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## Part II

# Jean-Pierre Warner: The Early Days of Community Law (1973–1981)

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## Accession to the Communities, and Compensation under the Common Agricultural Policy: Opinion of Advocate General Warner in *Ireland v Council*

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### I. Introduction

The proceedings in *Ireland v Council*<sup>1</sup> concerned the Act on Conditions of Accession of Denmark, Ireland, and the United Kingdom to the European Communities,<sup>2</sup> and related to derogations provided therein regulating transitional systems of compensation. The derogations set up a transitional regime of diminishing compensatory amounts for certain agricultural products.<sup>3</sup> The applicant state, Ireland,

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<sup>1</sup> Case 151/73 *Ireland v Council* ECLI:EU:C:1974:23. For an overview see pp 287–288.

<sup>2</sup> Act on Conditions of Accession was a part of the Accession Treaty. See Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands (Member States of the European Communities), the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland 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 Economic Community and to the European Atomic Energy Community [1972] OJ L73/5.

<sup>3</sup> The transitional regime was laid down in Art 65 of the Act. It read as follows:

‘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 organisation of the market in fruit and vegetables.

3. The compensatory amount shall apply only during the period for which the basic price is in force.’

in proceedings brought against the Council, sought an order declaring void Regulation 1365/73 of 21 May 1973 relating to the fixing of compensatory amounts for tomatoes.<sup>4</sup>

The production of tomatoes on a commercial scale in the Community was almost entirely, at the time, outside in the open in the south, in Southern France and Italy; wholly under glass in the north, in Ireland, the UK, the Netherlands, and Denmark; and partly in the outside in the open and partly under glass in northern France, Belgium, Luxembourg, and West Germany. It thus raised an interesting question about the normalisation of Community standards after the first enlargement in light of such considerable divergences.

Ironically, the place of glass house tomatoes thus resulted in the case at hand in a notable Irish victory in the proceedings very shortly after entry to the Communities. It exposed tense engagement with a highly protected economy affected acutely by liberalisation of its markets, only to be protected by the Act on Conditions of Accession and the operation of a compensation system. It is one of the earliest Irish proceedings against a European Union (EU) institution. Subsequently, Ireland did not litigate much against the Council directly.<sup>5</sup> Instead, it has a wealth of litigation initiated against the Commission, of at least 200 cases at the time of writing and a lengthy history of intervening in support of UK-led or UK-related proceedings, although a fuller discussion is beyond the scope of the chapter.<sup>6</sup> With accession to the Communities, an extraordinary increase in agricultural incomes was predicted

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<sup>4</sup> Regulation (EEC) No 1365/73 of the Council of 21 May 1973 supplementing, as regards cauliflowers and tomatoes, Regulation (EEC) No 228/73 laying down general rules for the system of compensatory amounts for fruit and vegetables [1973] OJ L137/1.

<sup>5</sup> A rare example was Case C-301/06 *Ireland v Parliament and Council* ECLI:EU:C:2009:68. See E Fahey, *Practice and Procedure in Preliminary References to Europe* (First Law, 2007); E Fahey, *EU Law in Ireland* (Dublin, Clarus Press, 2010).

