OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 14 December 1988 *

Mr President,
Members of the Court,

1. In the present proceedings the national court seeks a ruling on:

(a) the validity of Commission Regulation No 756/85 of 22 March 1985 [1] which suspended the advance fixing of the subsidy for oilseeds;

(b) in the event of that regulation being declared invalid, on the consequences thereof regarding the conditions to be applied by the national intervention agency.

2. Before I examine the two questions raised by the national court, it is appropriate to consider the following matters.

By Regulation No 735/85 of 21 March 1985 [2] the Commission fixed the subsidy for oilseeds with effect from 22 March 1985. Pursuant to the relevant provisions of the basic regulation (Article 27 of Regulation No 136/66 of the Council of 22 September 1966 [3]), that subsidy is equal to the difference between the world price and the Community target price for oilseeds; the latter price is fixed, pursuant to Article 33 of Commission Regulation No 2681/83 of 21 September 1983, [4] whenever the market situation makes it necessary to do so and in any event at least once a week.

3. On 22 March 1985 the Netherlands undertaking Cargill BV submitted to the national intervention agency ('the Produktschap') two applications for advance fixing of the subsidy in respect of an aggregate amount of 10 000 tonnes of sunflower seeds purchased in France.

On the same day the Commission noted that there was an error in Regulation No 735/85. The result of that error, which affected the rate to be applied for converting the final subsidy into the currency of the country where processing was to take place where the latter is not the country of production, was that traders who purchased oilseeds in one Member State for processing in another could receive a final subsidy higher than they would have received if the correct rate for the two currencies had been applied.

4. To remedy that situation the Commission adopted two regulations on the same day, 22 March 1985. By means of the first, Regulation No 755/85, [5] the Commission changed as from 22 March 1985 the amount of the subsidy laid down in the previous

* Original language: Italian.
1 — OJ 1985, L 81, p. 38.
2 — OJ 1985, L 80, p. 18.
3 — OJ, English Special Edition 1966, p. 221.
4 — OJ 1983, L 266, p. 1.
5 — OJ 1985, L 81, p. 36.

regulation, Regulation No 735/85. By means of the second regulation, Regulation No 756/85, it suspended the advance fixing of the subsidy in respect of certificates applied for on 22 March 1985. In issuing the latter regulation, the Commission relied on Article 8 of Council Regulation No 1594/83,[6] which allows the Commission to amend the amount of the subsidy and suspend advance fixing where an abnormal situation arises on the Community oilseeds market.

Following that suspension, the Netherlands intervention agency rejected Cargill's application for certificates showing advance fixing; that rejection was then challenged before the national court, which stayed the proceedings and referred to the Court of Justice the two questions which I mentioned earlier.

The first question

5. In its first question, the national court seeks a ruling on the validity of Regulation No 756/85. It asks in particular whether that regulation is in conformity with the conditions laid down in the provision on the basis of which it was adopted: Article 8 of Council Regulation No 1594/83.

It should be borne in mind that according to that provision:

'If the situation of the Community seed market is abnormal, and in particular if the volume of applications for advance fixing of the subsidy does not appear to be related to normal outlets for seeds harvested in the Community, it may be decided, if the certificate referred to in Article 4 has not yet been issued, to alter the amount of the subsidy and to suspend the advance fixing of this amount, to the extent necessary to restore the balance between the Community market and the world market.'

6. Cargill BV pointed out that that provision does not allow the Commission to take — as it in fact did in this case — preventive measures, that is to say suspension of the advance fixing of the subsidy where there is merely a risk of an imbalance in the markets. In other words, the Commission can exercise the power of suspension granted to it by Article 8 only where the number of applications for advance fixing submitted by undertakings has already exceeded the volume corresponding to 'normal outlets for seeds harvested in the Community'. Since in the present case the applications submitted on 22 March 1985 related to quantities of oilseeds not exceeding the normal throughput of the market, it must be concluded that the Commission did not comply with the limitations imposed by Article 8.

