JUDGMENT OF THE COURT
8 APRIL 1976 [1]

Merkur-Außenhandel GmbH v Hauptzollamt Hamburg-Jonas (preliminary ruling requested by the Finanzgericht Hamburg)

Case 106/75

Summary

1. *Common Customs Tariff — Flaked barley under tariff subheading 11.02 E I b 1 — Concept — Rolled grains of barley under subheading 11.02 E I a 1 — Difference*

2. *Agriculture — Common organization of the market — Products subject to a single price system — Exportation — Certificate — Product indicated — Product exported — Difference — Export refund — Granting — Rate — Fixing — Absence — Benefit — Right — Absence*

(Regulation No 120/67 of the Council, Article 16; Regulation No 1041/67 of the Council, Article 1 and Article 3)

1. Flaked barley under tariff heading 11.02 E I b 1 is manufactured from grains subjected to hulling which removes part of their husk and what distinguishes it from 'rolled grains' of barley under subheading 11.02 E I a 1 is thus not what is removed in rolling.
2. Article 16 of Regulation No 120/67 and Articles 1 and 3 of Regulation No 1041/67 may be understood as conferring a right to the grant of an export refund even if the product exported differs from that for which the export certificate was issued.
When at the relevant date no rate of refund is fixed for the product which is actually exported there is no right to a refund.

In Case 106/75

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg for a preliminary ruling in the action pending before that court between

1 — Language of the Case: French.

MERKUR-AUSSENHANDEL GMBH

and

HAUPTZOLLAMT HAMBURG-JONAS (Principal Customs Office of Hamburg-Jonas),

on the interpretation of subheading 11.02 E I a 1 of the Common Customs Tariff,

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and F. Capotorti, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

By an order of 29 August 1975 the Finanzgericht Hamburg requests the Court in accordance with Article 177 of the EEC Treaty to give a preliminary ruling on the questions:

1. whether tariff subheading 11.02 E I a 1 of heading 11.02 of the Common Customs Tariff 'rolled barley grains' differs from tariff subheading 11.02 E I b 1 'flaked barley' in that, as opposed to rolled barley grains, flaked barley must be manufactured from hulled barley grains (shelled or husked) or whether the difference between those two tariff subheadings merely lies in the fact that flaked barley is more intensively rolled (crushed or ground), without prior hulling of the grains of barley,

(involving the removal of part of the hull in the course of this operation) than rolled barley grains;

2. if the first limb of Question 1 is answered in the affirmative:
whether the provisions of Article 12 (1) of Regulation No 120/67 in accordance with which all exports from the Community of any of the products listed in Article 1 shall be subject to the submission of an export licence, read together with Article 2 (1) of Regulation (EEC) No 1373/70 whereby the export licence shall authorize and require the exportation of the quantity of the specified product during the period of validity of the licence, mean that Article 16 of Regulation No 120/67 and Articles 1 and 3 of Regulation No 1041/67 confer a right to the granting of an export refund even if the product exported differs from that for which the export certificate was issued;
3. if Question 2 is answered in the affirmative:
whether, where at the relevant time no rate of refund was fixed for the product which was actually exported (rolled barley grains under tariff subheading 11.02 E I a 1), there exists a right to the granting of an export refund in respect of the basic product which may qualify for a refund (barley under tariff heading 10.03).

During the month of July 1972 the plaintiff in the main action exported four consignments of goods coming under heading 11.02 E I b 1 bb 'flaked barley not listed under subheading 11.02 E I b 1 aa of the Customs Tariff' and thus having an ash content exceeding 1 % on the dry product and a raw cellulose content exceeding 0·9 % on the dry product.

It then claimed from the defendant in the main action payment of an export refund and of compensatory amounts.

It emerged from examination of the samples which were taken from the consignments exported that the products in question did not constitute flaked barley under tariff subheading 11.02 E I b 1 but rolled barley grains under tariff subheading 11.02 E I a 1 which did not qualify for any refund at all. In view of this finding the defendant in the main action on 15 December rejected the claims of the plaintiff in the main action and on 9 March 1973 dismissed the objections which the latter lodged against those decisions of rejection.

By an application lodged on 16 April 1973 with the Finanzgericht Hamburg the plaintiff in the main action claimed that it should be granted the export refund for flaked barley coming under tariff subheading 11.02 E I b 1 bb which had been fixed in advance in the export certificates together with the corresponding compensatory amounts. In the alternative the plaintiff claimed that it should be granted the export refund fixed at the date of exportation for the barley together with the compensatory amounts laid down for rolled barley grains under tariff subheading 11.02 E I a 1.

