objective of preventing fraud. On the one hand, the aid system provides for various means of control, in particular with regard to the origin of the seeds processed, which make it possible to detect possible frauds and, on the other hand, there is a risk that the said obligation will entail increased costs for undertakings, which may be required to construct new storage facilities. At the same time, it is contrary to the principle of equality in so far as it applies to processors manufacturing foodstuffs or animal feedingstuffs but not to those producing soya oil, without there being any objective justification for that difference of treatment between the two categories of processors. For those reasons, Article 2(1)(b) of Regulation No 2537/89, as supplemented by Article 1(1) of Regulation No 150/90, is invalid.

REPORT FOR THE HEARING
in Case C-256/90 *

I — Legal background to the dispute

In order to promote the development of soya bean production in the Community, which was in direct competition with soya beans imported at zero duty from non-member countries, Council Regulation (EEC) No 1491/85 of 23 May 1985 laying down special measures in respect of soya beans (Official Journal 1985 L 151, p. 15), last amended by Council Regulation (EEC) No 2217/88 of 19 July 1988 (Official Journal 1988 L 197, p. 11), provided in Article 2(1) that aid equal to the difference between the guide price for a marketing year and the world market price for soya beans, when the latter was lower than the guide price, was to be granted for soya beans harvested and processed in the Community.

Article 2(2) provides that:

'Aid shall be granted to any processor of soya beans who has concluded with individual or associated soya bean producers a contract providing for payment to the producer of a price at least equal to the minimum price referred to in paragraph 3. However, until 31 December 1992, in Member States where the marketing of soya beans is subject to national rules ensuring adequate organization and controls, the aid may be granted to a first purchaser who is not the processor.

Where the first purchaser is the processor of the beans, the aid shall be granted once proof of processing has been provided.

* Language of the case: Italian.

In other cases, the aid shall be granted to first purchasers:

— meeting certain conditions to be determined,

— approved by the Member State,

and

— who have furnished proof of sale or delivery of the soya beans to a processor'.

Pursuant to Article 2(3), the minimum price is to refer to a standard quality and is to be fixed at a level guaranteeing sales for producers at a price as close as possible to the guide price, allowing in particular for market fluctuations and the cost of transporting the beans from the areas where they are produced to the areas where they are used.

The minimum price and the guide price are to be fixed by the Council acting by a qualified majority on a proposal from the Commission (Article 2(6].

Council Regulation (EEC) No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans (Official Journal 1985 L 204, p. 1), last amended by Council Regulation (EEC) No 1231/89 of 3 May 1989 (Official Journal 1989 L 128, p. 24), provides that the aid is to be paid to the first purchaser when the amount of aid has been fixed and after verification that the soya beans have been either processed in the Community for the production of oil or for other uses in human food or animal feeding, or, where the first purchaser is not the processor, sold or delivered to a processor in the Community for the production of oil or for other uses in human food or animal feeding. However, aid may be advanced following identification of the seeds provided that security is lodged. 'Identification' is to mean the act whereby the competent agency of the Member State certifies that the aid to be granted for the quantity of soya beans covered by the application is to be that applicable on the day when the application was lodged. Identification of the beans is to be carried out once they enter into the processing undertaking but before they are processed.

Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans (Official Journal 1989 L 245, p. 8) provides in Article 2:

'1. For the purposes of this Regulation, "undertaking' means:

(a) an oil mill, including:

— any building or other place within the precincts of the establishment where production takes place,

— any warehousing unit outside such precincts located in the customs territory of the Member State where

the production establishment is located in which the stored products can be properly controlled and which has been approved in advance by the authority responsible for that control;

(b) an establishment manufacturing feedingstuffs or foodstuffs intended for use by the final consumer without further processing;

(c) any establishment managed by a first purchaser who is not a processor, which is approved within the meaning of Article 2(2) of Regulation (EEC) No 2194/85, including storage installations in which the stored products can be properly controlled and which has been approved in advance by the authority responsible for that control.'

