

Christmas butter schemes on several occasions from 1977 onwards, while also adopting many other measures encouraging the disposal of butter at a reduced price. Notwithstanding that action, butter stocks increased considerably between 1983 and 1984. In

those circumstances, a prudent and discriminating trader ought to have taken account of the possibility that a further Christmas butter scheme would be introduced. Therefore, the Commission did not infringe the principle of the protection of legitimate expectation.

## REPORT FOR THE HEARING delivered in Case 265/85 \*

### I — Facts, legal framework and procedure

quantity of 9 100 tonnes marketed in the Netherlands).

#### A — Facts

1. The applicants, companies incorporated under Netherlands law, produce and market margarines and other edible fats of principally vegetable origin. They sell those products in the Netherlands, in other Member States and in non-member countries. They are claiming compensation for damage which they consider they suffered as a result of the Christmas butter scheme, decided on at the end of 1984 and set up by Commission Regulation No 2956/84 of 18 October 1984. That damage resulted from the fact that the subsidies granted by the Community for the sale of butter at a reduced price affect not merely the sale of fresh butter but also that of margarine. Furthermore, compared to earlier Christmas butter schemes, that set up in 1984 is marked by even greater reductions in prices and covers greater quantities of butter (1.6 ECU per kg for a

2. The Community market in milk products has been marked for several years by considerable overproduction. The only way of dealing with the structural excess of the supply (105 million tonnes for the 1983/84 milk year) over demand (82 million tonnes), other than measures designed to reduce production, is to store the milk in the form of butter or skimmed-milk powder and then to encourage consumption of those products or to promote their export. That imbalance gives rise to a constant and substantial increase in butter stocks, which amounted, at the end of 1984, to more than 1 million tonnes.

3. In order to dispose of those butter stocks, very costly for the Community budget, the Community has undertaken a number of schemes designed to offer butter at a reduced price to consumers or certain categories of them in order to stimulate consumption.

\* Language of the Case: Dutch.

4. It is in that context that the Christmas butter schemes, inaugurated in 1977 and repeated in 1978, 1979, 1982 and 1984, must be placed. The quantity of butter made available, and the price reduction, increased with each scheme. Their effectiveness has been the subject of much controversy and of a special report of the Court of Auditors of 13 April 1982 (Official Journal C 143, p. 1), the conclusions of which included criticism of the ever-increasing cost and limited efficiency of such schemes.

5. In view of that situation, the Commission's report on the agricultural situation in the Community for 1984 stated (page 51) that:

'Nevertheless, the Commission decided that exceptional measures were needed to reduce the level of stocks in the shorter term. Two specific measures have been decided on, the so-called "Christmas butter" scheme and particular disposal measures for very old butter to non-traditional outlets. Despite the substantial cost, the subsidized sale to European consumers of some 200 000 tonnes of butter at half the intervention price is being undertaken; 84% of this butter will be provided from intervention stocks. The cost-effectiveness of this measure should be higher than for similar operations carried out in the past, due to the 10% decrease in butter prices at the beginning of the 1984/85 marketing year. The disposal of very old butter held in intervention provides particular marketing difficulties. The Commission has reason to believe that opportunities exist to create a market for such very old butter (produced before April 1983), notably in the USSR, provided the price is competitive with other oils and fats.'

6. That was precisely the purpose of Regulation No 2956/84 of 18 October 1984, Title I of which establishes the 1984/85 Christmas butter scheme and Title II of which provides for a special scheme to promote the export of old butter. The

Christmas butter scheme covers 200 000 tonnes (of which 9 100 tonnes was to be sold in the Netherlands) with a reduction of 1.6 ECU per kilogram. Since the Management Committee did not express an opinion within the time-limit provided for, the Commission adopted the regulation, which entails expenditure of approximately 320 million ECU on the part of the Community for the Christmas butter scheme. The regulation has two aims: to increase consumption of butter and to avoid extended periods of storage.