On the basis of the rate for rolled barley grains under subheading 11.02 E I a 1 the defendant in the main action on 19 June 1974 remitted to the plaintiff in the main action a sum of 13 021·07 DM in settlement of the compensatory amounts whilst persisting in its refusal to grant the latter an export refund since Regulation No 1383/72 of the Commission of 30 June 1972 (JO No L 149, p. 30) which was in force at the date of the exportation, did not prescribe a refund for rolled barley and the plaintiff in the main action was not entitled to the refunds in respect of flaked barley and barley since it had not exported those products.

The court making the reference considers that the reply to Question 1 is supplied neither by the wording of tariff heading 11.02, 'cereal grains ... (for example rolled ... or flaked)' nor by that

of tariff subheading 11.02 E, 'rolled grains; flaked grains'. The words added in brackets, 'for example, ... flaked ...' [cereal grains] merely explain that flaked barley also constitutes rolled cereal grains since it has been further crushed and rolled. With regard to numbered subparagraph 6, item 2, of the second paragraph of the Explanatory Notes to the Brussels Nomenclature on tariff heading 11.02 it is not stated clearly whether flaked barley must be manufactured from husked grain (that is to say grain from which the pericarp has been largely removed). When the said notes state that the latter must have retained a part of their pericarp they do not indicate how much of the pericarp remains or how the pericarp removed was separated.

By 'pericarp' is meant the skin beneath the husk. As the explanatory notes do not explicitly prescribe a process for removing the husks from grains of barley it cannot be excluded that part of the husk is removed as a result not only of the hulling of the barley grains prior to mechanical crushing or rolling but also following scouring, cleaning and crushing or rolling. Nor do those notes provide grounds for holding that flaked barley must have lost at least 75 % of its bracts, which would only be possible if the grains of barley had been hulled before crushing. Such a requirement follows neither from the wording of the relevant tariff subheadings nor from the Brussels Explanatory Notes. The maximum content in raw cellulose is not fixed with regard to subheading 11.02 E I b 1 bb so that even a very high bract content does not preclude classification under this subheading provided that at least part of the husk has been removed.

The tariff subheading in dispute cannot be interpreted on the basis of the German explanatory notes. Apart from the facts that these notes are not binding on the courts and that they have not yet been accepted by the Court of Justice as a valid aid to interpretation they were only drawn up after the date of the exportation in dispute.

With regard to the second question, if the reply to the first question is that barley flakes must be manufactured from hulled grains, then the plaintiff in the main action exported a product for which it had not obtained an export certificate. In that case it could only obtain an export refund for another product if it considered that the acquisition of this right is not subject to the issue of a certificate and that the certificate and the granting of a refund are on different levels and quite unconnected. The court making the reference has already rejected this view but, taking account of Working Document No VI/358/74 — B of the Commission in which the opposite point of view is propounded, it considers it appropriate to submit the question to the Court of Justice. With regard to the third question, if the point of view maintained in the Commission's document is upheld (that if the conditions laid down in Articles 1 and 3 of Regulation No 1041/67 are fulfilled export refunds must in principle be granted even if a valid certificate is not submitted), the plaintiff in the main action is in principle entitled to an export refund in respect of flaked barley coming under tariff subheading 11.02 E I a 1. With regard to the alternative claim, to the extent to which it is compatible with the articles cited in the second question, the Commission's point of view is also valid if the product in respect of which the refund is claimed is the basic product from which the product actually exported was obtained by a simple physical treatment.

The order of the court making the reference was entered at the Court Registry on 3 October 1975. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 2 December 1975 by the Commission of the European Com-

munities, on 17 December 1975 by the defendant in the main action and on 22 December 1975 by the plaintiff in the main action.

Having heard the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

(a) On the first question

The *plaintiff in the main action* remarks that tariff heading 11.02 mentions first of all cereal groats and cereal meal classified under subheading 11.02 A, then cereal grains distinguished according to how they have been worked: hulled grains, classified under subheading 11.02 B, pearled grains, classified under subheading 11.02 C, kibbled grains under subheading 11.02 D and rolled grains (including flaked grains) under subheading 11.02 E. The tariff thus draws a distinction between hulled grains on the one hand and rolled grains (including flaked grains) on the other.

