result, fixes the final aid at a level which exceeds the difference between those two prices.

2. While it must be acknowledged that any Community institution which establishes that a measure which it has just adopted is tainted with illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on the lawfulness thereof.

The withdrawal of a measure vitiated by a manifest error which cannot have escaped the attention of the traders concerned, carried out less than three months after a judgment of the Court has revealed the need for it, is not open to criticism in the light of the above requirements.

REPORT FOR THE HEARING
in Case C-365/89 *

I — Facts and procedure

1. *Legal background*

1. Pursuant to Article 27 of Council Regulation No 136/66/EEC on the establishment of a common organization of the market in oils and fats (Official Journal, English Special Edition 1966, p. 221), a subsidy is to be granted for oil seed harvested and processed within the Community, where the target price in force for a species of seed is higher than the world market price for that seed. The general principles governing the grant of that subsidy are laid down in Council Regulation (EEC) No 1594/83 of 14 June 1983 (Official Journal 1983 L 163, p. 44), and the detailed rules for its application in Council Regulation (EEC) No 2681/83 of 21 September 1983 (Official Journal 1983 L 266, p. 1). The amount of the subsidy, equal to the difference between those two prices, is fixed by the Commission whenever the market situation makes it necessary and in such a way as to ensure its being applied at least once a week (Article 33(1) of Regulation No 2681/83).

2. Pursuant to Article 33 of Regulation No 2681/83 those regulations, adopted at periodic intervals, indicate, in Annex I the amount of the subsidy in ECUs ('gross' aid), in Annex II the amount so calculated converted into each of the national currencies plus or minus the differential amount ('final' aid) and, finally, in Annex III the spot and forward rates of the ECU to be used for converting final aid into the currency of the processing Member State

* Language of the case: Dutch.

when that state is not the country of production.

3. By Regulation (EEC) No 735/85 of 21 March 1985 (Official Journal 1985 L 80, p. 18), the Commission fixed the amounts of the subsidy and the exchange rates for the ECU applicable as from 22 March 1985.

After establishing on the following day, that is on 22 March 1985, in particular following questions from interested traders, that the table of exchange rates in Annex III to that regulation contained incorrect figures, the Commission adopted that same day Regulation (EEC) No 755/85 of 22 March 1985 (Official Journal 1985 L 81, p. 36), re-establishing the amounts of the subsidy and the exchange rates; that regulation restated the amounts of the subsidy fixed in Regulation No 735/85 and indicated in Annex III the rectified exchange rate of the ECU; the Commission also adopted Regulation (EEC) No 756/85 of 22 March 1985 (Official Journal 1985 L 81, p. 38), whereby it suspended advance fixing of the subsidy in respect of certificates for which applications had been lodged on 22 March 1985.

Those two regulations entered into force on 23 March 1985.

2. *The dispute in the main proceedings*

1. On 22 March 1985 Cargill BV (hereinafter 'Cargill') submitted an application for advance fixing of the subsidy in respect of 10 000 tonnes of sunflower seed harvested in France and to be processed in the Netherlands. As that application concerned oil seeds to be processed in a Member State other than the country of production, that subsidy arose from the application of the table of exchange rates for the ECU in Annex III to Regulation No 735/85. However, on the basis of the regulation suspending advance fixing, No 765/85, the Produktschap voor Margarine, Vetten en Oliën (hereinafter 'the Produktschap') refused to grant that application.

2. Cargill appealed against that decision to the College van Beroep voor het Bedrijfsleven (Administrative court of last instance in matters of trade and industry, hereinafter 'the College'). In those proceedings, the national court referred to the Court of Justice for a preliminary ruling two questions, which the Court answered in its judgment in Case 201/87 [(1989] ECR 489). In reply to the first question, the Court ruled that Commission Regulation No 756/85 was invalid. In reply to the second question, the Court ruled that, so long as Commission Regulation No 735/85 had not been declared to be invalid, the invalidity of Commission Regulation No 756/85 meant that the Produktschap must issue to Cargill with retroactive effect the advance-fixing certificates applied for on 22 March 1985 and pay it the subsidy in the sum fixed by Commission Regulation No 735/85.