7. The new scheme gave rise to discontent on the part of manufacturers and sellers of margarine, in the Netherlands as in the other Member States, who considered that they had suffered a significant loss as a result of the serious disturbance of the market in oils and fats by the sudden offering for sale of a considerable quantity of a competing, substitute product at prices considerably reduced by virtue of Community subsidies. It is for that reason that the applicant companies brought the present action for damages. They provisionally assessed their estimated losses at the time at which they filed their application and calculated those losses precisely in their reply.

#### B — *Legal framework*

1. Article 6 (3) and (4) of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176), as amended by Council Regulation No 559/76 of 15 March 1976 (Official Journal L 67, p. 9) provides as follows:

'3. Disposal of the butter bought in by the intervention agency shall take place in such a way as to avoid disturbing the balance of the market and to ensure equal access to the products for sale and equal treatment of purchasers.

Special measures may be taken for butter held in public storage which cannot be marketed on normal terms during a milk year. In so far as is justified by the nature of these measures, special measures shall also be taken to maintain the marketability of products receiving the aid provided for in paragraph 2' (that is to say, aid for private storage).

4. The intervention system shall be so applied that:

- (a) the competitive position of butter on the market is maintained;
- (b) the initial quality of butter is so far as possible preserved;
- (c) stocks are held on the most rational basis possible.'

Article 12 of the same regulation provides that:

- 1. When surpluses of butterfat build up, or are likely to occur, measures other than those laid down in Article 6 may be taken in order to facilitate their disposal.
- 2. The Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission, shall decide on the measures provided for in this Article and adopt general rules governing their application.
- 3. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 30.'

Article 30 of the regulation lays down the decision-making procedure. The Commission is to submit a draft of the

measures to be taken to the Management Committee for Milk and Milk Products. The Committee is to deliver its opinion on such measures within a time-limit to be set by its chairman. The Commission is to adopt measures which are to apply immediately if they are in accordance with the opinion of the Committee. If they are not in accordance with the opinion of the Committee they are to be communicated by the Commission to the Council, which may adopt a decision thereon within one month.

2. Furthermore, Article 1 of Regulation No 750/69 of the Council of 22 April 1969 amending Regulation (EEC) No 985/68 laying down general rules for intervention on the market in butter and cream (Official Journal, English Special Edition 1969 (I), p. 204) provides that the Commission is to examine the situation as regards milk products in public storage which cannot be marketed on normal terms during a milk year. Appropriate measures are to be adopted in accordance with the procedure laid down in Article 30 of Regulation No 804/68.

3. Commission Regulation No 2956/84 of 18 October 1984, Title I of which sets up the 1984/85 Christmas butter scheme, is essentially based on the abovementioned provisions of Regulations Nos 804 and 985/68. The preamble to that regulation states, in particular, that:

'... there are large quantities of butter on the market and all appropriate means should therefore be used to increase butter consumption;

... a reduction in prices to the final customer is an appropriate means of attaining this objective;

... moreover, there are in the Community stocks of butter which were built up following intervention under Article 6 (1) and (2) of Regulation (EEC) No 804/68;

... it will not be possible to dispose of these stocks on normal terms during the present milk year; ... prolonged storage should be avoided in view of the high cost involved; ... steps should therefore be taken to facilitate disposal of this butter;

... a balanced series of both internal and external measures for the disposal of butter stocks should be provided for as part of an overall policy for reducing stocks;

... the Christmas and New Year holidays may provide an opportunity for selling butter at a reduced price for direct consumption;

... the reduction ... should be sufficient to ensure that additional quantities are disposed of without disturbing normal trade in butter ...'.

### C — Procedure

By an application lodged at the Court Registry on 27 August 1985, the applicant companies brought an action under Article 178 and the second paragraph of Article 215 of the Treaty for an order directing the Commission, in the name of the European Economic Community, to compensate them for the damage they have suffered through the implementation of the 1984/85 Christmas butter scheme set up by Commission Regulation No 2956/84, in an amount to be precisely determined at a later date. In the alternative, they also claimed that the Court should order the Community to compensate them for the damage they have suffered, even if the contested measure is not regarded as unlawful, since in the absence of such compensation, that measure is 'unlawful on the ground that it contravenes the general principle of Community law concerning the protection of legitimate expectation'. Finally, they ask the Court to order the defendant to pay the costs.