That provision was supplemented by Commission Regulation (EEC) No 150/90 of 19 January 1990 amending Regulation No 2537/89 laying down detailed rules for the application of the special measures for soya beans (Official Journal 1990 L 18, p. 10), which added the following to Article 2(1)(b):

'it must have, on the premises, storage facilities which are of a capacity determined by the authority responsible for control and which meet the requirements of this Regulation as regards the identification of the beans and the verification of their presence and their use by the undertaking;'

II — Facts and procedure

Mignini SpA, located at Petrignano di Assissi, produces and markets animal feedingstuffs. For that purpose it uses soya beans which it obtains from, among others, producers situated in the neighbourhood of its establishment. In such cases, Mignini, pursuant to Regulation No 2194/85 of 25 July 1985, concludes with the producers contracts to purchase their crops in order to qualify for the aid.

On 3 April 1989 Mignini concluded such a contract with Ciri Agricola Srl. On 19 October 1989, pursuant to that contract, Ciri Agricola delivered a quantity of 3 770 kilograms of the product in question, which was placed in storage in a warehouse belonging to Mignini situated in the commune of Capezzale (in the district of Petrignano di Assissi) outside the precincts of its production establishment.

Mignini applied for and received from the Azienda di Stato per gli Interventi sul Mercato Agricolo (the Italian intervention agency, hereinafter referred to as 'AIMA') the certificate showing that AIMA had identified the beans delivered to Mignini; on the basis of that certificate, Mignini applied on 13 February for advance payment of the aid, providing the necessary bank guarantees. By letter of 19 February 1990 AIMA informed Mignini that its application for advance payment of the aid had been rejected, since examination of the documents enclosed with its application had revealed that the product identified had been stored in a warehouse situated in Petrignano di Assissi, in the commune of

Capezzale, outside the precincts of Mignini's establishment for the production of animal feedingstuffs, which was also situated in Petrignano di Assissi, but in the commune of Via dei Pini.

AIMA took the view that this meant that the aid could not be paid since, in the circumstances, Article 2(1)(b) of Regulation No 2537/89, as amended by Regulation No 150/90, was not satisfied.

Mignini, which did not obtain satisfaction following an administrative appeal, commenced proceedings against AIMA before the Pretore di Perugia (Magistrate, Perugia) by a writ of 28 June 1990. Mignini claimed that the Pretore, after first obtaining a preliminary ruling from the Court of Justice of the European Communities, should declare that Article 2(1)(b) of Commission Regulation No 2537/89, as amended by Regulation No 150/90 of 19 January 1990, was invalid and order AIMA to pay it the sum of LIT 1 650 000.

By order of 6 August 1990 the Pretore di Perugia, 'in view of the existence of serious doubts regarding the legality of the obligation imposed by the said provision on the first processor of soya beans engaged in food production, and since the question is relevant for the solution of the ... dispute', stayed the proceedings and referred the case to the Court of Justice of the European Communities 'for a preliminary ruling on the validity of Article 2(1)(b) of Commission Regulation No 2537/89 of 8 August 1989, as supplemented by Regulation No 150/90 of 19 January 1990'.

III — Procedure before the Court

The order of the Pretore di Perugia of 6 August 1990 was lodged at the Court Registry on 22 August 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Mignini, the plaintiff in the main proceedings, represented by Emilio Cappelli, Paolo De Caterini and Corrado Zaganelli, of the Rome Bar, by the Italian Government, represented by Professor Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato, and by the Commission of the European Communities, represented by its Legal Adviser, Eugenio de March, acting as Agent.

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

By decision of 14 November 1991, and pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court decided to assign the case to the Fifth Chamber.

IV — Observations submitted to the Court

Mignini and the *Italian Government* claim that the contested provisions are invalid because they are contrary to the principle of equal treatment and the principle of proportionality.

Mignini, the plaintiff in the main proceedings, first of all emphasizes that the proceedings which it has commenced with a view to obtaining a preliminary ruling on the validity of the contested provision is the result of a joint initiative on the part of Italian animal feedingstuffs producers directed against provisions which in fact prevent them from taking advantage of an incentive scheme intended for them.

Mignini explains that the trade organization responsible for protecting the interests of that industry (Associazone Nazionale tra i Produttori di Alimenti Zootecnici (National Association for Producers of Animal Feedingstuffs], faced with the arguments of the Commission's staff, and before commencing any action aimed at protecting its members' interests, decided to obtain the opinion of experts qualified to assess the relevance of the arguments put forward by the Community authorities.