3. The Commission amended Regulation No 735/85 with retroactive effect by Regulation (EEC) No 1358/89 of 18 May 1989 (Official Journal 1989, L 135, p. 22), setting out in a new Annex III the corrected exchange rates of the ECU for applications for advance fixing lodged on 22 March 1985.

4. Cargill subsequently instituted proceedings before the Court on 7 August 1989 under Article 173 of the EEC Treaty for the annulment of Regulation No 1358/89 (Case C-248/89).

5. Furthermore, in the proceedings pending before the College, Cargill set out its claims against the Produktschap, following[2] the judgment of the Court of 28 February 1989. In addition to the annulment of the contested decision of the Produktschap (claim (a], Cargill also seeks payment of:

(b) a sum equal to the difference between the amount of the subsidy applicable to sunflower seed harvested in France and processed in the Netherlands on 22 March 1985 (pursuant to Regulation No 735/85) and the amount applicable on 25 March (pursuant to Regulation No 1358/89), namely HFL 736 000;

(c) compensation (of HFL 51 520) on the ground that, had it obtained the very advantageous subsidy provided for by Regulation No 735/85, the plaintiff would have made use of the possibility offered by Article 10(3) of Regulation No 2681/83 to increase the quantity of sunflower seed to be processed by a maximum of 7% in relation to the quantities shown in the application;

(d) default interest (HFL 267 756);

(e) the costs of the proceedings (HFL 54 010).

Cargill states that, in accordance with the judgment of the Court in Case 201/87, the College must uphold its claims on the basis of Regulation No 735/85, without taking account of the new regulation, No 1358/89. The plaintiff claims, moreover, that the latter regulation is invalid in any event, because it is incompatible with Article 8 of Regulation No 1594/83 and with the principle of legal certainty.

6. The College takes the view, however, that Cargill's claims must be assessed on the basis of Regulation No 1358/89, on the ground that subsequent action by the legislature in principle — that is, subject to judicial review — takes priority over an earlier judicial decision. The College concedes that the plaintiff is right in maintaining that the amendment or withdrawal of a decision conferring a right — even where that decision is invalid — is subject, also under Community law, to certain restrictions deriving from the principle of legal certainty. However, the College makes it clear that in the circumstances of the case the principle of legal certainty appears to be only of limited significance, since in view of the repeated intervention of the Commission, the correctness of the exchange rates fixed by the initial regulation has been disputed from the outset.

7. In order to be able to settle the dispute, the College referred to the Court for a preliminary ruling a number of questions concerning the validity of both Regulation No 1358/89 and Regulation No 735/85 and, in addition, on the manner in which it is appropriate to deal with certain ancillary claims (for damages and default interest). Those questions are as follows:

'(1) Is Commission Regulation (EEC) No 1358/89 of 18 May 1989 invalid in the light of the considerations set out in this judgment?

If Question 1 is answered in the affirmative:

(2) Is Commission Regulation (EEC) No 735/85 of 21 March 1985 invalid on account of any incorrectness in the rates laid down therein for conversion into the currency of the processing Member State when the latter is a country other than the country of production and can it therefore not be used as the basis for granting subsidy, as requested by the plaintiff?

If Question 1 is answered in the affirmative and Question 2 in the negative:

3) (a) Should ancillary claims such as those set out in paragraph 3(c) and (d) of this judgment be assessed on the basis of Article 178 in conjunction with the second paragraph of Article 215 of the EEC Treaty, or should such claims be regarded as being wholly or partly ancillary claims which should be decided on by the national court having jurisdiction with regard to the principal claim?

If Questions 1 and 2 are answered in the affirmative:

3) (b) In the light of the considerations set out thereon in this judgment what consequences at Community level and at national level, respectively, should follow as regards legal redress from the declaration that Regulations (EEC) Nos 1358/89 and 735/85 are invalid, if they are in fact invalid?'

3. *Procedure before the Court*

The order for reference was lodged at the Court Registry on 4 December 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiff in the main proceedings, represented by E. H. Pijnacker Hordijk, Advocate, and by the Commission of the European Communities, represented by R. C. Fischer, Legal Adviser, and by P. Hetsch, a member of its Legal Department, acting as Agents.

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, and to assign the case to the Sixth Chamber.