<sup>6</sup> See eg Case C-199/03 *Ireland v Commission* ECLI:EU:C:2005:548; Case C-339/00 *Ireland v Commission* ECLI:EU:C:2003:545; Case C-239/97 *Ireland v Commission* ECLI:EU:C:1998:213; Case C-238/96 *Ireland v Commission* ECLI:EU:C:1998:451; Joined Cases C-296/93 and C-307/93 *France and Ireland v Commission* ECLI:EU:C:1996:65; Case 239/86 *Ireland v Commission* ECLI:EU:C:1987:554; Case 242/86 *Ireland v Commission* ECLI:EU:C:1988:288; Case 337/85 *Ireland v Commission* ECLI:EU:C:1987:453; Case 325/85 *Ireland v Commission* ECLI:EU:C:1987:546, almost all of which related to clearance of accounts of European Agricultural Guidance and Guarantee Fund (EAGGF) or agriculture and fisheries more generally. See also the case law before the General Court particularly related to state aid: Joined Cases T-778/16 and T-892/16 *Ireland and Others v Commission* ECLI:EU:T:2020:338; Joined Cases T-778/16 and T-892/16 *Ireland and Others v Commission* ECLI:EU:T:2020:338; Joined Cases T-129/07 and T-130/07 *Ireland and Aughinish Alumina Ltd v Commission* ECLI:EU:T:2019:610; Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06 *Ireland and Others v Commission* ECLI:EU:T:2007:383; Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV *Ireland and Others v Commission* ECLI:EU:T:2012:134; Joined Cases T-50/06 RENV II and T-69/06 RENV II *Ireland and Aughinish Alumina Ltd v Commission* ECLI:EU:T:2016:227. There are other proceedings brought by Ireland against the Commission but later discontinued by it: see eg Case T-56/05 *Ireland v Commission* ECLI:EU:T:2006:134.

between 1970 and 1980 in Ireland.<sup>7</sup> The proceedings in *Ireland v Council* arguably demonstrate significant tensions at the entry point of Ireland to the common market and the liberalisation of agriculture and trade that was to follow, given the highly protected nature of the Irish economy at the time.

The proceedings in *Ireland v Council* raised inter-institutional tension as to the accession process, and sought to bring clarity and legal certainty related to issues thought to have been agreed with states, but also the fairness of the process of accession. A compensatory amount was fixed regarding fruit and vegetables, where a basic price was set. It was anticipated that the lower agricultural prices existing in the UK, Ireland, and Denmark would necessitate difficult outcomes and systems as they transitioned into membership.<sup>8</sup> At the time of the first application of Ireland to join the European Economic Community (EEC) in January 1963, the majority of actors in Ireland realised that it could not prosper in economic isolation. As regards agriculture, it was felt that Irish advantage in British markets, its long-standing closest market, was in decline, and that the Common Agricultural Policy (CAP) offered guaranteed high prices to farmers, an expanded consumer market and new trading opportunities for such agricultural products.<sup>9</sup> In a largely agricultural economy, the CAP was central to the benefits derived by Ireland entering the EEC, with 30 per cent of the workforce engaged in agriculture, and with Ireland exporting half of its agricultural production at the time.<sup>10</sup> The proceedings related to a more significant dispute as to the Act on Conditions of Accession and tomatoes, with respect to compensation than might be apparent from its status as a historical precedent or its reporting.

AG Warner was to make an extraordinary impact upon the role of the AGs.<sup>11</sup> These proceedings were at an early point in his career as AG, and are thus of much historical value as to the nature of

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<sup>7</sup> See generally J Lee, *Ireland 1912–1985: Politics and Society* (Cambridge, CUP, 1990) 463; P Drudy and D McAleese, *Ireland and the European Community* (Cambridge, CUP, 1984).

<sup>8</sup> G Olmi, 'Agriculture and Fisheries in the Treaty of Brussels of January 22, 1972' (1972) 9 *CMLRev* 293, 296.

<sup>9</sup> G Murphy, 'Government Interest Groups and the Irish Move to Europe 1957–1963' (1997) 8 *Irish Studies in International Affairs* 57.

<sup>10</sup> E Moxon Browne, 'Ireland in the EEC' (1975) 31(1) *The World Today* 424, 426.

<sup>11</sup> A Dashwood, 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 *Legal Studies* 202, citing an unpublished lecture of Warner 'The Role of the Advocate General at the European Court of Justice' which was delivered in Luxembourg on 19 November 1976.

developments taking place.<sup>12</sup> They are also of some interest given the applicant, a new Member State, was challenging the conditions for new entrants as applied in accession frameworks.<sup>13</sup>

## II. Background, Context, and Facts

Before accession, tomato growers in Ireland were protected by a prohibition imposed annually on the importation of tomatoes during a period when domestic supplies were sufficient to meet demand. During this period, no tomatoes could be imported into Ireland without a licence, resulting in extremely low levels of imports. Irish tomatoes growers were further protected by duties on imports of tomatoes. A basic amount fixed in Regulation of 1365/73 was less than these duties. These duties were reducible over the period after accession. Imports were deductible from the basic amounts in computing compensatory amounts. The result was to leave no compensatory amount payable on imports of tomatoes in to Ireland, at all, from other Member States.

