mentioned provision and does not include the possibility, which is envisaged by other provisions of the said Regulation, of employing conversion factors.

3. It is clear from the text and objective of Article 4 (2) of Regulation No 159/66 that since the basic price is fixed for a product with defined commercial characteristics, the characteristics upon which the definition of the relevant product is based must be specified when the basic price is fixed and mentioned in the act by which that price is fixed.

In Case 151/73

GOVERNMENT OF IRELAND, represented by R. J. O'Hanlon and J. Blayney, instructed by L. J. Lysaght, Chief State Solicitor, as agent, with an address for service in Luxembourg at the office of E. Weitzel, 57 boulevard Royal,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by H. Darwin, Director of the Council's Legal Service, as agent, assisted by D. Vignes, Legal Adviser to the Council, with an address for service in Luxembourg at the chambers of J. N. Van den Houten, Director of the Legal Service of the European Investment Bank, 2 place de Metz,

defendant,

Application for annulment of Regulation (EEC) No 1365/73 of the Council of 21 May 1973 (OJ L 137, 1973), to the extent that that Regulation is concerned with the fixing of compensatory amounts for tomatoes,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco (Rapporteur), J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

I — Summary of facts and written procedure

The facts and the written procedure may be summarized as follows:

1. According to Article 65 (1) and (2) of the Act annexed to the Treaty of Accession (hereinafter referred to as the 'Act of Accession'):

'1. A compensatory amount shall be fixed for fruit and vegetables in respect of which:

(a) the new Member State concerned applied, during 1971, quantitative restrictions or measures having equivalent effect;

(b) a common basic price is fixed, and

(c) the producer price in that new Member State appreciably exceeds the basic price applicable in the Community as originally constituted during the period preceding the application of the Community system to the new Member States.

2. The producer price referred to in paragraph 1 (c) shall be calculated by applying to the national data of the new Member State concerned the principles set out in Article 4 (2) of Regulation No 159/66/EEC laying down additional provisions in respect of the common organization of the market in fruit and vegetables.

3. .....'

Article 66 (1) continues as follows:

'Until the first move towards alignment, the compensatory amount applicable in trade between a new Member State in which the conditions referred to in Article 65 (1) are fulfilled and the Community as originally constituted, another new Member State, with the exception of those referred to in the following subparagraph, or third countries, shall be equal to the difference between the prices referred to in Article 65 (1) (c).

In trade between two Member States in which the conditions referred to in Article 65 (1) are fulfilled, the compensatory amount shall be equal to the difference between their respective producer prices. The compensatory amount shall not be applied if this difference is insignificant.

The differences referred to in the above subparagraphs shall be adjusted, to the extent necessary, by the incidence of customs duties.'

As regards the criteria for the calculation of the compensatory amount, Article 4 (2) of Regulation No 159/66 of the Council, of 25 October 1966 (OJ No 192, 1966), provides that:

'the basic price shall be equal to the arithmetic mean of prices recorded on the representative Community market or markets which are situated in the surplus production areas having the lowest prices during the three marketing years preceding the date on which the basic price is fixed for a product with defined commercial characteristics (variety or type, quality class, sizing and packaging). In calculating the arithmetic mean, prices which on each representative market could be considered excessively high or excessively low in relation to normal price fluctuations on that market shall be disregarded.

The surplus production areas by reference to which the basic price is fixed shall, taken together, represent for the period in question between 20 % and 30 % of Community output of the relevant product.'

The following paragraph is added to the above provision at Article 4 (4) by Article 2 of Regulation No 2515/69 of the Council of 9 December 1969 (OJ L 318, 1969):

'For a product with commercial characteristics different from those of the product by reference to which the basic price is fixed, the price at which the product is bought-in pursuant to Article 7 shall be calculated by applying conversion factors to the buying-in price fixed by the Council.

The conversion factors shall be fixed in accordance with the procedure laid down in Article 13 of Regulation No 23.'

In view in particular of Article 66 (1) of the Act of Accession, the Council distinguished two components within the compensatory amount to be applied to imports of fruit and vegetables. It is provided at Article 1 of Regulation No 228/73 of 31 January 1973 (OJ L 27, 1973) that:

'The compensatory amount for fruit and vegetables shall comprise two components:

(a) the basic compensatory amount, hereinafter called the "basic amount", calculated in accordance with the first and second subparagraphs of Article 66 (1) of the Act;

(b) the amount of the customs duties referred to in subparagraph 3 of Article 66 (1) of the Act.'

