JUDGMENT OF THE COURT
15 DECEMBER 1971[1]

Heinrich P. Brodersen Nachf., GmbH & Co. KG v Einfuhr- und Voratsstelle für Getreide und Futtermittel (Reference for a preliminary ruling by the Hessisches Finanzgericht)

'Pearled Barley'

Case 21/71

Summary

1. *Common Customs Tariff — Description of goods — Interpretation — Absence of Community provisions — Authority of the explanatory notes and the classification opinions of the Convention on the Brussels Nomenclature*

2. *Agriculture — Common organization of the markets — Cereals — Processed products — Exports to third countries — Refunds — Pearled barley — Community definition — Powers of the Member States*

   (Regulation No 19 of the Council, Article 20; Regulation No 141/64/EEC of the Council; Regulation No 60/66/EEC of the Commission)

1. In the absence of any Community provisions in the matter, the explanatory notes and classification opinions provided for by the Convention on Nomenclature for the Classification of Goods in Customs tariffs are authoritative as means of interpreting common tariff headings.
2. Within the context of the application of the scheme of optional refunds on exports of processed cereal-baked products to third countries which is laid down in Article 20 of Regulation No 19/62 of the Council, Regulation No 141/64/EEC of the Council and Regulation No 60/66/EEC of the Commission, 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 in the document known as the 'Brussels Nomenclature'. Within the context of the application of the abovementioned provisions, the national authorities were entitled to add to those minimum requirements other more protective conditions.

In Case 21/71

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

1 — Language of the Case: German.

HEINRICH P. BRODERSEN NACHF., GMBH & Co. KG, Lübeck,

and

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL (Office for the importation and storage of cereals and fodder), Frankfurt am Main,

on the interpretation, under the scheme of refunds on exports of agricultural products to third countries laid down in Article 20 (2) of Regulation No 19/62 of the Council, of the expressions 'Hulled grains: barley' and 'pearled grains: barley' appearing under heading 11.02 of the Common Customs Tariff,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher, President of Chambers, A. M. Donner, A. Trabucchi (Rapporteur), R. Monaco and P. Pescatore, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — The provisions applicable, facts and procedure

The facts and procedure may be summarized as follows:

In order to enable exports to take place to third countries on the basis of the prices ruling in the world market, Article 20 (2) of Regulation No 19/62 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in cereals (JO No 30, p. 933) provides for the possibility of granting refunds.

For the period concerned in the present case the general criteria for fixing the amount of the refunds to be granted to processed products have been laid down by Regulation No 141/64/EEC of the Council of 21 October 1964 (JO No 169, p. 2666).

Article 5 (1) of that Regulation treats hulled barley differently from pearled barley, in that the maximum amount of the refunds payable in respect of the former is based on the average levy applying to 160 kg, while the basis for pearled barley is 250 kg.

The terms 'hulled grains' and 'pearled grains' are contained in the annex to

Regulation No 19/62 itself, which refers in this connexion to heading 11.02 of the Common Customs Tariff. This tariff heading distinguishes 'hulled grains: barley' from 'pearled grains: barley'.

Subsequently Regulation No 60/66/EEC of the Commission (JO No 103, p. 1854) established additional criteria designed to limit the maximum amount of the refunds permitted.

Within the context of the implementation of their right to grant export refunds the authorities in the Federal Republic of Germany adopted measures which establish the criteria and conditions which must be satisfied for this purpose.

In the version of 25 July, 1966, (Bundesanzeiger No 137 of 27 July 1966), Article 5 (2) of the German decree relating to refunds on cereals provides as follows:

'(3) hulled grains, under heading ex 11.02 of the Common Customs Tariff: according to the conversion rate of 100 kg; 102 kg of each of the basic products;

(4) pearled grains, under heading ex 11.02 of the Common Customs tariff:

(a) of barley, of an ash content, expressed as a ratio of the dry material, of less than 1% (without talcum): according to the conversion rate of *100 kg* for *220 kg* of barley,

(b) of barley, in all cases: according to the conversation rate of *100 kg* for *160 kg* of barley'

