of cereals'. It is only one of the criteria for classification within one of the subheadings 23.02 A.

4. The classification of products derived from barley under tariff headings 11.01 and 23.02, respectively, may be ascertained, without prejudice to the classification criteria imperatively prescribed by the Regulations applicable, both by chemical analysis and by any other appropriate means, including visual (microscopic) observation.

In Case 80/72

Reference to the Court for a preliminary ruling under Article 177 of the EEC Treaty by the 'College van Beroep voor het Bedrijfsleven' in the case pending before that Court between

NV KONINKLIJKE LASSIEFABRIEKEN, having its registered office at Wormerveer

and

HOOFDPRODUKTSCHAP VOOR AKKERBOUWPRODUKTEN of The Hague,

on the interpretation or validity of certain provisions of Regulation, No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals together with various Regulations of the Council and of the Commission on the system of exports and the fixing of refunds for processed products based on cereals, with regard to the classification, in the Common Customs Tariff established by Regulation No 950/68 of the Council of 28 June 1968, of certain processed products derived from barley.

THE COURT

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

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and proceedings can be summarized as follows:

Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (OJ No 117, 19. 6. 1967, p. 2269) by Article 16 (1), provides that a refund, equal to the difference between the quotations on the world market and the prices in the Community, may be granted on the export to third countries of cereals or processed products made from cereals, in particular, those products classified under Common Customs Tariff heading ex 11.01 C 'Barley flour or oat flour' heading ex 23.02 ('bran, sharps, and other residues derived from the sifting, milling or working of cereals').

In implementation of Article 16 (5) of Regulation No 120/67, the Council, by its Regulation No 360/67 of 25 July 1967 on the import and export system for products processed from cereals and from rice (OJ L 174, p. 13), adopted *inter alia* general rules on the grant of refunds for exports, and the criteria for fixing their amount.

From 29 July 1968, Regulation No 360/67 was replaced by Regulation No 1052/68 of the Council of 23 July 1968 on the import and export system for products processed from cereals and from rice. (OJ L 179, p. 8).

By article 14 (5) of Regulation No 360/67, and Article 6 (6) of Regulation No 1052/68, refunds are fixed once a month.

On 22 February, 11 April, 5 July, 23 July and 16 August 1968, Koninklijke Lassiefabrieken NV, having its registered office at Wormerveer (Netherlands) exported to Portugal or Denmark, 5 different cargoes, weighing respectively 344 500; 492 150 and 300 000 kgs of goods, described by the company as 'barley flour', 325 950 kg and 511 680 kg of goods described as 'barley flour in grain' and 'barley flour in pellets'.

On the basis of this information furnished by the export company, the competent Dutch bodies granted the company, for the products classified under subheading 11.01 C II of the Common Customs Tariff ('Barley four of an ash content, related to the dry material, not exceeding 2 % by weight') export refunds calculated by reference to the rates fixed for February, April, July and August 1968 respectively, by Commission Regulations No 122/68 of 30 January 1968 (OJ L 29, p. 13), No 372/68 of 28 March 1968 (OJ L 78 p. 14), No 814/68 of 28 June 1968 (OJ L 149, p. 23) and No 1138/68 of 30 July 1968 (OJ L 188, p. 13) prescribing refunds for products processed from cereals and from rice.

The total amount of refunds granted to Lassiefabrieken NV was 291 892·30 florins.

Checks carried out in September 1968 by the 'Rijkslandbouwproefstation' (National Agricultural Inspection Establishment) at Maastricht on samples taken from various lots established that the products exported by Lassiefabriek NV were composed of light grains of barley, too small and broken, still including some small residues of husks (which product is sometimes termed 'light barley'), residue from the first shelling, sharps made up partly of the inner tegument and partly of grain, and grain which was judged to be too small when the hulled barley was sifted.

Microscopic examination of the samples revealed a bran content of between 20

and 33 % and a flour constituent content of between 36 and 52 %.

Chemical analysis, by the Ewers method, established a crude cellulose content of between 8·7 % and 14·5 %, a moisture content of between 11·2 % and 12 %, an ash content of between 3·7 % and 4·5 % and a starch content of between 24 % and 35·5 %, for the products as such and not in the dry material.

The 'Produktschap voor Veevoeder' and the 'Hoofdproduktschap voor Akkerbouwprodukten', on 12 November 1968 and 12 December 1968 respectively, decided that the refunds which had been granted to Lassiefabrieken NV should be partially withdrawn, on the grounds that the exported products had been wrongly classified under tariff heading 11.01 (cereal flours) when, comprising bran, sharps and other residues derived from the sifting, milling or working of barley they fell under heading 23.02 of the Common Customs Tariff, for which the refunds were fixed at a lower level.

When these decisions were annulled on 1 December 1970 by the 'College van Beroep voor het Bedrijfsleven', the 'Hoofdproduktschap voor Akkerbouwprodukten' notified Lassiefabrieken NV by letter of 7 December 1970 of a new decision reducing the amount of the export refund to which it was entitled to 78 933·37 florins.

Lassiefabrieken NV appealed against this new partial withdrawal of export refunds, on 10 December 1970, to the 'College van Beroep'.

That court considered that, to settle the case before it, it was important to decide whether the products in question should be classified, with regard to the relevant Community provisions, under tariff subheading 23.02 A or subheading 11.01 C, and by order of 8 December 1972 decided to suspend proceedings until the Court of Justice had given a preliminary ruling on the following questions:

1. Must the provisions of Regulation No 120/67/EEC, read in conjunction with those of Regulation No 360/67/EEC, and of Regulations (EEC) No 122/68, No 372/68 and No 814/68 and/or the contents of the relevant Annexes to those Regulations be interpreted in such a way that for the application of those provisions or those contents, as the case may be, in relation to the grant of a refund on export from the Community, a product such as that now in question, of a composition and with the properties defined by this judgment, must be classified under tariff subheading 11.01 C, and not under tariff subheading 23.02 A, if such product has a starch content of more than 28 %?