In their reply, the applicants assessed their respective losses as follows:

Van den Bergh en Jurgens: HFL 3 834 000;

Van Dijk Food Products: HFL 819 525.

The Commission contends that the Court should dismiss the application and that the applicants should be ordered to pay the costs.

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

### II — Submissions and arguments of the parties

It should first be pointed out that the parties admit, to a certain extent, that butter and margarine compete with each other and are substitutes for each other. The Commission does not contest that fact, which was stated in the judgment of 23 February 1983 (Case 66/82 *Fromançais v Forma* [1983] ECR 395).

#### 1. *The compatibility of Christmas butter schemes with Community law*

The applicants rely on six submissions in support of their action.

*First submission:* Christmas butter schemes are contrary to the principle of market stabilization laid down in Article 39 (1) (c) of the Treaty and Article 6 (3) of Regulation No 804/68 of the Council of 27 June 1968.

(a) The *applicants* put forward an argument which may be summarized as follows: the necessary reconciliation of the aims laid down in Article 39 does not permit one of those aims to be pursued in isolation in such a way as to make the achievement of the others impossible, as the Court decided in

its judgment of 6 December 1984 (Case 59/83 *Biovilac v EEC* [1984] ECR 4057). However, the Commission has entirely neglected the objective of market stabilization and the market in the Netherlands has been disturbed by the Christmas butter scheme, contrary to the eighth recital in the preamble to Regulation No 2956/84. Article 39 merely makes it possible to accord temporary priority to one of its aims over the others but not to act in a way which is incompatible with one of the said aims. The Christmas butter schemes give rise to distortions in the market which disturb the balance of both the butter market and the margarine market, having regard to the fact that those products compete with each other and are substitutes for each other. Consequently, a massive short-term sale of butter at greatly reduced prices will upset the entire market for edible fats, having regard, on the one hand, to the fact that butter will be substituted for margarine, to the detriment of the latter, and, on the other hand, to the stability of consumption of edible fats.

(b) The *Commission* refutes that argument as follows:

The aim of market stabilization laid down in Article 39 of the Treaty is merely one of a number of conflicting aims which the Community institutions must reconcile, according to the established case-law of the Court, by exercising the discretion which they have been recognized as having both by the Court's case-law and by the provisions of Regulations Nos 804/68 and 750/69. Only if the measure is manifestly unsuitable for achieving the aim pursued will its legality be called into question, as the Court decided in the judgment of 6 December 1984 in Case 59/83 *Biovilac v*

*EEC* [1984] ECR 4057, and that is not so in this case. Furthermore, the applicants have not even shown that the alleged disturbance of the market actually exists.

*Second submission:* the contested Christmas butter scheme is *ultra vires* and a misuse of power to the extent that it is intended to stimulate the consumption of butter.

(a) The *applicant* companies claim that, in fact, this submission is allied to that alleging breach of the principle of non-discrimination and the submission alleging that the Commission did not have the powers to adopt such a measure. It may be formulated as follows. In Regulations Nos 804 and 985/68, the Council granted the Commission powers to adopt measures designed to ensure the disposal of butter stocks, not to increase consumption of butter. It is certainly true that an increase in the consumption of butter could lead to a disposal of stocks but the rule laid down in Article 6 (4) (a) of Regulation No 804/68, according to which the intervention system is to be so applied that the competitive position of butter on the market is maintained cannot be overlooked. Article 7a, introduced by Regulation No 750/69, cannot give the Commission wider powers. Hence, the measures which may be adopted in order to ensure the disposal of butter stocks must not affect competition. A massive subsidy for butter giving it an artificial competitive advantage compared to margarine does affect competition. The Commission therefore sought to achieve a purpose other than that for which the powers had been conferred on it. It deliberately disturbed a long-established competitive balance between butter and margarine in order to improve, and not

merely to maintain, the competitive position of butter, to the detriment of margarine, by authorizing and financing sales below cost price, that is to say, by granting a considerable subsidy for butter. Article 12 (1) of Regulation No 804/68 does not permit the Commission to take action contrary to the aim set out in Article 39 (1) (c) of the Treaty and laid down more precisely in Article 6 (3) of Regulation No 804/68, particularly since the Christmas butter scheme is designed to reduce existing stocks and not to prevent the constitution of new stocks. Furthermore, the aims which the 1984/85 Christmas butter scheme sought to achieve are not among those provided for in Article 12 of Regulation No 804/68.

