2. Pursuant to Community law in force in March and April 1966 regarding the export to non-member countries of cereal-based processed products, Member States were at that time permitted to treat as consignments of pearled barley capable of benefiting from a higher export levy than that provided for hulled barley only consignments of barley in which the proportion of pearled grains considerably exceeded 50% by weight of the dry matter.

In Case 3/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the action pending before that court between

LUDWIG WÜNSCHE & CO., Hamburg,

and

BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG [Federal Office for the Organization of Agricultural Markets], Frankfurt am Main,

on the interpretation of the terms "pearled barley" or "pearled grains of barley having an ash content expressed as a percentage of the dry matter of less than 1%" by weight appearing in the Annex to Regulation (EEC) No 19 of the Council of 4 April 1962 (Journal Officiel No 30, p. 933), [1] Article 5 (1) (d) of Regulation (EEC) No 141/64 of the Council of 21 October 1964 (Journal Officiel No 169, p. 2666) [1] and in Regulation (EEC) No 11/66 of the Commission of 3 February 1966 (Journal Officiel No 24, p. 393),[1]

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

1 — There are no authentic English translations of these regulations.

JUDGMENT

Facts and Issues

I — Facts and procedure

On 4 March and 9 and 13 April 1966 Ludwig Wünsche & Co., Hamburg, (hereinafter referred to as "Wünsche") obtained from the defendant in the main action (which at that time was the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, the predecessor in law of the Bundesanstalt für landwirtschaftliche Marktordnung) several undertakings to grant refunds on exports of pearled barley.

The power of a Member State to give such undertakings in respect of cereal products was provided for at that time by provisions of Community law, in particular by Article 20 (2) of Regulation No 19 of the Council of 4 April 1962 and Regulation No 141/64 of the Council of 21 October 1964. The conditions for the grant of a refund were set out in Commission Regulations Nos 164/64 of 29 October 1964 and 11/66 of 3 February 1966.

The German Government used that power to enact the regulation of 24 November 1964 on refunds in respect of cereals and rice, Article 6 of which made provision for either a cash refund on exports to non-member countries, or, in the case of products imported from a non-member country and intended for re-export after processing, consent to importation free from levy. In this case the refund was granted by the second method.

The chemists, acting under oath, instructed by the exporter to analyse the goods found that in every case the ash-content, expressed as a percentage of the dry matter, was less than 1% by weight and they classified the goods as "pearled grains of barley" coming under heading 11.02 B III (a) (now heading 11.02 C III) of the Common Customs Tariff.

However, the experts of the German governmental authorities came to a different conclusion after performing their analyses. They, too, found that all the samples had an ash-content of less than 1% but they found that the grains of barley were not homogeneous in character. The Bundesforschungsanstalt für Getreideverarbeitung [Federal Research Establishment for Cereals Processing] of Berlin stated that apart from large grains which were undoubtedly to be classified as "pearled", there were other, less worked grains which could be classified as hulled only and some which could even be regarded as still retaining the whole of their husk. The Zolltechnisches Prüfungs- und Lehranstalt [Customs Laboratory and Training College] at Hamburg-Altona found that the grains were predominantly not wholly round and smooth, that the aleurone cells had been removed only in part and that the starch cells were visible in far fewer than half the cases.

On the basis of those last two experts' reports the intervention agency revoked, in respect of certain exports, the licence granted in lieu of a refund (for the

importation of unworked barley free of levy).

Wünsche challenged the decision revoking the licence before the Hessisches Finanzgericht [Finance Court, Hesse] which, after hearing a considerable amount of evidence, dismissed the action. The issue was brought before the Bundesfinanzhof [Federal Finance Court] which in a first preliminary decision (Vorbescheid) of 9 January 1980 arrived at an interpretation unfavourable to Wünsche. It based its decision on the judgment delivered by the Court of Justice on 15 December 1971 in Case 21/71 *Brodersen* [1971] ECR 1069.

However, the Bundesfinanzhof was moved by new factual and legal arguments put forward by the applicant to put the following questions to the Court pursuant to Article 177 of the EEC Treaty:

"1. How is the expression 'pearled barley' or pearled grains of barley having an ash-content expressed as a percentage of the dry matter of less than 1% by weight appearing in the Annex to Regulation No 19/62/EEC of the Council, Article 5 (1) (d) of Regulation No 141/64/EEC of the Council and in Regulation No 11/66/EEC of the Commission to be interpreted in relation to undertakings in March 1966 and on 5 and 13 April 1966 respectively to grant refunds? In view of the fact that according to the last-mentioned regulation pearled grains of barley may have an ash-content of more than 1% by weight and that the ash-content is determined by the extent to which the pericarp has been removed and the grains have been rounded at the ends, is it to be assumed that at least when the ash-content is less than 1% by weight pearled grains of barley are invariably present so that it is immaterial whether in addition they fulfil the requirements contained in the Explanatory Notes to tariff heading No 11.02 of the Customs Cooperation Council Nomenclature?

2. If an ash-content of less than 1% by weight is not sufficient by itself to fall within the expression 'pearled barley':

   (a) Is it sufficient for more than 50% of the grains to have practically the whole pericarp removed and to be rounded at both ends or must almost all the grains of the consignment in question have these particular features for tariff purposes?

   (b) If a proportion of more than 50% suffices does the determination of the proportions depend on the percentage by weight or by number of the grains?"