   If question 1 must be answered in the negative:

2. Must the provisions mentioned in Question 1 and/or the contents of the Annexes therein mentioned be interpreted in such a way that, in relation to the question under which of the two abovementioned tariff subheading a product such as that in question must be classified, the decisive question is the nature of the product in so far as that nature is apparent, not only from the results of a chemical analysis, and the contents thus determined in cellulose, ash, starch, etc, but also from other characteristic properties which are ascertained not by means of chemical analysis but by other means, eg by means of visual (microscopic) observation, or must this question be answered also by reference to factors other than those mentioned above?

3. Must the provisions of Regulation No 120/67/EEC, if read in conjunction with those of Regulation (EEC) No 1052/68 and of Regulation (EEC) No 1138/68 and/or the contents of the relevant Annexes to those Regulations or, as the case may be, the contents of the Common Customs Tariff, as contained in the Annex to Regulation (EEC) No 950/68,

likewise be interpreted in such a way that, for the application of those provisions and/or contents, in relation to the grant of a refund in respect of export from the Community, for the classification of a product such as that now in question under one of the two abovementioned tariff subheadings, a criterion such as that mentioned in Question 2 must be employed?

If Question 1 must be answered in the affirmative;

4. Must the provisions of the Regulations mentioned in Question 1 and/or the contents of The Annexes therein mentioned, read where necessary in conjunction with the provisions of Regulation No 228/67/EEC, be interpreted in such a way that the starch content of the product, where this is decisive for the admission of the product to one of the two abovementioned tariff subheadings, must be determined in the goods as such rather than in the dry material?

Whatever answer may be given to Question 1:

5. Do the contents of the footnote to 'cereal flours' on page 1 of the Annex to Regulation (EEC) No 1052/68 — in so far as they lay down that the relevant product, in order to be admitted to the heading therein mentioned, must have a starch content exceeding 45 %, and also, if it is a product of barley, an ash content not exceeding 3 % by weight, and that if either of these conditions is not satisfied, the product must be classified under subheading 23.02 A — form part of the provisions of Regulation (EEC) No 1052/68 itself, and enjoy the same legal force as those provisions?

6. If so, must the provisions of Regulation (EEC) No 1052/68, wherein reference is made to columns 3, 4 and 5 of the Annex to that Regulation, be interpreted in such a way that those references include a reference to columns 1 and 2 of that Annex, and hence also to the contents of that footnote?

If Questions 5 and 6 must both be answered in the affirmative:

7. Are the contents of that footnote devoid of force as being incompatible with the provisions of Article 190 of the Treaty establishing the European Economic Community, on the ground that Regulation (EEC) No 1052/68, on the point dealt with in that footnote, does not contain any statement of reasons, as required by Article 190?

8. If not, are the contents of that footnote devoid of force as being incompatible with any provision of the Treaty or of a Regulation implementing the Treaty, or with any principle of law underlying the Treaty or such provision, which precludes an amendment in the rules based on the Treaty, such as that contained in the footnote — whereby, for the classification of a product under 11.01 C or under 23.02 A respectively, there is imposed as a criterion a starch content greater or less than 45 %, whereas formerly that criterion was not in force — from being effected in the manner adopted in Regulation (EEC) No 1052/68, namely by means of inclusion in a footnote in the Annex to that Regulation?

9. If not, are the contents of that footnote devoid of force as being incompatible with any provision or with any principle of law, as mentioned in Question 8, which would preclude an amendment such as is mentioned in Question 8 from being introduced without any transitional period?

10. If not, are the contents of that footnote devoid of force as being incompatible with any provision of Regulation No 120/67 EEC?

If all Question 7-10 inclusive must be answered in the negative;

11. Is Article 4 of Regulation (EEC) No 950/68, in so far as it provides that that Regulation shall come into force on 1 July 1968, devoid of force as being incompatible with the provisions of the first paragraph of Article 191 of the Treaty, or with any other provision of the Treaty, since that Regulation was published in the Official Journal of the European Communities dated 22 July 1968?

12. If so, on what date did that Regulation duly come into force?

    If Question 12 must be answered to the effect that Regulation (EEC) No 950/68 duly came into force on a date prior to 16 August 1968:

13. Are the contents of the abovementioned footnote devoid of force as being incompatible with the provisions of Regulation (EEC) No 950/68 and/or the contents of the Common Customs Tariff, as contained in the Annex to that Regulation?

The order of the 'College van Beroep voor het Bedrijfsleven' was registered at the Court on 11 December 1972.

In accordance which Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the defendant in the main action on 23 February 1973, and by the plaintiff in the main action on 27 February 1973 and by the Commission of the European Communities on 2 March 1973.

The Court, upon hearing the report of the Judge-Rapporteur, and the opinion of the Advocate-General, decided to commence the oral procedure without any preparatory inquiry.

Lassiefabrieken NV, represented by F. Salomonson, Advocate of Dordrecht, the Hoofdproduktschap voor Akkerbouwprodukten, represented by its Secretary-General L. J. Schippers and the Commission represented by its legal advisers J. H. J. Bourgeois and P. Kalbe, submitted their oral observations at the hearing of 8 May 1973.

The Advocate-General presented his opinion at the hearing on 23 May 1973.

II — Observations submitted to the Court

The observations, written and oral, which have been submitted to the Court may be summarized as follows:

Koninklijke Lassiefabrieken NV applicant in the main action, observes that Regulation No 1052/68 of the Council is an implementing regulation based on Regulation No 120/67 especially on Article 16 (5), and cannot therefore derogate from the latter. The footnote to the first page of the Annex to Regulation No 1052/68 contradicts Regulation No 120/67, in that it makes classification under heading 11.01 conditional on the product in question having a starch content exceeding 45 %, and, in the case of products based on barley, an ash content not exceeding 3 %. For this reason alone, the contents of the footnote must be held to be irrelevant.

Moreover, since the note had been drawn up by the international customs council, without the assistance of any agricultural expert, it can only be described at the very most, within the meaning of the judgment of the Court in Case 74/69 (Krohn; judgment of 18 June 1970, Rec. 1970, p. 451) as 'an unofficial interpretation of a Regulation' lacking any binding effect.