The Commission therefore exceeded the limits placed on its discretion by the abovementioned provisions by failing to take account of the similarity of the markets for butter and margarine, by intervening in the competitive relationship between the two markets and by causing one group of traders to bear an unfair, discriminatory and disproportionate burden. The contested measure is therefore *ultra vires* and a misuse of powers.

(b) The *Commission* replies that it acted within the limits of the powers conferred on it by the Council (Articles 6 and 12 of Regulation No 804/68 and Article 7a of Regulation No 985/68). According to the Commission, the idea of maintaining 'the competitive position of butter on the market' does not signify that the measures at issue must be strictly neutral from the point of view of competition with those products and that any change in the competitive position must be carefully avoided.

However, it is obvious that a scheme such as the Christmas butter scheme, which is

intended both to increase consumption of butter and to reduce and rotate existing stocks, fits perfectly into the framework of the aims laid down in the abovementioned measures.

In any event, the damaging effects alleged by the applicants have not been proved and, even admitting that they exist, they are justified as compensation for the competitive advantage granted to producers of margarine by the market organizations. Furthermore, even if the contested measure modified the competitive relationship, it did so to a limited extent and in accordance with the aims laid down in Article 39 of the Treaty. The Commission has therefore neither acted in excess of its powers nor misused them.

*Third submission:* the Christmas butter scheme breaches the principle of non-discrimination laid down in Article 40 (3) of the Treaty.

(a) The *applicant* companies claim that the scheme gives rise to discrimination between producers of butter and producers of margarine. The latter are discriminated against in two respects:

First, the Community granted, unilaterally and for the exclusive benefit of producers holding butter in private storage, a subsidy for marketing that butter in the Netherlands during the period concerned.

Secondly, only butter from public storage, to which the measures referred to in Article 6 (1) of Regulation (EEC) No 804/68 are applied, may be sold on the Netherlands market at a greatly reduced price. Such aid distorts the conditions of marketing there

and gives rise to a direct and significant competitive disadvantage for producers such as the applicants.

It is wrong to claim that sales of margarine have increased to the detriment of sales of butter and that the structure of the common market organizations at issue give margarine an advantage over butter. There is also no objective justification for such discrimination. Furthermore, discrimination of that kind between comparable products has been condemned by the Court (judgment of 25 October 1978 in Joined Cases 103 and 145/77 *Royal Scholten-Honig v Intervention Board for Agricultural Produce* [1978] ECR 2037).

Moreover, the Commission failed to take into account all the relevant aspects of the market organizations in question when making its comparison.

(b) The *Commission* admits that to a certain extent butter and margarine are substitute products and that selling butter at a reduced price can affect sales of margarine. However, it considers that the present structure of the common market organizations at issue entails significant advantages for margarine producers. As regards the common organization of the market in oils and fats (Regulation No 136/66 of the Council of 22 September 1966, Official Journal, English Special Edition 1965-66, p. 221), raw materials are available at world market prices. On the other hand, the price of butter is considerably higher than the world market price, with the effect that for many years there has been a steady increase in sales of margarine to the detriment of butter (that claim is contested by the applicants). Thus, the subsidy granted to butter by schemes such as the Christmas butter scheme are in fact merely limited and

temporary compensation for a handicap caused by the machinery of the common market organizations at issue. The drop in sales which could result therefrom cannot be regarded as 'significant'. Furthermore, the position of margarine compared to butter has improved since 1969, bearing in mind the differences between those products. It is for that reason, in particular, that it became necessary to take steps to reduce production of milk products, whereas no similar steps had been taken in the oils and fats sector since the proposed tax on oils and fats has not yet been instituted. Thus, not merely is there no prohibited discrimination to the detriment of margarine producers, but the latter have no vested right to the continuance of an advantage which they enjoy and which itself contributes to the increase in butter stocks.

