revising the level of processing costs obtaining there, since that method enables a realistic estimate to be made, in Greece, of the development of the industrial costs which play a part in the calculation of the aid. Only the production of evidence showing that the method was unsuitable could have obliged the Commission to discard it.

2. The fact that the Commission, in performing the necessary conversions and calculations for fixing the levels of production aid for tomato concentrates and peaches in syrup, chose as its accounting currency the currency of the Member State which had traditionally been the main producer of those goods in the Community cannot lead to any distortion in the fixing of aid for other Member States, provided that the same currency is used consistently for the same operations. The use of the exchange rate obtaining on the day on which the aid is calculated is justified in respect of a financial benefit whose purpose is not to offset expenses incurred in the past but to establish the competitive position of Community goods with a view to the forthcoming marketing year.

3. The Commission committed a technical error in Regulation No 1615/83, by transposing the machinery of uniform coefficients applicable, in order to take account of packaging costs, to aid for producers of tomato concentrates throughout the Community before the accession of Greece, to a system of aid which differentiates between Greek producers and those of the other Member States. The application of one and the same coefficient to different levels of aid leads to an unjustified reduction of the aid granted to all Greek producers whose product does not match the specification of the standard packaging prescribed by Article 1 (2) of Regulation No 1618/83, and thus conflicts with the second and third paragraphs of Article 40 (3) of the EEC Treaty.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 27 February 1985

My Lords,

In this case the Republic of Greece seeks an order that Commission Regulations Nos 1615/83 and 1618/83 (Official Journal 1983, L 159, p. 48, and L 159, p. 52) be declared void insofar as they regulate the production aid to be paid for the 1983/84 marketing year in respect of tomato concentrates and peaches in syrup produced in Greece.

Council Regulation No 516/77 on the common organization of the market in products processed from fruit and vegetables (Official Journal 1977, L 73, p. 1) was amended by Council Regulation No 1152/78 (Official Journal 1978, L 144, p. 1). The latter introduced into the former a series of articles providing for the grant of aid with respect to the conclusion of contracts between producers of fruit and vegetables and processors of some of these products, including tomato concentrates and peaches in syrup. The object of the scheme was to enable these products from Community countries, the prices of which were at the time 'considerably higher' than those from third countries, to become competitive in that they could be manufactured at a price lower than that which would result from the payment of a remunerative price to producers of the fresh products. The aid was to be paid to the processors after the processing had been carried out, provided that the applicable conditions had been complied with (Article 3 b (4) and (5)). One of these conditions was that the price paid by the processors to the producers must not fall below a minimum fixed in accordance with Article 3 a (3).

The amount of the aid was to be governed by the provisions of Article 3b. Paragraph 1 of that provision stipulates that 'the amount of the aid shall be so fixed as to make up the difference between the prices of Community products and those of products of third countries'. By paragraph 2, 'the prices of Community products shall be established having regard to: (a) the minimum price referrred to in Article 3 (a); (b) the processing costs, disregarding those undertakings with the highest costs'.

The first time prices were fixed, the price of products from third countries was to be determined on the basis of prices obtaining in international trade. Thereafter the price of such products was to be determined having regard to those prices and to the free at frontier prices on import to the Community (paragraph 3b (3)).

Article 3c provides that the amount of the aid and the minimum price are to be fixed by the Commission through the Management Committee procedure provided for in Article 20 of the principal Regulation. In the years since Greece acceded to the Community the Commission has fixed the minimum price and the amount of the aids for the products concerned in Regulations No 1963/81 (Official Journal 1981, L 192 p. 16), No 1585/82 (Official Journal 1982, L 178 p. 20) and 1618/83 (Official Journal 1983, L 159 p. 52) respectively.

For peaches in syrup, a flat rate expressed in ECU was provided in Article 6 (2) of each of these Regulations per 100 kg, immediate packaging included, (a) for Member States other than Greece and (b) for Greece. Thus in Regulation No 1618/83, which is challenged, it was fixed respectively at (a) 29.93 and (b) 14.06 ECU.