Thus, by letters of 15 September 1989, that organization first of all asked Professor Gianfranco Piva, President of the Faculty of Agriculture at the University of Piacenza and Director of the Institute of Nutritional Sciences at that university, to give his opinion on the argument that the processing of soya into oil takes place according to a fixed yield, unlike the position where the beans are used in the production of animal feedingstuffs; and secondly it asked Professor Pier-Luigi Navarotto, the holder of the Chair in Rural Construction at the University of Milan, to study the economic and organizational consequences for producers of animal feedingstuffs of the obligation to store the soya in premises situated within the precincts of the production establishment.

Mignini claims that Professor Piva's report, based, *inter alia*, on a study carried out on Italian undertakings, over an eight-year period (1981-88) and therefore indisputable, establishes that the minimum and maximum values of oil content vary between 31% and 76% and shows that 'it is scientifically inaccurate to state that the oil content of soya beans is sufficiently constant and, therefore, that the argument . . . that the oil yield is produced according to a fixed percentage' is wrong. Mignini adds that that report indicates that the incorporation of soya in animal feedingstuffs may be easily ascertained from the taxation and financial records which are systematically inspected by the State authorities.

Mignini also claims that Professor Navarotto's report, after noting that stocks of raw materials and finished products are kept to a minimum owing to the stock management techniques employed in the animal feedingstuffs industry, estimates that the typical cost to a manufacturer of animal feedingstuffs producing approximately 100 000 tonnes per annum of providing the storage facilities necessary to comply with the Community rules would be LIT 2 000 000 000. It concludes as follows: 'a change in the organization of a modern manufacturer of animal feedingstuffs such as that which would take place if the manufacturer had to provide himself with storage facilities for raw materials over long periods would be detrimental to the economy of the undertaking, not only because the cost to such undertakings of paying off their financial commitments would be increased, but also because of the organizational difficulties that a reduction in the productivity of the undertaking would inevitably entail'.

Mignini claims finally, that while manufacturers of animal feedingstuffs previously used mainly soya cake purchased from oil mills as waste following extraction of the oil, the manufacture of animal feedingstuffs according to the most recent formulae requires the use of soya beans purchased directly from soya producers.

Mignini points out, in particular, that manufacturers of animal feedingstuffs that originally obtained their supplies on the world market, where prices, not being subject to duty, are more advantageous, have obtained their supplies from Community producers since they became eligible for aid in respect of the price and thereby acquired a specific interest in obtaining supplies of soya beans originating in the Community.

According to Mignini, the fact that manufacturers of animal feedingstuffs find it economically impossible to construct the storage warehouses required by the Community rules makes it impossible for them to obtain supplies of soya beans originating in the Community and thus prevents those manufacturers from taking advantage of the aid.

In order to challenge the validity of Article 2(1)(b) of Regulation No 2537/89, as amended by Regulation No 150/90, Mignini claims that those provisions are contrary, first, to the principle of equal treatment and, secondly, to the principle of proportionality.

Infringement of the principle of equal treatment

Mignini points out, first of all, that the case-law of the Court concerning the principle of non-discrimination laid down in the second subparagraph of Article 40(3) of the EEC Treaty on the common agricultural policy, which is one of the aspects of the general principle of equality, establishes that there is discrimination when comparable situations are treated differently, when action by the public authorities is taken according to different rules which upset the balance between the capacities of undertakings in relation to competition and when the unequal treatment is not justified by objective criteria.

Mignini points out, first of all, that, with regard to the rules and conditions for the storage of the products, the difference in treatment between oil mills and producers of animal feedingstuffs is evident and unchallenged. The Italian Government adds that that difference of treatment, which it considers excessive, exists not only between manufacturers of feedingstuffs based on soya and first purchasers but also between those manufacturers and manufacturers of feedingstuffs based on other oilseeds such as colza, even though the situations are essentially the same.

Secondly, Mignini argues that, contrary to AIMA's claim, oil mills and manufacturers of animal feedingstuffs are not in a different situation, in particular with regard to controls.