*Fourth submission:* the Christmas butter scheme breaches the principle of proportionality.

(a) The *applicant* companies claim essentially that sales of butter at a reduced price are neither necessary nor appropriate in order to achieve the desired aim, which is to bring about a significant and durable reduction in stocks. In that regard, the Commission constantly confuses the end and the means used to achieve it and shows considerable hesitation in the precise determination of objectives. Consequently, discrimination as between traders is even less justified and the burden imposed on traders even more disproportionate. The sale of butter at a reduced price takes place essentially to the detriment of sales of fresh butter. There are more effective and less restrictive alternatives capable of achieving the desired objective. Furthermore, the 1984/85 Christmas butter scheme did not bring about a real and durable reduction of the structural surplus of butter.

(b) The *Commission* claims that the 1984/85 Christmas butter scheme has shown a satisfactory degree of efficacy. Furthermore, it considers that it has no other way of disposing of butter. The Commission has done everything possible in the way of measures designed to reduce butter production and therefore, at a previous stage, milk production. It only remains therefore to seek to increase consumption of butter on the Community market, that is to say, to undertake schemes such as the Christmas butter schemes. It cannot therefore be denied that the measure adopted is an appropriate one to achieve the three desired objectives, that is to say, an increase in sales of butter (more than 60 000 tonnes over the whole Community), a reduction and a better rotation of stocks, and finally, the offering to the Community consumer of butter at a reduced price. Furthermore, the Commission emphasizes that the applicants' arguments are contradictory: either any increase in butter sales is to the detriment of margarine sales, but in that case, the efficacy of the Christmas butter schemes cannot be denied, which demolishes a large part of the applicants' argument, or, on the contrary, the increase in butter sales is exclusively to the detriment of fresh butter and, in that case, margarine manufacturers suffer no injury on account of such schemes.

*Fifth submission:* breach on the part of the Commission of the principle of free movement of goods.

(a) The *applicants* point out that Article 5 (1) of Regulation No 2956/84 of 18 October 1984, which set up the Christmas butter scheme, provides as follows:

'The butter shall be used exclusively for direct consumption in the Member State where the subsidy or the price reduction are granted, apart from small quantities of a non-commercial character bought by final private consumers.'

They claim that that provision makes intra-Community trade in Christmas butter totally impossible and therefore constitutes a quantitative restriction or a measure having equivalent effect within the meaning of Articles 30 and 34 of the Treaty. Furthermore, such a provision is contrary to Article 22 (1) of Regulation No 804/68. However, as the Court decided in its judgment of 29 February 1984 (Case 37/83 *Rewe Zentrale v Landwirtschaftskammer Rheinland* [1984] ECR 1229), the Community institutions themselves must also have due regard for freedom of trade within the Community. Neither the social nature of the Christmas butter scheme nor any other reason can justify such a breach of so fundamental a principle of Community law.

(b) The *Commission* contends, on the one hand, that the principle of free movement has not in fact been violated because small quantities of butter may be traded on a non-commercial basis and, on the other hand, it was necessary to partition the markets of the various Member States to a certain degree in order to ensure a balanced division within the Community, to respect the social nature of the measure and, finally, to avoid disturbances of the market in certain Member States. In any event, Article 5 of the contested regulations merely limited the damage which might be suffered by the applicants, who therefore cannot rely on such an argument.

*Sixth submission:* breach of the principle of the protection of legitimate expectation.

(a) The *applicants* claim that the Commission itself stated, publicly and on several occasions, that schemes such as the Christmas butter scheme were not capable of achieving the desired objectives, that is to say, a durable reduction in stocks, and that

consequently they had no reason to believe that the Commission would act in contradiction with its statements and once again organize such a scheme.

Breach of the principle of the protection of legitimate expectation is also relied upon in the applicants' alternative conclusions, which claim that even if the regulation setting up the Christmas butter scheme is lawful, the abovementioned principle requires that they should none the less be compensated because the damage they have suffered exceeds the limits of the normal economic risks which they may incur as traders on the market concerned.