For tomato concentrates the provisions are more complex. Article 1 (2) of each of the three Regulations referred to sets out the amount of the aid for 100 kg, immediate packaging included, of tomato concentrates containing between 28% and 30% of dry matter and packed in units of 1.5 kg ('the reference product'), following a pattern established, though on a different reference product, for the marketing year 1978/79 (Commission Regulation No 1515/78 (Official Journal 1978, L 178, p. 61).

For the reference product in question again different rates are fixed (a) for Member States other than Greece and (b) for Greece. In Regulation No 1618/83 these were respectively (a) 47 and (b) 30.78 ECU.

Regulation No 1610/78 (Official Journal 1978, L 188, p. 19), however, introduced additional provisions into the aid scheme. It recited that 'because of the variations in packaging and the different degrees of concentration, the amount of production aid for tomato concentrates must be fixed for a product with defined commercial characteristics; whereas, therefore, the coefficients to be applied to such an amount should be fixed so as to take account of the differences in relation to the concentration and type of packaging'. Coefficients were laid down for calculating the aid due in respect of tomato concentrates containing more or less dry matter than the reference product and packaged in different sizes.

Commission Regulation No 1962/81 (Official Journal 1981, L 192, p. 13) recited that the use of these coefficients had shown the need 'in the case of the lowest and highest concentrations, to fix coefficients which are more closely related to the dry extract content of the products concerned; whereas, in applying the said coefficients to the product in question, a maximum ratio should be laid down between the net weight and the net weight with immediate packaging according to the various forms of packing'. An amended table of coefficients was introduced by this Regulation for the marketing year 1981/82. Coefficients were set out for calculating (as a percentage of the reference product taken as 100) the aid due for tomato concentrates containing more or less dry matter than the reference product and packaged in units of less than 1.5 kg.

For the marketing years 1982/83 and 1983/84, Commission Regulations Nos 1602/82 (Official Journal 1982, L 179, p. 16) and 1615/83 (Official Journal 1983, L 159, p. 48) recited that experience had shown that these coefficients should be retained unchanged, and the same table of coefficients was retained.

The fact that different rates were fixed for Member States other than Greece and for Greece, both in respect of peaches in syrup and of the reference product for tomato concentrates, derives from the Greek Act of Accession.

Article 59 of that Act provides, so far as is relevant, that prices for Greek products processed from tomatoes or peaches falling within Regulation No 516/77 shall be aligned with those for the rest of the Community in seven annual stages following the procedure laid down. Also, Article 103 of the Act lays down the provisions applicable with respect to the system of aid at issue in these cases. In particular, Article 103 (3) provides as follows:

'The amount of Community aid granted in Greece shall be fixed in such a fashion as to compensate the difference between the level of prices of products of third countries, determined under Article 3 a (3) of Regulation (EEC) No 516/77 and the level of prices of Greek products established taking into account the minimum price referred to in paragraph 2, and the processing costs obtaining in Greece, without taking into consideration undertakings which have higher costs. This aid may not however exceed aid granted in the Community as at present constituted.'

The minimum price was to be established prior to the first move towards alignment on the basis of prices paid in Greece to producers for a product for processing, recorded over a representative period to be

determined under the previous national system, and if that minimum price differed from the common price, the price in Greece was to be modified at the beginning of each year following accession in accordance with the rules laid down in Article 59.

On 31 March 1983, in answer to a request from the Commission dated 8 March 1983, the Greek Government forwarded its estimation of the processing costs applicable in Greece for the marketing year 1982/83 on which the 1983/84 aid was to be calculated. It was said that on the basis of data from 36 processors representing 84.96% of Greek production, the cost of processing tomato concentrates was 45.19 drachma per kilogram. This figure was made up from: 4.71 drachma for transport, 28.83 drachma for production, 6 drachma for management costs and 6.15 drachma for financial costs.