II — Written observations submitted to the Court

Question 1

The *plaintiff* considers that Regulation No 1358/89 is invalid, since it is incompatible with Article 8 of Regulation No 1594/83, that there was a misuse of powers on its adoption and that the principles of legal certainty and protection of legitimate expectations have been infringed.

It considers that Article 8 contains an exhaustive list of situations in which the Commission has the power to suspend advance fixing of the amount of the subsidy

and to alter the amount thereof where the certificate has not yet been issued. The judgment of the Court in Case 201/87 showed that the Commission was not empowered to decide to suspend advance fixing. The Commission could not rely on Article 8 of Regulation No 1594/83 to declare that it had the power to alter the amounts of the subsidies fixed by Regulation No 735/85 where the certificates had not yet been issued.

In the plaintiff's view, the Commission cannot in any circumstances draw from Article 8 of Regulation No 1594/83 the power to alter the amounts of the subsidies in cases where certificates have already been issued. It may not, *a fortiori*, rely on Article 8 in asserting that it has the power, four years later, to alter by means of Regulation No 1358/89 the amounts of the subsidies fixed by Regulation No 735/85.

In that respect, it points out that, following the amendment of Article 8 of Regulation No 1594/83 by Council Regulation (EEC) No 935/86 of 25 March 1986 (Official Journal 1986 L 87, p. 5), to which the Court refers in its judgment, the power to alter the amounts of subsidies was completely abolished. According to the plaintiff, it follows that the Commission cannot, in any event, derive from Article 8 of Regulation No 1594/83, in the version in force when Regulation No 1358/89 was adopted, even the slightest trace of a power enabling it to alter the amounts of the subsidies fixed by Regulation No 735/85.

The plaintiff considers that it follows from Article 8 of Regulation No 1594/83, in the version in force, that the suspension of advance fixing is the only solution available to the Commission in certain circumstances when it makes a material error in the amounts of the subsidies as published. In its view, the Commission is not justified, in any circumstances, in adjusting the amounts of the subsidies.

It considers that the conduct of the Commission constitutes nothing other than an attempt to deprive the judgment of the Court in Case 201/87 of its effectiveness. In so doing, the Commission is guilty of a misuse of powers, as a result of which Regulation No 1358/89 is null and void.

The plaintiff explains that the advance-fixing machinery is intended to create legal certainty for traders; hence the possibilities available to the Commission of circumventing the legal certainty so created, by suspending the advance fixing of the amounts in question or by altering them pursuant to Article 8 of Regulation No 1594/83, are very limited. The Commission must always act within those limits, which are strictly defined. It is in that context that the Court ruled in its judgment in Case 201/87 that the suspension by Regulation No 756/85 of the advance fixing of the processing subsidy was invalid: the Commission had exceeded the limits of its powers.

The plaintiff submits that that judgment made it clear that the Commission should have ensured a favourable outcome for the application for advance fixing submitted by Cargill on 22 March 1985 in accordance with the provisions of Regulation No 735/85. The subsidy in question should,

according to Cargill, have been paid in 1985. It is only because of the fact that the Commission adopted its unlawful suspensory regulation that the subsidy has still not in fact been paid unconditionally to Cargill. As a result of the Court's judgment, it is clear that Cargill has since 1985 had a claim for payment of the amounts in question.

Cargill maintains that it is in the light of those facts that Regulation No 1358/89, by which the Commission is attempting to alter, with retroactive effect over a period of more than four years, the amounts of the subsidies that were in force on 22 March 1985 — an alteration which can affect only the undertakings which, owing to the Commission's unlawful conduct, have still not received the subsidy to which they have been entitled since 1985 — constitutes a particularly serious infringement of the principles of the protection of legitimate expectations and legal certainty.

The plaintiff contends that the nature of the advance-fixing system as much as the spirit and the letter of Article 8 of Regulation No 1594/83 rule out the possibility of amending, with retroactive effect, regulations which introduce subsidies. Since the financial interests at stake are enormous, the principle of legal certainty requires that the undertakings concerned should be able, as a matter of principle, to place unquestioning reliance on the amounts published.