(b) The *Commission* denies that it stated that there would never again be a Christmas butter scheme. At very most, it indicated that such schemes should in the future be employed with moderation. Thus, having regard to the development of butter stocks (which in June 1984 were double those of June 1983), the applicants, like all other traders in the milk products sector, could have foreseen that measures such as a Christmas butter scheme would be adopted in order to reduce stocks. In regard to the second part of the argument, the Commission emphasizes that the Court has never held the Community institutions liable for the consequences of a lawful measure.

## 2. *The measure of damages*

### (a) *The applicants*

They rely, in the first place, on Article 28 of the Statute of the Court to ensure that the information concerning their turnover will be kept secret.

They consider that all the conditions concerning compensation for the damage have been fulfilled. A sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred; the damage suffered is of the kind giving a right to compensation because it exceeds in degree the limits of the economic risks inherent in the activities engaged in in the sector concerned. Furthermore, a relationship of cause and effect is apparent in the losses in turnover suffered during the period in which the 1984 Christmas butter scheme was operating, the sale at a reduced price of a substitute product necessarily having a damaging effect on the disposal of a competing product, without there being any need to take account of the advertising campaign in favour of butter, because that was part of the Christmas butter scheme (Article 10 (3) of Regulation No 2956/84), or of any increase in the market for oils and fats attributable to the Christmas butter scheme.

With regard to assessing the loss, the applicants put forward in their reply (pages 53 to 69) and the annexes thereto the factors necessary to make a precise calculation, which may be briefly summarized as follows:

- (i) The Christmas butter scheme led to a reduction in sales of margarine in the Netherlands between 1 December 1984 and 24 February 1985 of 4 136 tonnes, equivalent to a substitution effect of 56.1%.
- (ii) On the basis of that figure, the applicants set out the share of each of them in that reduction, the resultant loss of turnover less the variable costs, and finally, the loss, estimated at HFL 3 834 000 for Van den Bergh en Jurgens and HFL 819 525 for Van Dijk Food Products.

The applicants are prepared to prove their claims and their calculations to the extent that they are contested by the Commission.

in consumption of margarine, the damage is not of such a nature as to justify compensation.

### III — Oral procedure

(b) The Commission, which did not submit a rejoinder, considers that the applicants have not succeeded in proving either that they have really suffered damage or that there is a relationship of cause and effect between any damage they may have suffered and the Community's conduct.

The applicants, represented by B. H. ter Kuile and F. O. W. Vogelaar, lawyers, and the Commission of the European Communities, represented by A. Haagsma, acting as Agent, presented oral argument at the sitting on 3 June 1986.

At that sitting, the Court asked the parties to produce certain information concerning the volume of intra-Community trade in butter and margarine.

(i) With regard to whether they have actually suffered damage, the Commission contends that the applicants have resorted to abstract calculations which, moreover, are unsound, without producing proof that their sales of margarine actually diminished. Moreover, their method of calculation leaves out of consideration several essential factors, such as the effect of the advertising campaign which accompanied the Christmas butter scheme, the enlargement of the market for oils and fats due to the Christmas butter scheme, the variation in the degree of substitution on the basis of the quality of the margarines and the distinction between loss of turnover and actual damage.

(a) The applicants produced the information available to them in a document received at the Court Registry on 17 June 1986.

(b) The Commission produced a table showing exports of butter and margarine from the Member States to the rest of the Community and from the Community to non-member countries (expressed in tonnes, covering the period from 1978 to 1985). That document was received at the Court Registry on 5 August 1986.

(ii) With regard to the relationship of cause and effect, it has not been shown that the Christmas butter scheme had a negative effect on sales of margarine, having regard, in particular, to the enlargement of the market for edible fats which it brought about and the existence of factors other than price likely to bring about a reduction in sales of margarine.

(c) In a document received at the Court Registry on 2 September 1986, the applicants claimed that the information supplied by the Commission was out of date, incomplete and irrelevant, and submitted two tables concerning intra-Community trade in butter and margarine in 1985.

The Advocate General delivered his opinion at the sitting on 5 December 1986.

(iii) In any event, having regard to the fact that measures such as Christmas butter schemes were foreseeable and that there has been no significant reduction

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Judge-Rapporteur