At the same time the Greek Government evaluated the processing costs for peaches in syrup at 42.75 drachma per kilogram. This sum was broken down as follows: 1.33 for transport, 31.01 for production, 5.54 for management and 4.87 for financial costs. These figures were based on data supplied by 42 processors representing 94.44% of Greek production.

The Commission did not adopt these figures. Instead it took the figure of 39.64 drachma per kilogram for tomato concentrates in respect of the reference product and 39.76 drachma per kilogram for peaches in syrup. It arrived at the former figure by taking the sum of 33.28 drachma representing the processing costs in 1981/82 and increasing it by 19.1%, which was said to be the rate of inflation in Greece at the material time. It has not been suggested that the processing costs for peaches in syrup were calculated otherwise than by this method.

The essential starting point of the Greek Government's argument is Article 103 of the Act of Accession. It is said first that the level of prices of Greek products must be determined separately from those in other Member States. This is clearly correct. Then it is said that the level of prices of Greek products must be established by taking the minimum price referred to in paragraph 2 of the Article plus the processing costs obtaining in Greece. The third country prices must then be deducted from the total of these. This is substantially correct, since the minimum price and the processing costs must be established, though it does not mean that the exercise of fixing the prices is a purely precise arithmetical one, since the Commission is required to fix 'the level' of prices in Greece, 'taking into account' (or as the French text has it 'compte tenu notamment') the minimum price and the processing costs. There remains an element of assessment to arrive at 'the level' on the basis of these figures.

On this aspect of the case there is no real issue as to the calculation of the 'minimum price' or as to the level of third country prices. What is in issue is the calculation of the 'processing costs obtaining in Greece' and in consequence 'the level of prices of Greek products', and the amount of aid resulting from the deduction from the Greek prices of the third country prices. Unlike the applicants in Cases 194-206/83, who are Greek processors, the Greek Government attacks *in limine* the price established, both for the reference product in tomato concentrates and for peaches in syrup.

So far as the other Member States were concerned, it seems that the Commission, in respect of aid for 1983/84, had regard to processing costs supplied by the Member States for the years 1981/82 and 1982/83. If

the figures supplied for the latter year represented a proportionate increase over the previous year which exceeded the current rate of inflation, then the 1981/82 figures were multiplied by the rate of inflation. These costs were averaged out to produce a single figure for the nine Member States.

The Greek Government contends in respect of Greece that for each year there must be established the processing costs actually applying on the basis of detailed figures and that it is not permissible simply to take an overall rate of inflation as a mark-up on the previous year.

It seems to me that the Commission is required under Article 103 to seek to establish the 'processing costs obtaining' and that means the actual costs being incurred, even if they have to be averaged out. For this purpose it is entitled to ask the Greek Government to collect the necessary statistics. The Commission is not bound to accept those figures without more. If it finds them unacceptable it is entitled to investigate them, but it does not seem to me that it is justified in rejecting them without giving the Greek Government or the processors the opportunity to deal with those matters in respect of which the Commission is not satisfied. It is said here that the figures were vague, but it is not shown that further clarification was requested or that, if it had been sought, it would not have been forthcoming. If such clarification had been sought and the Commission had reasonably formed the view that the figures (i.e. 45.19 drachma for the processing costs of tomatoes and 42.75 drachma for the cost of peaches) were not made out, then the Commission would have been entitled to take the rate of inflation as the yardstick by which to assess the processing costs for the relevant year, since clearly there must be some limit on the extent to which the Commission can be required to investigate the figures. In the present case, however, it seems to me that the Commission erred in simply taking the rate of inflation, both for tomato concentrates and for peaches in syrup, without giving the Greek Government or the processors any opportunity to satisfy the Commission as to the figures put forward, and that Articles 1 (2) and 6 (2) of the Regulation should be annulled in so far as they concern the amount of production aid fixed for Greece.