According to the plaintiff, there is no doubt whatsoever that the Commission failed to observe the 'reasonable period' required by the Court in the case-law which it relies upon. It points out in that respect that advance-fixing certificates must be issued on the day following that on which the application is lodged and that an express provision in the legislation applicable prohibits certificates from being amended after they have been issued. A reasonable period within the meaning of the Court's case-law can never exceed one day. An amendment made after a longer period will not normally be capable of taking effect because the certificates based on the incorrect amounts of the subsidy will by then already have been issued.

The plaintiff states that it has already explained in Case 201/87 how, relying *bona fide* on Regulation No 735/85, it entered into firm contracts of purchase and sale which it would never have concluded on the basis of the rates of subsidy laid down by Regulation No 755/85.

The applicant thus proposes that the Court should answer Question 1 as follows:

'Regulation (EEC) No 1358/89 is not valid.'

The *Commission* submits that, as is clear from the preamble thereto, the contested regulation, No 1358/89, was adopted in order to prevent the unwarranted and discriminatory effects which would have resulted, after Regulation No 756/85 had been declared invalid, from the application, as it stood, of Annex III to Regulation No 735/85. It points out that, by invalidating Regulation No 756/85, the Court left open the question of the legality and the validity of Regulation No 735/85, having regard to the material error in the table of exchange rates for the ECU in Annex III. According to the Commission, the Court criticized only the means chosen by the Commission to remedy that error, namely the measure suspending the subsidy. It was

thus for the Commission, as the institution which adopted the measure, to assess, subject to review by the Court, the need to correct the error and to specify the means whereby this could be achieved.

The Commission considers that the illegality of Annex III to Regulation No 735/85 is not in doubt. The errors contained in the table of exchange rates in that annex substantially distort the amounts of the subsidy to be granted to traders where the oil seeds are processed in a Member State other than the State in which they were harvested. According to that incorrect annex, the amount of the subsidy to be paid for seed imported from France and processed in another Member State is unduly generous as a result of the difference of almost FF 0, 80 per ECU between the incorrect rate and the actual rate. According to the Commission, that difference gives a substantial advantage to traders engaging in that transaction, unrelated to the purpose of the subsidy as laid down in Article 27(1) of Regulation No 136/66. Furthermore, it is doubly discriminatory.

According to the Commission, in view of the nature of the error, which concerns principally the rate of the ECU expressed in French francs, only traders who had bought oil seeds in France in order to import them into another Member State for processing benefited from an application for advance fixing on that date. Furthermore, given the obvious nature of the error, only some traders decided none the less to submit applications for advance fixing on the basis of those incorrect exchange rates.

The Commission points out that, according to Article 33 of Regulation No 2681/83, the spot and forward rates for converting the ECU into national currencies are derived from the exchange rates established daily by the Commission and published in the 'C' Series of the *Official Journal of the European Communities* and from the forward exchange rates for the ECU which it calculates daily on the basis of information recorded on the exchange markets. So far as concerns the spot rates, the figures published on 21 and 22 March in the 'C' Series of the *Official Journal of the European Communities* highlight unambiguously the manifest error contained in Annex III to Regulation No 735/85.

According to the Commission, therefore, by adopting Regulation No 1358/89 it merely sought to prevent the unwarranted and discriminatory advantage, incompatible with the purpose of the regulation in question, that would have resulted from the application, after the measure suspending the subsidy had been declared invalid by the Court, of the incorrect exchange rates for the ECU in Annex III to Regulation No 735/85 in favour of those who had applied for advance fixing. To that end, it took a measure withdrawing the subsidy in order to correct the error affecting the exchange rate of the ECU and tainting the legality of Regulation No 735/85. That measure was confined to correcting the incorrect exchange rates in Annex III to Regulation No 735/85, without amending the remaining provisions of that regulation, and in particular the amounts of 'gross' and 'final' aid. According to the Commission, Regulation No 1358/89 entirely satisfies the conditions laid down by Community law and confirmed by the case-law of the Court, which the Community legislature must observe when it seeks to remedy, with retroactive effect, a material error affecting a regulation which it has adopted.

The Commission goes on to explain that the main condition is that the principles of legal certainty and protection of legitimate expectations must be complied with. Only the principle of legal certainty is referred to by the College, and with the reservation that it appears to be only of limited application in the instant case, since in view of the repeated intervention of the Commission, the correctness of the rates fixed had been called in question from the outset. The Commission adds that the material error contained in the table of exchange rates was so obvious that some traders discovered it on the first day, even before the Commission had intervened.