7. I do not believe that that objection can be upheld. The reason for this is eminently textual. Article 8 of Regulation No 1594/83 clearly indicates, by using the expression 'in particular', that the eventuality of an abnormally high number of applications for advance fixing being lodged is only one of the situations in which the Commission may intervene by suspending advance fixing of the subsidy. The reason for which an example is thus given in Article 8 seems moreover to be clear. It is obvious that if the

6 — OJ 1983, L 163, p 44.

applications lodged have attained a level disproportionate to the normal throughput of seeds on the market a particularly serious situation has arisen, indicative of movements attributable essentially to speculation, thus calling for prompt action by the Commission.

8. However, that does not mean that even when the number of applications is not so high the Commission cannot likewise suspend advance fixing. The power of suspension is vested in the Commission in order to enable it to remedy an abnormal situation on the oilseeds market. And it is precisely in order to facilitate monitoring of the state of the market that, under Regulation No 1594/83, the certificate showing advance fixing is issued only after a specified period — albeit a short one (expiring on the afternoon of the following working day) — has elapsed since lodgment of the application.

It seems to me to be consistent with that aim that the Commission should be able to suspend advance fixing whenever there are sound reasons for believing that the market situation has changed and that, therefore, the amount of the applicable subsidy no longer corresponds — as it must pursuant to Article 27 of the basic regulation, Regulation No 136/66 — to the difference between the world price and the Community target price for oilseeds. In such circumstances, the fact that the volume of applications lodged by traders has not (or not yet) attained an abnormal level does not have the effect of 'paralysing' the Commission's power to intervene; I will go further and say that it is not only legitimate but indeed advisable for the Commission to intervene to remedy an abnormal situation even before its immediate effects have become apparent and therefore before there is a rush of speculative transactions manifested by an excessive number of applications for advance fixing.

9. Cargill BV also stated that the Commission was not entitled in this case to decide to suspend advance fixing on the basis of Article 8, since that provision allows it to intervene only in order to remedy abnormal market situations attributable to the impact of factors of an *economic* nature. Article 8, it contends, does not allow the Commission to suspend advance fixing in order to remedy the consequences of an *error* which it has itself committed in calculating the amount of the subsidy.

10. Two arguments are put forward in support of that view. First, it is observed that Regulation No 1594/83 does not expressly provide that an error in the determination of the subsidy will justify exercise of the power to suspend advance fixing. It was only as a result of a later amendment to Article 8, made by the Council in Regulation No 935/86 of 25 March 1986,[7] that such a possibility was envisaged.

In the second place, it is stated that suspension in the event of an error results in an unjustified encroachment upon the protection of the legitimate expectations of the traders who made proper applications for advance fixing. They are, it is said, deprived of the possibility of obtaining a certificate not only when there is an abnormal market situation but also whenever the Commission is negligent in calculating the amount of the subsidy. Their right is thus dependent upon the greater or lesser diligence applied by the Commission.

7 — OJ 1986, L 87, p. 5.

That also gives rise to a precarious situation which is incompatible with the requirements of legal certainty that are essential in order to ensure the orderly conduct of the economic relations concerned.

11. In that regard I must observe that it does not seem to me that in fact the committing of an error by the Commission in fixing the amount of the subsidy falls within the scope of Article 8 of Regulation No 1594/83. I think that there is a fairly clear difference between an error and a 'situation on the . . . market which is abnormal' envisaged by that provision. The latter situation should in fact be seen as an adverse development in the economic situation in which the subsidy is intended to operate, a development brought about by abnormal evolution of the variables affecting the market, such as, in particular, the balance of supply and demand and price levels.

Where there is an error, on the other hand, the situation may also produce distorting results but it is nevertheless unconnected with any change in the economic situation and is exclusively attributable to negligence, of a greater or lesser degree, on the part of the Commission.