The Greek Government says, in the alternative, that the true rate of inflation at the relevant time was 21%, and not 19.1%. The Commission has countered this assertion by saying that the latter figure had been given by the authorities responsible for such statistics in Greece. Since this has not been contested by the Greek Government, it seems to me that the Commission could rely on the figure if it was entitled to take the rate of inflation as the method of fixing the increase in costs.

Then the Greek Government impugns the coefficients set out in Annex I to Regulation No 1602/82 which applied during the marketing year 1983/84 by virtue of Regulation No 1615/83. Its initial attack was on the method of adopting coefficients as such, on the basis that there must be an individual appraisal of the costs of producing concentrates at different degrees and in different sized packaging. This argument I understand to have been abandoned, in my view rightly, since the adoption of coefficients may be the most convenient way of setting out in the Regulations the amount of aid due for the various concencentrations and packagings involved. What the Greek Government says at the end of the day is

that to apply the same coefficients to all Member States, including Greece, fails to comply with Article 103 of the Act of Accession, since there must be a separate consideration of the Greek position. This would obviously not matter if the coefficients adopted produced the right results, but it is said that they did not do so for Greece. The method adopted is in addition in breach of Article 7 read with Article 40 (3) of the EEC Treaty.

In addition, the Commission relies on Article 2 of the Act of Accession which stipulates, *inter alia* that the acts adopted by the institutions of the Communities shall apply to Greece. Thus, it argues, Greece must take the Community regulations as it found them on accession, in particular it cannot challenge the basis adopted in Commission Regulation No 1610/78.

This argument is applicable only to the tomato concentrates since no coefficients were adopted for peaches.

This latter argument seems to me without foundation. Prior acts of the institutions are subject to the conditions laid down in the Act of Accession. Their further application is, thus, to be subject to the provisions of Article 103.

The basis of the Greek Government's argument is that processing costs are higher in Greece than in the rest of the Community. This means that the application of the same coefficients to Greece resulted in unlawfully reduced aids being granted to Greek producers. Moreover, the processing costs inevitably become greater as the container becomes smaller and in fact the half-kilo container is that most used. Thus the distortion becomes greater with the smaller containers and with it the discrimination suffered by Greek producers.

That Article clearly looks, and looks only, to processing costs obtaining in Greece. Just as the costs fixed for the reference product must relate to costs obtaining in Greece for that product, as the Commission admitted in its defence, so it seems to me that the costs established for tomato concentrates of other dry extract content, and packaged in units of different weights, must reflect costs obtaining in Greece. It is permissible to provide for those costs by adopting coefficients, but they must be coefficients which reflect the costs in Greece, which are not necessarily the same as those in the rest of the Community. The Greek Government contends that the need to import raw materials or manufactured packaging materials, and other factors, made those costs for smaller quantities in Greece more expensive than elsewhere in the Community. The coefficients adopted for 1983/84, and taken from Regulation No 1962/81 were fixed generally for the Community. It is not suggested that Greek processing costs, for other than the reference product, were reviewed and that this review produced the

The Commission does not contend that the coefficients applied reflected actual processing costs in Greece. Instead it claims that these coefficients are 'objective', being of general application and they are intended only to give partial compensation. Furthermore, it claims to have based them on the coefficients applied in Portugal, a country which it regards as similar for these purposes to Greece, though it does not claim that these coefficients are identical to those applied in Portugal.

very same coefficients to reflect Greek costs for the smaller quantities and other densities. It may be that the difference in drachmas between the aid granted to Greece and other Member States (which is the ceiling by virtue of Article 103) is not very great. It is however proportionately a significant difference and overall could involve substantial sums.

Accordingly, in my view, the Commission failed to carry out the requirements of Article 103 of the Act of Accession and in so far as it fixed the coefficients for Greece, Regulation No 1615/83 should be annulled. This factor does not affect the validity of Regulation No 1618/83 which is concerned only with the reference product.