In the proceedings, the Government of Ireland argued that the contested Regulation made no mention of the application of conversion factors set out in the Regulation 2515/69<sup>14</sup> before the ratification of the Accession Treaty (including one of its parts, that is the Act on Conditions of Accession). The use of conversion factors for fixing compensatory amounts to be applied in respect of fruit and vegetables was not contemplated by Ireland. Ireland challenged the process for the new Member States related to tomatoes grown under glass. All tomatoes in Ireland were grown under glass given the climate, and were thus significantly protected before entry into the common market by temporary measures prohibiting imports, or making the latter subject to customs duty.<sup>15</sup> Ireland argued that if the conversion factor was legal the factor, it was incorrectly applied in this instance. The Council, as the defendant of the legal act, argued that the content and scope of the principle referred to in the Act of Accession did not require interpretation by the Court.<sup>16</sup> Ireland produced forms from the Commission that had been drawn up to calculate basic prices for fruit and vegetables for the 1969-1971 period,

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<sup>12</sup> This chapter relies upon European University Institute (EUI) historical archives on the case (682 pages of proceedings) as well as Lee (n 7) and also for background context J McMahon and M Cardwell (eds), *Research Handbook on EU Agricultural Law* (Cheltenham, Edward Elgar, 2015).

<sup>13</sup> *cf* C-273/04 *Poland v Council* ECLI:EU:C:2007:622.

<sup>14</sup> Regulation 604/71 of the Commission of 23 March 1971 fixing the list of representative producer markets for the products listed in Annex I to Regulation 159/66/EEC [1971] OJ L70/9.

<sup>15</sup> Page 306 of the Opinion.

<sup>16</sup> Page 292 of the Judgment.

not mentioning the distinction to be drawn between glasshouse and open field cultivation. The Council argued that the Commission, and not the Council, was the author of these forms, and argued that any distinction was not material or thought necessary to be elaborated.<sup>17</sup>

### III. The Opinion of AG Warner

AG Warner delivered his Opinion on 19 February 1974,<sup>18</sup> shortly before the Court would deliver its judgment on 21 March 1974. He stated in a careful and detailed Opinion, but with occasional bursts of frankness that ‘oddly’, the Regulation of greatest importance in the proceedings, was no longer in force, ie Regulation 159/66<sup>19</sup>, amended by Regulation 2515/69<sup>20</sup> on 9 December 1969.<sup>21</sup> He noted – perhaps of more historical interest – that there was no authentic English text of either of these regulations, and only unofficial translations.<sup>22</sup> He outlined nonetheless how the Regulation envisaged two stages of intervention in support of the market in tomatoes as to organisation of producers and intervention, when the Commission declared the market was in a state of crisis. In the Regulation, a basic price was formulated to serve as a starting point in the calculation of withdrawal prices, buying in prices, and reimbursements to Member States. However, in practice, the Council fixed prices for tomatoes only for the months of June to November in each year.

Ireland had complained that the relevant recitals of Regulation 1365/73 were ‘cryptic’, so as not to amount as to a proper statement of the Council’s reasons for adopting the figures that it did. AG Warner expressed himself ‘in sympathy’ with this complaint, because he stated that one had to go to the Council’s pleadings in order to ascertain the reasoning.<sup>23</sup> In fact, the adoption of the reasoning by the Council was to defeat the object of Articles 65 and 66 of the Act on Conditions of Accession in the view of Ireland was to temper the procedures in new Member States who, before accession, were protected by quantitative restrictions.

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<sup>17</sup> Page 293 of the Judgment.

<sup>18</sup> Opinion of AG Warner in Case 151/73 *Ireland v Council* ECLI:EU:C:1974:14.