12. On the basis of those considerations it seems to me that, if a strict approach is adopted, it must be concluded that the Commission, by basing Regulation No 756/85 on Article 8 of Regulation No 1594/83, did not choose an appropriate legal basis. Having said that, however, I must also point out that I am not altogether sure that such a defect is capable of rendering Regulation No 756/85 invalid.

It must be observed that even if Article 8 were not applicable in cases of error that would not mean that the Commission was not entitled to adopt, in this case, a measure containing substantially the same provisions as Regulation No 756/85. In other words, the Commission, as well as being clearly empowered to change the amounts of subsidy erroneously laid down in Regulation No 735/85 — as it did by means of Regulation No 755/85 — could also take action regarding applications for certificates with advance fixing lodged on 22 March 1985 by preventing the issue of such certificates.

Intervention of that kind is justified by the principle whereby a measure which is irregular as a result of an error may be withdrawn or amended — even retroactively, within certain limits — by the authority which issued it; the purpose is to protect both the public interest in ensuring the legality of administrative action, which may not take the form of a measure of other than the prescribed scope, and subjective legal situations in the area in which the measure is intended to operate. [8] I would point out in that connection that in the judgment of 1 June 1961 in Case 15/60 *Simon* v *Court of Justice* [1961] ECR 115 the Court expressly declared that 'if the administrative authority becomes aware that a certain allowance has been granted as a result of a wrong interpretation of a legal provision it has the power to amend the previous decision. Even if in certain cases, in

8 — It seems to me to be significant that, after the occurrence of the events at issue in this case, and even after the amendment of Article 8 of Regulation No 1594/83 made by Council Regulation No 935/86, the Commission, having in two other cases found an error in a regulation fixing the amount of the subsidy, proceeded to rectify matters by amending the incorrect regulation (see Commission Regulations Nos 1520/87 of 1 June 1987, OJ 1987, L 142, and 1537/87 of 2 June 1987, OJ 1987, L 143). In the first case, when the error was unfavourable to the traders concerned, the amendment took effect *ex nunc*, unless otherwise requested by those concerned; in the second case, where the amendment was made a few days after the issue of the incorrect regulation, in which the error was favourable to the traders concerned, the amendment took effect *ex tunc*, unless otherwise requested by those concerned.

view of vested rights, withdrawal on the ground of unlawfulness does not have retroactive effect it always takes effect from the present'. In its judgment of 13 July 1965 in Case 111/63 *Lemmerz-Werke* [1965] ECR 677 it stated that 'the High Authority can revoke illegal decisions, even retroactively, provided that in certain exceptional cases proper consideration is given to the principle of legal certainty'. I would point out finally that in the judgments of 3 March 1982 in Case 14/81 *Alpha Steel* [1982] ECR 749 and of 26 February 1987 in Case 15/85 *Consorzio Cooperative d'Abruzzo* [1987] ECR 1005 it was held that 'the withdrawal of an unlawful measure is permissible, provided that the withdrawal occurs within a reasonable time and provided that the Commission has had sufficient regard to how far the application might have been led to rely on the lawfulness of the measure'.

In the present case — although, by contrast with those cited, it concerns a general measure — I do not believe that there is anything to prevent the withdrawal (or amendment) of the irregular Regulation No 735/85 from including the suspension of the issue of certificates applied for on 22 March 1985. Those applications, which were in any case based on an irregular measure, did not in fact confer perfect rights on the persons concerned but merely rights which remained *sub conditione*. Naturally, the right of the traders affected to take action to establish the institution's liability for the damage suffered by them was not affected by that fact.

13. I must also add that intervention of that kind appears to be closely connected with the action envisaged in Article 8. In both cases, the same objective is pursued: that of ensuring that a subsidy is not granted which is not in conformity with the basic provision and is therefore likely to cause distortion. It is true that the power of suspension under Article 8 relates, as we have seen, to a specific eventuality (a change in the economic situation); and it is also true that in such an eventuality the expectations of the traders must be considered with greater care, in so far as the applications for advance-fixing certificates are nevertheless based on a proper rule, which explains why Article 8 makes the exercise of the power of suspension subject to precise conditions.

