ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
15 September 1998 *

In Case T-109/97,

Molkerei Großbraunshain GmbH and **Bene Nahrungsmittel GmbH,** companies incorporated under German law, established in Altenburg, Germany, represented by Michael Loschelder and Thilo Klingbeil, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicants,

supported by

Freistaat Thüringen, represented by Georg M. Berrisch, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the Chambers of Guy Harles, 8-10 Rue Mathias Hardt,

intervener,

v

Commission of the European Communities, represented by José-Luis Iglesias Buhigues, Legal Adviser, and Ulrich Wölker, of its Legal Service, acting as Agents, assisted by Bertrand Wägenbaur, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

supported by

Molkerei und Weichkäserei K.-H. Zimmermann GmbH, a company incorporated under German law, established in Falkenhain, Germany, represented by Philipp Lotze and Stefan Lehr, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of René Foltz, 6 Rue Heinrich Heine,

intervener,

APPLICATION for annulment of Commission Regulation (EC) No 123/97 of 23 January 1997 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation (EEC) No 2081/92 (OJ 1997 L 22, p. 19), in so far as it registers the protected designation of origin 'Altenburger Ziegenkäse' for a too extensive geographical area,

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

composed of: A. Kalogeropoulos, President, C. W. Bellamy and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background and facts of the case

1 Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1) lays down, according to Article 1, rules on the Community protection of designations of origin and geographical indications for certain agricultural products and foodstuffs.

2 Article 2(2)(a) of Regulation No 2081/92 defines a designation of origin as the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff originating in that region, specific place or country, the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area.

3 Registration as a protected designation of origin of the name of an agricultural product or foodstuff, which must satisfy the conditions laid down by Regulation No 2081/92 and in particular comply with the specification defined in Article 4, confers generally on producers established in the defined geographical area the exclusive right to use that name (Articles 1 to 4 and 13 of the regulation).

4 Two registration procedures are provided for that purpose by Regulation No 2081/92. The 'ordinary' procedure under Articles 5 to 7 allows any group, defined as an association of producers and/or processors working with the same agricultural product or foodstuff, or, subject to certain conditions, a natural or legal person to apply for registration of a protected designation of origin (PDO) or a protected geographical indication (PGI) for agricultural products or foodstuffs which it produces or obtains, and which originate in the defined geographical area, to the Member State in which that geographical area is located. The Member State checks that the application is justified and forwards it to the Commission, which, if it considers that the name qualifies for protection, publishes specific information in the *Official Journal of the European Communities*, thus giving the Member States and any legitimately concerned natural or legal person an opportunity to object to the proposed regulation (Article 7(3)).

5 A 'simplified' or 'shortened' procedure is further provided for in Article 17, which reads as follows:

'1. Within six months of the entry into force of the Regulation, Member States shall inform the Commission which of their legally protected names or, in those Member States where there is no protection system, which of their names established by usage they wish to register pursuant to this Regulation.

2. In accordance with the procedure laid down in Article 15, the Commission shall register the names referred to in paragraph 1 which comply with Articles 2 and 4. Article 7 shall not apply. However, generic names shall not be added.

3. Member States may maintain national protection of the names communicated in accordance with paragraph 1 until such time as a decision on registration has been taken.'

6 In accordance with Article 18, Regulation No 2081/92 entered into force 12 months after the date of its publication in the Official Journal, which was 24 July 1992.

7 On the basis of Article 17 of Regulation No 2081/92, the Commission adopted Regulation (EC) No 123/97 of 23 January 1997 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation (EC) No 2081/92 (OJ 1997 L 22, p. 19). The annex to that regulation includes in point A, under the heading 'Cheeses', 'Germany', the protected designation of origin (PDO) 'Altenburger Ziegenkäse' (goat cheese made in the Altenburg region, which must contain a minimum percentage of goats' milk).

8 Registration by the Commission of the name 'Altenburger Ziegenkäse' was preceded by several legislative and administrative measures in Germany:

— On 20 December 1993 the German authorities adopted regulations amending *inter alia* the regulations on cheese. The annex to the regulations on cheese, as so amended, *inter alia* registered the name 'Altenburger Ziegenkäse' as a designation of origin. The geographical area of manufacture corresponding to that designation comprised the districts of Altenburg, Schmölln, Gera, Zeitz, Geithain, Grimma, Wurzen and Borna and the city of Gera. The names of these districts were subsequently changed — for example, Schmölln and Altenburg became Altenburger Land — but the geographical area covered by the 'Altenburger Ziegenkäse' designation remained unchanged.

— By letter of 26 January 1994 the Federal Republic of Germany informed the Commission that, on the basis of the German regulations on cheese, it sought registration pursuant to Article 17 of Regulation No 2081/92 of the name 'Altenburger Ziegenkäse' as a Community protected designation of origin.

9 Before the registration by Regulation No 123/97 of the name 'Altenburger Ziegenkäse', the applicants — the first applicant, Molkerei Großbraunshain GmbH is a cheesemaker established in the district of Altenburger Land, Thuringia, which has since 1898 manufactured a cheese sold under the description 'Altenburger Ziegenkäse', while the second applicant, Bene Nahrungsmittel GmbH, holds all the shares in the first applicant — took various steps at national and Community level:

— On 4 April 1995 they complained to the relevant German ministry that the German regulations on cheese had defined the area of manufacture of 'Altenburger Ziegenkäse' too widely, by including in particular the district of Wurzen in Saxony, the place of establishment of the cheesemaker Zimmermann GmbH, which has since 1936 likewise manufactured a cheese sold under the name 'Altenburger Ziegenkäse'. The applicants requested that the area of manufacture should be limited to the district of Altenburger Land, as the product 'Altenburger Ziegenkäse' could come only from the district which had given it its name.