Mignini claims, first of all, that, for the purposes of the system of aid for soya

production, oil mills and manufacturers of animal feedingstuffs are in a comparable situation since in Regulation No 2537/89 (Articles 2 and 3(a] oil mills, producers of animal feedingstuffs and the foodstuff industries are grouped together without distinction under the description 'first purchaser who is a processor'.

Mignini then maintains that the grounds given by the Commission to justify the contested measure, namely the need to control the quantities of soya actually processed by operators, are unfounded.

In that respect, both Mignini and the Italian Government point out that the 'additional difficulties of controls' mentioned in the twentieth recital of the preamble to Regulation No 2537/89 are not specified.

Mignini relies, moreover, on the following arguments:

— Regulation No 150/90 of 19 January 1990, which added to Article 2(1)(b) a new subparagraph increasing the scope of the discrimination, is based on reasons which, as the Pretore di Perugia has pointed out, are obscure and add no objective criterion to justify the difference of treatment;

— Regulation 2537/89 makes no provision for any special control with regard to the foodstuff industries, nor does it provide for any specific check in relation to and as a result of the obligation to store the soya on the premises of the establishment, since Chapters I to III of the regulation lay down identical rules and conditions regarding control for all first purchasers and processors;

— the argument put forward by the Commission that the use of soya in the production of oil can be controlled more easily than the use of soya in the production of animal feedingstuffs because the yield of oil is constant, unlike the position when the beans are incorporated into animal feedingstuffs, is scientifically inaccurate and incorrect because the oil content includes a variable component (specifically, between 31% and 76%), as is shown by the expert's report established by Professor Piva. Mignini adds that, as the Piva report stressed, the use of soya in the production of animal feedingstuffs can be controlled easily and accurately;

— as the Pretore di Perugia pointed out in his order for reference, processing into oil alters the physical state of the beans which go from the solid stage to the liquid stage, making possible the manipulation which that type of processing involves, so that surveillance is more difficult. To that must be added the fact that animal feedingstuffs are manufactured according to formulae that are fixed and certified by the producer and according to production methods that are developed entirely by computer in the laboratory. According to Mignini, the extremely high cost of developing formulae for the composition of feedingstuffs and programs for their

manufacture makes it quite impossible to alter the quantities of soya to be incorporated by the producers.

Mignini maintains that there is therefore no requirement for any specific control in relation to manufacturers of animal feedingstuffs and that in any event, supposing there was such a requirement, the conditions imposed do not require the storage facilities to be situated on the premises of the production establishment.

In that respect, Mignini observes that the subsidy system introduced for other oilseeds (Council Regulation (EEC) No 1594/83 of 14 June 1983 on the subsidy for oilseeds (Official Journal 1983 L 163, p. 44) and Commission Regulation (EEC) No 2681/83 of 21 September 1983 laying down detailed rules for the application of the subsidy system for oil seeds (Official Journal 1983 L 266, p. 1] makes no distinction between oil mills and manufacturers of products for animals with regard to the storage of the seeds, even though the position is exactly the same compared with producers of soya, in particular where the controls are concerned.

Infringement of the principle of proportionality

Mignini observes that, as the Court has consistently held (see, in particular, judgment in Case 47/86 *Roquette Frères* v *ONIC* [1987] ECR 2889, at p. 2914), that 'in order to determine whether a provision of Community is in conformity with the principle of proportionality it is necessary to verify whether the means which it employs are appropriate to achieve the objective pursued and whether or not they go beyond what is necessary to achieve it'.

Mignini and the Italian Government maintain that the obligation to store the beans on the premises of the establishment is useless for the purposes of control and that it imposes an excessive sacrifice on the undertakings in question.

According to the Italian Government, the arrangement for identification provided for in Regulation No 2537/89 is effective and adequate for the control.

In order to challenge the contested provisions, Mignini claims, first of all, that Council Regulation No 2194/85, adopting general rules concerning special measures for soya beans, lays down a control system which essentially includes sample checks on the areas cultivated with soya and checks on the stock records and, where appropriate, on the financial records of applicants for aid (eighth recital of the preamble and Article 6).

Mignini then points out that, in order to meet the objectives assigned to the subsidy system, the surveillance measures must make it possible, first, to determine the quantities of beans originating in the Community that have been delivered to the processor and, secondly, to verify that those quantities have actually been processed.