However, if the note were considered as a rule with the same legal effect as the Regulation itself, it must be recalled that it involves a derogation from the Common Customs Tariff; a regulation in implementation of Regulation No 120/67, enacted by a qualified majority, cannot validly modify Regulation No 950/68 on the Common Customs Tariff,

which adopted the tariff nomenclature deriving in particular from Regulation No 120/67 and thus of the Regulations in implementation of the latter, and which, moreover, was enacted unanimously.

So important an alteration in the law as that introduced by the disputed note cannot be enacted without a statement of the reasons therefore, surreptitiously (in the form of a footnote) and without observing any transitional period.

The note is relevant only to the fifth export at issue in the main action, as the other four exports were completed prior to the entry into force of Regulation No 1052/68, and fell under the combined provisions of Regulations Nos 120/67, 360/67 and 950/68. With regard to these four exports, the question of their classification under heading 11.01 or 23.02 was settled by the Court's judgment in Case 72/69 (Bremer Handelsgesellschaft; judgment of 18 June 1970, Rec. 1970, p. 427). The main action, in fact, concerns high quality animal foodstuffs, due to their high starch content. According to the Court, 'starch residues' were to be distinguished from 'flour' by their starch content alone. The Court likewise ruled that 'in classifying flour as a product of the milling industry, the Common Customs Tariff does not have in view a fixed mode of transforming vegetable products into flour', and adopted, as a criterion for the minimum starch content of manioc flour, the percentage which 'is such as to ensure that in every case . . . products derived from manioc, which could be marketed without other additives, as manioc flour' should be subject to the levy (applicable to flour); the application of this criterion to barley flour immediately entails the classification of the product in dispute under heading 11.01.

It emerges from the judgment of the Court that the nature of the product must not be ascertained by visual observation, but by chemical analysis, and that the starch content must be determined on the dry material and not on the goods as such.

The question of when Regulation 950/68 came into force is of no importance for the result of the main dispute: there is no difference between the classifications operative on the basis of the combined provisions of Regulations Nos 120/67 and 360/67 on the one hand, and the Common Customs Tariff on the other.

The plaintiffs in the main action declare that they share the views argued, in Case 72/69, by the Government of the Federal Republic of Germany, *viz.* that the starch content is the sole distinguishing factor between the two headings in question, and by the Commission which considers that the composition, quality and manufacturing process are irrelevant, the distinction between the tariff headings being made according to the rules of interpretation proper to the Common Customs Tariff, and in case of doubt as to tariff category, the highest rate of charge should be adopted.

The *Hoofdproduktschap voor Akkerbouwprodukten,* the defendant in the main action, in essence submitted the following observations:

1. The first question which concerns the period prior to 29 July 1968, when Regulation No 360/67 was replaced by Regulation No 1052/68, must be answered in the negative. The main action concerns a processed product based on barley; products having a starch content of less than 28 % are classified under a subheading of tariff heading 23.02, its specification in Regulation 360/67 corresponding completely with the Common Customs Tariff annexed to Regulation No 950/68. It emerges from the wording of subheading 23.02 that a starch content limited to 28 % is one of the criteria deciding the inclusion of a residuary product under either subheading 23.02 A I b 1, or subheading 23.02 A I b 2. It does not serve to ascertain whether the product must be classified under tariff heading 11.01 or heading 23.02; and in particular, that criterion does not appear

in the specification of heading 11.01 (cereal flours).

The matter may also be understood in the following way: while the limit of 28 % does not appear in the relevant specification of the headings as a criterion for classification under one or other of these headings, it could nevertheless follow from the very nature of the product that it could only be classified under tariff heading 11.01, since it has a starch content exceeding 28 %. This is not the case: processed products based on barley, derived from light grains of barley, too small and broken, with fragments of straw still adhering to them (sometimes this product is termed, 'light barley', and is obtained by washing the barley), waste from the first hulling, sharps and hulled grains which were too small, rejected from sifting, with a starch content of between 32·5 % and 35·5 %, a straw content of 20 % and an ash content of between 3·7 % and 4·5 %, are not by their nature, 'cereal flour', but bran, sharps and other residues derived from the sifting, milling or working of cereals'. A starch content in excess of 28 % cannot mean that it is to be considered cereal flour.

2. Processing the cereal results in a 'principal' products and releases residues. The products in question in the main action are the residues which are milled and pressed, in the processing of barley into pearled barley. The description appearing under tariff heading 23.02 defines the relevant product as the residue of certain operations. As a rule, its characteristics can be ascertained by chemical analysis and visual (microscopic) observation.

3. Regulation No 950/69, on the Common Customs Tariff, adopts the subdivisions of Regulation No 360/67; thus the reply to the third question, relating to the period prior to 29 July 1968, must be identical with that given to the first question.

Concerning heading 23.02, Regulation No 1052/68 also provides a subdivision taking account of a starch content not less than 28 % without indicating whether this content constitutes the criterion of classification of a product under heading 23.02 or heading 11.01. Heading 23.02 is thus not defined otherwise than in Regulation No 360/67. Regulation No 1052/68 excludes from heading 11.01, products with a starch content of less than 45 %, and, in the case of products based on barley, products with an ash content exceeding 3 %; account must be taken of this requirement, to classify the product in dispute. This is indicated by the judgment of the Court in Case No 18/72 (Granaria, judgment of 30. 11. 1972 Rec. 1972, p. 1163).

4. It emerges from Regulation No 228/67 of the Commission of 28 June 1967 on the starch content of compound feeding stuffs, on the content of starch and of ash in brans and on the denaturing of manioc flour and other roots (OJ p. 2925), that the bran content is to be ascertained on the goods as such and not on the dry material.

5. The footnote relating to heading 11.01 ('cereal flours'), on the first page of the Annex to Regulation No 1052/68 forms an integral part of that Regulation and enjoys its binding force.

There is nothing to prevent the Council, for reasons of its own, from enacting certain provisions of a regulation in the form of a footnote.

The Regulation, in Article 4 (1) (c), refers to the note in dispute; this undeniably renders it part of the provisions of the Regulation. Such footnotes are, moreover, very often inserted in the texts of regulations and Community directives, in order to give details of how the schedules are to be used.