The order for reference was registered at the Court on 12 January 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Wünsche, represented by F. Modest, Rechtsanwalt, Hamburg, by the Bundesanstalt für landwirtschaftliche Marktordnung, represented by A. Stockburger, Rechtsanwalt, Frankfurt am Main, and by the Commission of the European Communities, represented by J. Sack, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to

open the oral procedure without any preparatory inquiry. It did however ask Wünsche to submit copies of the two experts' reports prepared on its instructions.

By an order dated 13 May 1981 made pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court assigned the case to the First Chamber.

II — Written observations submitted to the Court

Wünsche observes first that the facts of the case before the national court are different from those before the Court of Justice in Case 21/71 *Brodersen*, already cited, in which it held that the Member States could only regard as "pearled barley" those products which satisfied at least the conditions laid down by the Explanatory Notes to heading 11.02 of the Customs Cooperation Council Nomenclature.

It submits that Regulation No 11/66, which was no longer in force at the material time in Case 21/71, is of great importance in this case.

Moreover, in Case 21/71 the Court restricted its interpretation of the concept "pearled barley" to cases in which Member States granted the maximum amounts of refunds fixed by the Commission. When granting refunds for pearled barley, however, the Federal Republic of Germany always kept below those maximum rates.

After making some introductory remarks designed to demonstrate that the questions put by the Bundesfinanzhof cannot be answered by reference to the judgment given by the Court in Case 21/71, Wünsche stresses that an answer to them pre-supposes profound technical knowledge.

In this respect, the botanical characteristics of cereals must first be examined.

The constituent elements of cereal grain of any kind are as follows:

(a) The endosperm, that is to say the floury kernel in the strict sense and the aleurone layer;

(b) The seed-envelope composed of several layers, namely, from inside to outside, the seed coat, the pericarp and the husk;

(c) The germ which is at one end of the grain, attached to the seed coat.

There are however differences between the various kinds of cereals. In particular a distinction is made in botany, economics and the Customs Tariff and the Explanatory Notes thereto between "naked cereals" and "bracteiferous cereals". "Naked cereals" are those from which the husk falls off as soon as they are threshed in the field. "Bracteiferous cereals", on the other hand, have the characteristic that the husk is so closely attached to the grain that it is not separated during threshing in the field. Removal of the husk takes place afterwards, by hulling, and very often results in the removal of a small part of the seed coat or pericarp as well.

In Wünsche's view it is also necessary to be familiar with the historical development and significance of ash-content in relation to cereals and cereal products.

The ash-content of a cereal grain consists of the incombustible minerals mainly to be found in the pericarp and seed coat, the germ and, to some extent, in the aleurone layer. Those minerals are particularly concentrated at the tips or ends of the grain.

The ash-content of hulled barley, that is to say barley from which the husk has been removed, is about 1.3% on average whilst that of the floury kernel alone, without the aleurone layer, is 0.6% at the most.

Using ash-content as a criterion of assessment and delimitation became increasingly common over the years in the cereals and milling industry in Germany and that criterion eventually found its way into legislation. The reason for that is that the determination of the ash-content of a particular cereal flour makes it possible to assess in an objective and reliable manner the amount of seed-envelope, germ and aleurone layer still remaining in a cereal flour coming on to the market. The legislative requirement on ash-content, is thus an indication to millers of what and how they must mill and the types of flour which they may and must manufacture.

However, even today, there is still no requirement under German legislation as to which techniques must be used for manufacturing types of flour classified according to their ash-content.

Wünsche recalls that when the provisional organization of the market in cereals came into force in 1962 the institutions of the Community adopted ash-content from the national organization of the market in products of the cereals milling industry applying in the Federal Republic of Germany as a criterion of assessment and delimitation.

It stresses that in the case of export refunds on pearled barley the criterion of ash-content was introduced into German law by the regulation of 24 November 1964, later amended by regulations of 10 March 1965 and 25 July 1966.

The Commission followed the German legislature in this matter, too, and by Regulation No 11/66, cited above, introduced a provision as to ash-content as a criterion for distinguishing pearled barley, reducing the percentage of the maximum refund on "pearled grains of barley having an ash-content expressed as a percentage of the dry matter of more than 10%" to 79%.

The rules introduced by the Commission thus overlap with the German rules as contained in the regulation of 25 July 1966.

Wünsche believes that it is also necessary to point out that there are different techniques for hulling cereal grain. The most important difference consists in the metal rollers or drums used being arranged either horizontally or vertically.

In vertical hulling the grains are mainly ground down and polished at the sides and in the middle whereas in horizontal milling the grains are ground down and polished at the ends which produces a steeper and more marked reduction in ash-content since the mineral constituents are essentially concentrated at the ends of the grain.

So after horizontal hulling not only a part of the aleurone layer and seed coat but also some of the pericarp remains along the sides of the grain.

By the use of that technique it is possible to obtain an ash-content of less than 1% and to bring about a pronounced rounding of the ends of the grains without removing the whole pericarp.

As regards the grading of the grains, Wünsche observes that this is not possible until the grain has been hulled. Before 1962 it was the practice in Germany for mills to grade the hulled barley and on the basis of that practice the legislature varied export refunds according to the different categories of hulled barley determined on the basis of the size of the grains and the degree of hulling. That system of refunds abruptly came to an end however with the entry into force of the common organization of the market in cereals on 1 August 1962. Since then, German mills have been obliged to adapt their practice to Community provisions when exporting.