In such a system, the growing and marketing of the seeds, up to the time of their delivery to the first purchaser, are checked by comparing the contracts to purchase the crops with the declarations of the quantities delivered, taking account of the yield recorded in the areas where the seeds are produced. The quantities

processed are checked by means of the stock records and, where appropriate, the financial records.

The obligation to store the seeds on the premises of the establishment is useless where it does not enable fraud to be avoided, nor does it improve the control if the fraud is considered to take place at the time of processing. Furthermore, if it is accepted that such fraud is possible, the obligation to store the seeds on the premises of the establishment should also be imposed on oil mills.

Mignini claims finally that, as Professor Piva's report demonstrates, the system and methods of production and also the characteristics of the base products and those of the finished goods are sufficiently rigid and transparent to enable the quantities to be determined *ex post facto* from the stock records and the financial records of the undertaking.

In order to demonstrate that the contested provisions are excessive, Mignini argues, first, that they fail to take account of the rules regarding storage and the organization of production in the animal feedingstuffs industry and thus interfere with the production process in modern, technically advanced undertakings. It then observes that, following Professor Navarotto's report, the production process, the structures and the production establishments are designed and organized, in modern undertakings, in such a way that the raw materials enter the establishment at the beginning of the manufacturing cycle without any need for storage and are entirely utilized during each of the cycles, which are often completed within a single day. The contested provisions, which require traders to construct storage facilities within the precincts of their establishments, thus infringe the traders' right to organize the production factors in the most effective and most economically viable way, whereas such an obligation is not indispensable for achieving the objective pursued when it can be achieved less onerously and more effectively by checking the records.

Finally, according to Mignini, the harm thus caused to the manufacturers of animal feedingstuffs has the effect of simply excluding them from the system of subsidies for soya.

Since the contracts for the supply of seeds are concluded for the whole of the marketing year before the commencement of that year, manufacturers of animal feedingstuffs could not, except by creating storage capacities much greater than those which they have at present, obtain the quantities of beans necessary to obtain payment of the Community premiums and thus pay their suppliers.

Since that type of supply is therefore not profitable, the manufacturers of animal feedingstuffs are, in practice, excluded from the benefit of the aid and must therefore obtain their supplies from the oil mills, which is the result desired by the latter.

The *Italian Government* states, in that respect, that since the unitary amount of the Community aid is fixed by the Commission

at least twice per month in the light of the price fluctuations recorded on the world market, the time when the product is identified is particularly significant because it determines the amount of the aid to which the first purchaser is entitled. Pursuant to Article 11(2) of Regulation No 2537/89, the application for identification 'shall be considered only if the seeds entered the undertaking at the latest on the day it was submitted'; it must be made not less than three days before processing takes place, or a longer period where the application is sent by telecopy or telex pursuant to Article 12 et seq. of the regulation.

To that must be added the fact that, pursuant to Article 6(2)(d) of that regulation, the first purchaser must take delivery of all the beans harvested which are covered by the contract. A first purchaser who produces animal feedingstuffs and has only limited storage facilities can therefore conclude only a limited number of contracts in view of the conditions for identification and the fact that it is clearly not economically viable to keep the seeds stored outside the premises of the processing establishment without being able to benefit from the corresponding aid.

In those circumstances, a producer of animal feedingstuffs benefits from the aid not according to his own economic choices but only according to the rate at which his own plant processes the seed. Not being able to store the product if he cannot benefit from the aid, he is obliged to obtain his supplies from an intermediary (a first purchaser who is not a processor), which increases his expenses.

The *Commission* contends, on the other hand, that the contested regulation is not invalid.

It first of all recalls the development of the system of Community aid for soya bean production.

It also points out that annual production of soya beans within the Community, which was initially limited to 4 000 tonnes per annum, increased appreciably from the marketing year 1975/76, reaching a level of 2 000 000 tonnes by the marketing year 1989/90.

Regulation (EEC) No 1900/74 of the Council of 15 July 1974 laying down special measures for soya beans (Official Journal 1974 L 201, p. 5) first of all established a system of subsidies per hectare, which had the disadvantage of discouraging the most efficient producers.

