

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

*Mr President,
Members of the Court,*

A — Facts

1. The case in which I am to give my Opinion today is concerned with an application requesting the Court to declare void the Commission's decision (COM(85) 276 final) of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market, which, according to the applicants (four German margarine manufacturers), adversely affects their position on the market.

2. Since I have already described the Community market for 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 in 1984 stood at approximately one million tonnes.

3. 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.

4. 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 had made available for distribution free of charge 900 tonnes of butter from public intervention 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'.

5. 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.

6. 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.

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

8. 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:

* Translated from the German.

1 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ English Special Edition 1968 (I), p. 176).

2 — Joined Cases 279, 280, 285 and 286/84 and 27 and 265/85.

3 — OJ 1977, L 131, p. 6.

- (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.

9. Those measures are to be adopted under the management committee 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.

10. The Berlin butter operation was in conformity with the opinion given by the Management Committee.

11. The four applicants in these proceedings, 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 they applied to the Verwaltungsgericht (Administrative Court) Frankfurt am Main 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.

12. 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 under civil law, it might also be possible for the applicants 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 such persons to bring an action under the second paragraph of Article 173 of the EEC Treaty.

13. After the Verwaltungsgericht had issued the interlocutory order, the applicants 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; see p. 2289).

14. On 16 April 1985 the applicants brought this action for annulment before the Court, and simultaneously applied to the Court for an order suspending the operation of the contested decision (Case 97/85 R [1985] ECR 1331). That application was dismissed by Order of the President of the Court of 3 May 1985 on the ground that the applicants were not liable to incur 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.

15. In their main application, the *applicants* allege a breach of the general legal principle of freedom to carry on business; the principle of market stabilization; the prohibition of discrimination; the principle of the protection of legitimate expectation; the principle of proportionality; the principles of law which prohibit unfair competition; and essential procedural requirements. Moreover, they maintain that the defendant lacked power to adopt its decision.

16. Accordingly, the *applicants* claim that the Court should:

1. Declare void the Commission's decision (COM(85) 276 final) of 25 February 1985 on measures for the promotion of sales of butter on the West Berlin market;

2. Order the defendant to pay the costs.

17. The *defendant* contends that the Court should:

1. Dismiss the application as inadmissible;

2. In the alternative, dismiss the application as unfounded;

3. Order the applicants to pay the costs.

18. I will consider the submissions of the parties in detail below in so far as is necessary for the purposes of the action.

B — Opinion

19. (a) The *defendant* considers that the application for annulment is inadmissible.

20. In its view, the contested decision, which is addressed to the Federal Republic of Germany, is not of direct concern to the applicants since it does not impose any obligation upon them either directly or indirectly. The mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly concerned by that measure.

21. Nor is the decision in question of individual concern to the applicants, since they are not individually distinguished in that decision in the same way as the addressee. There are several other margarine manufacturers and importers who supply the Berlin market or who could in any event decide to do so.

22. To declare the application inadmissible would in no way deprive the applicants of legal protection. In the first place, the applicants have been partially successful in the action before the Verwaltungsgericht, since that court has submitted a number of questions to the Court of Justice for a preliminary ruling on the validity of the contested decision. Had the applicants, like other margarine manufacturers, brought actions in the civil courts, it would have been possible to refer questions to the Court of Justice concerning the relationship between the contested decision and the German rules on unfair competition. Furthermore, the applicants may also bring an action for damages against the defendant under Article 178 and the second paragraph of Article 215 of the EEC Treaty.

23. Finally, the defendant points out that the contested decision will in all likelihood have been implemented by the time the Court gives judgment in these proceedings.

Accordingly, the applicants have no legally protected interest in pursuing their action.

24. The *applicants* contend that the defendant's decision is of direct and individual concern to them, within the meaning of the second paragraph of Article 173 of the EEC Treaty.

25. In their view, since butter and margarine may be substituted for one another, any measure promoting sales of butter is necessarily detrimental to sales of margarine. As the decision itself lays down all the detailed rules for implementing the measures concerned, it injures the applicants directly.

26. The contested decision is also of individual concern to the applicants. The number of persons or undertakings adversely affected by the Commission's decision is clearly circumscribed. In the Federal Republic of Germany there are only 16 margarine manufacturers and that number is unlikely to change before the operation is carried out. Moreover, imports account for a negligible share of margarine consumption in West Berlin.