6. The reference in Regulation No 1052/68 to Columns 3, 4 and 5 of the Annex would be meaningless if Columns 1 and 2 had to be discounted. In that case, it would be impossible to

determine the product to which the provisions on basic products, coefficients and fixed components relate. Articles 5 and 8 of the Regulation explicitly refer to tariff headings and to the products, appearing in Columns 1 and 2 of the Annex.

7. The footnote to the first page of the Annex to Regulation 1052/68 is covered by the general statement of reasons appearing in the recitals to the Regulation, in particular, the second recital; as a working rule, it may be considered as one of the adaptations provided for by that recital.

8. The rule set out in the note in question cannot be considered as merely optional. It involves a modification of Regulation No 360/67, but Regulation 1052/68 in its entirety, which replaced Regulation 360/67 must be regarded as a revision in so far as is necessary, of that Regulation. Moreover, Regulation No 1052/68 as is indicated in connection with the 5th question, in particular Article 4 (1) (c), refers to the note.

9. A principle of law such as that invoked by the ninth question, is not at issue in the present case.

10. With regard to refunds, Regulation No 1052/68 is legally founded on Article 16 (5) of Regulation No 120/67. It is not irreconcilable with the latter, in particular with Article 18. This provision defines the scope of Regulation No 120/67, which cannot be greater or less than that indicated by the descriptions of the disputed headings in the Common Customs Tariff appearing in the Annex to Regulation No 950/68. Regulation No 1052/68 does not infringe this definition. The footnote in dispute only provides that barley flour having a starch content not exceeding 45 % and an ash content exceeding 3 % shall be treated as equivalent to brans, sharps and other residues for the purpose of calculating levies and refunds.

11. As Regulation No 950/68 provided that it should enter into force on 1 July, this was the date of its entry into force, by Article 191 of the EEC Treaty. The fact that publication did not take place until a later date is not irreconcilable with Article 191.

12. Since a negative reply should be given to Question 11, it is unnecessary to reply to Question 12.

13. The footnote to the Annex to Regulation 1052/68 is not incompatible with Regulation 950/68: it only provides that the calculation of levies and refunds for processed products based on barley classified under tariff heading 11.01, but having a starch content not exceeding 45 % and an ash content exceeding 3 %, must be made as though these products fell under tariff heading 23.02 A.

The Commission of the European Communities considers that a reply to the questions put by the 'College van Beroep' necessitates an analysis of the rules of interpretation of the system of refunds and of the principles to be applied to the interpretation of the nomenclature of the Common Customs Tariff.

1. It must be noted, with regard to the rules of interpretation of the refunds system, that neither Regulation No 120/67 nor Regulation No 360/67 nor the Regulations of the Commission fixing the amounts of the refunds, contains precise criteria with regard to the specification of products falling under tariff headings 11.01 and 23.02 respectively. The distinction on the basis of starch content and of ash content is effective within tariff positions 11.01 and 23.02 respectively; it is of little use as a means of distinguishing flour from bran. For the description and definition of products falling under the different headings for which refunds are available, the said Regulations have recourse to the unmodified nomenclature of the Common Customs Tariff. Nor does

Regulation No 1138/68, applicable to the last export in dispute, contain any further specific directions for the interpretation of the different headings. Article 1 thereof refers expressly to the products described in Regulation No 1052/68, whose Annex contains a particular nomenclature, accompanied by a note applicable to heading 11.01, indicating the boundary between that heading and tariff heading 23.02.

It is not, however, certain that this note can be used as a rule of classification with binding force for the interpretation of the refund nomenclature of Regulation No 1138/68; its aim is plainly to define the nomenclature of the Annex to Regulation No 1052/68 for the calculation and definition of the levies alone, which explains its insertion in Regulation No 1137/68 on levies, and not in 1138/68 on refunds.

On the other hand, it must be considered that Articles 7 and 8 of Regulation No 1052/68 refer to the nomenclature appearing in the Annex to this Regulation as regards refunds and that the application of a uniform nomenclature requires a uniform interpretation of the tariff, such that, in the absence of specified exceptions therefrom, the interpretation of the description of products in the Common Customs Tariff, should be the same within the framework of the refunds system as within that of the levies system.

On any interpretation, the question whether the note in question has the force of a binding rule of classification may be ignored, as it emerges from the decisions of the Court (Case 30/71, Siemers, judgment of 24 November 1971, Rec. 1971, p. 919 and Case 77/71 Gervais-Danone, judgment of 15 December 1971, Rec. 1971, p. 1127) that it applies only to exports carried out after 29 July 1968 the date when Regulation No 1052/68 came into force, and that Regulations Nos 122/68, 372/68 and 814/68 apply to exports prior to that date. With regard to Regulation No 1138/68 which applied to the last export in question, it adopted, without modifying them, the tariff headings of the nomenclature of the Common Customs Tariff; only the rules of interpretation of this Tariff are therefore of importance.

2. With regard to the interpretation of the Common Customs Tariff, it must be considered that Tariff headings of the latter haven been adopted as they are in the refunds system and that they have the same meaning in both cases. Furthermore, unless the contrary is indicated. the description of goods in the Common Customs Tariff, when applied to the refunds system, retains its original scope and meaning for classification purposes. This meaning is to be determined in the light of the canons of interpretation and the principles appropriate to the interpretation of the Common Customs Tariff. According to the case law of the Court, the matters to be taken into account in this connection are, in this order: the terms of the tariff headings themselves, and if necessary, the terms of the Notes and Additional Notes which precede the tariff nomenclature; any rules of interpretation laid down by means of regulations implementing Council Regulation No 97/69 of 16 January 1969 on measures to be taken for the uniform application of the nomenclature of the Common Customs Tariff (OJ L 14, p. 1); in the absence of binding rules, the explanatory notes to the Brussels Nomenclature and explanatory notes to the customs tariff of the European Communities; in the absence of such explanatory notes, or when no conclusion can be drawn from them in the particular case, the Brussels Nomenclature of 1950, the explanatory notes and classification opinions issued by the Nomenclature Committee under the authority of the Customs Cooperation Council in accordance with the Brussels Convention of 15 December 1950; finally, when classifying on the basis of the terms and structure of the tariff provisions of headings 11.01 and

23.02 now in question, reference should be made to the quality, observable by tests, displayed by the various principal and secondary products normally obtained in the course of the various operations in processing barley.