According to the Commission, it is apparent as much from the factual circumstances as from the details and the means of information at the disposal of all traders that none of the persons concerned, especially none of those who intended to seek advance fixing of the subsidy for seed harvested in France and to be processed in another Member State, could have been led to rely on the legality of Regulation No 735/85, when Annex III thereto was vitiated by a material error which became evident on a simple reading of that annex. In the Commission's view, the fact that the error affecting the exchange rates was obvious to all the traders is sufficient on its own to support the conclusion that the rectification of the incorrect exchange rates with retroactive effect, by means of Regulation No 1358/89, does not infringe the principles of legal certainty and protection of legitimate expectations.

Moreover, the Commission considers that it cannot be accused of waiting more than four years to withdraw the incorrect annex to Regulation No 735/85 and thereby acting out of time. In that respect, it refers to the following circumstances:

— on the one hand, the suspension of applications for advance fixing, even though the Court subsequently declared it invalid, postponed *de facto*, until after the judgment of the Court of 28 February 1989, the decision concerning the issue of advance-fixing certificates applied for in respect of the amounts of the subsidy fixed by Regulation No 735/85;

— on the other hand, in hearing proceedings directed against the refusal of the Produktschap to issue the advance-fixing certificates to Cargill, the College had not yet given effect to the judgment of the Court of 28 February 1989 at the time when Regulation No 1358/89 was adopted.

The Commission considers that, in adopting the latter regulation, it took action in a situation which, so far as concerns the actual grant to Cargill of a subsidy calculated on the basis of incorrect exchange rates for the ECU, had to be considered provisional. In that respect, it points out that every measure taken by a Community institution is presumed lawful as long as it has not been withdrawn by that institution or declared invalid by the Court.

The Commission therefore considers that, having regard to the circumstances of the present case, Regulation No 1358/89, which withdrew Annex III to Regulation No 735/85 — an annex that affected the validity of the regulation — in order to replace it with the correct rates for converting the ECU into national currencies, to be applied on 22 March

1985, was adopted within a reasonable period. Accordingly, by re-establishing by means of the contested regulation the actual rates for converting the ECU into national currencies, to be applied on 22 March 1985, the Commission complied with the principle of legality without infringing the principle of legal certainty, regard being had to the particular circumstances of the instant case, or frustrating the legitimate expectations of traders, given the obvious nature of the irregularities arising from the application of incorrect exchange rates. According to the Commission, therefore, Regulation No 1358/89 should not be declared invalid.

Question 2

1. The *plaintiff* considers that the fact that, according to the Commission, Regulation No 735/85 apparently contains a miscalculation is not sufficient to render that regulation invalid per se. The validity of Regulation No 735/85 must be examined in the light of the superior rules of law on which these particular rules are based.

In its view, the legal basis of Regulation No 735/85 is, in the final analysis, Article 27(1) of Regulation No 136/66, which is relied upon by the Commission. The plaintiff points out in that respect that the 'world market price' within the meaning of Article 27 of Regulation No 136/66 is not an empirical measure, but a price arrived at by the Commission on the basis of specific figures such as the market prices of oil and seed charged in Chicago. The methods used by the Commission in that connection are, to a large extent, impenetrable and unverifiable, and besides, they are not strictly defined in the legislation, so that it is impossible to determine on an objective and unequivocal basis what is, at any given time, the 'world market price' within the meaning of Article 27(1) of Regulation No 136/66.

The plaintiff submits that, in practice, industry is inclined to take the view that the Commission regularly fixes the subsidy at a level which is excessively low, or at any rate lower than that which would follow from the application of Article 27(1) of Regulation No 136/66. As a result, on most days of the year, no application for advance fixing is lodged because, in view of the amounts of the subsidy applicable on those days, none of the undertakings concerned is capable of processing the products economically.

In the light of market developments in March 1985, the plaintiff considers that the amounts of the subsidy fixed in Regulation No 735/85 were much closer than those fixed in Regulation No 755/85 to the objectives of Regulation No 136/66. The latter amounts were so low that they did not allow the products to be processed economically.