The Brussels Explanatory Notes emphasize the objective characteristics of the product and not the manufacturing process. They do not even stress the part of the bract which must be removed, but rather the part remaining. Thus it remains possible that barley flakes can be manufactured from raw materials which have not been hulled. The English text of those notes furthermore declares explicitly that flaked barley is 'the whole grain' crushed or rolled.

The German explanatory notes on the Common Customs Tariff, which define flaked cereal as 'hulled grain (shelled or husked)' cannot be reconciled with the Brussels Notes and in addition they were adopted after the exportations in dispute.

On the other hand the Finanzgericht is justified in referring to the simplified version of the Nomenclature annexed to Regulation No 1383/72 which, with regard to the legal situation obtaining in 1968, omits any numbered entry for flaked grain in the second category — at issue in the main action — and thus does away with the requirement as to hulling.

In relation to grains which have only been rolled the essential characteristic of flaked grains is that they have been crushed to a greater degree (the plaintiff in the main action offers to prove this) and the problem of hulling is irrelevant to the concept of flaked cereals, either from the customs or the commercial point of view. The plaintiff in the main action adduces as evidence the report of an engineer operating in the milling industry and in the construction of mills, according to which flakes can be manufactured without hulling. The term 'flakes' can only be employed with regard to products which have been cooked and steamheated and thereafter rolled and dried. Dry products cannot be classified as flakes.

The plaintiff in the main action offers to prove this and proposes to obtain an expert's opinion.

The *defendant in the main action* emphasizes that, except for cereal meal and germ of cereals, tariff heading 11.02 only mentions processing, that is hulling, the manufacture of husked grains, kibbling and rolling; this is the basis on which the group of products coming under the heading must be determined. The terms 'cereals grains ... (for example, rolled ... or flaked)' must be understood in the sense of 'pressure-rolled'. The Brussels Explanatory Notes do not define these terms: they merely define the term 'rolled or flaked grain'. In effect the relevant product constitutes rolled barley when the barley with its bracts is subjected to water treatment (moistening)

and is then pressure-rolled. The relevant product constitutes flaked barley when the barley has been hulled, subjected to hydrothermal treatment and pressure-rolled in a flaking machine. The flaked barley is distinguished by its external aspect; it takes the form of rolled and hulled grains of barley, having a smooth, compact and dense surface. The Committee on Common Customs Tariff Nomenclature arrived at the same conclusion in its Explanatory Notes.

There is indeed a difference between 'split' ('anknacksen'), 'roll' ('quetschen' — literally 'crush') and 'crush' ('zerquetschen' — literally 'pulverize') but the Common Customs Tariff does not make this distinction. Technically, from the commercial point of view and indeed from the tariff point of view, the distinction envisaged by the Finanzgericht cannot be drawn. The intensity of the pressure-rolling can clearly be modified but it cannot produce flaked barley, whilst less intensive treatment results in rolled barley grains. The results of analysis allow a distinction to be drawn between the 'washing process' and a hulling operation.

The *Commission* notes that the Brussels Nomenclature and the Common Customs Tariff adopt as their basis, with regard to the structure of Chapter 11 and the wording of heading 11.02 and its subheadings, manufacturing processes of the milling industry and that on each occasion they distinguish between the different products emanating therefrom. Viewed in this light 'flakes' are merely the typical product from the traditional manufacturing procedure. As with rolled barley this procedure amounts to grinding grains of barley between two millstones. In the course of the manufacture of flakes however the cereal grains also undergo steam (thermal) treatment until the grain, which in its natural state is hard and brittle, becomes soft and supple to the point where the pressure-rolling no longer grinds it into irregular pieces but processes it into sheets comprising an entity having a more or less regular form and a smooth surface.

With regard to the question whether it is technically possible to manufacutre 'flaked grains' from barley which has not been hulled, if necessary by grinding, and the grains of which remain the pericarp, the original French version of the Explanatory Notes to the Brussels Nomenclature merely refers to 'rolled or flaked grain (principally barley and oats) obtained by crushing or rolling in the whole grain [which still retains part of the pericarp]'.[1] This indicates that the other part of the pericarp must have been removed and that products manufactured from cereals which have not been hulled cannot be considered as 'flaked grains' within the meaning of the Tariff.

The Explanatory Notes to the Common Customs Tariff, adopted by the Committee on Common Customs Tariff Nomenclature, expressly confirm the Explanatory Notes to the Brussels Nomenclature:

11.02 E I b: Flaked grains coming within this subheading comprise grains which have been hulled and rolled and which still retain a part of their husk (see also the Explanatory Notes to the Brussels Nomenclature, No 11.02, second paragraph, 6).