In Accordance with this distinction and with reference to the 'basic amount' component, the Council supplemented the above Regulation by the addition of Article 2a, contained in Article 1 of Regulation No 1365/73 of 21 May 1973 (OJ L 137, 1973), which reads as follows:

'The basic amounts applicable until 31 December 1973 in trade between a new Member State and the Community as originally constituted, another new Member State and third countries in respect of cauliflowers (subheading ex 07.01 B I of the Common Customs Tariff) and tomatoes (subheading ex 07.01 M of the Common Customs Tariff) shall be as shown in Annex I. These amounts shall apply only to products for delivery fresh to the consumer.'

Annex I to this Regulation provides an amount, to be applied by Ireland, of 7·3 u.a./100 kg net for 'tomatoes for delivery fresh to the consumer'.

Moreover, the last recital of the same Regulation explains that:

'Whereas, as regards tomatoes, the prices notified by the new Member States relate to tomatoes grown under glass, which differ in certain respects from the tomatoes grown in the open, to which the basic price relates; whereas, for the purpose of calculating the compensatory amounts, a conversion factor, fixed on the basis of market prices recorded over several years at a standard figure of 0·55 should be applied in respect of the prices for tomatoes grown under glass.'

On 16 July 1973 the Government of Ireland brought an action for annulment against the abovementioned Regulation, to the extent that it provides for the application of a conversion factor.

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

II — Conclusions of the parties

The *applicant* claims that the Court should make an order:

'— declaring void Regulation (EEC) No 1365/73 of the Council of the

European Communities of 21 May 1973 in so far as the same deals with the fixing of compensatory amounts for tomatoes,' and that

'— the costs of this application be borne by the defendant.'

The *defendant* submits that the Court should:

'— reject the application', and

'— order the applicant to pay the costs'.

III — Submissions and arguments of the parties

The *Government of Ireland* states, firstly, that Article 65 (2) of the Act of Accession makes express reference, for the calculation of the producer price, to the 'principles set out in Article 4 (2) of Regulation No 159/66/EEC'. The latter provision makes no mention of the application of conversion factors, which are laid down by Article 4 (4), added by Regulation No 2515/69 before the ratification of the Treaty of Accession. The fact that Article 65 (2), although drafted after Regulation No 2515/69, clearly limits its reference to Article 4 (2) of Regulation No 159/66 alone, and does not extend that reference to paragraph 4 of the same Article, means, in the applicant's view, that the use of conversion factors for fixing the compensatory amounts to be applied in respect of fruit and vegetables was not contemplated by the authors of the Act of Accession. Accordingly the application of a conversion factor involves the introduction of a new principle, modifying the principles for calculation to which the text of Article 65 (2) of the Act of Accession refers, and amounts to a misuse of powers by the Council and an infringement of the rules of law relating to the implementation of the Treaty of Accession.

The Irish Government next challenges the statement of reasons in Regulation No 1365/73, in particular the argument that 'the prices notified by the new Member States relate to tomatoes grown under glass, which differ in certain respects from the tomatoes grown in the open, to which the basic price relates' (last recital). In the applicant's view, there is no difference between the 'commercial characteristics' of tomatoes grown under glass and those of tomatoes grown in the open.

Moreover, all tomatoes grown in Ireland for sale are grown under glass. Before Ireland's entry into the Common Market, Irish tomato growers were protected by temporary measures prohibiting imports or making the latter subject to customs duty. The basic amount fixed by Regulation No 1365/73 is lower than this duty, whereas, according to Article 4 of Regulation No 228/73, it should be reduced by the amount of the customs duty, the remaining portion being the compensatory amount to be applied. Following the abolition of import restrictions required by Ireland's entry into the Common Market, Irish producers, if the compensatory amount were calculated in accordance with the criteria contained in Regulation No 1365/73, would enjoy infinitely less protection than in the past, which would be contrary to the Treaty of Rome and to the Treaty of Accession, in particular to Article 39 of the Treaty of Rome and to the general principles of the Common Agricultural Policy.

The *Council* replies that since the common organization of the market in fruit and vegetables was first implemented it has been impossible in numerous cases to take account of a single variety of those products. In cases where a basic price established for a single variety had to be applied to concrete circumstances it seemed necessary to fix prices adapted to varieties of the same product having different characteristics.