The common organization of the market in cereals and the regulations introduced by the Community and the Member States relating to refunds placed the trade circles in all the Member States, but above all in Germany, in a new situation. For it was necessary on the one hand to work with the concept of "pearled grains of barley" and on the other, since 1964, to come to terms with the significance of the criterion of ash-content in the manufacture of a product, such as hulled barley, derived from the processing of cereals.

The concept of "pearled grains of barley" was entirely unknown in the Federal Republic of Germany both in trade circles and in the public administration.

The trade circles and the public authorities had no knowledge either of the Explanatory Notes to the Customs Cooperation Council Nomenclature which were not applied anywhere at that time.

Regulations Nos 141/64 and 11/66 on refunds moreover demonstrate that the Commission itself either did not know of those Explanatory Notes or at any rate did not consider them to be of any significance.

The Customs Tariff, for its part, was of no assistance in interpreting the concept of "pearled grains of barley".

Mills were therefore at first left to their own devices and took the view that

As the proper meaning of the word "pearled" indicates, the barley had to be hulled to such a degree that the grains were rounded at the ends;

The Tariff contained no requirement as to grading and the concept of "pearled barley" did not imply any specific size or diameter;

Owing to the requirement that the cereal grains should be rounded at their ends that concept presupposed a certain degree of hulling at the ends but did not indicate the degree to which that was required or whether the grains had to be hulled elsewhere than at the ends.

The first and only certain guidance in this regard was afforded by the introduction of the criterion of ash-content.

The provision contained in the regulations on refunds (the three German regulations already cited and Regulation No 11/66) which specified the ash-content which pearled barley was required to have gave millers an objective criterion and indicated without any ambiguity the degree to which the barley, besides the rounding of the ends, had to be hulled.

Thus the decisive factor was, apart from the rounding of the ends, that the grains of barley should have been hulled to such an extent that the appropriate ash-content was obtained.

The ash-content specified in the four regulations on refunds had greater implications, however, and affected the technology involved.

The prescribed ash-content made it evident that hulling did not have to be so intensive as to leave only the white, floury kernel, for then the ash-content limit would be around 0.6%. Since barley from which the husk has been removed has an ash-content of 1.3 to 1.4%, more intensive hulling was required to attain an average ash-content of less than 1%: It was not necessary however for large parts of the pericarp, the seed-coat, the germ and the aleurone layer to be hulled; the miller could therefore decide which parts he wished to leave and which he wished to hull.

It was assumed in all four regulations that it was possible for pearled barley to have an ash-content equal to or more than 1%.

However, owing to their botanical composition, barley grains from which virtually all the pericarp has been removed and which are also rounded at the ends, even if only to a slight extent, are bound to have an ash-content of less than 1%.

The fact that the four regulations on refunds acknowledged that it is possible for pearled barley to have an ash-content of more than 1% necessarily means that barley grain must certainly be rounded at the extremities but that the whole pericarp does not necessarily have to be removed.

On the other hand, the ash-content, as stipulated in the four regulations, is further evidence that the miller may obtain an ash-content of less than 1% by hulling and rounding the ends of the grain, where the ash-content is concentrated, although parts of the pericarp still continue to adhere to the middle of the grain.

The Explanatory Notes to tariff heading 11.02 of the Customs Cooperation Council Nomenclature contain outright errors in point 3 dealing with the hulling of cereals, errors which also affect point 4 dealing with pearled grains.

As regards bracteiferous varieties of cereals those notes provide in effect that it is sufficient for hulling purposes for the husks of the grains to have been removed and add that "generally the floury kernel is then visible".

However, between the pericarp and the floury kernel — whether with or without an aleurone layer — there is always the seed coat. In the case of bracteiferous cereals, from which only the husk has been removed, only the pericarp is

therefore visible, and not the floury kernel.

Point 3 of the Explanatory Notes of the Customs Cooperation Council Nomenclature on tariff heading 11.02 cannot therefore be used because it is wrong. That error affects point 4 of the Explanatory Notes on "pearled grains", which is based on the incorrect notes under point 3.

The explanations under point 4 are wrong and inapplicable for yet another reason.

The Customs Tariff contains no provision as to grading and does not prescribe any technology as to the manner of hulling, or as to a specific degree of hulling. It simply provides that the barley must be "pearled", that is to say, that the grains must be hulled in such a way that the ends are peeled and thus rounded.

But by going on to say that the cereal grains must in addition have virtually all their pericarp removed, the Explanatory Notes to the Customs Cooperation Council impose an additional requirement which is not contained in the Tariff. Above all they prescribe a specific manufacturing technology, namely vertical milling, which is to be used by the millers and which is not required by the Tariff, since it is immaterial, as regards the pearled nature of a cereal grain, whether parts of the pericarp or other parts around the floury kernel, or both, have been removed in order to obtain the pearled shape.

Even if specific legal rules on ash-content did not exist, it would thus be impossible to place reliance on the Explanatory Notes to the Customs Cooperation Council Nomenclature for the purpose of interpreting the expression "pearled grains of barley" for the simple reason that they are wrong and not covered by the Common Customs Tariff itself.

Nor can the Explanatory Notes to the Customs Cooperation Council Nomenclature concerning the expression "pearled grains of barley" be applied in practice.

It is not in fact technically possible to hull barley grains, which by nature are not homogeneous, so as completely to remove just the pericarp from nearly all the worked grains.