On the other hand, it seems to me that the alternative basis advanced by the Greek Government for contesting the application of the same coefficients to Greece, namely Articles 7 and 40 (3) of the Treaty of Rome, is unsound. Where the alleged discrimination between producers also constitutes discrimination on the basis of nationality, Article 40 (3) is in fact the concrete expression of the general principle contained in Article 7: paragraph 28 of the judgment in Case 106/83 *Sermide* v *Ministero del Tesoro* [1984] ECR 4209). I agree with the Commission's submission that, during the transitional period, Article 40 (3) has been displaced by Article 103 of the Act of Accession as regards this point. Article 40 (3) applies during the transitional period except to the extent that the provisions of the Act of Accession expressly or impliedly require otherwise. Article 103 of the Act of Accession does in fact oust Article 40 (3) during the transitional period, precisely because it requires the costs of Greek processors to be assessed separately from those of the other nine Member States.

A further argument canvassed by the Greek Government is to the effect that the preambles to the Regulations concerned fail to set out reasoning to justify the application of the same coefficients to Greece as to the other Member States, in other words that the Regulations do not comply with Article 190 of the Treaty. Although the earlier Regulation setting up the coefficient system explains sufficiently why it had been adopted, clearly the Regulations in question do not give any reasons to show why the same coefficients can, or should, be applied to Greece or that the exercise required to be carried out by Article 103 of the Act has been undertaken. If it was contended that the coefficients were coincidentally the same for Greece as for other Member States this should have been explained. Alternatively, the justification claimed for applying these coefficients to Greece for the purposes of Article 103 should have been stated in Regulation No 1615/83 so that their validity could have been considered. This conclusion again does not apply to Regulation No 1618/83 because that Regulation does not concern coefficients.

Greece next complains of the monetary method adopted by the Commission to carry out its calculations. In respect of each product falling within the aid system the costs of the basic material were converted from the currencies of the relevant Member States, including Greece, into the currency of one Member State, in the present case Italian green lire for the basic material and Italian lire for the processing costs. The Commission first contended that this was because Italy was the country which was the largest producer of the product in question, but when Greece protested in its reply that Greece was the largest producer of peaches in syrup, the Commission said that it took

Italian lire since Italy was the largest producer of processed fruits and vegetables, whereas for raisins it took Greek drachmas and for prunes it took French francs since these two countries were the only producers of these products.

When making the relevant calculations it seems to me that the Commission was entitled to work, and that it was at least convenient, and perhaps essential, to work, in one currency for the nine Member States in order to achieve a common basis. I cannot see that it erred in also adopting the same currency for calculating the Greek aid so that all the figures were at one stage in the same currency. Moreover, the Commission had to convert the third country price into the same currency as was used for other purposes in order to make the appropriate deduction. Nor, so long as it was the fact (as I am prepared to accept, despite the Commission's change of position) that the country of the largest overall producer was taken, does it make any difference that that currency was taken rather than that of the country producing the largest quantity of the specific fruit in question. Accordingly, even though I do not find convincing the Commission's explanation as to why it could not have worked in ECU throughout, it seems to me that it has not been shown that the Commission erred in law by calculating the costs in lire and then converting the result into ECU for the purpose of expressing and paying the aid.

A more difficult point is the second argument of the Greek Government on this issue. The task of the Commission is to assess aid for the marketing year 1983/84 which both for tomato concentrates and peaches is from 1 July to 30 June. Since the aid has to be fixed before the beginning of the marketing year (paragraph 6 of Article 3b of Regulation No 516/77), the costs also have to be determined before the beginning of the marketing year. Under Article 103 the processing costs are those 'obtaining in' Greece. It has not been suggested that an attempt must be made to forecast likely costs during 1983/84. The argument has proceeded on the basis that it was right to determine the processing costs for the marketing year 1982/83 which were still current when the assessment had to be made. As has been seen, the Commission took the 1981/82 figures and increased them by the rate of inflation to achieve the 1982/83 costs. This calculation was in fact made apparently in April 1983 but in any event not later than 15 June 1983 when Regulation No 1618/83 was made. The Commission took the exchange rate of the drachma/lira at the date the calculation of costs was made in order to convert Greek costs into Italian lire.