In order to deal with that disadvantage, Council Regulation (EEC) No 1614/79 of 24 July 1979 laying down special measures in respect of soya beans (Official Journal 1979 L 190, p. 8) then introduced a system providing for the payment of aid to the first purchaser according to the quantity actually produced. That system encouraged the development of cultivated areas, which went from 4 000 hectares in 1979 to 600 000 hectares in 1989/90.

The aid system was again modified at the beginning of the marketing year 1985/86 so that aid could also be paid to undertakings processing soya beans.

That was the purpose of Council Regulation No 1491/85 of 23 May 1985 laying down special measures in respect of soya beans and of Council Regulation No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans.

The Commission claims that the considerable growth in the production of soya in the Community inevitably had consequences on the system of control. While it was possible to carry out checks directly on producers or first purchasers while production remained limited, those controls became more and more expensive and less and less effective when production rose considerably, as was revealed by an inquiry carried out in Italy in 1988 pursuant to Article 9 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218).

It was against that background that the Commission, on 8 August 1989, adopted Regulation No 2537/89 laying down new detailed rules for the application of the special measures for soya beans, which was later supplemented by Regulation No 150/90 of 19 January 1990.

The Commission observes that the main purpose of those regulations, as expressly stated in the grounds therefor (eighteenth and twentieth recitals of the preamble to Regulation No 2537/89 and first recital of the preamble to Regulation No 150/90), is to determine the definition of 'undertaking' and to restrict its scope where the manufacturers of feedingstuffs and foodstuffs are concerned, in view of the special difficulties presented by surveillance of that type of activity.

According to the Commission, the concept of undertaking referred to in Regulation No 2537/89 corresponds to that used in the system of aid for the production of oilseeds, where the undertaking is taken to mean the physical place within which the seeds are 'identified', in other words where the parameters of the subsidy to be paid to the operator (weight of seed, rate of subsidy) are determined. The identification of the seeds in a specified place satisfies the need for a physical check, where appropriate, on the declarations made by the operator.

Furthermore, identification marks the point at which the period during which the seeds must be processed begins to run and prevents their leaving the undertaking until they have been processed (Articles 21 and 29 of Regulation No 2537/89).

While Regulation No 2537/89 made no fundamental change in respect of oil manufacturers ('crushers') or first purchasers who are not processors, it did, on the other hand, provide that, as regards manufacturers of feedingstuffs or foodstuffs ('incorporators'), the storage facilities must be on the premises of the production establishment in order to prevent the risks of fraud specific to that type of activity.

The Commission points out, in that respect, that pursuant to Article 2 of Council Regulation No 1491/85 of 23 May 1985, aid may be granted only in respect of soya beans harvested and processed in the Community and that the system of control serves in particular to ascertain that the subsidy has not been sought for soya beans imported from non-member countries, an extremely simple operation since soya beans are exempt from customs duty and, unlike imports of other oilseeds, do not require the provision of security.

Secondly, because a large number of products are used in the manufacture of feedingstuffs, it would be particularly difficult in practice to ascertain the percentage of soya beans incorporated in the final product (compound feedingstuffs).

In the case of oil mills, on the other hand, it is easy to ascertain the quantity of seeds used to produce the oil since the processing conforms with standard yields.

The Commission contends, first, that the contested provisions are not contrary to either the principle of equality of treatment or the principle of proportionality.

Such differences justify the requirement for the incorporators to identify the soya beans at the time when they are physically present in the actual place where they will be processed in order to prevent seeds from being removed from one production establishment to another and to ensure that, once identified, the seed will actually be incorporated within a reasonable period.

Infringement of the principle of equality

The Commission contends *in limine* that manufacturers of feedingstuffs or foodstuffs, who are treated equally by the contested provisions, are not in a comparable situation to that of the other categories of persons entitled to Community aid ('crushers' and first purchasers who are not processors).

Secondly, the Commission contends that, contrary to what the order of reference states, incorporators of soya beans are in a different situation from that of incorporators of colza, rape and sunflower seed as far as controls are concerned.