In order to round the cereal grains at their ends during the hulling process mills would always have to grind away some of the seed coat, aleurone layer and even some of the white floury kernel at the ends but, on the other hand, they would have to leave some of the pericarp varying in amount from grain to grain. They could achieve total removal of the pericarp only by completely peeling away the parts of the grain surrounding the floury kernel. That, however, is not what is meant by pearling and, in any event, is certainly not required by the Tariff.

The criterion of ash-content, on the other hand, offers a practicable solution by the use of objective and reliable methods.

The Explanatory Notes to tariff heading 11.02 of the Customs Cooperation Council Nomenclature and the provisions as to ash-content contained in Regulation No 11/66 are partly contradictory and partly overlap; at any rate they are not wholly the same.

For the purposes of Regulation No 11/66 it was sufficient, in order to attract the maximum rate of refund, for the barley grains to be very rounded at the ends and have an ash-content of less than 1%. In order to achieve that result it is not necessary to remove the pericarp from the grains completely, but it is sufficient to take away part of the

pericarp, the seed coat and the aleurone layer. In such cases, the floury kernel is always at least partly visible.

That hulling method, therefore, comes nearest to the (clearly mistaken) view derived from the definitions contained in the Explanatory Notes to the Customs Cooperation Council Nomenclature that in the case of hulled barley the (white) floury kernel must be visible in some way or other.

Regulation (EEC) No 11/66 thus defines pearled barley differently from the Explanatory Notes to the Customs Cooperation Council Nomenclature and to that extent they stand in contradiction to each other.

In Wünsche's view the question whether the Commission was empowered to define the concept of "pearled barley" in Regulation No 11/66 may be left open.

By adopting the provision on ash-content the Commission provided that definition which, by virtue of the principle of the protection of legitimate expectation, must be treated as valid, even in the event of its being void on the ground that the Commission did not have the power to adopt it. Moreover it follows from the principle of legal certainty that it is the task and duty of public administration to provide clear definitions by which those affected by the relevant legal provisions may direct themselves. In the present case, the Commission did that by adopting the provision on ash-content.

If the Commission did not wish to create a definition it could have referred to the Explanatory Notes to the Customs Cooperation Council Nomenclature. That it did not do so is its responsibility.

In any event the definitions contained in Regulation No 11/66 superseded points 3 and 4 of the Explanatory Notes to tariff heading No 11.02 of the Customs Cooperation Council Nomenclature which are not rules of law and, moreover, are wrong in essential aspects.

Wünsche then goes on to examine the six experts' reports or groups of reports procured by the parties during the main proceedings and challenges the results arrived at by the experts instructed by the defendant.

In its view, in considering whether the commodity which they were analysing was pearled barley, those experts had regard to criteria which are not provided for by Community rules.

Thus, the criteria applied by the Bundesforschungsanstalt für Getreideverarbeitung were whether grains had been graded, the classifications commonly adopted in Germany before the entry into force of the common organization of the market in cereals, and the customary quality of pearled barley. The Zolltechnische Prüfungs- und Lehranstalt at Hamburg based its view on the fact that the grains were not rounded all over, the aleurone cells had been removed only in part and the starch cells were less than 50% visible. A second report of the Bundesforschungsanstalt reached a negative judgment because in order to calculate the proportion of grains from which practically the whole pericarp had been removed the percentage in weight was taken and not the percentage of the number of grains which Wünsche believes is the only proper criterion. However, all the reports found that the ash-content was less than 1% and that *all the grains were rounded at the ends.*

In view of the foregoing considerations Wünsche proposes that the reply to the *first question* should be that in order for a barley grain to be considered to be pearled at the time when Regulation No 11/66 was in force it was sufficient that:

(1) The barley grain be rounded at both ends by hulling; and

(2) The layers above the floury kernel be ground away to the extent necessary to attain on average the percentage of ash-content required for the rate of refund.

As to the second question, Wünsche submits that since an ash-content of less than 1% necessarily supposes the ends of the grain to have been rounded the conditions for a barley grain to be regarded as pearled are fulfilled automatically whenever the ash-content is less than 1%. Therefore the second question does not require to be answered.

For what it is worth, however, it examines the two sub-questions of the second question.

As far as the first sub-question is concerned, it observes that the effect of any appreciable degree of hulling is to round the tips or ends of all the grains.

Apart from "fragments", which are bound to occur during the hulling of cereals, and which are themselves somewhat rounded owing to the grinding process, nearly all the grains are rounded at both ends after hulling.

Thus it would be possible to require without more ado that, in the case of pearled barley, and apart from fragments, not just 50% of the grains but practically all of them should be rounded at the ends.

The position would be different, in regard to the removal of the pericarp, if it were necessary to refer to the Explanatory Notes to the Customs Cooperation Council Nomenclature.

Since cereal grains vary in size and diameter it is technically impossible to hull them so that the pericarp is removed from all or nearly all of the grains.

Such a requirement could be met only by grading the grains to some extent. But a requirement as to sorting is contained neither in the Customs Tariff itself nor in the Explanatory Notes to the Customs Cooperation Council Nomenclature. If sorting were required by the Explanatory Notes that requirement would not be covered by the Tariff.

Since it is possible to determine whether virtually the whole pericarp has been removed from a grain of barley only by visual inspection and by estimation, it would be sufficient, if need be, to verify that the pericarp has been virtually entirely removed from about 50% of the hulled grains.