This system has been adopted in the context of several Regulations, involving the use of 'conversion factors', and it

was a system of this type that the Community applied to the calculation of compensatory amounts, not only for tomatoes, but also for apples, pears and cauliflowers. During the planning of the Common Agricultural Policy the Commission had already acknowledged that tomatoes grown under glass and those grown in the open differ in certain respects.

The best evidence of the existence of such differences is shown by the disparity between the prices of tomatoes grown under glass and of those grown in the open. According to the statistical data set out at Annex IV to Annex 4 B of the statement of defence, the price of tomatoes grown under glass, in 1970, 1971 and 1972, was on average 1·8 times higher than that for tomatoes grown in the open. It is no easy matter to establish with certainty the reasons for this disparity. Account has to be taken of subjective consumer preferences, reflected in the structure of the market and of which it would be possible to suggest only a tentative explanation.

Furthermore, it must be borne in mind that the distinction between tomatoes grown under glass and those grown in the open has been recognized by the Council itself, independently of the context of compensatory amounts, in particular in Regulations Nos 999/73 and 1624/73, in relation to reference prices and withdrawal prices.

The system for compensatory amounts provided at Articles 65 and 66 of the Act of Accession is based upon the comparison between two prices: the 'producer price' in the new Member States and the 'basic price' applicable in the Community as originally constituted, that is to say the price at the production stage, a concept already familiar in Community legislation.

In such a system, the object of which is to integrate the markets in fruit and vegetables into a single unified market of all the Member States, despite initial differences between price levels existing within the new Member States before their accession, it is essential that the comparison between the prices be made as between comparable products.

If the compensatory amounts were fixed at too high a level, because they were based upon prices which were not comparable, the result would be a distortion of the market. On the one hand, the application of excessively high compensatory amounts, resulting in tariff barrriers which were too high, would shelter the markets of the new States from competition from the other Member States, even where such competition was legitimate. On the other hand, the application of these high compensatory amounts would mean that exports from the new Member States would be excessively subsidized, which would lower their prices to a level well below that for tomatoes cultivated under glass within the Community. This would lead in turn to the artificial stimulation of production of this product within the new Member States during the early years of the transitional period.

Moreover, were the Irish Government's point of view to be adopted, anomalies would arise in the working of the system, arising from the fact that, in putting on to the market a specified variety of product, a compensatory amount was applied which bore no relation to the price of that variety.

Since the calculation of the basic price for tomatoes produced in the Community for 1972, that is to say the year preceding the coming into force of the Act of Accession, was effected purely on the basis of figures for tomatoes grown in the open (Regulation EEC No 1173/72 of the Council of 6 June 1972, OJ L 130, 1972), a conversion factor had to be applied to the Irish production in order to compare the price of tomatoes grown under glass in Ireland with the above basic price.

Finally, as regards the argument that the system at issue offers no additional protection to the Irish tomato grower in relation to that which he enjoyed in the

past, the Council notes that the present situation is the inevitable consequence of the Act of Accession, and that the level of protection which existed before the coming into force of the Act is irrelevant except as recognized in Articles 65 and 66.

In reply, *the Government of Ireland* asserts that tomatoes grown under glass do not differ from tomatoes grown in the open in any respect which would justify the application of a conversion factor. The analogy drawn by the Council from differences existing between different varieties of other products (apples, pears, cauliflowers) is irrelevant. In the context of tomato production the terms 'commercial characteristics' contained in the Regulations refer to characteristics as to type (round, ribbed or plum type), quality class (I, II etc.), size and packaging. Moreover it is not usual to describe tomatoes for sale as 'outdoor' or 'glasshouse'. Neither seller nor consumer knows or wishes to know the method of cultivation employed, attaching importance only to the quality of the end-product, as indicated above.

The average prices of tomatoes grown under glass are indeed generally higher than those of tomatoes grown in the open, but the reasons for this disparity are not based on any distinction between the two categories of tomato at the level of sales. They are based on labour and production costs which are necessarily higher for tomatoes grown under glass, and on the fact that the latter can be sold at times when demand exceeds supply.

The Irish Government next refutes the argument that if its claim were upheld a distortion of the market would result. Firstly, in view of the marginal percentages of Irish production and export of tomatoes in 1970, it would be fanciful to suppose that failure to apply a conversion factor could stimulate exports to any appreciable extent during the short period during which the compensatory amounts are to be applied. Furthermore, Irish tomato production, which is carried on entirely under glass, is not yet in a position to meet the demand on the home market for more than about seven months in the year.