— The ministry rejected that request by letter of 13 July 1995 and explained the reasons for the definition of the contested geographical area.

— On 9 August 1995 the applicants complained to the Commission, asking for an action for failure to fulfil obligations to be brought against Germany under Article 169 of the EC Treaty. They argued that the German regulations on cheese infringed Regulation No 2081/92 by not limiting the area of manufacture of 'Altenburger Ziegenkäse' to the district of Altenburger Land but including other districts such as Wurzen.

— The Commission's Directorate General for Agriculture (DG VI) replied by letter of 18 March 1996 that it would recommend that the Commission take no action on the complaint, but would ask the Federal Republic of Germany for further information on the geographical area of manufacture in question. By letters of 31 July, 12 November and 28 November 1996, the Federal Republic of Germany gave the Commission further information on the point.

Procedure and forms of order sought by the parties

10 By application lodged at the Registry of the Court of First Instance on 11 April 1997, the applicants brought the present action. They essentially seek annulment of Commission Regulation No 123/97. They submit that, contrary to Article 2(2)(a) and Article 4(2)(c) and (d) of Regulation No 2081/92, under which the geographical area covered by a designation must, in their view, be limited to the territory whose name corresponds to that designation, the geographical area covered by the designation 'Altenburger Ziegenkäse' extends beyond the boundaries of the district of Altenburger Land (Altenburg and Schmölln) in Thuringia. By including districts in Saxony and Saxony-Anhalt, such as the district of Wurzen in particular, the definition of the geographical area at issue enables undertakings not established in the district of Altenburger Land to use that designation for their products, thus causing the applicants damage which threatens their existence. By so doing the Commission, first, infringed the above provisions of Regulation No 2081/92 and the principle of non-discrimination. Second, by simply taking over the information supplied by Germany, the Commission manifestly failed to exercise the discretion conferred on it by Article 15 of Regulation No 2081/92, thus committing a misuse of powers. Finally, the choice of the shortened procedure under Article 17 constituted a failure to respect the applicants' right to object to the registration, and consequently a failure to respect their rights of defence under Article 7 of Regulation No 2081/92.

11 By separate document lodged at the Registry of the Court of First Instance on 14 July 1997, the Commission raised a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure.

12 By documents lodged on 29 September and 2 October 1997 respectively, Molkerei und Weichkäserei K.-H. Zimmermann GmbH (hereinafter 'Zimmermann') and Freistaat Thüringen (*Land* of Thuringia) sought leave to intervene, the former in support of the form of order sought by the defendant and the latter in support of the form of order sought by the applicants.

13 By order of the President of the Second Chamber of the Court of First Instance of 24 March 1998, Zimmermann and the *Land* of Thuringia were granted leave to intervene, their observations being restricted exclusively to the question of the admissibility of the application.

14 The Commission claims that the Court should:

— dismiss the application as inadmissible;

— order the applicants to pay the costs.

15 The applicants contend that the Court should:

— dismiss the plea of inadmissibility;

— in the alternative, join the plea to the substance.

16 Zimmermann claims that the Court should:

— dismiss the application as inadmissible, without considering the substance;

— order the applicants to pay the costs, including those of the intervener in support of the form of order sought by the defendant.

17 The *Land* of Thuringia contends that the Court should:

— primarily, declare the application admissible;

— in the alternative, join the plea of admissibility to the substance, since there are certain links between the question of admissibility and the substance;

— order the Commission to pay the costs.

Pleas in law and arguments of the parties

18 The Commission puts forward five pleas in law in support of its claim of inadmissibility. It submits that the application is inadmissible in that, first, registration of the designation 'Altenburger Ziegenkäse', which took place before the entry into force of Regulation No 123/97, does not affect the applicants' rights, and consequently does not adversely affect them. Second, that regulation is not of individual concern to them. Furthermore, they have no right to institute proceedings deriving, third, from their having been heard before the contested regulation was adopted or arising, fourth, from their procedural rights having been reduced by reason of the registration of the designation at issue under Article 17 of Regulation No 2081/92. Fifth and finally, they have no interest in bringing proceedings.

The plea that Regulation No 123/97 does not affect the applicants' rights

19 The Commission and Zimmermann contend that Regulation No 123/97 does not affect the applicants' rights but, on the contrary, confers legal benefits on them. Registration of the name 'Altenburger Ziegenkäse' as a protected designation of origin replaces national protection, previously ensured by the German regulations on cheese, by Community protection. The fact that Regulation No 123/97 does not give the applicants an exclusive right to the name 'Altenburger Ziegenkäse', which would enable them to prevent any competitor, for example Zimmermann, from using it, does not affect their rights either. Any designation of origin is by its nature a 'collective' designation, that is, a designation which may be made use of by all producers established within the defined geographical area for marketing products in accordance with the prescribed conditions of manufacture.

20 The applicants reply that they do not seek to be given exclusive use of the designation 'Altenburger Ziegenkäse', nor for other manufacturers of that cheese established in a correctly defined area to be prohibited from using it. They merely wish for the geographical area covered by that designation to be reduced, corresponding to the name of the product, to the district of Altenburger Land.