That must be the case *a fortiori* if the Member State is not paying the maximum rates of refund.

As regards the second sub-question Wünsche takes the view that the percentage of the number of grains should be the deciding criterion.

It observes that the decisive factor determining the weight of barley grains is the proportion of starch contained in the kernel. The parts of the seed-envelope around the cereal grain on the other hand are extremely light.

But the issue in the present case is not one of appraising the floury kernel but

solely of determining if and to what extent the different parts of the seed-envelope have been removed from the individual grains.

The structure of the product from the point of view of the degree of the hulling process therefore depends not on the weight of the grains but, since the weight of the parts of the seed-envelope is impossible to determine, on the number of grains which are sufficiently hulled and meet the various requirements laid down.

Furthermore, barley grains are not homogeneous. Consequently a flour-mill can only operate economically by regulating the intensity of hulling so that on average grains are to a certain degree freed from pieces of the seed-envelope. If the flour-mill were to hull so as to remove the seed-envelope from the largest grains, the small or medium-sized barley grains would not only lose their whole shell but a large part of the floury kernel as well. It is thus in keeping with the nature of hulled barley for more parts of the seed-envelope to adhere to the large grains of higher specific weight than to the medium-sized and smaller ones.

If the extent to which parts of the seed-envelope have been removed is to be the identifying factor then it is necessary to concentrate on the number of grains which have been husked to the required extent.

The *Bundesanstalt für landwirtschaftliche Marktordnung* states that there is nothing to justify the contention that the interpretation af the term "pearled barley" given by the Court in Case 21/71 is not valid in the present case.

The Community provisions in force were exactly the same both in the period in question in Case 21/71 and in the period under consideration in the present case.

Moreover the argument that the Court might perhaps have erred in Case 21/71 in its construction of Regulation No 11/66 has no foundation. In truth the Court was not unaware of the existence of that regulation. That is proved by the fact that in that part of the judgment stating the facts and issues the Court set out exhaustively the observations of the Commission, which emphatically denied that the inference that hulled barley having an ash-content expressed as a ratio of the dry matter of less than 1% by weight is necessarily "pearled" barley could be drawn from the provisions of Regulation No 11/66.

Whether or not a grain is pearled is not determined by its ash-content alone; it is pearled if, amongst other things, it is almost round in shape, something which may be ascertained only by visual inspection.

In view of the wording and scheme of Regulation No 11/66 the *first question* put by the Bundesfinanzhof thus requires a clear-cut answer, namely to the effect that a pearl-shaped form has always been regarded as an independent identifying feature apart from ash-content and can on no account be replaced by ash-content.

Contrary to Wünsche's argument before the Bundesfinanzhof, Regulation No 11/66 is not incompatible with the Explanatory Notes to the Customs Cooperation Council Nomenclature. Since in reality ash-content varies appreciably according to the conditions of cultivation, the nature of the soil and the fertilizers used, as well as the strains and varieties of cereals, it is quite possible for a grain of barley from which

almost the whole pericarp has been removed to have an ash-content higher than 1% by weight.

As to the *second question*, the Bundesanstalt takes the view that at the time of the exports in question it was not sufficient for only more than 50% of the grains to be pearled for the purposes of the Customs Tariff, but it was necessary for almost all the grains to have nearly the whole pericarp removed and be rounded at both ends. General Rule 3 (b) for the Interpretation of the Tariff was not yet applicable during the transitional period. The provisions of Community law governing refunds, which always laid down maximum refunds in order to prevent disturbances on the markets of the Member States, did not by their nature allow an export consignment comprising for example 51% pearled grains and 49% unworked grains to attract a refund at the highest rate of 100%.

The Bundesanstalt adds that, even if General Rule 3 (b) could have been applied, the percentages in weight and not the number of grains would have had to be used as a criterion.

Pearled grains of barley are in fact a bulk commodity which can be handled only by weight and are consequently imported or exported in that way, too.

It may be noted in addition that pearled barley grains may also be created by the polishing of grain fragments. Grain fragments would also have to be counted as grains if the relevant criterion were the percentage of the number of grains. Such a method would open the door to all sorts of manipulation. For example, it would not be difficult to obtain more than 50% of pearled barley grains by mixing polished grain fragments with barley of poorer quality or which is hardly hulled.

Such a practice would not be reconcilable with the Community refund rules as they applied during the transitional period.

The *Commission of the European Communities* believes that there is no point in dealing separately with the two questions submitted for a preliminary ruling. That artificial division of the issue into two distinct parts produces materially incorrect results and goes a long way towards explaining the erroneous legal argument of the plaintiff.

The Commission observes first of all that Wünsche's view is materially incorrect. There exists also pearled barley (Perlgraupen) of which the ash-content expressed as a percentage of the dry matter is higher than 1% by weight. In fact the ash-content of barley varies considerably depending upon the harvest and origin. Even the specialist literature assumes an ash-content of 1.1% for pearled barley.

In addition, a number of general legal considerations militate against the view taken by Wünsche.

First of all the distinction between hulled barley and pearled barley would be largely devoid of meaning if very high quality standards were not required of pearled barley. The particularly high rate of refund on pearled barley is only justified by the fact that a costly method of processing is necessary.