Although it is true that the recent Regulations of the Commission and of the Council concerned with reference prices and withdrawal prices distinguish between tomatoes grown under glass and tomatoes grown in the open, it is also true that in those fields the jurisdiction of the Council and of the Commission is not limited by the provisions of the Act of Accession, which are applicable in this case. Moreover, the Council's interpretation does not take into consideration the fact that specific authority is given by other Articles of the Act of Accession (Articles 74, 75, 77, 79 and 80) to use conversion factors in calculating the compensatory amounts for other products, whereas no such authority is given in the Articles in question. In the applicant's view this omission is clear evidence that the authors of the Act did not in fact intend to authorize the use of these factors for the calculation of the compensatory amounts to be applied in respect of fruit and vegetables.

The Irish Government further notes that even if it is assumed that the use of a conversion factor was legal, the factor was incorrectly applied in this instance. In order to establish the correct relationship between the two price components involved in the calculation of the compensatory amount, the conversion factor should have been applied not to the producer price in Ireland — as was done by the Council — but to the common basic price. In the latter case the compensatory amount would have been considerably higher (13·4 u.a.) than that which was in fact calculated (7·3 u.a.).

Finally, the Irish Government submits that there was no adequate statement of

reasons. In its view, the Regulation does not fulfil the formal conditions required by Article 190 of the Treaty, since it gives no indication of the reasons which justify:

— the differences alleged to exist between the commercial characteristics of tomatoes grown under glass and those of tomatoes grown in the open,

— the legal grounds for the use of a conversion factor,

— the choice of the factor employed,

— the application of this factor to the producer price and not to the common basic price.

By way of rejoinder, the *Council* states that the content and scope of the 'principles' to which reference is made by Article 65 (2) of the Act of Accession are not, in themselves, of such clarity that they do not require interpretation by the Court of Justice. The fact that, unlike Articles 74, 75, 77, 79 and 80, Articles 65 and 66 of the Act make no mention of the use of conversion factors does not necessarily imply that the last-mentioned Articles do not provide for the application of these factors in the relevant sector. Such an argument *a contrario sensu* is not justified owing to the difference in structure of the common organization of agricultural markets aimed at by Articles 65 and 66 as compared with the other common organizations with which the other provisions are concerned.

The reference in Article 65 (2) to the 'principles' in question must be considered in relation to the whole range of legislation in this field, without losing sight of the link, within Regulation No 159/66, between Article 4 (2) and Article 7 (4) which provides for the application of conversion factors. By repeating this last provision at Article 4 (4), Regulation No 2515/69 implicitly emphasised the interdependence between the various components of a price system which lays down a common basic price, a buying-in price, an intervention price and conversion factors.

Having once more stated that the argument of the Irish Government, if accepted, would lead to a distortion of the market, the Council returns to the problem of the commercial distinction between tomatoes grown under glass and tomatoes grown in the open, within the meaning of Article 4 (2) of Regulation No 159/66. It notes here that the 'variety', the 'type' etc. listed at Article 4 does not constitute an exhaustive enumeration and therefore is not to be read as definitive of the concept 'commercial characteristics'.

The term 'commercial characteristics', in its normal, usual meaning, refers to characteristics which affect the market, and there is nothing in the disputed Regulation limiting its scope to specific characteristics. Furthermore, the disparity between the prices of tomatoes grown under glass and those of tomatoes grown in the open is such that it cannot be justified on the basis of production costs or of a different value placed upon these products in the commercial context. Nor is it true to say that, owing to the higher price of tomatoes grown under glass, it is possible to produce them at a time when the demand for tomatoes exceeds supply and tends to push prices upwards. The documents produced before the Court in fact show that during the summer tomatoes grown under glass are produced and consumed within the Community at the same time as tomatoes grown in the open. As its final remark on this problem, the Council refers to a report giving reasons in justification of the distinction at issue between the two 'types' or 'varieties' of tomato.

Turning next to the applicant's objections as to the way in which the conversion factor was applied in this case, the Council replies that these objections, as well as the suggestions formulated on this issue by the Irish

Government, are not supported by the wording of Articles 65 and 66 of the Act. On the one hand, Article 65 (1) (c) speaks of the 'basic price applicable in the Community as originally constituted', the level of which is fixed by Regulation No 1173/72. On the other hand, Article 65 (2) provides for the application of the principles contained in Article 4 (2) of Regulation No 159/66 'to the national data of the new Member States'. It is entirely justified and in accordance with the wording of the Act of Accession to accept that the conversion factor should be applied to those price data regarded as being flexible, that is, to the producer price, and not to the common basic price, which is, on the contrary, a fixed component.