In its directives of 15 April 1966 (Bundesanzeiger No 73 of 19 April 1966) the Einfuhr- und Vorratsstelle für Getreide und Futtermittel drew up the following definition:

'Criteria for identifying pearled barley: pearled barley is a product the ash content of which, expressed as a ratio of the dry material, does not exceed a certain percentage (without talcum) and which is hulled, round and smooth on all sides, with the result that the grains show no deep groves, angles or germs, nor remains of bracts and that the aleurone cells have been removed to such an extent that more than half the starch cells are visible on all the surface of the grain. The product must show a uniform curvature and the difference in width (that is, the distance between the sides) must, for at least 70% of the grains, be at least 0.5 mm and, for all the grains, be a maximum of 1 mm (finding made by granulometric analysis by passing through a round-holed sieve or by measurement of 200 grains).

Indication of the difference in width for 70% of the grains and the difference in width for all grains. Percentage ash content (without talcum) expressed as a ratio of the dry material.'

On 18 July 1967 the Einfuhr- und Vorratsstelle für Getreide und Futtermittel refused to grant the undertaking Heinrich P. Brodersen the refund which it requested on the export of 270 000 kg of barley grains, to Denmark on 29 June 1967. This refusal was based on the fact that the form of the sample examined did not correspond to that of pearled barley and, moreover, that as a result of the presence of traces of embryo found in most of the grains, the goods exported did not consist of pearled barley grains.

The dispute between the parties before the Hessisches Finanzgericht, before which the matter was brought by Brodersen company in order to obtain this refund, turns eventually on the question how the barley grains must appear in order to correspond to the concept of 'pearled grains'. During the proceedings the Einfuhr- und Vorratsstelle granted the applicant the amount of the refund provided for by the German rules on hulled barley, which is considerably lower than that provided for in respect of pearled barley. The applicant insists on obtaining the difference. By order of 25 February 1971

received at the Court Registry on 27 April 1971 the Hessisches Finanzgericht requested the Court under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'1. What must be understood by the terms

(a) "Hulled barley grains": ("Getreidekörner, geschliffen, von Gerste")

(b) "pearled barley grains": ("Getreidekörner, perlförmig geschliffen, von Gerste")

appearing under heading 11.02 of the Common Customs Tariff?'

2. How are the two categories of products referred to under 1 above distinguished and in what does this distinction consist? In particular, in order that the product may be given the tariff classification described under 1 (b), is it necessary for the grains to have become approximately pearl-shaped (that is, almost spherical or ellipsoidal) and, therefore, for them to show no grooves or traces of embryo, or is it sufficient for almost all the pericarp to have been removed from the grain and for it to have been rounded at both ends, with the result that traces of embryo remain?'

In the grounds of its order the Finanzgericht observes that the difference between the rates of refund provided for by the German rules on the basis of which of these types of barley grains is in question is in accordance with the provisions of Article 5 (1), C, (b) and D (a) of Regulation No 141/64 EEC of the Council of 21 October 1964.

The Finanzgericht also observes that it is impossible to decide on the basis of the Common Customs Tariff how to operate the distinction between the products referred to under tariff heading 11.02 A, III (b), 2 (aa) from those under 11.02 A, III, b, 3 (aa) in particular, it does not indicate how hulled barley grains are distinguished from pearled barley grains. The German text of the Tariff merely showed that the degree of processing must be greater for pearled grains than for hulled grains. To discover the degree of processing required in order that the grain may be regarded as 'pearled' it is necessary to interpret the Common Customs Tariff. It is for this reason that the Finanzgericht has referred the above questions to the Court.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice annexed to the EEC Treaty, written observations were lodged by the undertaking H.P. Brodersen and the Commission of the European Communities.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without holding any preparatory inquiry. The parties to the main action and the Commission presented oral argument at the hearing on 12 October 1971. H.P. Brodersen was represented by Mr Modest, Advocate, of the Hamburg Bar, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel was represented by Mr Stockburger, Advocate of the Bar of Frankfurt am Main and the Commission of the European Communities was represented by its Legal Adviser, Mr Kalbe.