First, since the incorporation of seed, unlike crushing, does not call for significant investment or infrastructures, the number of potential recipients of aid is much greater than that of crushers (there are more than 1 000 'incorporators' in Italy).

In the first place, imports of colza, rape and sunflower seeds are much lower than those of soya beans, as is evident from the statistics enclosed with the documents submitted by the Commission. Consequently, there is far less likelihood of applications for the Community subsidy in respect of imported colza, rape and sunflower seeds than in respect of soya beans.

Secondly, unlike soya beans, imports of colza, rape and sunflower seeds are subject to a strict administrative control together with a security, since Council Regulation No 1594/83 of 14 June 1983 on the subsidy for oilseeds (Official Journal 1983 L 163, p. 44) provides that imports of colza, rape and sunflower seeds are to be subject to control, which may be accompanied by the provision of a security, the level of which may not exceed the amount 'necessary to ensure that there is no incentive to withdraw imported seeds from control and to make an unwarranted application for the subsidy' (Article 9); the system was implemented by Commission Regulation No 2681/83 of 21 September 1983 laying down detailed rules for the application of the subsidy system for oil seeds (Official Journal 1983 L 266, p. 1).

That strict control of imports of colza, rape and sunflower seeds considerably reduces the risks of fraud on imported seeds and allows a less rigorous system of control when the seeds are identified on the importers' premises.

Infringement of the principle of proportionality

According to the Commission, the contested provisions guarantee payment of the Community subsidy only to soya beans harvested and processed within the Community, an objective which assumes fundamental importance for the smooth operation of the system.

The Commission claims that since the areas cultivated with soya beans will henceforth be considerable, since those seeds are imported into the Community in large quantities, without restriction and duty-free, and since there is no standard percentage for the incorporation of those seeds in compound animal feedingstuffs, the only point at which the incorporation of soya beans in the feedingstuffs can be effectively controlled is when the seeds to be processed are identified. The Commission considers that the contested provisions are necessary to prevent frauds in respect of the Community rules and thus comply with the principle of proportionality.

V — Answers to the questions put by the Court

A — *Request to the Commission for a communication*

The Court noted that the Commission indicated, on page 4 of its statement, that:

'The considerable development of the production of soya in the Community has inevitably had consequences on the system of control. While production remained limited, it was still possible to carry out direct controls on producers or first purchasers. As production increased, those controls became more and more expensive and less and less effective. The inadequacies of the system of control in force were confirmed by the results of an inquiry carried out in Italy by the Commission in 1988, pursuant to Article 9 of Regulation (EEC) No 792/70 of the Council of 21

April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218).'

The Court therefore asked the Commission to produce the results of the inquiry thus carried out.

The Commission produced before the Court, first, the letter which it sent on 5 June 1989 to the Permanent Representation of Italy to the European Communities following the fact-finding missions conducted in Italy between 5 and 23 September 1988 and between 28 November and 7 December 1988 and, secondly, the summary report relating to the results of the controls carried out for the clearance of the accounts of the EAGGF Guarantee Section for the marketing year 1988.

B — *Questions*

The Court put the following questions to the Commission.

1. According to the twentieth recital of the preamble to Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans (Official Journal 1989 L 245, p. 8): 'experience ... also indicates additional difficulties of controls where soya beans are incorporated directly in foodstuffs and feed and ... the possibility of storing beans outside the production plant should consequently be limited solely to cases where beans are crushed for the production of oil' and, according to the first recital of the preamble to Commission Regulation (EEC) No 150/90 of 19 January 1990 amending Regulation (EEC) No 2537/89 (Official Journal 1990 L 18, p. 10): 'one of the purposes of Commission Regulation (EEC) No 2537/89 of 8 August 1989 ... was to tighten up the definition of "undertaking' and in particular to restrict its scope where the manufacture of feedingstuffs and foodstuffs referred to in Article 2(1)(b) were concerned, in view of the special difficulties presented by surveillance of this type of activity'.

Furthermore, the Commission mentions, at page 7 of its statement, the 'specific risks of fraud inherent in these activities'.

The Commission is requested to indicate precisely what are the 'particular problems of control', the 'additional difficulties of controls' and the risks of fraud presented by the manufacture of animal feedingstuffs compared with both other activities involving the processing of soya beans and the activities of the manufacture of animal feedingstuffs based on other oilseeds.