Finally, as for the argument based on lack of an adequate statement of reasons, the Council maintains that Regulation No 1365/73 fulfils the conditions as to legality required in this field by Community law as defined by the Court of Justice in its case law, and seeks to show, by means of a detailed examination, that, on the various points at issue, the contested Regulation, in law as well as in fact, is supported by an adequate statement of reasons.

IV — Oral procedure

The parties submitted oral observations at the hearing on 29 January 1974.

During the course of the hearing the Irish government produced forms drawn up by the Commission intended to gather the information required for the calculation of the basic prices for fruit and vegetables, including tomatoes, for the period 1969-1971. These forms expressly defined the commercial characteristics to be specified in respect of each product, but nowhere mentioned, amongst those characteristics, the distinction between glasshouse and open field cultivation.

The Council, apart from challenging the regularity of this production of documents, on the grounds that it was belated, noted, firstly, that the originator of these forms was not the Council but the Commission, and, secondly, that their failure to mention the distincition between glasshouse and open field cultivation may be explained by the fact that at that time it was not thought necessary to make the distinction.

The Advocate-General presented his opinion at the hearing on 19 February 1974.

Law

1 By application registered on 16 July 1973 the Government of Ireland, pursuant to Article 173, first paragraph, of the EEC Treaty, brought before the Court an action for the annulment of Regulation (EEC) No 1365/73 of the Council of 21 May 1973 (OJ L 137, 1973), to the extent that that Regulation is concerned with the fixing of compensatory amounts for tomatoes for delivery fresh to the consumer.

2 In support of its action, the applicant submits, firstly, that the Regulation in issue infringes Articles 65 and 66 of the 'Act concerning the Conditions of Accession and the Adjustments to the Treaties' (hereinafter referred to as the

'Act of Accession') annexed to the Treaty of Accession signed at Brussels on 22 January 1972, in that, for the purpose of fixing the compensatory amount for tomatoes, it applied a conversion factor to the producer price. The application of this conversion factor is alleged to be all the more unjustified in that the Irish producer price related to a product commercially comparable to that in relation to which the Common basic price was fixed.

3 It is apparent from the arguments that the action is concerned solely with those provisions of the Regulation affecting Ireland.

4 Article 65 (1) of the Act of Accession provides for the fixing of a compensatory amount for fruit and vegetables in respect of which the new Member State concerned applied, during 1971, quantitative restrictions or measures having equivalent effect. According to this provision, the fixing of the compensatory amount presupposes the establishment, on the one hand, of a common basic price and, on the other hand, in the new Member State concerned, of a producer price which appreciably exceeds the basic price applicable in the Community as originally constituted during the period preceding the application of the Community system to the new Member States.

5 According to Article 66 (1) of the said Act, the compensatory amount shall be equal to the difference between the producer price in the new Member State concerned and the common basic price.

6 The common basic price is calculated, pursuant to the criteria laid down in Article 16 (2) of Regulation No 1035/72 of the Council of 18 May 1972 (OJ L 118, 1972), having regard to prices recorded on the representative Community market or markets which are situated in the surplus production areas with the lowest prices during the three marketing years immediately preceding the date on which the basic prices are fixed.

7 Since the production areas taken into account in calculating the common basic price are those where tomatoes are more usually grown in the open, the figures employed for fixing this price refer to open field tomatoes.

8 Furthermore, the Irish producer price was fixed pursuant to the criteria contained in Article 65 (2) of the Act of Accession, by applying to the national data of the new Member State the 'principles set out in Article 4 (2) of Regulation No 159/66/EEC laying down additional provisions in respect of the common organization of the market in fruit and vegetables'. Since the Irish national data are concerned solely with the cultivation of tomatoes under glass- the producer price employed refers to tomatoes grown under glass.

9 Regulation No 1365/73 of the Council fixed the compensatory amount at issue on the basis of the producer price and the common basic price calculated in this way. On the basis that the differing methods of cultivation for tomatoes grown under glass and those grown in the open are reflected in a difference between those products in commercial terms, the said Regulation, in its final recital, decided that a conversion factor fixed at a standard figure of 0·55 should be applied in respect of prices for tomatoes grown under glass. This conversion factor was in fact applied to Irish producer prices.