The plaintiff further considers that, according to the case-law, a national body responsible for applying Community rules cannot escape its duty towards the individual concerned to interpret a Community rule under the pretext that it is invalid, except where that rule has been lawfully repealed by the Community legislature or annulled by the Court.

In other words, the plaintiff considers that, even if Regulation No 735/85 was

unlawful, that does not in any way affect the situation so far as the national court is concerned unless that regulation has been properly withdrawn in the meantime. The answer to Question 1 has shown that this was not the case.

The plaintiff thus proposes that the Court should answer Question 2 as follows:

'In order to assess the plaintiffs' claims, the national court must proceed on the assumption that Regulation (EEC) No 735/85 is valid.'

2. The *Commission* points out that, on account of a material error affecting the table of exchange rates in Annex III thereto, Regulation No 735/85 is partially invalid because it is incompatible with Article 27 of Council Regulation No 136/66 and, furthermore, favours certain traders in an unwarranted and discriminatory manner.

In its reply to Question 2, therefore, the Court would be obliged to state, in the opinion of the Commission, that owing to material errors affecting Annex III, Regulation No 735/85 is partially invalid. A ruling to that effect would require the Commission, in accordance with Article 176 of the EEC Treaty, to take the necessary measures to comply with the judgment. In adopting those measures, the Commission would obviously have to take into account the Court's reply to Question 1.

Question 3

Part (a)

1. According to the *plaintiff*, the national court seeks essentially to ascertain whether Community law prevents it from upholding Cargill's claims in the main proceedings in which the latter seeks payment of the difference between the amounts of the subsidy fixed pursuant to Regulation No 735/85 and the same amounts calculated in accordance with Regulation No 755/85 in respect of the 700 tonnes of seed that Cargill would have been able to process by using the certificates which it was wrongly denied, namely the 700 tonnes over and above the quantity (10 000 tonnes) in respect of which the certificates had been applied for, as well as payment of interest on the principal sum.

The plaintiff considers that it follows from the invalidity of Regulation No 756/85 that Cargill should be placed in the position in which it would have been if, on 23 March 1985, it had obtained certificates drawn up on the basis of the amounts of the subsidy set out in Regulation No 735/85.

If Cargill had obtained the certificates which it applied for on 22 March 1985, it would, where appropriate, by making full use of those certificates, have obtained an extra HFL 787 510 on the identification of seed purchased on 22 March 1985. In its view, the interest claimed on that sum is intended solely to ensure that, on the date of payment, the amount finally attributed to Cargill is equal to the value in cash, on the date of payment, of the sum of HFL 787 510 which was wrongfully withheld in 1985.

The plaintiff proposes that the Court should reply to Question 3(a) as follows:

'The ancillary claims at issue fall to be decided by the national court having jurisdiction with regard to the principal claim.'

2. The *Commission* submits that if the Court declares that Regulation No 1358/89 is invalid, but holds that Regulation No 735/85 is entirely valid, the Produktschap will be required, as the Court ruled in paragraph 2 of its judgment in Case 201/87, to 'issue to Cargill with retroactive effect the advance-fixing certificates applied for on 22 March 1985 and [to] pay it the subsidy in the sum fixed by Commission Regulation No 735/85'.

The Commission infers from this that the Produktschap is still required to apply Regulation No 735/85 to the applications for advance-fixing certificates submitted by Cargill on 22 March 1985 and to grant either the subsidy calculated on the basis of Annex III for sunflower seed processed on the basis of those certificates in a Member State other than the State of production, or the difference between that subsidy and the lower amount of the subsidy which has in fact already been received in respect of that quantity.

Accordingly, it considers that it is not a matter of damages as such, but of the application, albeit belatedly, of Regulation No 735/85, which therefore comes entirely within the jurisdiction of the national court. Under the Common Agricultural Policy, it is for the national authorities to pay that subsidy to those entitled to it on behalf of the Community and in accordance with the relevant provisions of Community law.