According to the Commission, the particular difficulties of control and also the risks of fraud inherent in the incorporation of soya beans into animal feedingstuffs are due to the following circumstances:

— as the investment required for the manufacture of those feedingstuffs is reduced, since not even fixed installations are necessary, the number of recipients of the subsidy that have to be controlled is very high;

— as the manufacture of feedingstuffs for animals makes use of a great variety of products, it is impossible to ascertain from the finished products that the components used are actually those for which the subsidy is granted. The control must therefore be carried out 'upstream', before any incorporation takes place, and the necessary steps be taken to prevent the seeds identified before incorporation from being resold to third parties with a view to obtaining a further subsidy;

— Italian legislation subjects manufacturers of oil to much more rigorous controls (the seeds come under the control of the financial authorities) than those provided for incorporators;

— the risks of fraud are much more restricted in the case of the other seeds (colza, rape and sunflower), not only owing to the securities required but also, and above all, owing to the small quantities used in the manufacture of animal feedingstuffs (2% and 5%, respectively, of the Community production of sunflower and colza for the marketing year 1990/91).

2. The Commission indicates, at page 10 of its statement, that 'unlike soya beans, imports of colza, rape and sunflower seeds are subject to a strict administrative control accompanied by a security' and that 'that strict control of imports of colza, rape and sunflower seeds allows a less severe system of control when the seeds are identified on the incorporators' premises'.

The Commission is requested to give the reasons why a similar system is not implemented for imports of soya beans.

The Commission stated that since imports of soya beans into the Community are much higher than imports of other oilseeds, a system of securities comparable to that implemented for those other oilseeds would be disproportionate and excessively rigid. In view of the number of dossiers involved, such a system would be particularly difficult and onerous to manage.

3. Article 3(2) of Commission Regulation No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans, as amended by Commission Regulation (EEC) No 150/90 of 19 January 1990, provides that, for the purposes of controlling entitlement to the aid:

'... every undertaking shall keep separate stock records for soya beans harvested in the Community and for imported beans. These shall contain at least the following information:

— the quantities in weight of beans received as such and in the case of beans harvested in the Community, moisture content and impurity content,

— the movements between the various stores of the undertaking,

— the quantities of beans processed and the type and quantity of the products obtained where the first purchaser is also the processor; at the request of the competent agency the percentage of soya beans used in the processed mixture obtained must be specified,

— the quantity of beans or of the processed products leaving the undertaking and their destinations,

— a regular inventory of stocks, carried out at least on a quarterly basis,

— reference to the contracts, delivery declarations and invoices or equivalent documents for both products bought and products sold and, in the case where the first purchaser is not the processor, references to the delivery to the processor'.

Mignini contends, at page 7 of its statement, that: '... in a processing industry which uses soya beans for incorporation in animal feedingstuffs, the system and the methods of production (formulae of the products, automation, etc.) and also the characteristics of the basic products and those of the finished products are so rigid and so transparent that all that is required for the purposes of control is to check the stock records and financial records to ascertain the quantities processed'.

In view of the conditions laid down for the control of the subsidy by Article 3(2) of Regulation No 2537/89, the Commission is requested to indicate the reasons why a restrictive definition of 'undertaking' such as that given by Regulation No 150/90 was necessary to ensure effective control of the payment of Community aid to the manufacturers of animal feedingstuffs.

According to the Commission, while a financial control is possible, that does not mean, however, that a physical control is also possible. In so far as it is impossible to check the percentage of a product eligible for Community aid incorporated in a finished product, the accuracy of the financial records cannot itself be checked. That, according to the Commission, is the fundamental distinction between the manufacture of animal feedingstuffs and the manufacture of oil, for which the combination of physical and financial checks is accurate.

The Commission indicated that a restrictive definition of 'undertaking' was adopted in order to require manufacturers to identify the seeds only when the seeds are physically present in the actual places where they will be processed. It also wished to prevent any movement of the seeds from one establishment to another after identification and to ensure that, once identified, the seeds will be incorporated in the feedingstuffs within a reasonable period, making a further control possible at a later date.

F. Grévisse
Judge-Rapporteur