21 According to the applicants, the argument that the contested regulation amounts to an extension to Community level of the national protection ensured by the German regulations on cheese is incorrect. There is no hierarchical relationship between Community protection under Regulations No 2081/92 and No 123/97 and protection ensured by German national law. Whether registrations may be carried out under Regulation No 2081/92 depends exclusively on the formal and substantive requirements of that regulation.

22 They contend that recognition at Community level of the designation at issue brings no improvement in their legal situation. On the contrary, whereas they were able in the past to defend themselves under the laws applicable in other Member States, in other words, outside the scope of the German regulations on cheese, against the use of wrong names, they have now been deprived of that possibility as a result of the incorrect definition of the geographical area by Regulation No 123/97.

The plea that the applicants are not individually concerned by Regulation No 123/97

23 The Commission and Zimmermann note that in the contested regulation the applicants are neither mentioned by name nor envisaged generally as undertakings producing specific products. Instead, the regulation lists a number of products intended for human consumption, one of which is 'Altenburger Ziegenkäse', and thereby confers on all undertakings manufacturing that cheese in accordance with the prescribed conditions of production the right to market it under the protected designation of origin 'Altenburger Ziegenkäse'.

24 They consider that Regulation No 123/97 also does not affect the applicants by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (within the meaning of Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107). First, the fact that the applicants are, according to their own statements, the only manufacturers of 'Altenburger Ziegenkäse' in the district of Altenburg does not confer on them any attribute peculiar to them, but merely means that at present they have no competitors in that district, which is a factual circumstance not dependent on them which may change at any moment. Second, the legislative nature of a measure is not called into question by the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom it applies, as long as it is established that it applies by virtue of an objective legal or factual situation defined by it in relation to its purpose (order of 23 November 1995 in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 30). In the Commis-

sion's view, that is the case here, since Regulation No 123/97 applies to the applicants because they manufacture 'Altenburger Ziegenkäse'. Consequently, the applicants are not distinguished individually by the contested regulation in the same way as the addressee of a decision.

25 The Commission and Zimmermann further submit that the judgment in Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 20, cannot be applied to the present case and does not give the applicants any right to bring proceedings. In *Codorniu* the Court of Justice held that a provision of Community law which prevents a producer from using his registered trade mark at national level differentiates it from all other traders. The present case, by contrast, does not concern a registered trade mark which gives its holder certain exclusive rights, but a protected designation of origin which is not reserved to a particular producer or registered in his favour. The Commission points out that a protected designation of origin benefits an indeterminate number of traders, in so far as they satisfy the conditions required for its use, which are the same for all producers.

26 They submit, finally, that the judgment in Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207, paragraph 19, does not cover the present case either. In *Piraiki-Patraiki* the Community safeguard measure at issue made it impossible, in whole or in part, to perform the sales contracts concluded by the applicants, whereas Regulation No 123/97, at issue in the present case, does not interfere directly or immediately with any sales contracts which may exist.

27 The applicants and the *Land* of Thuringia submit that in its analysis of *Codorniu*, cited in paragraph 25 above, the Commission misinterprets the extent of the rights which follow from a correct definition of the geographical area pursuant to Regulation No 2081/92 in conjunction with German national law. Registration of an individual right, as in the case of a trade mark, is not required here, since the protection of a designation takes effect for an undertaking established in the area of the same name against all undertakings established outside that area. The protected undertaking is entitled under national law to demand the immediate termination of

wrongful use of the designation. According to the applicants and the *Land* of Thuringia, the protection made available by a protected designation of origin should not be assessed differently from that of a registered trade mark. Both cases concern individual protected rights within the field of industrial and commercial property. The protection given by the designation would be incomplete, or even ineffective, if the undertakings concerned could not apply for judicial review of the legal form given to that protection by legislative measures of the Community institutions.

28 The applicants and the *Land* of Thuringia stress that in any event manufacture of 'Altenburger Ziegenkäse' is limited — as the Commission too was aware before it adopted the contested regulation — to a defined area and there are only two manufacturers, industrial production in the district of the same name being undertaken only by the applicant Molkerei Großbraunshain. In contrast with extensive designations such as feta cheese and Spanish wine from the Rioja region, the area at issue in the present case is small. The number of manufacturers established inside and outside the district in question is also limited, known, and unchanged for an indefinite period. That 'Altenburger Ziegenkäse' might be made in future by new producers in the district of Altenburger Land is so unlikely, in view of existing conditions of manufacture, that it is a purely theoretical possibility, and may thus be excluded.

29 They conclude that the contested regulation can only be regarded as an individual decision of the Commission whose consequences are such that it directly and individually affects the applicants' interests.

The plea that no right to bring proceedings results from a hearing allegedly given to the applicants by the Commission

30 While the applicants contend that they have a right to bring proceedings because before the adoption of Regulation No 123/97 they raised objections and were heard by the Commission, the latter and Zimmermann submit that the case-law referred to by the applicants cannot be applied to the present case. That case-law may be summarised to the effect that, where Community law accords complainant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings must be able to institute proceedings in order to protect their legitimate interests (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 23 and 24, referring to Case 264/82 *Timex* v *Council and Commission*, also cited by the applicants). The Court of Justice considers that individuals who are, for example, entitled to request the Commission to find a breach of Article 85 or 86 of the Treaty, or whose complaint has led to the initiation of anti-dumping proceedings, who have been heard in that connection and whose observations have largely determined the course of the procedure, thus have a right to bring proceedings.

