all the essential details are already set out in the decision itself. The question therefore arises whether decisions of that type should be equated, having regard to their direct effect, with decisions of a 'self-executing character'.

indeterminate number of persons should, in order to be valid, be adopted in the form of a regulation.

185. (b) The *plaintiff* in the main proceedings deals in the first place with the question of the validity of the Commission's decision of 25 February 1985 and goes on to assess that decision in the light of the German rules on unfair competition. Thereafter it considers the reference for a preliminary ruling submitted by the Landgericht.

188. The question whether the decision has direct effect arises in circumstances wholly different from those of the so-called 'Leberpfennig' judgments of 6 and 21 October 1970,²⁵ in which a decision was recognized as having direct effect. Those judgments were concerned with a situation in which a directive supplemented by a decision has imposed an obligation on a Member State to amend its national law in a certain manner and the Member State has failed to fulfil that obligation. In the aforesaid case, the relevant provisions of national law should have been set aside and replaced in all the Member States by harmonized rules, whilst in this case only the German rules on unfair competition have been suspended and only for a short period as regards part of the area in which they apply and in respect of certain products.

186. The plaintiff challenges the view that the decision of 25 February 1985 has direct effect on several grounds. The Commission's decision was not intended to impose on the Federal Republic of Germany an obligation to set aside its rules on unfair competition while the operation was in progress. The decision lays down no such requirement. Furthermore, it may be assumed that the Commission was not even aware in adopting its decision that the implementation thereof would be contrary to the principles of the law on unfair competition. Finally, the Commission failed to publish the decision, although in keeping with the principle of legal certainty the decision should have been published if its purpose was to set aside the German rules on unfair competition while the operation was in progress.

189. Moreover, in the 'Leberpfennig' cases there was a conflict between a Community rule and a national rule relating to the same branch of the law, whilst in this case there is a conflict between a decision and a Member State's legislation relating to a branch of the law which has not been harmonized and in which that Member State's powers are still unfettered.

190. If, in adopting its decision, the Commission did not intend to influence German national law, that decision was no more than a practical measure. However,

187. A legal measure which is to have general legal effect and is to apply to an

25 — See the judgments of 6 October 1970 in Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825; 21 October 1970 in Case 20/70 *Transports Le Sage v Hauptzollamt Freiburg* [1970] ECR 861; and 21 October 1970 in Case 23/70 *Haselhorst v Finanzamt Düsseldorf-Alttadt* [1970] ECR 881.

Article 189 of the EEC Treaty does not cover effects which are purely practical. A decision can take precedence at best where legal measures are necessary for its implementation. If a decision aims only to produce practical effects, it cannot claim precedence over national law.

191. Finally, the principle that the objectives of the Community must be adhered to, which is laid down by Article 5 of the EEC Treaty, must also be observed. The Commission has contravened that principle by setting aside fundamental provisions of national law such as the German rules on unfair competition for the purpose of implementing a short-term measure of agricultural policy.

192. The Commission expresses doubts in the first place as to whether the Landgericht applied German law correctly. Next, it criticizes the view taken by the Landgericht that the decision of 25 February 1985 can take precedence over the German rules on unfair competition only if it has direct effect in relation to individuals.

193. Admittedly, the question of primacy can arise only if the relevant provision of Community law is directly applicable in a national legal system. However, it would be mistaken to draw the conclusion that the primacy of a provision of Community law over national law always depends on the direct applicability of the former. The true reason for the primacy of Community law lies not in the direct effect of the Community provision itself but in the binding nature of the substantive provisions of Community law and, consequently, in the need for their effective implementation.

194. It is of little significance that the decision was addressed only to one Member State, since the justification for the direct applicability of Community law lies not in the need for its uniform application in all the Member States but in the need to ensure the proper functioning of the Community.

195. If the decision was to take precedence over the German rules on unfair competition, it would have been sufficient to impose on the Federal Republic of Germany unequivocal and unconditional obligations requiring it to override those rules if that was necessary for the implementation of the decision. Accordingly, the Federal Republic was under an obligation, pursuant to Article 5 of the EEC Treaty, to implement the decision notwithstanding any doubts regarding the compatibility of the measure provided for therein with national law. The same holds true with regard to the actions of the Federal Office which has merely performed the obligations imposed on the Federal Republic.

196. In the result, the primacy of Community law is a two-edged mechanism which works to the advantage of individuals as well as to their detriment.

197. (c) It is necessary first to define the problem raised by the reference for a preliminary ruling submitted by the Landgericht.

198. First of all, we must disregard the Commission's criticism of the finding made by the Landgericht that the measure promoting sales of butter was contrary to the German rules on unfair competition. That is a matter for the national court to establish.

199. Nor is it necessary to consider the question whether the Federal Office was

really seeking to influence competition, or rather, whether it was the commercial undertakings that were so acting in disposing of the butter on the West Berlin market. In that respect the Court must rely on the findings made by the Landgericht, which the former is not entitled to review in order to establish their accuracy.

200. Although in its reference for a preliminary ruling the Landgericht did not expressly question the validity of the Commission's decision of 25 February 1985, it is still necessary to consider its validity. That follows from the consideration that the Landgericht's question was not concerned with the primacy of decisions in general but was limited to a decision 'such as the decision of 25 February 1985'. Hence the question of the primacy of the decision cannot be separated from that of its validity.