10 In support of this decision the Council contended, in particular, that the 'principles set out in Article 4 (2)' of Regulation No 159/66 for the calculation of the producer price, to which Article 65 (2) of the Act of Accession refers, include all the rules contained in Article 4, including those contained in the last paragraph which provide for the application of conversion factors to the buying in price in the event of the product concerned displaying commercial characteristics which differ from those of the product by reference to which the basic price is fixed.

11 The object of a system of compensatory amounts instituted by Articles 65 and 66 of the Act of Accession is essentially to facilitate the gradual adaptation by the new Member States to the rules in force within the Community as originally constituted. This adaptation is to be effected by means of transitional measures, amongst which Article 55 (1) (a) provides for the application, in the agricultural sector, of compensatory amounts levied on imports and exports by the new Member States in trade between the latter and with the Community as originally constituted, such amounts being designed to compensate differences between the national price levels in those States and common price levels.

12 The Act of Accession attributes to these compensatory amounts the function of ensuring a measure of tariff protection which, if not identical to that enjoyed by the new Member States by reason of their national legislation before their accession to the Communities, is at least comparable thereto.

13 More particularly in the context of the common organization of agricultural markets, Article 65 (1) of the Act provides in effect that, with regard to fruit and vegetables, the compensatory amounts are to be fixed only if the new Member State concerned applied, during 1971, quantitative restrictions or measures having equivalent effect. The protective function of the compensatory amounts, which are designed to supersede national measures for the protection of the market, is clearly apparent from this provision.

14 The compensatory amounts envisaged by Article 65 and 66 of the Act of Accession should therefore offer Irish tomato producers a measure of protection, against imports of tomatoes from the Community as originally constituted, comparable to that provided by the quantitative restrictions and measures having equivalent effect applied in 1971.

15 Even on the supposition that tomatoes grown in the open are, in a commercial sense, a different product from tomatoes grown under glass, the former are likely to compete with the latter when offered for sale at the same time as tomatoes grown under glass. Accordingly, since the adoption of conversion factors, by its very nature, affects the level of the relevant compensatory amount in a way which is unfavourable for the new Member State, such adoption could only be permissible if it were expressly provided by the Act of Accession or were clearly necessary for the fixing and correct application of the compensatory amount.

16 Article 4 (2) of Regulation No 159/66 of the Council of 25 October 1966 (OJ No 192, 1966), does not include, amongst the principles to which it gives expression, the possibility of applying conversion factors to the basic price, nor does it provide, by means of the reference in article 65 (2) of the Act of Accession, for the application of conversion factors to the producer price in the new Member State.

17 Article 65 (2), since it derives from the above-mentioned Article 4 (2) the 'principles' to be applied for the fixing of the producer price, gives a precise definition of the scope and limits of its reference. The extension of this reference to 'principles' other than those contained in Article 4 (2) would constitute a disregard of the spirit as well as the letter of Article 65 (2) of the Act of Accession. Such an extension of the reference would be rendered still less admissible by the fact that at the time when the Accession Agreement was signed, the States which were parties to that Agreement were aware that the possibility of applying conversion factors was provided by Article 7 (2) of the same Regulation and that, in consequence of an amendment incorporated by Regulation No 2515/69 of 9 December 1969 (OJ L 318, 1969), that possibility was dealt with in the final paragraph of the said Article 4.

18 If this possibility had in fact been envisaged by the authors of the Act of Accession for the purpose of fixing compensatory amounts for tomatoes, the Act would necessarily have made express mention of that possibility or would have referred to the whole of Article 4 of Regulation No 159/66, so as to include in the reference the principles contained in the final paragraph of that provision. In fact it is clear from the provisions of the Act of Accession devoted to other agricultural markets, and more precisely from Sections 4 to 8 of Chapter 2, Title II, which also contains Articles 65 and 66, that, in cases where the Act allows of the possibility of employing conversion factors for the assessment of the compensatory amount, it does so expressly, defining at the same time the details of their application.

19 It follows that Article 65 (2) of the Act of Accession, when it refers to the 'principles' contained in Article 4 (2) of Regulation No 159/66, is concerned solely with the criteria for calculation expressly defined by the last-mentioned provision and does not include the possibility, which is envisaged by other provisions of the said Regulation, of employing conversion factors.