31 They contend that in the present case the applicants do not enjoy such procedural rights. The contested regulation was adopted on the basis of Article 17 of Regulation No 2081/92, which in turn was based on Article 43 of the Treaty. The procedure for adopting legal measures of a general nature, for which the legal basis is Article 43 of the Treaty, makes no provision for intervention by individuals, unlike that provided for by Article 93 of the Treaty (order in *Asocarne* v *Council*, cited in paragraph 24 above, paragraph 39). Nor did the applicants take part in the adoption of Regulation No 123/97, as the hearing of third parties is expressly excluded by the second sentence of Article 17(2) of Regulation No 2081/92, which states that Article 7 is not to apply.

32 In the Commission's submission, the fact that they addressed a complaint to it and were 'heard' in that connection does not give the applicants a right to bring

proceedings either. Their complaint was directed at having the Commission bring an action against the Federal Republic of Germany for failure to fulfil obligations, under Article 169 of the Treaty; that complaint thus was not a condition laid down by Regulation No 2081/92 for registration of the name 'Altenburger Ziegenkäse'. Even if the applicants did 'take part' in the adoption of the contested regulation by reason of their complaint, it would be contrary to the wording and spirit of Article 173 of the Treaty to allow every individual who has taken part in the preparation of a measure of a legislative character subsequently to bring proceedings against that measure (order in *Asocarne* v *Council*, cited in paragraph 24 above, paragraph 40).

33 Finally, according to the Commission, the applicants are wrong in submitting that they have a right to bring proceedings because, after Regulation No 123/97 was adopted, 'no further action' was taken on the complaint which they had lodged with the Commission. First, it is scarcely conceivable that a decision to take no further action on a complaint aimed at the bringing of an action under Article 169 of the Treaty could give the complainant the right to bring proceedings under the fourth paragraph of Article 173 of the Treaty. Second, the adoption of the contested regulation did not bring about the decision to take no further action on the complaint.

34 The applicants contend that the Commission's argument that they were not heard before the contested regulation was adopted is purely formal and does not touch the substance of the matter. In their opinion, it is incompatible with the principles of the rule of law which apply to administrative procedures if the Commission receives observations, as in the present case, from the parties involved in the case and gives its opinion on the substance, and the persons concerned are no longer able to seek judicial review of the Commission's conduct. In this connection, the *Land* of Thuringia submits that the applicants' position is comparable to that of Sinochem Heilongjiang, which was the only Chinese undertaking to have taken part in the investigation leading to the adoption of a regulation imposing anti-dumping duties, that constituting a factor capable of distinguishing it individually, from the point of view of that regulation, from all other traders (Case T-161/94

Sinochem Heilongjiang v *Council* [1996] ECR II-695, paragraph 48). The *Land* of Thuringia also draws a parallel between the present case and Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501.

35 The applicants and the *Land* of Thuringia criticise the Commission for wrongly treating the letter of 9 August 1995 (see paragraph 9 above) as a complaint requesting it to initiate the procedure under Article 169 of the Treaty. It would not have been difficult for the Commission, using a reasonable interpretation, to realise that what the applicants wanted was not to have to suffer the consequences of a wrong definition of the area covered by the designation at issue, as it already appeared in the German regulations on cheese and as the Federal Republic of Germany proposed that it be registered pursuant to Article 17 of Regulation No 2081/92. The Commission could not seriously have considered that the applicants, first, envisaged that an action should be brought against Germany under Article 169 of the Treaty on the ground that the German regulations on cheese were incompatible with Community law and, second, regarded as just and reasonable a regulation — extending to the territory of the Community — registering the designation under Regulation No 2081/92. The Commission should thus at least have considered whether the applicants intended their letter of 9 August 1995 as a request made in the context of the procedure, then already pending, applicable under that regulation. Consequently, the Commission should have asked for clarification.

36 According to the applicants and the *Land* of Thuringia, the Commission is wrong in disputing that the adoption of the contested regulation led to the decision to take no further action on the complaint before it. While DG VI did indeed propose that the complaint procedure be closed, the Commission has not yet taken a decision on the complaint; at any rate, no corresponding decision has been addressed to the applicants. The Commission could decide the question, if the contested regulation were maintained, only by terminating the procedure. It would be absurd for the Commission to start an action under Article 169 against the Federal Republic of Germany on the ground that the German regulations on cheese were incompatible with Community law while at the same time introducing similar rules at Community level.

The plea that the applicants have no right to bring proceedings deriving from an alleged reduction of their procedural rights

37 The Commission and Zimmermann submit that the applicants' argument that, by choosing the simplified procedure under Article 17 of Regulation No 2081/92, the Commission reduced the procedural rights they would have had under the ordinary procedure provided for by Article 7 of that regulation is unfounded, as the case-law they cite on the right of individuals to take part in administrative proceedings is not relevant. Registration of the designation 'Altenburger Ziegenkäse' following the adoption of the contested regulation was a legislative measure, not a decision taken in the context of administrative proceedings.