The Greek Government says that this is wrong in principle. The Commission should have taken the rate of exchange prevailing at the time the costs were incurred, not at the date when the calculation was made. Otherwise a true equivalence of costs in the two currencies is not produced. In the instant case the result of what the Commission did was serious for the Greek processors because between 1982 and June 1983 there had been a devaluation of the drachma from LIT 20.45 to LIT 17.19. Accordingly Greek costs were translated at 3.26 lire less per drachma than they should have been. Moreover, there was in the result discrimination against the Greek processors, contrary to Articles 7 and 40 (3) of the Treaty, because, although the aid granted to

the Greek processors for 1983/84 was 6.7% higher than in 1982/83, that granted to processors in other Member States in 1983/84 was 7.3% higher than in 1982/83.

The Commission contends that it is right to take the exchange rate at the date the calculation is made, as otherwise it will affect the validity of other financial factors for a given period. Moreover this method is one which is easy to apply to all Member States and likely to iron out any discrepancies which would otherwise arise.

Clearly it is not practicable to take all costs as they are incurred and to convert them at the rate of exchange then prevailing, as at one stage Greece appeared to be arguing. It is equally impossible to seek to assess the likely exchange rate during the marketing year in question.

Both to have a workable method of calculation, which is not unwieldy, and to ensure that the figures for costs obtaining are not distorted by the rate of exchange adopted, is not entirely easy, but both must be achieved as far as possible. It seems to me that if the Commission had taken actual costs over the 1982/83 marketing year and had worked out an average, or a mean, for the year, then it would have been right to take the average exchange rate over say the first day of each month, or the mid-point between the highest and the lowest rates for the year. This is not, however, what the Commission did. As I understand it, they took 19.1% as the appropriate rate of inflation as at the date of their calculation. This was in fact the annual rate of inflation for the 12 months ending December 1982, but was accepted as still being relevant by the Greek representative at the committee of management meeting. They were thus seeking to take the appropriate costs as in the spring of 1983, rather than to take an average of the costs and the inflation rates over the year. On this basis since these were taken as current costs, it seems to me that the Commission was entitled, within its discretion, to take the current exchange rate, even if in the end this did not reflect with complete accuracy the equivalence of actual costs over the year. It is unfortunate that this exchange rate was affected by a devaluation; conversely, it is not impossible that the rate of inflation could have been lower earlier in 1982/83 (so that the calculation in respect of costs at that period may have been proportionately higher) and that the devaluation was in any event reflected in the rate of inflation.

Accordingly, although I confess that initially I found the Greek Government's argument very persuasive, I am of the view that it has not been shown that in this respect there was a breach of Article 103 of the Act of Accession. Nor, since rates of inflation and exchange rates were taken for other Member States in the same way and at about the same date, do I consider that there has been any unlawful discrimination against Greek processors or producers.

The Greek Government further maintains that the contested Regulations should in any event not have been adopted according to the management committee procedure. This is said to infringe Article 103 (3) of the Act of Accession. However, there is nothing in that paragraph to suggest that the management committee procedure might not be used. On the contrary, the inference is that unless excluded by the Act of Accession, the machinery set up to regulate

the common market organization should be used. Nor has the Greek Government advanced any argument to substantiate its contention. I would therefore reject this argument.

Article 3 (f) read with Article 40 of the Treaty has also been relied on to justify the claim for annulment of these Regulations. In my opinion nothing has been shown to support these contentions.

However, it is my view that for the reasons given, Articles 1 (2) and 6 (2) of Commission Regulation No 1618/83 in so far as concerns the amount of production aid fixed for Greece and Commission Regulation No 1615/83 in so far as it concerns the coefficients to be applied to production aid for tomato concentrates produced in Greece should be annulled.

The Commission should pay the costs of Greece.