27. If this application were to be declared inadmissible, the applicants would to some extent be deprived of effective legal protection. In that regard, they point out that their application for an injunction in the administrative courts was unsuccessful. The proceedings instituted by other margarine manufacturers in the Landgericht (Regional Court) Frankfurt am Main and in the Oberlandesgericht (Higher Regional Court) Frankfurt am Main for the adoption of interim measures were also unsuccessful, since those courts relied on the primacy of Community law in dismissing the applications.

28. The questions referred to the Court of Justice by the Verwaltungsgericht for a preliminary ruling is not concerned with the relationship between the contested decision and German competition law.

29. The need to ensure effective legal protection for natural and legal persons, and the inadequacy of the means of redress available in the national courts in that regard, militate in favour of the admissibility of the application.

30. (b) Since the Commission's decision of 25 February 1985 was addressed exclusively to the Federal Republic of Germany and not to the applicants, the admissibility of the application must depend on the second paragraph of Article 173 of the EEC Treaty. It follows from that provision that a decision addressed to another person must be of direct and individual concern to the applicants.

31. For the contested decision to be of 'direct' concern to the applicants, it must adversely affect them *ipso facto*, and the possibility that it may adversely affect them if other factors are present is not sufficient. The mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question does not justify the assumption that those measures are of direct concern to the applicants.⁴

32. Even though it must be acknowledged that the proposed measure for the promotion of sales of butter was set out in detail in the Commission's decision of 25 February 1985, with the result that the German intervention agency was left with scarcely any room for manoeuvre, the decision itself cannot be said to have had an adverse effect on the applicants' rights.

⁴ — See the judgment of 10 December 1969 in Joined Cases 10 and 18/68 *Eridania and Others v Commission* [1969] ECR 459.

33. According to Article 1 (2) of the contested decision, the operation was to be carried out by one or more organizations (traders) which possessed the necessary qualifications and experience and which were able to furnish guarantees that it would be brought to a successful conclusion.

34. Accordingly, it was necessary first of all to find suitable undertakings which were prepared to carry out the operation on the terms set out in the decision. Since neither the Commission nor the Federal Republic of Germany could oblige individual traders to cooperate in the disposal of the butter, it was not absolutely certain from a legal point of view, at any rate at the time of the adoption of the decision, that the operation would in fact be carried out. At least a voluntary decision on the part of the traders concerned to cooperate in the disposal of the butter was still required as a complement to the Commission's decision. The traders had first to be willing to conclude contracts to that effect with the Federal Office. Lastly, consumers had to be willing to purchase the butter.

35. Since, therefore, other independent factors, namely the voluntary decisions of individual third parties were needed in addition to the Commission's decision, it is impossible to accept the view that the decision itself was of direct concern to the applicants.

36. Nor is the decision of 'individual' concern to the applicants. Persons other than those to whom a decision is addressed may claim to be individually concerned only

if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.⁵

37. The applicants have not established the existence of such circumstances. They maintain, admittedly, that the West Berlin market is supplied with margarine largely by them. However, that is a commercial activity which the applicants carry on in competition with many other margarine manufacturers and importers within the Community and outside it. Even if the applicants hold a substantial share of the margarine market in West Berlin, it does not follow that the market is wholly and exclusively controlled by them. On the contrary, the Berlin market is open to all margarine manufacturers in the Community, that is to say, to an indeterminate number of undertakings. Even on the assumption that at the time when the Commission adopted its decision the most important margarine manufacturers and dealers who supplied the Berlin market were known, they constituted an open and not a closed circle of traders. The Commission's contested decision of 25 February 1985 affected not merely a circle of traders that was fixed at the time of its adoption and could no longer be widened, but all undertakings operating on the Berlin margarine market before and during the implementation of the measure for the promotion of sales of butter.

38. In my view, the applicants' reference to the Court's judgment of 1 July 1965 in Joined Cases 106 and 107/63⁶ is misconceived.

5 — Judgment of 15 July 1963 in Case 25/62 *Plaumann v Commission* [1963] ECR 95; established case-law since then.

6 — Judgment of 1 July 1965 in Joined Cases 106 and 107/63 *Tölpfer v Commission* [1965] ECR 405.

39. In that case, the contested decision, which was addressed to the Federal Republic of Germany, concerned the treatment of requests for import licences and, on account of the specific circumstances of the case, could apply only to requests submitted three days prior to the adoption of the decision. Since the circle of the importers concerned was known, the importers were, as the Court stated, differentiated from all other persons and distinguished individually just as in the case of the person addressed.