38 On this point, the Commission and Zimmermann state that the ordinary procedure defined in Article 5 et seq. of Regulation No 2081/92 and the shortened procedure under Article 17 of that regulation are wholly distinct and subject to fundamentally different conditions. The question which of those two types of procedure applies in a particular case is not within the Commission's discretion. Where a Member State, in this instance the Federal Republic of Germany, makes use of its right under Article 17(1) of Regulation No 2081/92 to communicate designations to the Commission within six months of the entry into force of that regulation, the Commission is obliged, under Article 17(2), to ascertain whether those designations comply with the conditions of Articles 2 and 4 and then, if they do, to register them, following the procedure under Article 15. The second sentence of Article 17(2) expressly states that Article 7 is not to apply. Consequently, in the shortened procedure, other Member States and individuals do not have an opportunity to state their views.

39 The Commission and Zimmermann, finally, dispute the applicants' argument that if their action for annulment is inadmissible, they are deprived of all possibility of judicial review. The applicants would remain free to apply to the national courts and to seek a ruling from the Court of Justice under Article 177 of the Treaty. In first place, the applicants — who do not claim that an application to the national courts was ruled out — are of the opinion that the German regulations on cheese are also contrary to German law. Second, about three years passed between the communication by the German authorities of the designation at issue and the

adoption of the contested regulation, which left the applicants sufficient time to apply to the national courts for the purpose of a reference to the Court of Justice for a preliminary ruling. Moreover, Article 9(1) of Regulation No 2081/92 authorises Member States to request the Commission to redefine the geographical area of a registered designation of origin. The applicants thus had the possibility of having the geographical definition of the designation 'Altenburger Ziegenkäse' altered. That they were unable to convince the competent German authorities that their request was well founded is certainly not the fault of the Commission.

40 The applicants submit that the Commission's reasoning is a vicious circle. It is not a question of abstract reflections on the relationship between the ordinary procedure under Article 5 et seq. and the simplified procedure under Article 17 of Regulation No 2081/92, nor of the fact that the simplified procedure in fact does not provide for rights for third parties. Rather, it is the Commission's choice of the simplified procedure which is itself wrong, since the legal conditions for that procedure under Article 17(1) were not satisfied in the case of the registration of the designation 'Altenburger Ziegenkäse'. According to the applicants and the *Land* of Thuringia, if the Commission had correctly examined the communication from the Federal Republic of Germany concerning that registration, it would have found that the conditions for such a registration were not met. The Commission should thus have rejected the communication and, because the time-limit provided for by Article 17(1) had expired, should have requested Germany to make a fresh application under Article 5 et seq. of Regulation No 2081/92. Since the Commission simply took over the communication made by the Federal Republic of Germany, it chose the wrong procedure and thereby cut down the applicants' procedural rights.

41 In this connection, the applicants and the *Land* of Thuringia add that the Federal Republic of Germany created the conditions for registration using the simplified procedure only at the last moment, by amending the regulations on cheese shortly

before the expiry of the time-limit by registering 'Altenburger Ziegenkäse' with a geographical definition which it knew was wrong.

42 As to the Commission's assertion that legislative measures are not accompanied by procedural rights capable of being cut down, the applicants and the *Land* of Thuringia point out that Article 5 et seq. of Regulation No 2081/92 undeniably provides for such procedural rights for third parties. It would be contrary to all principles of the rule of law if the Commission could, in order to evade such rights, use legislative procedures which make no provision for them, thus shielding the measures so adopted from all judicial review. The basis of the applicants' right to bring proceedings on this point rests on the fact that by unlawfully choosing the shortened procedure the Commission deprived them of the rights which are guaranteed in the procedure provided for by Article 5 et seq. of the regulation. In any event, if the Court were not willing at once to declare the application admissible on the above grounds, the question whether the conditions in Article 17 of Regulation No 2081/92 were satisfied could be decided only in connection with the substance, so that a decision under Article 114 of the Rules of Procedure does not appear possible here.

43 The applicants deny, finally, that they were in a position to obtain protection of their rights by applying to the national courts and urging them to refer a question for a preliminary ruling under Article 177 of the Treaty. That would not have been possible because the contested regulation did not yet exist and a national court would not therefore have been able to make such a reference. Nor could they have attempted to encourage the Federal Republic of Germany to amend the geographical definition of the production area at issue. They had no right which could force Germany to act accordingly.

The plea of lack of interest in bringing proceedings

44 The Commission submits, finally, that the applicants have no interest in bringing proceedings for annulment of the contested regulation. Even if the area of manufacture were defined in the way sought by the applicants, that is, limited to the district of Altenburger Land, they could not prevent a competitor or competitors from setting up there and also making 'Altenburger Ziegenkäse' in accordance with the prescribed conditions and marketing it under that name. In other words, even if the applicants won their case, they would not enjoy the exclusive legal right they seek for the contested designation of origin.

45 The applicants state that that argument is a misunderstanding of the real extent of their request. They do not claim the designation 'Altenburger Ziegenkäse' for themselves. Their concern is merely, by virtue of the requirements of Regulation No 2081/92 and in the interest of consumers, to prevent designations of origin which are recognised by consumers and are in general use from being defined differently by the legislature without examining the material circumstances. Since, because of the special characteristics of the district of Altenburger Land and the product of the same name, the applicants are themselves concerned, they have an obvious interest in bringing proceedings in the present case.

Findings of the Court

46 Under Article 114 of the Rules of Procedure, the Court, on application by a party, will rule on admissibility without considering the substance of the case. Article 114(3) provides that the remainder of the proceedings is to be oral, unless the Court decides otherwise. In the present case, the Court considers that it has sufficient information from the documents before it to rule on the application without opening the oral procedure.