3. The distinction between tariff heading 11.01 and 23.02, which was long disputed, has now been settled through the work of the Customs Cooperation Council of Brussels. On the appearance of the new edition of the 'Brussels Nomenclature' of 1972, in the text of the Common Customs Tariff in force after 1 January 1972, an Additional Note has been inserted, relating to headings 11.01 and 23.02 which states:

'Products from the milling of the cereals listed in the table below fall within this Chapter if they have, by weight on the dry product:

(a) A starch content (determined by the modified Ewers polarimetric method) exceeding that indicated in Column (2); and

(b) An ash content (after deduction of any added minerals) not exceeding that indicated in Column (3);

Otherwise, they fall to be classified in heading No 23.02.'

The table mentions, in the case of barley, a starch content of 45 % and an ash content of 3 %.

Precise rules of classification were not in force when the exports in dispute in the main action were effected, but a distinction could be drawn between 'barley flour' and 'brans and sharps of barley', founded objectively on the following basis:

It emerges from the wording of the headings in dispute that Chapter 11 of the Common Customs Tariff does not encompass all products from the milling of cereals, but only those which are obtained principally by milling and which are essentially composed of particles obtained by the more or less intensive crushing of the flour element. On the other hand, 'brans, sharps and other residues derived from the sifting, milling or working of cereals', classified under heading 23.02, are the by-products and wastes obtained in the course of the various processing operations and in essence comprising particles of tegument and chaff of the grain.

This description is, however, insufficient. The distinction requires to be founded on the specific content of the essential components of the products in question, viz. the starch content and the ash content. Principal products and by-products obtained in the course of the various processing operations which normally pertain to the milling of barley display, albeit with a certain margin of variation, specific contents in starch and ash, and possibly in other components, which can be determined by tests and serve as a basis for classification.

The experts of the Customs Cooperation Council of Brussels adopted a starch content of 45 % and an ash content of 3 % as the limits which taking account of existing manufacturing procedures and ultimate uses, make it possible to establish, between the products under heading 11.01 and these under heading 23.02, a distinction meeting commercial needs and appropriate to the requirements of the common organization of the market. Since these limits were adopted in the note accompanying the nomenclature of Regulation No 1052/68 and in the text of the Common Customs Tariff, and since starch content might, since April 1967, be employed by national administrations on the basis of a classification opinion by the Common Customs Council, the use of these criteria of delimitation is objectively justified, and from the point of view of the uniform application of Community law, necessary, for the export period in question.

Products of the milling of barley which have both a starch content exceeding 45 % and an ash content not exceeding 3 %, therefore, fall to be classified under Chapter 11; on the other hand, products

of the milling of barley which have a starch content not exceeding 45 % and an ash content exceeding 3 % fall to be classified under heading 23.02. These limits should be applied, to the extent that they have been inserted in binding Community rules of classification, as legal criteria of distinction, and, where this is not so, as the most appropriate criteria from the point of view of the objective classification of the products in question.

In the light of these considerations, the following observations should be made on the questions put by the 'College van Beroep':

(a) On the first question: a starch content of 28 % is so far below the rate of 45 % considered objectively as the correct limit, that it cannot serve as a criterion of distinction between headings 11.01 and 23.02. Regulations Nos 122/68, 372/68, 814/68 and 1138/68 moreover, only use this rate of 28 % to differentiate the various products within heading 23.02 itself.

(b) On the second and third questions: past experience shows that criteria other than the specific content of starch and ash, while not to be rejected outright, do not allow the tariff headings in question to be distinguished with sufficient accuracy. In particular, it is impossible, on the basis of the other criteria, to take sufficient account of the numerous processed products which are common in trade.

(c) On the fourth question: various arguments could be invoked in favour of extending to the refunds system Regulation No 228/67 which is directly applicable only for distinguishing the different tariff headings within the framework of the levy system, in particular the quality of the method of analysis laid down for ascertaining the starch content, and the advantages of adopting the same nomenclature and the same method of analysis for levies and refunds. However, the method of analysis provided for by Regulation 228/67 is concerned only with calculating the starch content and its employment would not in itself give any answer to the question whether the content in starch and ash, which are decisive factors for classification, should be calculated on the goods as such or on the dry material.

A reply to the question asked can be given only on the basis of the provisions and rules applicable to the tariff classification of the products in question. Most of the rules of classification clearly indicate that they adopt the contents of the various constituents calculated on the dry material, and the absence of such an indication in the note accompanying the nomenclature of Regulation No 1052/68 must be interpreted as requiring the calculation to be effected on the goods as such. In this case, whether recourse is had to one method or the other is of little importance; the ash content (between 3·7 % and 4·5 %), calculated on the goods as such clearly exceeds the maximum limit of 3 % laid down as a criterion of classification in chapter 11 of the Common Customs Tariff, and to convert this limit to a percentage calculated on the dry material could only increase the margin. Likewise, the starch contents calculated on the goods as such are clearly less than 30 or 40 %; conversion of these contents calculated on the dry material, would give percentages between 27·1 % and 40·2 %, clearly less than the minimum of 45 % laid down for products coming under Chapter 11.

(d) On questions 5 to 10: the problems relating to the nature and validity of the footnote to the Annex to Regulation No 1052/68 have little relevance for the result of the main action.

From the point of view of the content of the note, it gives a description of products for which the sole considerations are the amounts established by heading 11.01. From the point of view of form, the note

represents a binding rule of classification, addressed to customs officials and judges who might come to give decisions on the classification of the products in question. It comprises an integral part of the nomenclature of the Annex to Regulation No 1052/68 and from the legal point of view it enjoys the binding force of the provisions of the Regulation on the same basis as the whole Annex. The position of the note is purely a result of editorial expediency and it is impossible to discern in it a basic distinction such as to affect the validity of the explanatory note.

According to the Court's decisions, the note, as a binding rule, is only applicable after the entry into force of Regulation No 1052/68. Exports prior to that date fall under the provisions of Regulations Nos 122/68, 372/68 and 814/68 and consequently under the general principles of classification valid for these latter Regulations.