But it is also true that that power must be regarded as a specific manifestation of a wider power of intervention which is available to the Commission in any event to enable it to ensure that the subsidy is not diverted from its proper purpose. The Commission is responsible for ensuring that the subsidy in question is not converted from something which contributes to market equilibrium into something which upsets the economic balance and distorts competition. So instead it must be concluded that, if on the basis of Article 8 the Commission may, within certain limits, halt the issue of certificates relating to amounts of aid determined *correctly*, the Commission must, *a fortiori*, be able to achieve the same result — keeping its action within the same limits — where the applications submitted by companies relate to amounts which were incorrect *ab initio*.

The foregoing considerations confirm, in my view, the fact that the Commission was entitled in this case to adopt a regulation having the scope and effects of Regulation No 756/85, and that the latter's reference to Article 8 of Regulation No 1594/83 is not such as to render it invalid.

14. However, if only to dispel any uncertainty on this point, the matter must be considered from another standpoint, which I see as decisive. I refer to the Commission's statement of the reasons on which Regulation No 756/85 is based. It is to be noted in the first place that reference is made to Article 8 in the first recital in the preamble to that regulation in the part relating to the possibility of suspension 'if the volume of applications for advance fixing of the subsidy does not appear to be related to normal outlets for seeds harvested in the Community'; that reference is not only not pertinent, as has been stated, but is even misleading in so far as it gives the impression that the Commission's intervention was in fact prompted by the lodgment of an abnormally large number of applications, whereas it is undisputed that in this case that did not happen.

But what must be emphasized above all — giving rise to serious doubts in my mind as to its validity — is the fact that Regulation No 756/85 fails to mention the only real reason for which advance fixing was suspended: namely, to correct the calculation error previously committed by the Commission.

In those circumstances it seems to me that it must be concluded that the measure in question does not contain a statement of the genuine and sole reasons which prompted the Commission to adopt it, consequently detracting from the possibility of those concerned discovering, possibly even through review by the courts — including the possibility of an action for damages — in what circumstances the institution exercised the powers conferred upon it (see judgments of 7 July 1981 in Case 158/80 *Rewe* [1981] ECR 1805 and of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493).

It seems to me therefore that Regulation No 756/85 must be regarded as invalid in so far as it does not meet the requirement laid down in Article 190 of the Treaty and consistently clarified by the Court of stating the reasons on which it was based.

The second question

15. In its second question the national court essentially asks the Court of Justice to state whether, in the event of Regulation No 756/85, which suspended the advance fixing of the subsidy at issue, being declared invalid, the national intervention agency is obliged to accede to the application for advance fixing lodged by the undertaking concerned, applying the provisions of the earlier Regulation No 735/85.

I think that in reply to that question it must be stated that Regulation No 735/85 is itself invalid and cannot therefore be applied. In fact, by laying down an amount for the subsidy which, as a result of a calculation error, does not correspond to the difference between the Community target price and the world price, that regulation infringes the relevant provision of the basic regulation (Article 27 of Regulation No 136/66).

16. In any event, it must also be borne in mind that the national intervention agency, in adopting a fresh decision on the application for advance fixing at issue, must take account of the *jus superveniens*. It must therefore take its decision having regard to the *de jure* (and *de facto*) situation obtaining when it does so and may not therefore accede to an application if it relates to an amount of subsidy which is no longer applicable, like in fact those envisaged in Regulation No 735/85. Moreover, the issue

of a certificate with advance fixing relating to an amount of subsidy not provided for in the legislation *in force* would give rise to transactions causing distortion and would therefore infringe the rules on the common organization of the market.

In conclusion I suggest that the following reply should be given to the national court:

'(1) Commission Regulation No 756/85 of 22 March 1985 is invalid;

(2) Commission Regulation No 735/85, which fixes the amount of the subsidy incorrectly, is invalid and cannot be applied by the competent national intervention agency.'