The reply to the first question should thus be that

'by "flaked barley", within the meaning of the nomenclature employed for the refunds mentioned in Regulation (EEC) No 1383/72, there is meant grains of barley or fragments of grains which, after the removal of the husk and of certain parts of the pericarp by hulling and following prolonged hydrothermal treatment, have been pressure-rolled so

1 — The last phrase in parentheses does not occur in the original English version of the Brussels Nomenclature (Translator's note).

as to obtain almost uniform sheets, the great majority of which display a smooth surface and form a whole.'

(b) On the second question

The *plaintiff in the main action* claims that Regulations Nos 120/67 and 1041/67, which apply to the main action, provide no grounds for maintaining that the acquisition of a right to a refund depends on the existence of an export licence. The certificates are merely intended to provide for supervision of trade and the effectiveness of the scheme is ensured by the system of deposits. A certificate is indeed required for all exports of products which fall within the scope of Regulation No 120/67 but it does not follow that for entitlement to a refund a certificate is also required. Furthermore import levies are also imposed if a valid import licence cannot be submitted. The outcome cannot be otherwise with regard to the granting of export refunds.

The *defendant in the main action* considers that a right to the grant of an export refund arises in a case such as the present one — independently of the submission of a certificate — when, with regard to the product which has been exported after completion of the customs export formalities prescribed by Regulation No 1041/67, a regulation of the Commission provides — where appropriate by the method of advance fixing — for an export refund of a specific amount. In so far as in the present case the plaintiff exported 'rolled barley' under subheading 11.02 E I a 1 of the CCT there is, however, no right to a refund because the regulation in force on the day of exportation, that is to say, Regulation No 1383/72, does not lay down rates of refund for products coming under this tariff subheading.

The *Commission* maintains that the law relating to export certificates does not prescribe any specific penalty for the sort of irregularity mentioned by the court making the reference. It merely obliges the Member States to notify the Commission of it. Since the obligation to 'export under the certificate the net quantity of the product specified during the period of the validity of such certificate' is not fulfilled if a certificate made out for flaked barley is used to export a product other than that specified in the certificate, the deposit lodged is then forfeited except in cases of *force majeure.*

The law relating to refunds under the common organization of the market in cereals contains no specific provision regarding these problems as a whole. The export certificate forms the basis for the advance fixing of the refund so that the certificate and the granting of the refund together apply compulsorily only to the product specified in the certificate. On the supposition that Regulation No 1383/72 had also laid down a refund for rolled barley grains would a disparity between the certificate and the goods exported jeopardize the entitlement of such goods to the ordinary refund which was not fixed in advance? No Community provision renders the acquisition of a right to a refund (not fixed in advance) subject to the submission of an export certificate. Furthermore this is not one of the 'customs export formalities' which it is essential to complete in order to acquire the right to the refund. In addition it does not constitute proof of the exportation and merely enables the Commission to make the most reliable forecasts possible with regard to probable exports. Except in the case of an advance fixing its absence thus does not prevent, in the present state of Community law, the acquisition of a right to a refund. This view moreover corresponds to that which the Court of Justice adopted in Case 35/71 ([1971] ECR 1083, ground of judgment 11).

(c) On the third question

The plaintiff in the main action considers that the refund in respect of

the basic product, barley, must in any event be granted in the main proceedings because there is no difference in substance between the composition of barley on the one hand and rolled barley grains on the other.

The *defendant in the main action* claims that a right to an export refund is only acquired if the exported product in question corresponds to one of the descriptions of products and subheadings of the CCT for which the regulations of the Commission on force at the date of the exportation provide a specific rate of refund or if the rate of the refund was fixed in advance in an export certificate issued specifically for that product.

The *Commission* states that, with regard to the basis of the right to the export refund, the common organization of the market in cereals does not establish the refund as a permanent method to be used without taking account of the market situation, but merely authorizes the grant thereof to the extent necessary to fix a price enabling the products to be exported and distributed on the world market. The refunds were thus expressly fixed in a special measure adopted for this purpose by the Commission. The provisions relating to refunds in Regulation No 120/67 do not lay down any principle in accordance with which the exportation of a processed product must also qualify for the refund available for the corresponding cereal in its raw state when no refund has been fixed for the processed product itself. The regulations adopted by the Commission with regard to refunds, such as for example Regulation No 1383/72, referred to in the main action, are thus distinguished by a very detailed differentiation of the products which may qualify for a refund together with the amounts of the relevant refund.