201. After examining the questions submitted by the Verwaltungsgericht Frankfurt, I came to the conclusion (paragraphs 37 to 64, *supra*) that the Commission's decision of 25 February 1985 was not valid. As is already apparent from that conclusion, the answer to the Landgericht's question must be that a national court cannot be prevented from applying its national law by a Commission decision that is not valid.

202. In any event, a national court cannot itself determine whether a Commission decision is valid but must refer the matter to the Court of Justice, as the Landgericht has done. That follows from the first and second paragraphs of Article 173 and the first paragraph, under (b), of Article 177 of the EEC Treaty.

203. (d) In the event that the Court should decide not to follow my opinion and to consider the Commission's decision of 25 February 1985 to be valid, there remains to be examined the alternative question whether that decision takes precedence over national law.

204. The Court has consistently held that Community law takes precedence over conflicting provisions of national law. In its judgment of 15 July 1964 in Case 6/64 *Costa v ENEL* [1964] ECR 585, the Court held that law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

205. The Court has subsequently upheld that finding in a consistent line of decisions.²⁶ It must be acknowledged that the Court has so far only had to deal with the primacy of regulations, that is to say with the primacy of directly applicable provisions of Community law over conflicting provisions of national law. The reasoning inherent in that case-law must, however, also be applied to decisions addressed to the Member States by the Community institutions in the exercise of their powers. The fourth paragraph of Article 189 of the EEC Treaty provides that a decision is to be 'binding in its entirety'. In that respect, a decision resembles a regulation or a general decision under the ECSC

26 — See the judgments of 13 February 1969 in Case 14/68 *Wilhelm and Others v Bundeskartellamt* [1969] ECR 1; 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; and 9 March 1978 in Case 106/77 *Staatliche Finanzverwaltung v Simmenthal* [1978] ECR 629.

Treaty and differs from a directive, which is binding only as to the result to be achieved.

206. A decision addressed to a Member State therefore has the attributes of a legal provision.

207. A decision is binding upon those to whom it is addressed and they must abide by it unless or until it is declared invalid. Pursuant to Article 185, even an action brought before the Court does not have suspensory effect. The Court may, at best, if it considers that circumstances so require, order that application of the contested act be suspended.

208. In his Order of 3 May 1985 in Case 97/85 R, however, the President of the Court of Justice refused to grant such an application.

209. The decision therefore continued to be binding in its entirety on the Federal Republic of Germany and on all its national institutions, whether courts of law or administrative authorities. The decision therefore had to be implemented, even though certain national rules on unfair competition had to be infringed in a limited

sector of the market, within a limited area and over a limited period. Hence the Landgericht could not rely on national law to prevent the Berlin butter operation from being carried out before the Court of Justice has given a ruling on the matter. That is a direct consequence of the primacy of Community law.

(e) I therefore suggest that the Court should answer the question submitted to it by the Landgericht Frankfurt as follows:

210. The fourth paragraph of Article 189 of the EEC Treaty is to be interpreted as meaning that a decision of the Commission of the European Communities such as the decision of 25 February 1985 on the promotion of sales of butter on the West Berlin market precludes a court of the Federal Republic of Germany from restraining conduct which is contrary to German competition law on the part of an undertaking which, although not a direct addressee of the decision, is involved in the implementation thereof, unless or until the decision has been declared invalid by the Court of Justice or has otherwise ceased to be applicable.

C — Conclusion

211. I—I therefore suggest that the questions submitted by the Verwaltungsgericht Frankfurt should be answered as follows:

1. The system of legal protection on which the EEC Treaty is based does not preclude the initiation of proceedings under national law where the plaintiff is able to bring an action, pursuant to the second paragraph of Article 173 of the EEC Treaty, for the annulment of the measure adversely affecting him.
2. Article 2 (1) of the Commission's decision of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market is not valid.

3. The competent Community authorities may alter the competitive relationships created by the market organizations. In so doing, however, they must respect the interests of trade rivals, which are protected by the general principles of Community law, and in particular the principle of non-discrimination.
4. The competent Community authorities may interfere with the protection afforded by the general principles of law, provided they act in the exercise of their own powers.
5. The measure provided for by the Commission's decision of 25 February 1985 is not inconsistent with one of the objectives of agricultural policy set out in Article 39 of the EEC Treaty.

If, however, the Commission acts in the exercise of the implementing powers which have been conferred upon it by the fourth indent of Article 155 of the EEC Treaty, it must do so on the basis of a Council measure.

6. The measure provided for by the Commission's decision of 25 February 1985 is a measure concerning the search for new outlets within the meaning of Article 4 (2) 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.
7. Paragraphs (1) and (2) of Article 4 of Regulation No 1079/77 accord with constitutional requirements relating to the principle that there must be a sufficient degree of legislative precision.
8. The measure provided for by the Commission's decision of 25 February 1985 is compatible with the principle of proportionality.

II—I suggest that the Court should answer the question submitted by the Landgericht Frankfurt as follows:

The fourth paragraph of Article 189 of the EEC Treaty is to be interpreted as meaning that a decision of the Commission of the European Communities such as the decision of 25 February 1985 on the promotion of sales of butter on the West Berlin market precludes a court of the Federal Republic of Germany from restraining conduct which is contrary to German competition law on the part of an undertaking which, although not a direct addressee of the decision, is involved in the implementation thereof, unless or until the decision has been declared invalid by the Court of Justice or has otherwise ceased to be applicable.