<sup>19</sup> Règlement n° 159/66/CEE du Conseil, du 25 octobre 1966, portant dispositions complémentaires pour l’organisation commune des marchés dans le secteur des fruits et légumes [1966] OJ 192/3286.

<sup>20</sup> Règlement (CEE) n° 2515/69 du Conseil, du 9 décembre 1969, modifiant le règlement n° 159/66/CEE portant dispositions complémentaires pour l’organisation commune des marchés dans le secteur des fruits et légumes [1969] OJ L318/10 (no official English text of the Regulation).

<sup>21</sup> Page 302.

<sup>22</sup> *ibid.*

<sup>23</sup> Page 306.

AG Warner preferred the submission of Ireland, that it could not be organised in interpreting Articles 65 and 66 of the Act on Conditions of Accession that the common basic prices were fixed for reference types.<sup>24</sup> Ireland had vigorously denied that the different method of production was an issue, pointing to the case of Belgium. AG Warner noted that contention of the Council seemed surprising, given the succulence of French or Italian tomatoes ripened in the sun, in contrast to the ‘dreariness of the almost plastic products of [the] Northern glasshouses’.<sup>25</sup> AG Warner initially considered that the Court had to resolve, as a preparatory matter, the issue of whether tomatoes grown under glass, and those grown outside in the open, were commercially different products.<sup>26</sup> However, at a later stage, as he openly admitted in the Opinion, he experienced a change of heart and therefore argued that:

The relevant question is thus not whether tomatoes grown under glass and those grown in the open have different commercial characteristics in some general sense, but whether the Irish tomatoes for which producer prices are to be fixed under Article 65 [of Act on Conditions of Accession] have characteristics differing from those by which the reference types are defined.<sup>27</sup>

AG Warner accepted the submission of Ireland that it was wrong to apply the conversion factor to the Irish producer price for this amounted to fixing a producer price for non-existent product, namely open field tomatoes. If an adjustment was to be made, he held, it had to be made to the common basic price for tomatoes generally, so as to obtain a notional common basic price for glasshouse tomatoes, for which Irish producer price for the same tomatoes could be compared. AG Warner argued that Ireland’s production of tomatoes and its export of them was ‘infinitesimal’ in relation to production in the Community as a whole, and any substantial increase in those exports would necessitate investment in new glasshouses and heating plants.<sup>28</sup> It is notable that neither side had asked the Court to exercise its jurisdiction under Article 174 EEC Treaty (now Article 264 TFEU) to state which of the effects of the regulation to be declared void.<sup>29</sup> Nonetheless, AG Warner concluded that it would be hardly possible to ‘unscramble’ the effects on Ireland’s and Denmark’s trade in tomatoes.<sup>30</sup> He advised the Court to declare Regulation 1365/73 void as it related to tomatoes, and to state that the effects of the Regulation would be considered definitive.

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<sup>24</sup> Pages 309–10.

<sup>25</sup> Page 308.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> Page 309.

<sup>29</sup> Page 309.

<sup>30</sup> Page 310.

## IV. Analysis

The proceedings ultimately related to one of the few cases taken by Ireland against the EU institutions. Whatever doubts existed as to the impact of accession with respect to increased competition from imports, sovereignty and neutrality, it was abundantly clear that there were no reservations with respect to the huge gains expected to accrue to Irish agriculture from higher prices paid under the CAP. For this alone, the issue was worth litigating.

On one level, the Irish economy appeared that it would be badly affected by a decision to compensate only tomatoes grown outdoors. At the time, however, the brutal reality was that the number of tomatoes grown in Ireland was relatively low, amounting to nothing more than could be considered negligible. The dispute, with hindsight, was the revealing of a protected economy becoming exposed to significant new European agriculture rules, and the challenge of modelling compensation for those changes. The Opinion of AG Warner here was a modicum of clarity and certainty.<sup>31</sup> Within it were traces of evidence of AG Warner harbouring certain sympathy for new entrants to the Community, given that northern Europe enjoyed differing climates and agriculture fortunes compared to those of the original six Member States.