47 The fourth paragraph of Article 173 of the Treaty gives individuals the right to challenge any decision which, although in the form of a regulation, is of direct and individual concern to them. It is settled case-law that the objective of that provision is in particular to prevent the Community institutions from being able, merely by choosing the form of a regulation, to exclude an application by an individual against a decision which concerns him directly and individually; the provision therefore makes it clear that the choice of form cannot change the nature of the measure (see Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 7, and the order of 28 October 1993 in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 19).

48 It is also settled case-law that the test for distinguishing between a regulation and a decision is whether or not the measure in question has general application (see Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, paragraph 8).

49 In the present case, the Court must therefore analyse the nature of Regulation No 123/97 and in particular its intended or actual legal effect.

50 The aim of the regulation is to confer *inter alia* on the product 'Altenburger Ziegenkäse' the protection given to designations of origin under Regulation No 2081/92, a designation of origin being defined by Article 2(2)(a) of that regulation as *inter alia* the name of a region used to describe a product originating in that region, the quality or characteristics of which are essentially or exclusively due to the geographical environment with its inherent natural and human factors, and the production of which takes place in the defined geographical area. As the Commission rightly observes, the contested regulation, far from being addressed to specific traders such as the applicants, gives all undertakings whose products meet the prescribed geographical and quality requirements the right to market them under the protected designation of origin 'Altenburger Ziegenkäse'.

51 That provision is thus clearly a measure of general application within the meaning of the second paragraph of Article 189 of the Treaty. It applies to objectively determined situations and produces its legal effects with respect to categories of persons envisaged generally and in the abstract (see, to that effect, the order of 19 June 1995 in Case T-107/94 *Kik* v *Council and Commission* [1995] ECR II-1717, paragraph 35, and the case-law cited there), namely all undertakings which manufacture a product with objectively defined characteristics.

52 In so far as the applicants submit in this connection that 'Altenburger Ziegenkäse' is manufactured by only two producers, namely Molkerei Großbraunshain and Zimmermann, that the number of manufacturers will not change in the foreseeable future, and that the possibility of 'Altenburger Ziegenkäse' being made by other producers is so unlikely that it may be dismissed, it must be noted that it is settled case-law that the general application and hence the legislative character of a measure are not called into question by the fact that it is possible to determine with a greater or lesser degree of precision the number or even the identity of the persons to whom it applies at a given moment as long as it is established that it applies by virtue of an objective legal or factual situation defined by the measure in relation to its objective (Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409, at p. 415, Case 64/69 *Compagnie Française Commerciale et Financière* v *Commission* [1970] ECR 221, paragraph 11, Case 101/76 *Koninklijke Scholten Honig* v *Commission* [1977] ECR 797, paragraph 23, and the order of 29 June 1995 in Case T-183/94 *Cantina Cooperativa fra Produttori Vitivinicoli di Torre di Mosto and Others* v *Commission* [1995] ECR II-1941, paragraph 48).

53 In the present case, regardless of the number of undertakings manufacturing the product at issue at the time of its adoption, the contested regulation confers the protection afforded by the 'Altenburger Ziegenkäse' designation of origin with respect to a geographical area defined objectively in relation to one of the objectives of Regulation No 2081/92, namely the promotion of certain rural areas (second and third recitals in the preamble).

54 Moreover, the applicants' argument concerning the unchanging number of manufacturers is no more than a mere supposition. There is nothing to prevent the number of undertakings affected by the regulation from being subject to later variations. The fact that when the regulation was adopted it concerned a limited number of undertakings is thus not capable of distinguishing those undertakings individually, since they are in a situation comparable with that of any other undertaking which might in future find an economic interest in entering the market in question by meeting the specific conditions for manufacture of the product at issue (see, to that effect, the order of 11 January 1995 in Case T-116/94 *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e Procuratori* v *Council* [1995] ECR II-1, paragraph 28).

55 Furthermore, the economic benefits of the protection conferred by the contested regulation, which may improve the position on the market in cheese, are enjoyed not only by the manufacturers of 'Altenburger Ziegenkäse' but also by the producers of the cows' and goats' milk which is processed into 'Altenburger Ziegenkäse'. These are the 'natural and human factors' within the meaning of Article 2(2)(a) of Regulation No 2081/92 to which the quality or characteristics of the product concerned are essentially or exclusively due.

56 Regulation No 123/97 is therefore, by its nature and application, a legislative measure and not a decision within the meaning of the fourth paragraph of Article 189 of the Treaty.

57 However, it has been held that, in certain circumstances, even a legislative measure which applies to the traders concerned in general may concern some of them individually (*Codorniu* v *Council*, cited in paragraph 25 above, paragraph 19), provided that they are affected by the measure in question by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (*Plaumann* v *Commission*, cited in paragraph 24 above, at p. 107, and *Codorniu* v *Council*, paragraph 20).

58 The question is therefore whether in the present case the applicants are affected by the contested regulation by reason of certain attributes which are peculiar to them or whether there are circumstances in which they are differentiated from all other persons from the point of view of that regulation.

59 As the applicants argue in this connection that they were heard by the Commission during the procedure which led up to the adoption of the contested regulation and complain that the Commission infringed their procedural rights, it must be borne in mind, first, that the registration of protected designations of origin is by its nature and application a legislative measure (see paragraph 51 above). Second, it must be remembered that Regulation No 2081/92 lays down two different legislative procedures for registrations, one of which involves the participation of all natural and legal persons concerned (Articles 5 to 7), whereas the other — introduced on a transitional basis — is limited to cooperation with the relevant Member State, any participation by persons who might be concerned being expressly excluded (Article 17, especially the second sentence of paragraph 2).