A further factor is the transposition into Community law without modification of

concepts contained in the Customs Cooperation Council Nomenclature, which led the Court to consider in Case 21/71 that the Explanatory Notes to that Nomenclature are binding in Community law as well. That factor is especially important when it is considered that the Common Customs Tariff did not enter into force in the form of Regulation No 950/68 of the Council of 28 June 1968 (Journal Officiel L 172, p. 1) until 1 July 1968 and that therefore particularly close observance of the Customs Cooperation Council Nomenclature was necessary before that date whenever concepts of customs nomenclature came to be defined.

Finally, it is to be noted that in its judgment in Case 21/71 the Court did not consider at all the question whether Regulation No 11/66, which in Wünsche's view contains a wider definition of pearled barley for Community law, was still in force or had already been repealed. It would indeed be strange for the Explanatory Notes to the Customs Cooperation Council Nomenclature to have no significance in Community law in March and April 1966 but to have become of decisive importance a few months later.

The correctness of that view follows from the meaning and purpose of the rules on pearled barley contained in the Annex to Regulation No 11/66. The reasons why both questions of the Bundesfinanzhof should be examined together also become clear in that context.

Even on the supposition that Wünsche's argument is correct and that for the purposes of the Explanatory Notes to the Customs Cooperation Council Nomenclature pearled barley never has an ash-content higher than 1% by weight, it should not be forgotten that in practice it is not possible, even through intensive, repeated milling, to make all the grains of a given consignment of barley conform with the definition contained in the Customs Cooperation Council Nomenclature. Even if the vast majority of grains fulfilled those requirements and if, always on the assumption that Wünsche's argument is correct, they therefore had an ash-content of less than 1%, there would still remain a number of grains with a higher ash-content because they would have undergone less intensive working. Even if the whole commodity could then be described as pearled owing to the predominance of fully worked grains, the much higher ash-content of a small proportion of the grains could make the average ash-content exceed 1% by weight. In such a case it would be impossible to ascertain whether grains had been mixed or simply worked to a lesser degree.

For practical purposes that question is not important in any case because the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff apply. There is no reason why those general rules should not be applied in this case. Admittedly in 1966 the Common Customs Tariff did not yet exist in the form of a Council regulation but there was a "common customs tariff" in existence which was worked out in several stages in the form of decisions of the Community institutions and already contained the rule concerning mixed products.

All this demonstrates that, even supposing that Wünsche's argument is correct, it is purely theoretical and does not accord with practice. Completely pearled barley grains are very rarely encountered in practice which is the reason why the ash-content limit of 1 % by weight may actually be exceeded. The definition contained in the Customs Cooperation Council Nomenclature remains binding, but obviously not every grain of a given commodity has to meet that definition. The permitted maximum proportion by weight or number of such grains enabling the commodity as a whole still to be described as "pearled" is the subject of the second question referred to the Court and must be examined in that context.

The purpose of the provisions contained in the Annex to Regulation No 11/66 was not to let a commodity which could in its entirety be described as "pearled" attract the maximum rate of refund if there was reason to believe either that it had not undergone intensive working or that it had been artificially "inflated" by the addition of a less worked commodity. On the other hand those provisions were not intended to introduce into Community law a definition of pearled barley differing from that contained in the Customs Cooperation Council Nomenclature.

On the basis of those considerations the Commission reaches the conclusion that since the first question submitted to the Court is based on purely theoretical factors it has no real importance for the decision to be given in the main action. On the other hand, the answer to the second question is decisive.

For the purposes of the answer to that question the Commission believes that two things must be borne in mind. First, it must be acknowledged that it is impossible in practice for virtually all the grains in a given consignment of pearled barley to have the characteristics required by the Explanatory Notes to the Customs Cooperation Council Nomenclature. Secondly, the very large difference existing between the maximum export refunds on pearled barley and those on hulled barley must be borne in mind.

Consequently the quality standards required of the commodity should not be too strict but should not be too lax either, for that would allow the amount of the refund to be artificially and excessively inflated through the mixing of pearled barley and husked or (simply) hulled barley.

A reasonable solution may be found on the basis of General Rule 3 (b) for the Interpretation of the Nomenclature of the Common Customs Tariff according to which mixtures are to be classified according to the material or component which gives the goods their essential character. That material might be constituted by pearled grains of barley if the proportion of them clearly exceeded 50% by weight.

The percentage by weight should be taken and not the percentage of the number of grains since it is weight which determines the character of the commodity and also how the rate of refund is calculated. Moreover, grain fragments rounded by milling might also be found in the commodity in which case, if the percentage of the number of grains were taken as a basis, the fragmentation of grains would make it easy to obtain a higher percentage which would meet those requirements, although

the percentage by weight would be distinctly lower.

In conclusion the Commission proposes that the Court should answer the questions submitted by the Bundesfinanzhof for a preliminary ruling as follows:

"In applying Community law in force in March and April 1966 to the exportation to non-member countries of products processed from cereals Member States could only treat as 'pearled barley' at that time products fulfilling, at least in a proportion clearly exceeding 50% by weight of the dry matter, the requirements of the Explanatory Notes to heading 11.02 of the Customs Cooperation Council Nomenclature."

III — Oral procedure

At the sitting on 19 November 1981 oral argument was presented by the following: Fritz Modest, Rechtsanwalt, of Hamburg, for the plaintiff in the main proceedings; Albrecht Stockburger, Rechtsanwalt, of Frankfurt am Main, for the defendant in the main proceedings; and Jörn Sack, a member of the Legal Department, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered her opinion at the sitting on 18 February 1982.