The exporter thus enjoys a specific right to a refund only if the goods which he exported could have been classified under one of the categories of products for which a specific amount was fixed at the time of the exportation. If the plaintiff in the main action had exported 'rolled barley grains' under tariff subheading 11.02 E I a 1, it would have had no right to the refund since the product was not included in the list in Regulation No 1383/72 fixing the refunds. Moreover the method adopted by the Bundesfinanzhof in its judgment of 13 January 1970 does not enable the plaintiff in the main action to qualify for a refund in respect of the exportation of rolled barley grains. In fact it may be inferred from the order for reference that the export certificates produced by the plaintiff specify the relevant products clearly and unambiguously as coming under tariff subheading 11.02 E I b 1. They contain the rates of refund fixed in advance and applicable in accordance with Regulation No 1383/72 which does not lay down a refund for rolled barley. This finding was thus illegal and could not entitle the plaintiff in the main action to a refund.

Neither in German law nor in Community law is there a principle in accordance with which the Community must *ex aequo et bono* pay refunds for which the law does not expressly provide. Such arrangements are restricted to cases where legal provisions have been adopted in the public interest which adversely affect existing and protected legal situations and which require intolerable sacrifices from the persons concerned. Those provisions are not, in addition, intended to avoid disadvantages for which the person concerned is solely responsible.

Consequently it is proposed that the answer to the third question should be in the negative.

The plaintiff in the main action did not comply with the Court's request to lodge the expert's opinion to which it refers in its written observations.

The plaintiff in the main action, represented by Mr Modest of the Hamburg Bar, and the Commission of the European Communities, represented by Mr Kalbe, its Legal Adviser, acting as Agent, presented oral argument at the hearing of 10 March 1976.

The Advocate-General delivered his opinion at the hearing on 1 April 1976.

Law

1 By an order of 29 August 1975 which reached the Court on 3 October 1975 the Finanzgericht Hamburg submitted under Article 177 of the EEC Treaty preliminary questions on the interpretation of subheading 11.02 E I a 1 of the Common Customs Tariff.

Those questions were raised within the framework of a dispute relating to the export of four consignments of goods which the plaintiff in the main action declared as flaked barley coming under subheading No 11.02 E I b 1 bb of the customs nomenclature but which the defendant in the main action, after examining samples taken from the exported consignments, classified as rolled barley grains under subheading 11.02 E I a 1.

The defendant in the main action refused to grant a refund for this export since Regulation No 1383/72 of the Commission of 30 June 1972, fixing the refunds applicable on the exportation of processed cereals and rice products (JO No L 149, p. 30), which was in force at the date of the exportation in dispute, did not prescribe a refund for rolled barley.

The defendant refused the application of the plaintiff in the main action for refunds for flaked barley (tariff subheading 11.02 E I b 1) and for barley (tariff heading 10.03), since it had not exported those products.

2 It is asked first of all whether subheading 11.02 E I a 1 of heading 11.02 of the Common Customs Tariff, 'rolled barley grains', differs from tariff heading 11.02 E I b 1, 'flaked barley', in that flaked barley, as opposed to rolled barley grains, must be manufactured from hulled grains of barley (shelled or husked), or whether the difference between those two tariff subheadings lies in the fact that flaked barley is merely rolled (crushed or ground), without prior hulling of the grains of barley, more intensively (involving the removal of part of the husk in the course of this operation) than rolled barley grains.

3 Since no definition of the words 'flaked barley' and 'rolled barley grains' is contained initially in the Common Customs Tariff and since tariff heading 11.02 does not state expressly whether the manufacture of flaked barley involves prior hulling, reference must be made to the Explanatory Notes to the Brussels Nomenclature.

By hulled grains the said notes mean 'Grain from which the pericarp (the skin beneath the husk) has been partially removed. 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 — see Explanatory Note to heading 10.03).'

By 'rolled or flaked grain (principally barley and oats)' the notes mean grain 'obtained by crushing or rolling the whole grain. In this process the grain is frequently steam-heated or rolled between heated rollers but this is not regarded as removing the product from this Chapter.'

4 It is clear from the foregoing that flaked grains are produced by hulling which consists in removing a part of the husk from the grain.

Furthermore, although the Explanatory Notes to the Customs Tariff of the European Communities are applicable subsequent to the matters at issue they are based on the same interpretation in that they provide that 'flaked grains coming under this subheading are hulled and rolled grains which frequently still retain part of the husk.'