### A. The Judgment

In the judgment of the Court, the Court declared Regulation 1365/73 to be void, to the extent that it provided for the application of a conversion factor to the producer price, which in consequence fixed the compensatory amount to be applied in Ireland to tomatoes for fresh delivery to the consumers. The Court found that the system of compensatory amounts laid down in Article 65 of the Act on Conditions of Accession was to facilitate the gradual adaptation of the new Member States to EEC rules, in particular the Common Agriculture Policy. The Court reiterated the protective function of the compensatory amounts, which were designed to supersede national measures for the protection of the market.<sup>32</sup> The Court stated that the compensatory amounts were to offer Irish tomato producers a measure of protection against imports of tomatoes from the Community as originally constituted.<sup>33</sup> It stated further that tomatoes grown outside in the open were, in a commercial sense, different

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<sup>31</sup> Pages 288–93 of the Judgment.

<sup>32</sup> Para 13 of the Judgment.

<sup>33</sup> Para 14 of the Judgment.

produce from those grown under glass, and that the adoption of conversion factors affected the level of the relevant compensatory amount in a way which was unfavourable for the new Member States. The contested Regulation had not provided for a reference to the Act on Conditions of Accession for the application of conversion factors to the producer price in the new Member State. The Court held that the extension of principles in Article 4(2) of Regulation 159/66 would disregard the spirit and the letter of Article 64(2) of the Act on Conditions of Accession.<sup>34</sup>

## B. Effect on Future Case Law

The case remains of interest, more for its timing and subject field and outcome, than the actual content of its judgment. Ultimately, the case provides evidence of benevolence to newcomers affected by the extreme variety of regulatory spaces covering agriculture in the then EEC. It is also an early example of significant inter-institutional tension as to the process of accession. As noted above, the proceedings demonstrated tensions at the entry point of Ireland to the common market and the liberalisation of agriculture and trade that was to follow, given the highly protected nature of the Irish economy.

However, the case also suggests a highly misleading stance as to Irish engagement with the EU institutions through EU law and litigation, which ultimately would not be carried out. The Opinion of the AG was of much significance for its insightful ‘take’ on the nature of the challenges posed for the new Member States. *Ireland v Council* was cited by the Commission during the proceedings in the later case of *Commission v UK (Potatoes)*.<sup>35</sup> That case related to litigation by the Commission against the UK with respect to similar agricultural law issues, namely sheepmeat and potatoes, arising from the Act on Conditions of Accession.<sup>36</sup>

Other future related case law would deal with other similar complaints, yet considerably later on and without citation of the commented opinion of AG Warner or judgment of the Court.<sup>37</sup> In the relative

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<sup>34</sup> Para 17 of the Opinion.

<sup>35</sup> See Opinion of AG Mayras in Case 231/78 *Commission v UK* ECLI:EU:C:1979:101, p 1465.

<sup>36</sup> The actions of intervening parties are of much interest there in the Opinion of AG Mayras, who undertook an assessment of the alignment of interests of the Netherlands, UK, and France to warrant intervention: See p 1464 of the Opinion.

<sup>37</sup> See eg Case 6/78 *Union française de céréales v Hauptzollamt Hamburg-Jonas* ECLI:EU:C:1978:154; Opinion of AG Capotorti in Case 6/78 *Union française de céréales v Hauptzollamt Hamburg-Jonas* ECLI:EU:C:1978:138; Case 250/80 *Schumacher* ECLI:EU:C:1981:246; Opinion of AG Capotorti in Case 250/80 *Schumacher* ECLI:EU:C:1981:212; Joined Cases 71/84 and 72/84 *Surcouf* ECLI:EU:C:1985:363; Opinion of AG Lenz in Joined Cases 71/84 and 72/84 *Surcouf* ECLI:EU:C:1985:191.

scheme of things, the Opinion of AG Warner was arguably not of much significance, but more of historical interest as to the dynamics of accession and the power dynamics taking effect in agriculture being rebalanced in the Court room. It also aligns well with understanding the nature of transitional arrangements designed to facilitate the entry of new Member States into the Common Agricultural Policy.