Decision

1 By order of 18 November 1980, received at the Court Registry on 12 January 1981, the Bundesfinanzhof [Federal Finance Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the expression "pearled grains of barley" appearing in the Annex to Regulation (EEC) No 19 of the Council of 4 April 1962 (Journal Officiel 1962, p. 933) [1] and in Article 5 (1) (d) of Regulation (EEC) No 141/64 of the Council of 21 October 1964 (Journal Officiel 1964, p. 2666) [1] and in particular of the expression "pearled grains of barley having an ash-content expressed as a percentage of the dry matter of less than 1% as used pursuant to Regulation (EEC) No 11/66 of the Commission of 3 February 1966 (Journal Officiel 1966, p. 393). [1]

2 The order was made in proceedings before the Bundesfinanzhof between Ludwig Wünsche & Co., Hamburg (hereinafter referred to as "Wünsche"),

1 — There are no authentic English translations of these regulations.

a German importer and exporter of cereals, and the German agricultural intervention agency, the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], Frankfurt am Main (hereinafter referred to as "the Federal Office"). Having granted Wünsche the maximum entitlement to export refunds, consisting in this case in authority to import, free of levy, 220 kg of basic product (unprocessed barley) for 100 kg of processed product (pearled grains of barley), the Federal Office decided, after the processed product had been examined by technical experts, to withhold authorization for the levy-free import and, in both cases, to withdraw the import authorizations already granted. Wünsche lodged an objection and was allowed a refund only at the reduced rate of 160 kg of basic product for 100 kg of processed product; it then applied to the Finanzgericht [Finance Court] for a declaration: (a) that the intervention agency was under an obligation to grant it authority to import free of levy a further quantity equal to 60% of the exported goods; (b) that, in so far as the decisions revoked authorizations previously granted, those decisions were void. Wünsche's application was dismissed and it appealed on a point of law to the Bundesfinanzhof, which, considering that any declaration as to the lawfulness of the contested decisions depended on the interpretation to be given, under Community law, to the concept of pearled grains of barley, submitted the following questions to the Court:

"1. How is the expression 'pearled barley' or 'pearled grains of barley having an ash-content expressed as a percentage of the dry matter of less than 1%' by weight appearing in the Annex to Regulation No 19/62/EEC of the Council, Article 5 (1) (d) of Regulation No 141/64/EEC of the Council and in Regulation No 11/66/EEC of the Commission to be interpreted in relation to undertakings in March 1966 and on 5 and 13 April 1966 respectively to grant refunds? In view of the fact that according to the last-mentioned regulation pearled grains of barley may have an ash-content of more than 1% by weight and that the ash-content is determined by the extent to which the pericarp has been removed and the grains have been rounded at the ends, is it to be assumed that at least when the ash-content is less than 1% by weight pearled grains of barley are invariably present so that it is immaterial whether in addition they fulfil the requirements contained in the Explanatory Notes to tariff heading No 11.02 of the Customs Cooperation Council Nomenclature?

2. If an ash-content of less than 1% by weight is not sufficient by itself to fall within the expression 'pearled barley':

(a) Is it sufficient for more than 50% of the grains to have practically the whole pericarp removed and to be rounded at both ends or must almost all the grains of the consignment in question have these particular features for tariff purposes?

(b) If a proportion of more than 50% suffices does the determination of the proportions depend on the percentage by weight or by number of the grains?"

First question

3 The first question seeks essentially to determine whether the concept of "pearled grains of barley" may be defined according to the sole criterion of ash-content where such content is less than 1% or whether, on the contrary, other factors and in particular the conditions set out in the Explanatory Notes to the Customs Cooperation Council Nomenclature must be taken into consideration.

4 It is important to emphasize in the first place that Regulation No 19 of the Council and Regulations Nos 141/64 and 11/66 of the Commission provide no definition whatsoever of "pearled grains of barley". The two first-mentioned regulations refer only to "pearled" grains of cereals; the third regulation does not refer to "grains of pearled barley having an ash-content expressed as a percentage of the dry matter of less than 1%" but limits the export refund granted in respect of "grains of pearled barley having an ash-content expressed as a percentage of the dry matter exceeding 1%" to an amount equal to 70% of the refund available pursuant to Regulation No 164/64 of the Commission of 29 October 1964 (Journal Officiel 1964, p. 2743); neither does it contain a definition of the concept of "pearled grains of barley".

5 In so far as no definition of "pearled grains of barley" can be obtained either from the above-mentioned regulations or from heading 11.02 of the Common Customs Tariff, to which the Annex to Regulation No 19 expressly refers, or from the Explanatory Notes to the Common Customs Tariff, it is appropriate, in view of the fact that heading 11.02 of the Common Customs Tariff has exactly the same wording as a heading in the Customs Cooperation Council Nomenclature, to refer to the Explanatory Notes to that Nomenclature (hereinafter referred to as "the Explanatory Notes").

6 The Explanatory Notes contain the following definitions with regard to heading 11.02:

"... The products covered by the present heading are:

...

(3) Grain which has been hulled or otherwise worked to remove wholly or partially the pericarp (the skin beneath the husk). Grains of the bracteiferous varieties of barley are also classified in this heading if their husks (or hulls) have been removed; generally the floury kernel is then visible. (The husks can be removed only by grinding since they adhere too firmly to the grain kernel to be separated by mere threshing or winnowing) ...