Even if the note were considered as not applying as a binding rule of classification to the export effected within the scope of Regulation No 1138/68, or as constituting merely a technical note without any binding force, account must be taken of the consideration and conclusions relating to the classification of the products exported previously. The classification would not have been essentially modified by the note, since its aim is not to modify a prior interpretation, but merely to clarify it.

It emerges from this last finding that in practice it is of little importance whether the insertion of the note in Regulation No 1052/68 is valid or not; on any interpretation the tariff headings in question are distinguished by the application of criteria substanially the same as those contained in the note.

In any case, there can be no question of any infringement of a legal principle, such as to vitiate the legality of the note as a binding rule of classification.

(e) On questions 11 to 13 it should be pointed out that the question of the validity of Regulation 950/68 is irrelevant for the decisions both of the Court and of the 'College van Beroep'. It is true that Regulation No 950/68 gave the Common Customs Tariff the force of law, but the regulations relating to refunds are based on Article 43 of the EEC Treaty, and are autonomous in relation to, and by virtue of Article 38 prevail over, the customs legislation. Furthermore since the note is concerned with a subject legally independent of Regulation No 950/68, and adopts in essentials the nomenclature of the common Customs Tariff, it must, as a rule of derogation concerned with the refunds system, take precedence over Regulation No 950/68 and consequently cannot be rendered void on the grounds that it contradicts it. Regulations Nos 122/68, 372/68 and 814/68 cannot infringe Regulation No 950/68, which was adopted subsequently.

Grounds of judgment

1 By an order of 8 December 1972, lodged with the Registry of the Court on 11 December 1972, the 'College van Beroep voor het Bedrijfsleven', by virtue of Article 177 of the EEC Treaty, has asked the Court for a preliminary ruling on the interpretation of certain provisions of the Annex to Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (OJ p. 2269) and of the Common Customs Tariff laid down by Regulation No 950/68 of 28 June 1968 (OJ L 172, p. 1) in conjunction

with implementing Regulations Nos 360/67 of 25 July 1967 (OJ 174, p. 13) and 1052/68 of 23 July 1968 (OJ L 179, p. 8) of the Council on the import and export system for products processed from cereals, including the implementing regulations of the Commission, chiefly in order to decide the validity of a provision forming part of the Annex to Regulation No 1052/68;

The state of Community legislation at the time of the exports in dispute

2 The questions referred arose within the context of a dispute over the grant of the export refunds provided for in Regulation No 120/67 and over the classification of a product derived from barley, with regard to certain rubrics of tariff headings 11.01, 'cereal flours', and 23.02 'brans, sharps and other residues derived from the sifting, milling or working of cereals';

3 Under Article 16 (5) of Regulation 120/67, the Council established certain general rules relating to the grant of refunds, in the first place by Regulation No 360/67, whose Annex adopts the rubrics with which the main action is concerned, adding thereto certain specification intended to clarify the application of the headings and subheadings laid down by Regulation No 120/67;

4 In its turn, the Commission, by Regulations Nos 122/68 of 30 January 1968 (OJ L 29, p. 13), 372/68 of 28 March 1968 (OJ L 78, p. 14) and 814/68 of 28 June 1968 (OJ 149, p. 23) fixed the refunds in accordance with the provisions of Article 16 of basic Regulation No 120/67 and of general implementing Regulation No 360/67 of the Council;

5 The first form of the five exports which gave rise to the case brought before the 'College van Beroep' were effected under the system established by these provisions;

6 Regulation No 360/67 was subsequently replaced by Regulation No 1052/68, the Council, introduced, as emerges from the second recital of the preamble, in the light of experience gained during the first marketing year in which common prices for cereals were applied, so as to bring the previous provisions more into line with the actual situation and the requirements of the trade;

7 The Annex to that Regulation (No 1052/68) retains the rubrics of headings 11.01 and 23.02 ad they appear in Regulation No 120/67 and in the provisions derived thereform, and contains a note common to headings 11.01 and 11.02 which states, 'Inclusion under this heading is subject to the condition that the product in question has a starch content exceeding 45 % and an ash content not exceeding . . . 3 % for products based on barley . . . . If either of the two conditions mentioned above is not fulfilled, the product in question shall be classified under Tariff Subheading No 23.02 A on the basis of its starch content';

8 Regulation No 1052/68 was followed by implementing Regulation No 1138/68 of the Commission of 30 July 1968 (OJ L 188, p. 13), governing the fifth and last of the exports which gave rise to the action;

9 By Article 18 of Regulation 120/67, 'the tariff nomenclature resulting from application of this Regulations shall be incorporated in the Common Customs Tariff from the date on which the latter is fully applied';

10 By the provision, the nomenclature of the Customs Tariff replaced the corresponding provisions of the Annex to Regulation No 120/67, with regard to the tariff headings cited by the reference for a preliminary ruling, when Regulation No 950/68 came into force.

11 Finally, the substance of the note introduced by the Annex to Regulation No 1052/68 has been adopted in the form of an 'Additional Note' preceding the provision of Chapter 11 of the Custom Tariff, on the revision of the latter by Regulation No 2451/69 of 8 December 1969 (OJ L 311, p. 1);

On the legal nature and validity of the note in the Annex to Regulation No 1052/68 (Questions 5, 6 and 7)

12 From all the questions referred, it appears that the dispute has been caused, in essence, by the insertion in to the Annex to Regulation No 1052/68 of the note whose aim was to clarify the criteria of classification establishing the distinction between Tariff Headings 11.01 and 23.02;

13 In these circumstances, the questions dealing with the legal scope and the validity of the note in dispute should be examined first;

14 The *fifth question* asks in this connection whether the said note forms an integral part of Regulation No 1052/68 and is therefore to be considered as enjoying the same legal force as the provisions of that Regulation;

15 Altough the provisions in dispute appears in the form of a footnote annotating certain tariff headings, it is an expression of the will of the Council and on that ground forms an integral part of Regulation No 1052/68;