60 The applicants have not challenged the lawfulness of the latter legislative procedure on the ground that it infringes the lawful rights of participation which all traders concerned by the registration of a protected designation of origin should have. Moreover, a complaint directed at the absence of participation by the persons affected in that legislative procedure cannot be accepted in any event. Neither the procedure for drawing up legislative measures nor the legislative measures themselves, as measures of general application, require, by virtue of the general principles of Community law such as the right to a hearing, the participation of the persons affected, since their interests are deemed to be represented by the political authorities called upon to adopt those measures (order in Case T-122/96 *Federolio* v *Commission* [1997] ECR II-1559, paragraph 75).

61 In those circumstances, for the present action directed against Regulation No 123/97, which was adopted following a legislative procedure in which the traders

concerned have no procedural rights, to be admissible, it is not sufficient for the applicants merely to submit that the conditions for the application of Article 17 of Regulation No 2081/92 were not met in the present case and to draw the conclusion that the Commission should therefore have used the other legislative procedure, laid down by Articles 5 to 7, which would have given them procedural rights and the consequent right to bring proceedings. That argument challenges the legal basis of the contested regulation and thus concerns the substance of the case.

62 The Court considers that the criticism of the legislature for choosing, from the two legislative procedures provided for, the one which deprives the persons concerned of procedural rights is irrelevant for the purpose of assessing the admissibility of an action brought against the legislative measure adopted at the end of the legislative procedure chosen, a measure which is in principle presumed to be lawful (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48), unless the legislature's choice is shown to constitute an abuse of procedure. It is settled case-law that there is abuse of procedure, which is merely one form of misuse of powers (Case T-192/94 *Maurissen* v *Court of Auditors* [1996] ECR-SC II-1229, paragraph 75), only if there is objective, relevant and consistent evidence that the contested measure followed an objective other than that pursued by the rules in question (Case 135/87 *Vlachou* v *Court of Auditors* [1988] ECR 2901, paragraph 27, and *Maurissen* v *Court of Auditors*, cited above, paragraph 75).

63 The applicants have not produced any evidence to show that the Commission, possibly by arrangement with the Federal Republic of Germany, chose the 'shortened' legislative procedure precisely in order to deal with the particular situation and evade the 'ordinary' procedure giving the applicants procedural rights (Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69), so that the contested regulation was adopted 'on the basis of a procedure which was vitiated in its entirety' (see, to that effect, Case 148/87 *Frydendahl Pedersen* v *Commission* [1988] ECR 4993, paragraphs 10 to 13).

64 On the contrary, in Germany, protection of the designation 'Altenburger Ziegenkäse' by the regulations on cheese likewise resulted from a legislative procedure, in which the competent federal ministry had to obtain, and did obtain, the approval of the Bundesrat (the second chamber of Parliament, in which the German *Länder* are represented). As may be seen from the case-file, the question of the geographical area of 'Altenburger Ziegenkäse' was expressly discussed in the Bundesrat before being decided at both national and Community level in the way challenged by the applicants.

65 That being so, the Commission cannot be criticised for abuse of procedure by not objecting, when adopting the contested regulation, to the definition of the geographical area at issue made by the German legislature. That definition concerns only a comparatively small area in the middle of Germany, so that it may reasonably be accepted that the German legislature was better placed than the Community legislature to define the geographical area, taking account of the particular features of production and marketing in the region.

66 Consequently, the fact that the Commission chose the legislative procedure under Article 17 instead of that under Articles 5 to 7 of Regulation No 2081/92 for the adoption of the contested regulation cannot distinguish the applicants individually for the purposes of the fourth paragraph of Article 173 of the Treaty.

67 Next, since Article 17 of Regulation No 2081/92 does not give traders such as the applicants any rights of a procedural nature, the mere fact that before adopting the contested regulation the Commission received comments from the applicants on the subject of the geographical area at issue and replied to those comments is also incapable of distinguishing them individually from all other traders.

68 The legislative procedure at issue, by its very nature, did not oblige the legislature to observe a right of the persons affected to be heard, although it did not rule out the possibility of the legislature obtaining their comments (order in *Federolio* v *Commission*, cited in paragraph 60 above, paragraph 78). In the absence of expressly guaranteed procedural rights, it would be contrary to the wording and spirit of Article 173 of the Treaty to allow any individual who has taken part in the preparation of a legislative measure subsequently to bring an action against that measure (order in *Asocarne* v *Council*, cited in paragraph 24 above, paragraph 40).

69 Moreover, the provisions at issue in the present case are fundamentally different from the very specific provisions in the anti-dumping field which confer on certain traders a specific role in the procedure leading up to the imposition of anti-dumping duties. The reference to *Sinochem Heilongjiang* v *Council* (cited in paragraph 34 above), a case concerning a Chinese exporting company which the Commission had on its own initiative officially included in its preparatory investigation, is therefore irrelevant. The same applies to the reference to Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraphs 14 and 15, in which an action in an anti-dumping case brought by a complainant was held admissible *inter alia* by reason of the rights given to complainants by the basic regulation and the active role played by that complainant in the preliminary anti-dumping investigation; in addition, the anti-dumping duty imposed was based on the individual situation of that complainant. Finally, *Extramet Industrie* v *Council* (cited in paragraph 34 above), in which an action brought in an anti-dumping case by an independent importer was held admissible, is characterised by the particular features of anti-dumping law and of that importer's economic and competitive position, so that it cannot be applied to the present case.