(4) Pearled grains (principally barley); that is, grain from which practically the whole pericarp has been removed; these are more rounded at the ends."

They make no reference whatsoever to the criterion of ash-content.

7 Wünsche maintains that paragraph (3) of that note is vitiated by a gross error, by reason of the fact that, having stated that hulling consists, in the case of bracteiferous varieties of barley, of removal of the husks or hulls, it goes on to say that "generally the floury kernel is then visible". Such a statement is incorrect since, in the case of a bracteiferous variety of cereal, removal of the bracts always leaves the pericarp intact, which prevents the floury kernel from being visible. That mistake, which renders paragraph (3) of the Explanatory Notes on heading 11.02 inapplicable, has the same consequences with regard to paragraph (4), in which the definition of "pearled" grains relies upon the concept of "hulled" grains.

8 That argument is untenable. In fact, the statement that the floury kernel is visible after hulling, contained in the above-mentioned Explanatory Notes refers to all cereals in general, the great majority of which are naked cereals. That does not mean, as is acknowledged in the Explanatory Note itself, that bracteiferous varieties of barley may not constitute a special case which is an exception to the general rule. In fact, that rule itself provides for the possibility of exceptions, by using the word "generally". The statement

challenged by Wünsche is not therefore of such a nature as to render the Explanatory Notes inapplicable to bracteiferous varieties of barley.

9 Wünsche also states that, in this case, the Explanatory Notes are incompatible with Regulation No 11/66. The incombustible minerals which give rise to the ash-content of the cereal grains are in fact concentrated at the extremities of the grain, whilst the ash-content of the floury kernel never exceeds 0.6% of the grain by weight. Consequently, if the only method of obtaining pearled barley consists, as appears from the Explanatory Notes, in removing practically the whole of the pericarp from the grain, the ash-content of pearled barley could never exceed 1% by weight.

10 That argument, however, disregards the fact that the ash-content of a cereal may vary considerably according to the species and variety of the cereal, the growing conditions, the nature of the soil, the fertilizers and other factors. Moreover, new agricultural techniques are, as the Commission has rightly emphasized, likely to promote the production of new vegetable varieties of which the biological characteristics may vary.

11 It should also be emphasized that the Community provisions on agriculture, as pointed out by the national court, acknowledge the existence of pearled grains of barley whose ash-content exceeds 1%, a fact which prevents the concept of pearled barley from being defined according to the sole criterion of ash-content.

12 In view of the foregoing considerations, it is appropriate to state in answer to the first question submitted by the Bundesfinanzhof that "pearled grains of barley", as referred to in the Annex to Regulation No 19, in Article 5 (1) (d) of Regulation No 141/64 and in Regulation No 11/66, must be taken to mean grains of barley which satisfy, as a minimum, the conditions laid down in the Explanatory Notes on heading 11.02 of the Customs Cooperation Council Nomenclature.

Second question

13 In view of the fact that no technical process exists which ensures that all or practically all the grains contained in a consignment of barley display all the

characteristics of pearled barley, it is important to establish the minimum percentage of pearled grains displaying such characteristics which must be comprised in a consignment of barley to enable it to be regarded as a consignment of pearled barley, and whether that percentage must be calculated by reference to the weight or to the number of grains.

14 The answer must take into account the objectives pursued by the Community provisions in question which grant in respect of exports of pearled barley much higher refunds than those available for hulled barley, in order to preclude a situation in which a product which has undergone less processing, and therefore has a lower cost price, could, if accorded the same refund as the more costly product, be sold in non-member countries at a price lower than that applied on the world market.

15 In view of that fact, the number of grains cannot be taken as a reference basis. If in fact it were, the greater refunds available for pearled barley, which has undergone an additional operation after hulling of the grains, might, in view of the varying widths and weight of the grains, be granted for a product not displaying the characteristics of pearled barley.

16 Moreover, the criterion of percentage by weight could likewise not be regarded as satisfactory if it led to the grant of the maximum refund for a consignment of barley in which the weight of the pearled grains hardly exceeded that of the merely hulled grains. Such a result would not in fact be in harmony with the objectives of the regulations determining the export refunds. The only way to safeguard those objectives is to treat a consignment of barley as a consignment of pearled barley only if the proportion of pearled grains considerably exceeds 50% by weight.

17 It must therefore be stated in reply to the second question submitted by the Bundesfinanzhof that in March and April 1966, pursuant to Community law as then in force regarding the export to non-member countries of cereal-based processed products, Member States were permitted to treat as consignments of pearled barley only consignments of barley in which the proportion of pearled grains considerably exceeded 50% by weight of the dry matter.

Costs

18 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in reply to the questions submitted to it by the Bundesfinanzhof by order of 18 November 1980, hereby rules:

1. **"Pearled grains of barley", within the meaning of the Annex to Regulation No 19, Article 5 (1) (d) of Regulation No 141/64 and Regulation No 11/66, must be taken to mean grains of barley which satisfy, as a minimum, the conditions laid down in the Explanatory Notes to the Customs Cooperation Council Nomenclature concerning heading 11.02.**

2. **In March and April 1966, pursuant to Community law as then in force regarding the export to non-member countries of cereal-based processed products, Member States were permitted to treat as consignments of pearled barley only consignments of barley in which the proportion of pearled grains considerably exceeded 50% by weight of the dry matter.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 17 June 1982.

P. Heim
Registrar

G. Bosco
President of the First Chamber