According to the Commission, that solution, which entrusts the national court with the task of adjudicating on both the payment of the subsidy and the payment of default interest, is also to be preferred for reasons of procedural economy, a point made by the College. On the other hand, the claim in paragraph 3(c) of the order for reference relates not to the payment of interest, which is ancillary, but to full compensation since it does not apparently refer to payment of the subsidy for sunflower seed which has already been processed on the basis of the certificates at issue, but to payment of an additional amount which Cargill would have received if on 22 March 1985, as a result of a certificate being issued, it had obtained the right to that higher subsidy and if, because that subsidy was particularly advantageous, it had processed a quantity not more than 7% greater than that specified in the certificate. More precisely, those damages appear to relate not to the loss incurred *(damnum emergens)*, but to loss of income *(lucrum cessans)*.

In the Commission's view, that claim for damages may not be determined by the national court, but only by the Court, in proceedings brought under Articles 178 and 215 of the EEC treaty. The responsibilities which are entrusted to the national authorities under the Common Agricultural Policy, whether administrative or judicial, concern only the proper application of the measures laid down by that policy. Such responsibilities therefore cover, equally, the rectification of an incorrect application of

those measures, for example by the payment *a posteriori* of a subsidy which is due but has not been paid, or the repayment of levies unduly charged. However, compensation for damage caused by an unlawful act of the Community is completely outside the jurisdiction of the national authorities. An action for damages of that kind may only be brought against the Community itself, on the basis of the second paragraph of Article 215 of the EEC Treaty and, pursuant to Article 178 of that Treaty, it comes within the exclusive jurisdiction of the Court.

Finally, the Commission considers that the ancillary claim for default interest associated with that claim for damages may also be determined only by the Court in accordance with Articles 178 and 215 of the EEC Treaty, on the same basis as the claim for damages itself.

Part (b)

1. The *plaintiff* submits that, as is apparent from the order for reference, it is necessary to examine this question only in the event of affirmative answers to Questions 1 and 2. Given that Question 2 should be answered in the negative, Cargill considers that it is unnecessary to examine the present question.

10. The *Commission* considers that, if the Court also declares Regulation No 735/85 (partially) invalid because of errors affecting Annex III thereto, it will be required to take the measures necessary to remedy that (partial) invalidity, as it has pointed out in connection with Question 2. Taking account of the answer to Question 1, the Commission will by means of those measures have to fix the exchange rates applicable to the calculation of the amounts of the subsidy for sunflower seed processed in a Member State other than the State of production, in respect of which advance-fixing certificates were applied for on 22 March 1985.

So long as the Commission has not adopted those measures, the national court cannot determine the proceedings before it because, in the event of both Regulation No 1358/89 and Annex III to Regulation No 735/85 being declared invalid, the system of subsides established by the latter regulation will no longer contain the details (that is, the table of exchange rates) which are necessary to fix and pay the amount of the subsidy in the event that sunflower seed is processed in a Member State other than the State of production (see Article 33 of Regulation No 2681/83).

Conclusions of the Commission regarding the questions as a whole

In the light of the foregoing considerations, the Commission considers that Question 1 should be answered in the negative and that, as a result, the other questions do not call for an answer. In the event of the Court taking a different view, the Commission proposes, in the alternative, that the other questions be answered as follows:

If the Court answers Question 1 in the affirmative, and declares that Regulation No 1358/89 is invalid, it will be necessary to answer Question 2 in the affirmative by declaring that Annex III to Regulation No 735/85 is invalid.

If the Court answers both Question 1 and Question 2 in the affirmative by declaring that Regulation No 1358/89 and Regulation No 735/85 are invalid, either in whole or in part, it will be necessary to hold by way of reply to Question 3(b) that the Commission is required, in accordance with Article 176 of the EEC Treaty, to take the necessary measures to comply with the judgment of the Court.

On the other hand, if the Court answers Question 1 in the affirmative and Question 2 in the negative, it will be necessary to hold by way of reply to Question 3(a) that the national court has jurisdiction to order the national body concerned to issue to Cargill, with retroactive effect, the advance-fixing certificates applied for on 22 March 1985 and to pay the corresponding amount of the subsidy as well as any default interest payable thereon. However, the national court does not have jurisdiction to determine claims for damages where the Community may be accountable owing to the fact that Regulations Nos 756/85 and 1358/89 are invalid in whole or in part, or claims seeking payment of default interest due in that connection.

Díez de Velasco
Judge-Rapporteur