40. In this case, however, the applicants are not individually distinguished in such a specific manner since when the Commission adopted its decision, that is, on 25 February 1985, the circle of traders operating on the Berlin margarine market was—as stated earlier—open, at any rate from a legal point of view.

41. Even if the applicants had been the sole margarine manufacturers or traders supplying the Berlin market, they would still not be individually distinguished just as in the case of the addressee of the decision, which was the Federal Republic of Germany.

42. According to the case-law of the Court, which is now very restrictive, a trader does not become the addressee of a decision which is not addressed to him merely because he is the sole trader operating on the market concerned.⁷

43. Accordingly, the contested decision concerned the applicants merely by virtue of their objective capacity as margarine manufacturers just as any other trader 'who is, or might be in the future, in the same situation'.⁷

44. The question which now arises is whether, having regard to the general context in which the present application for annulment is set, there are grounds for mitigating the admittedly very strict criteria of admissibility developed by the Court with regard to an application based on the second paragraph of Article 173 of the EEC Treaty. In particular, it is necessary to consider the applicants' submission to the effect that they have still not been able to obtain effective legal protection in the national courts against the measure for the promotion of sales of butter, which was implemented on the basis of the Commission's decision of 25 February 1985.

45. It must be acknowledged that the applicants may have experienced some difficulty in identifying the proper means of redress under national law for bringing proceedings against the Federal Office.

46. The history of the proceedings shows, however, that the applicants were not denied effective legal protection under national law. The national courts are quite willing to grant legal protection, as is clear from the references for a preliminary ruling submitted by the Verwaltungsgericht Frankfurt, in the proceedings instituted by the applicants, and by the Landgericht Frankfurt, in an action brought by another margarine manufacturer against the Federal Office. The question whether the German courts competent to decide the dispute are, ultimately, those with civil jurisdiction or those with administrative jurisdiction has not yet been resolved. Nor does the finding of the Hessische Verwaltungsgerichtshof to the effect that the contested measure may not be challenged in administrative proceedings necessarily have to be regarded as conclusive since that finding was made in summary proceedings for the adoption of an interim measure. On the other hand, it may

⁷ — Judgment of 14 July 1983 in Case 231/82 *Spijker Kwasten BV v Commission* [1983] ECR 2559.

be inferred from the decisions of the Landgericht Frankfurt and the Oberlandesgericht Frankfurt that, in their view, it is possible at least to bring an action in the civil courts.

47. It must be stated, moreover, that an action for annulment is not the only means of redress available under Community law. The applicants may, if they have suffered damage as a result of the implementation of the contested measure, bring an action for damages pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty. In such proceedings it would be necessary to determine, in particular, whether the criteria laid down by the Court for establishing non-contractual liability in the case of unlawful economic measures apply even where a Community institution has adopted a purely administrative measure in the form of a decision.

48. Finally, on the question of admissibility, it is also necessary to consider the defendant's objection to the effect that the applicants no longer have an interest in seeking legal protection by way of an action for annulment because the contested decision has in the meantime been implemented.

49. That view is contrary to the findings made by the Court in its judgment of 24 June 1986 in Case 53/85,⁸ in which it rejected that very argument. The annulment of a decision which has already been implemented is in itself capable of having legal consequences, in particular by preventing a repetition by the Commission of the practice complained of.

50. Accordingly, the implementation of the measure for the promotion of sales of butter is not itself a ground for declaring the application inadmissible.

Substance

51. As I intend to suggest that the Court dismiss the application as inadmissible, it would be appropriate to consider in the alternative the applicants' individual submissions on the substance of the case. However, I do not intend to do so in view of the special nature of the case as a whole, to which, as I said earlier, further proceedings for a preliminary ruling must be added. In my Opinion on the references for a preliminary ruling submitted in Joined Cases 133 to 136 and 249/85, I shall, however, consider all the parties' submissions, including those relating to the substance of the application in Case 97/85.

C — Conclusion

52. In conclusion, I suggest that the Court:

1. Dismiss the application as inadmissible;
2. Order the applicants to pay the costs, including those of the application for the adoption of interim measures.

⁸ — Judgment of 24 January 1986 in Case 53/85 *Akzo Chemie BV and Others v Commission* [1986] ECR 1965.