20 Moreover, the Council's argument that the distinction which, in its opinion, exists in the commercial context between tomatoes grown in the open and those grown under glass rendered the application of conversion factors to the Irish producer price inevitable is in no way justified by Article 4 (2) of Regulation No 159/66 and, furthermore, is in conflict with the practice previously followed by the Council in the case of other products which are also covered by the common organization of the market in fruit and vegetables. Article 4 (2) does not define the commercial characteristics of the product which are to be taken for the calculation of the basic price and does

not preclude the possibility that the same basic price may be fixed for products of the same type which may be defined in different ways in relation to each other by reason of their commercial characteristics.

21 Furthermore, the distinction between tomatoes grown under glass and those grown in the open is not made, as a general rule, in acts of the Community adopted prior to the accession of the new Member States, nor was it made in Regulation No 1173/72 of 6 June 1972, determining the common basic price used for the fixing of the compensatory amount at issue.

22 However, it is clear from the text and objective of Article 4 (2) of Regulation No 159/66 that since the basic price is fixed for a product with defined commercial characteristics, the characteristics upon which the definition of the relevant product is based must be specified when the basic price is fixed and mentioned in the act by which that price is fixed. The fact that the distinction between tomatoes grown under glass and those grown in the open was subsequently employed in Council Regulations Nos 999/73 of 11 April 1973 (OJ L 99, 1973) and 1624/73 of 8 June 1973 (OJ L 163, 1973), fixing the reference price and the withdrawal price for tomatoes, for the 1973 marketing year and the 1973/74 marketing year respectively, is here not relevant.

23 Accordingly the conclusion must be drawn that Regulation No 1365/73 of the Council of 21 May 1973, in that it applies a conversion factor to the Irish producer price for tomatoes for the purpose of caculating the compensatory amount, infringed Articles 65 and 66 of the Act of Accession, as well as Article 4 (2) of Regulation No 159/66.

24 Regulation No 1365/73 must therefore be declared void, to the extent that it provides for the application of a conversion factor to the producer price and, in consequence, fixes the compensatory amount to be applied in Ireland to tomatoes for delivery fresh to the consumer.

Costs

25 Under the terms of Article 69 (2) of the Rules of procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleadings.

26 The defendant has been unsuccessful in its submissions.

27 Accordingly, pursuant to the applicant's pleadings, the defendant must be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 173;
Having regard to the Act concerning the Conditions of Accession and the Adjustments to the Treaties, annexed to the Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Communities, especially Articles 9, 55, 65, 66, 74, 75, 77, 79 and 80;
Having regard to Regulation No 159/66 of the Council of 25 October 1966 (OJ No 192, 1966), especially Articles 4 and 7;
Having regard to Regulation No 1035/72 of the Council of 18 May 1972 (OJ L 118, 1972), especially Article 16;
Having regard to Regulation No 2515/69 of the Council of 9 December 1969 (OJ L 318, 1969), especially Article 2;
Having regard to Regulation No 1173/72 of 6 June 1972 (OJ L 130, 1972);
Having regard to Regulation No 999/73 of the Council of 11 April 1973 (OJ L 99, 1973);
Having regard to Regulation No 1365/73 of the Council of 21 May 1973, (OJ L 137, 1973);
Having regard to Regulation No 1624/73 of the Council of 18 June 1973 (OJ L 163, 1973);
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Declares Regulation (EEC) No 1365/73 of the Council of 21 May 1973 void, to the extent that it provides for the application of a**

conversion factor to the producer price and, in consequence, fixes the compensatory amount to be applied in Ireland to tomatoes for delivery fresh to the consumer.

2. Orders the Council of the European Communities to pay the costs.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 21 March 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 19 FEBRUARY 1974

My Lords,

As is well known the Treaty providing for the accession to the Communities of Denmark, Ireland and the United Kingdom was signed at Brussels on 22 January 1972. Annexed to that Treaty is an 'Act concerning the Conditions of Accession and the Adjustment of the Treaties', which is commonly called 'the Act of Accession'. Article 2 of that Act provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

That is subject to Article 9 (1) of the Act, which provides:

'In order to facilitate the adjustment of the new Member States to the rules in force within the Communities, the application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.'

One of the derogations provided for in the Act consists in the institution for a transitional period of a system of diminishing 'compensatory amounts' for certain agricultural products. Article 55 (1) provides in particular that:

'in trade between the new Member States themselves and with the Community as originally constituted,