Furthermore the fact that flaked grains are crushed or rolled in no way alters this finding.

On the other hand rolled barley grains are merely subjected to a treatment which, whilst modifying their form, does not remove most of their husks, which, according to the Brussels Explanatory Notes, adhere too firmly to the grain kernel to be separated by mere threshing or winnowing.

5 Consequently the reply must be that 'flaked' barley under tariff subheading 11.02 E I b 1 is manufactured from gains subjected to hulling which removes part of their husk and that what distinguishes it from 'rolled grains' of barley under subheading 11.02 E I a 1 is thus not what is removed in rolling.

6 It is then asked, if an affirmative answer is given to the first limb of Question 1, whether the provisions of Article 12 (1) of Regulation No 120/67, in accordance with which all exports from the Community of any of the products listed in Article 1 shall be subject to the submission of an export licence, read together with Article 2 (1) of Regulation (EEC) No 1373/70, under which the export licence shall authorize and require the exportation of the quantity of the specified product during the period of validity of the licence, mean that Article 16 of Regulation No 120/67 and Articles 1 and 3 of Regulation No 1041/67 open a right to the granting of an export refund even if the product exported differs from that for which the export certificate was issued.

7 Article 12 of Regulation No 120/67 of the Council on the common organization of the market in cereals (OJ, English Special Edition 1967, p. 33) provides that exports from the Community shall be subject to the submission of an export licence, the issue of which shall be conditional upon the lodging of a deposit guaranteeing that exportation is effected during the period of validity of the licence and which shall be forfeited if the transaction is not effected within that period.

Apart from the foregoing, Article 16 of the said regulation provides that to the extent necessary to enable the products to be exported on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices in the Community may be covered by an export refund.

Those two provisions refer to different situations since the only consequences prescribed if goods are exported which do not correspond to what is stated in the certificate are, under Article 14 (2) of Regulation No 1373/67 of the Commission of 10 July 1970 on joint implementing rules for import, export and advance-fixing certificates for agricultural products subject to a single price system (JO No L 158 of 20 July 1970, p. 1), that the Member States in question are obliged to notify the Commission of this and that the deposit lodged may possibly be forfeited.

In addition, according to Article 1 (2) of Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (OJ, English Special Edition 1967, p. 323), acceptance of the document by which the declarant states his intention to export the products in question and qualify for a refund shall be considered to be the completion of the customs export formalities.

8 Consequently the reply must be that the product exported may qualify for a refund even if it differs from that for which the certificate was issued.

9 Finally, if Question 2 is answered in the affirmative, it is asked whether, where at the relevant date no rate of refund was fixed for the product actually exported (rolled barley grains under tariff subheading 11.02 E I a 1), there exists a right to the grant of an export refund in respect of the basic product which may qualify for a refund (barley under tariff heading 10.03).

10 The refund is only granted if the exported product is listed in the annex to the regulations fixing the amounts.

Under the above-mentioned Regulation No 1383/72 no rate of refund had at the time been fixed for rolled barley grains.

It is nowhere provided that in the latter case the refund for basic products shall at least be granted.

Accordingly the answer to the third question must be in the negative.

Costs

11 The costs incurred by the Commission of the European Communities which 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 action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Finanzgericht Hamburg by order of 29 August 1975, hereby rules:

1. **Flaked barley under tariff subheading 11.02 E I b 1 is manufactured from grains subjected to hulling which removes**

part of their husk and what distinguishes it from 'rolled grains' of barley under subheading 11.02 E I a 1 is thus not what is removed in rolling.

2. **Article 16 of Regulation No 120/67 and Articles 1 and 3 of Regulation No 1041/67 may be understood as conferring a right to the grant of an export refund even if the product exported differs from that for which the export certificate was issued.**

3. **When at the relevant date no rate of refund is fixed for the product which was actually exported there is no right to a refund.**

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 8 April 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 1 APRIL 1976 [1]

Mr President,
Members of the Court,

The case on which I am giving my opinion today is concerned with the problems of export refunds under the common organization of the market in cereals.

The following has to be said briefly with regard to the facts:

From 26 to 29 July 1972 the company Merkur, which has its registered office in Hamburg, applied for export clearance for goods which it described as 'flakes of barley not listed under subheading 11.02 E I b 1 aa of the customs tariff' or as 'barley flakes with a raw fibre content of more than 0.9 per cent by weight and an ash content of more than 1 % by weight in relation to dry matter'. The exports were made on the basis of licences in

1 — Translated from the German.