70 The Court of Justice admittedly held in *Codorniu* v *Council*, cited in paragraph 25 above and relied on by the applicants, that a provision of a legislative character may, in certain circumstances, be of individual concern to certain traders in so far as it adversely affects their specific rights (see the order in *Asocarne* v *Council*, cited in paragraph 24 above, paragraph 43, and Case T-482/93 *Weber* v *Commission* [1996] ECR II-609, paragraph 67). In the present case, however, it is sufficient

to observe that before the contested decision was adopted the applicants had not acquired, either at Community or at national level, a right to geographical protection limited specifically to the district of Altenburger Land, which right could be affected by that regulation; on the contrary, the regulation confirmed, at Community level, the extent of the territorial protection previously granted under national law.

71 On the last point, it is true that the definition of a too extensive geographical area may in theory cause a reduction in the real value of a designation of origin which was previously restricted to a smaller geographical area, and possibly affect the specific rights of the undertakings in the smaller geographical area which use that designation. In the present case, however, it was for the applicants to produce, at the admissibility stage, specific evidence that that might be the case with respect to them. Given that Zimmermann has manufactured and marketed the product in question under the name 'Altenburger Ziegenkäse' or the similar name 'Altenborger Zeege' since 1936, and that the applicants have not succeeded at national level in having that designation restricted to a smaller geographical area, namely the district of Altenburger Land, it is clear that the applicants have not produced any evidence to show that the contested provisions weakened their rights in the way described above. Consequently, the applicants can also not be regarded as being distinguished individually from the point of view of a possible infringement of their specific rights.

72 On this point, the present case differs from the case of *Bergpracht Milchwerk and Others* v *Commission* currently pending before this Court (registered as Case T-141/96), which concerns an action brought by German undertakings for the annulment of Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 148, p. 1), in so far as it reserves the protected designation of origin 'feta' to cheese manufactured in Greece. Unlike those German undertakings, the applicants have not been forced to cease using a designation which they have used for a long time.

73 The applicants cannot therefore be regarded as individually concerned in the *Codorniu* sense.

74 Nor may such individual concern be deduced from *Piraiki-Patraiki* v *Commission* (cited in paragraph 26 above, paragraph 31), in which the Court of Justice held that the applicants were individually concerned by the contested decision, as members of a limited class of traders particularly affected by it, in particular because contracts already entered into were to be performed during the period of application of the decision and performance had been prevented by the decision. In the present case, the applicants are not members of a limited class of traders particularly affected by the contested regulation, and they have not alleged that the performance of contracts concluded by them with suppliers or purchasers could be prevented by the entry into force of the contested regulation.

75 The applicants refer, finally, to Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 23 to 26, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 17 to 20, which they interpret as meaning that all persons concerned must have procedural rights, even in the context of a procedure which does not provide for any, where that procedure may lead to a decision of the Commission which has the effect of excluding the initiation of another procedure which is governed by provisions expressly giving those persons such rights. The Court considers, however, that that case-law does not apply to the present case.

76 While the Court of Justice indeed held in those two cases that the parties concerned, within the meaning of Article 93(2) of the Treaty, must be regarded as individually concerned by decisions not to initiate the procedure under that provision, that remedy was allowed them in their capacity as undertakings competing with actual beneficiaries of State aid, since the applications in both cases concerned the lawfulness of Commission decisions finding that the grant of specific aid was compatible with the common market. In the present case, by contrast, as the Court has already found in paragraphs 51 and 52 above, the contested regulation introduces protection, with respect to an objectively determined product, whose potential beneficiaries are defined only in a general and abstract manner. A competition

situation disrupted by authorisation of an individual aid paid to an undertaking's competitors, such as was behind the two judgments cited by the applicants, is thus not present in this case, since the number of undertakings concerned by the contested regulation is not, as a matter of law, confined to one of the applicants on the one hand and Zimmermann on the other (see, to that effect, Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraphs 48 and 49, with reference to a general aid scheme).

77 Accordingly, the applicants are not individually concerned by the contested regulation, and the action must therefore be held to be inadmissible, without there being any need to examine whether that regulation actually affects them adversely as a matter of law and whether they have an interest in bringing proceedings.

78 In so far as the applicants contend that it would be incompatible with the principles of the rule of law to refuse them judicial protection against the regulation in question, they have not, however, shown or even claimed that it is legally impossible for them to address themselves to a national court which could, if appropriate, make a reference to the Court of Justice for a preliminary ruling under Article 177 of the Treaty on the validity of Regulation No 123/97.

79 The action must therefore be dismissed.

Costs

80 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's

pleadings. Since the applicants have been unsuccessful and the Commission and Zimmermann have asked for costs, the applicants must be ordered to bear their own costs and jointly and severally the costs incurred by the Commission and Zimmermann. Under Article 87(4) of the Rules of Procedure, the *Land* of Thuringia is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **The action is dismissed as inadmissible;**

2. **The applicants are ordered to bear their own costs and jointly and severally the costs incurred by the Commission and by the intervener Molkerei und Weichkäserei K.-H. Zimmermann GmbH;**

3. **The Freistaat Thüringen shall bear its own costs.**

Luxembourg, 15 September 1998.

H. Jung — A. Kalogeropoulos

Registrar — President