16 Annotations, in various forms, are commonly used in this sphere;

17 The note in dispute is therefore to be considered as enjoying the same legal force as the Regulation;

18 By the *sixth question,* the Court is asked to state whether the provisions of Regulation 1052/68 referring to columns 3, 4 and 5 of the Annex are to be interpreted in such a way as to include a reference to columns 1 and 2 of that Annex; the note in dispute is appended to a heading set out in column 2;

19 The Annex, which is drawn up in the form of a general schedule, is to be considered as a coherent entity within which the detailed provisions are meaningful only in relation to the schedule as a whole;

20 In particular, the entries in columns 3, 4 and 5 would be meaningless unless they were taken on conjunction with the corresponding rubrics in columns 1 and 2;

21 It follows that the note appended to the rubrics which appear in column 2 opposite headings 11.01 and 11.02 relates to all the provisions of the Annex which concern the said headings, including *inter alia* subheading 23.02 A which is expressly referred to by the note itself;

22 Any reference in the Regulation to columns 3, 4 and 5 therefore constitutes an implicit reference also to columns 1 and 2 and the note appended thereto;

23 The *seventh question* asks whether the validity of the note is affected by the fact that Regulation No 1052/68 does not, on the point laid down by the note in dispute, contain a statement of reasons in accordance with the requirements of Article 190 of the EEC Treaty.

24 The requirements of Article 190 of the Treaty are satisfied when the said statement of reasons explains in essence the measures taken in regulations by the institutions;

25 A specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided such details fall within the general scheme of the measure as a whole, which in this case cannot be disputed;

26 The validity of the note in dispute cannot therefore be doubted on the ground of the absence of a statement of reasons;

On the relationship between the classification criteria laid down by Regulation No 1052/68 and the basic Regulations and prior provisions (Questions 1 and 4, and 8 to 13)

27 The 'College van Beroep' has referred a certain number of questions, first, on the interpretation of the classification criteria laid down by the various relevant regulations, and, secondly, on the validity of the note in dispute, in the Annex to Regulation 1052/68 with regard to the classification criteria fixed by the basic Regulations *viz,* Regulation No 120/67 and where appropriate, the Common Customs Tariff established by Regulation No 950/68, of which Regulation No 1052/68 is intended to implement;

28 The *first question* asks whether, with regard to products derived from barley, the criteria of a starch content exceeding 28 % may be taken into consideration as determining the distinction, for the classification of the goods, between tariff headings 11.01 C and 23.02 A;

29 The criterion referred to appears, both in Regulations Nos. 360/67 and 1052/68 and in the Common Customs Tariff, as one of two criteria for classification within one of the subheadings 23.02 A, so that a starch content exceeding 28 % cannot indicate that the goods fall outside the said subheadings;

30 It follows therefrom that the first question must be answered in the negative;

31 The *fourth question* requires to be answered only in the event of the reply to the first being affirmative;

32 It appears in fact from the order referring the case that the quantities exported whose classification is in dispute have a starch content of approximately 28 %, so that in this case the choice of the basis of analysis—starch content calculated on the goods as such or on the dry material—could have been of decisive importance;

33 Taking account of the reply to the first question, the fourth question is no longer of importance;

34 *Questions 8 to 13* request the Court to consider whether the validity of the note in dispute, which has been inserted into the Annex to Regulation No 1052/68, may be challenged as being incompatible with any provision of the Treaty or principles relating to the application thereof (Questions 8 and 9), Regulation No 120/67 (Question 10) or the Common Customs Tariff (Questions 11 to 13);

35 It emerges from the order referring the case that, according to the plaintiff in the main action, the introduction of this note involved a modification of the tariff law established by the provisions of the abovementioned Regulations and was incompatible with them; so important a modification required, at the very least, a transitional period in the interests of legal certainty;

36 The note in dispute cannot be considered as creating an exception to the provisions of the existing Regulations, nor as constituting in itself a modification of the legal situation previously in existence;

37 In this connection it must be recalled that, in the first place, there is no substantial break in continuity between the headings in the Annex to Regulation No 120/67, those of the Common Customs Tariff which were substituted therefor on the entry into force of Regulation No 980/68, the provisions of implementing Regulations Nos 360/67 and 1052/68 of the Council and the Regulations of the Commission based on them;

38 Before the note appearing in the Annex to Regulation No 1052/68 came into force, questions of classification fell to be resolved by the authorities entrusted with the execution of the common agricultural policy, and, as a last resort, by the competent courts, in the light of the general procedures and principles prevailing in the application of the Customs Tariff;

39 In the absence of binding indications for the period prior to the note appearing in the Annex to Regulation No 1052/68, regard may be had to several factors enabling the competent authorities to distinguish between the categories of classification of headings 11.01 and 23.02;

40 It is to be noted that the 'flours' referred to in heading 11.01 must always, of necessity, have a starch content exceeding, and an ash and cellulose content less than that of the original cereal;

41 Explanatory notes were already in existence when the exports in dispute were effected, which, although they were concerned with cereals other than barley, sanctioned the adoption of a starch content of 45 % as a decisive criterion of classification in that sphere;

42 It is therefore clear that the note inserted in the Annex to Regulation 1052/68, far from introducing an innovation into the principles of classification previously in force, restricted itself to establishing precise criteria which were thenceforth authoritatively imposed;

43 It follows that the criteria emerging from that note cannot be considered as conflicting with those previously applied in the context of the normal procedures of interpretation of the Customs Tariff;

44 The various questions which have been referred must be answered in the light of these considerations;

45 The *eighth question* asks whether the note in dispute is to be considered as devoid of force as being incompatible with any provision of the Treaty or of a regulation adopted in implementation thereof or of a principle of law inherent in the Treaty;

46 It emerges from the order referring the case, the statements of case and the oral arguments that this question is based on the criticisms raised by the plaintiff in the main action on the grounds of the legislative procedure by which the note in question was introduced, described as 'surreptitious' and the legal uncertainty which resulted from that legislative 'modification';

47 As is set forth above, no criticism can be upheld against the legislative procedure, employed to clarify, authoritatively and for the Community as a whole, the dinstinction between the two tariff headings the interpretation of which had previously given rise to differences of opinion;

48 The note was adopted by legitimate legislative procedure, by the competent authority with the aim of establishing both the agricultural rules and the tariff rules of the Community, and cannot therefore be considered incompatible with a provision of the Treaty or of the secondary legislation, nor with any principle governing the application of these measures;

49 The *ninth question* asks whether the note in dispute may be vitiated by the fact that it does not provide for a transitional period;

50 In this case it is sufficient to find that the sole objective of that note was to clarify the meaning of two tariff headings in relation to each other, which question was previously left to the judgment of the competent authorities;

51 The *tenth question* asks, farther, whether that note is to be considered as devoid of force as being incompatible with one of the provisions of Regulation No 120/67.

52 That question appears to be founded on the hypothesis of a possible incompatibility between the tariff headings laid down by the Annex to Regulation No 120/67 and the note introduced by the Annex to Regulation No 1052/68;

53 The tariff headings laid down in the Annex to Regulation No 120/67 have been in no way modified by Regulation No 1052/68; the scope of the latter,

as is stated *supra,* was to clarify the meaning of the two headings in question in relation to each other, in order to eliminate all uncertainty as to their interpretation;

54 In laying down such a provision the Council has kept within the power expressly reserved to it by Article 16 (5) of Regulation No 120/67, which provides that the Council 'shall adopt general rules for granting export refunds and criteria for fixing the amount of such refunds';

55 The note in dispute, having been adopted within the framework of that enabling provision, cannot be considered as incompatible with the said Regulation.

56 The *thirteenth question* asks whether there is a possibile incompatibility between the note in dispute and the Common Customs Tariff laid down by Regulation No 950/68;

57 The 'College van Beroep', asks two further questions as to when Regulation No 950/68 came into force *(eleventh and twelfth questions);* taking account of the date of the fifth export (16 August 1968), the 'College van Beroep' is uncertain when the Common Customs Tariff came into force; the latter was laid down by Regulation of 28 June 1968, to come into force in terms of Article 4 thereof, on 1 July, 1968 and was only published in the Official Journal on 22 July 1968; there is also a possible overlap with the dates determining when Regulation No 1052/68 came into force; the latter was adopted on 23 July, published in the Official Journal on 25 July and came into force on 29 July 1968;

58 It follows from the preceding that there is no break in continuity between the provisions in the Annex to Regulation No 120/67 and the provisions of the Common Customs Tariff which replaced the former from the entry into force of Regulation No 950/68; the provisions of both are substantially identical with regard to the tariff headings in question.

59 The question of the relationship between the note in dispute and the basic tariff rules which served to lay down these headings should therefore be judged in the same way, regardless of whether the Annex to Regulation No 120/67 or the Common Customs Tariff is in question;

60 It is therefore irrelevant to establish which was the basic rule applicable at the time of the export in question.

61 In accordance with the abovementioned grounds, and in the absence of any conflict between the note in dispute and the tariff headings whose delimitation the note is intended to clarify, the legality of that note cannot be doubted;

On the means of analysis (Questions 2 and 3)

62 The *second question* asks whether, apart from the results of a chemical analysis intended to reveal the cellulose, ash, starch etc. contents, in the products in question, account may be taken of other characteristics, established by another means, such as visual (microscopic) observation;

63 The *third question* asks in addition whether the application of these methods of analysis may have been modified by the effects of the provisions of Regulation No 1052/68;

64 Apart from such methods of analysis as may be imperatively prescribed by the tariff provisions, the competent authorities may apply any appropriate means of analysis or observation including visual (microscopic) observation;

65 Without prejudice to the details it has added on the limits prescribed for the starch and ash contents, the note appended to the Annex to Regulation No 1052/68 has not restricted the freedom of the competent authorities to employ in addition to chemical analysis, such other means of analysis as seem to them appropriate, in order to reach a correct classification;

Costs

66 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, cannot be reimbursed;

67 Since, insofar as the parties to the main action are concerned, the proceedings are a step in the action before the national court, it is for the latter court to decide the question of costs.

On those grounds

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties to the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to the Statute of the Court of Justice of the European Economic Community, in particular Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in reply to the questions referred to it by the 'College van Beroep voor het Bedrijfsleven' by its order of 8 December 1972, hereby rules:

1. Examination of the questions referred has revealed no element of such a nature as to affect the validity of the note relating to the heading 'cereal flours' inserted in the Annex to Regulation No 1052/68 of 23 July 1968. This note forms an integral part of the Regulation and enjoys the same legal force as its provisions, (Questions 5, 7, 8, 9, 10, 11, 12 and 13).

2. The references in Regulation No 1052/68 to columns 3, 4 and 5 of the Annex thereto must be interpreted as references to all the provisions of the Annex, including columns 1 and 2 and the note appended thereto. (Question 6).

3. The criterion 'starch content not exceeding 28 %' which appears in subheading 23.02 A of the Annex to Regulation No 360 of 25 July 1967, and of the Common Customs Tariff, established by Regulation

No 950/68 of 28 June 1968 cannot serve to distinguish tariff headings 11.01 'cereal flours' and 23.02 'brans, sharps and other residues derived from the sifting, milling or working of grains of cereal'. (Question 1).

4. The classification of products derived from barley under tariff headings 11.01 and 23.02, respectively, may be ascertained, without prejudice to the classification criteria imperatively prescribed by the Regulations applicable, both by chemical analysis and by any other appropriate means, including visual (microscopic) observation. (Question 2).

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

Delivered in open court in Luxembourg on 20 June 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 23 MAY 1973 [1]

Mr President,

Members of the Court,

The proceedings which caused the College van Beroep voor het Bedrijfsleven to refer thirteen questions, the text of which is before you, relate to the cassification, for the grant of export refunds, of goods described by the plaintiffs in the main action, Koninklijke Lassiefabrieken, as 'barley flour' coming under Tariff Heading 11.01.

Between 22 February and 16 August 1968, the company exported five lots of these goods to Denmark and Portugal, third countries, and obtained refunds at the daily rate or by means of fixing in advance.

The Hoofdproduktschap voor Akkerbouwprodukten, the competent Dutch

1 — Translated from the French.