The Advocate-General delivered his opinion at the hearing on 9 December 1971.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court

The observations submitted under Article 20 of the Protocol on the Statute of the Court may be summarized as follows:

Brodersen, the plaintiff in the main action, emphasizes first the disadvantages resulting from the retroactive effect of interpretative decisions in tariff matters, both as regards legal certainty and

the uniform application of Community law. It is not certain that all the Member States apply the Court's interpretation of a tariff heading in a uniform manner to past situations.

As regards heading 11.02 of the Common Customs Tariff, the plaintiff maintains that it could not be interpreted in a different manner for exports and for imports. Thus, the concept of 'pearled barley' cannot be more restrictive in the case of exports than in the case of imports.

The plaintiff then enters into technical details, and considers the characteristics and composition of barley grains both as regards their chemical and nutritive properties and their ash content.

For the purposes of replying to the questions submitted to the Court, the plaintiff considers it useful to refer to the following texts:

(a) the Explanatory Notes in the Brussels Customs Cooperation Council concerning heading 11.02 of the Common Customs Tariff;

(b) the decree of the Federal Minister of Finance adopted in relation to the Common Customs Tariff, as well as the Anweisung zum Abschöpfungstarif (instruction concerning the rate of levy) of 20 November 1964, III B 6—Z 1777—7/64 (Bundeszollblatt 1964, p. 977 *et seq.*);

(c) EEC Council Regulations Nos 19/62; 55/62, Article 5, 14 *et seq.*; 141/64, Article 14 *et seq.*; 120/67, Articles 5 and 14;

(d) Regulation No 821/68 of the Commission;

(e) the German decrees on refunds on the export of cereals of 30 July 1963 (Bundesgesetzblatt BGBl. I, 543), 5 August 1964 (BGBl. I, 578) and 24 November 1964 (BGBl. I, 917);

(f) directives from the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Bundesanzeiger No 222 of 27 November 1964, No 156 of 21 August 1965 and No 73 of 19 April 1966).

From its consideration of all the abovementioned texts Brodersen draws in particular the following conclusions:

1. Since 30 July 1962 no explanatory notes of a binding nature have been issued regarding the goods subject to the agricultural market organization, nor are any being issued by the Commission;
2. The contents of the various German explanatory notes, which had no binding force but which have however been applied in practice are not the same;

   The directives from the Einfuhr- und Vorratsstelle laid down additional criteria which did not conform either with the decrees concerning refunds or with the instructions from the Federal Minister for Finance;
3. The German decrees on refunds had acknowledged that a type of pearled barley exists which may have an ash content equal to or higher than 1%;
4. The contradictory German practice which results from the decrees, instructions and directives does not correspond to current economic practices and concepts.

The plaintiff in the main action maintains that the requirements of Regulation No 821/68, which was adopted by the Commission after the period in question in the present case, were exaggerated and had led in practice to the cessation of exports of pearled barley as, from an economic point of view, the conditions cannot be fulfilled.

Furthermore, the plaintiff adds that a definition must also take account of the nutritive value of high quality hulled barley. The barley is no longer of high quality, from a nutritive point of view, when it has been hulled and polished to the point where it contains no or almost no minerals or vitamins. Thus, to require a total absence of teguments, bracts or germs is contrary to the recognized requirements of the physiology of nutrition. It is also impossible to recon-

cile this interpretation with the Explanatory Notes of the Brussels Customs Cooperation Council, according to which barley is to be regarded as pearled when not all but practically the whole pericarp has been removed. *A fortiori* this applies as regards all the teguments or all the remains of germs.

When the Customs Tariff speaks of 'pearling' this is a concept which is out of date in the modern practice of the food industries. Present husking techniques are different from those employed earlier. In order to manufacture high quality hulled barley it is no longer necessary today for the grain to be broken.

If the definitions and restrictions of the concept in question are adapted to modern needs and processes the best method (that is, the method which also covers past events without infringing the principle of legal certainty) appeared to be that which adopts the ash content as the criterion of classification; this was the method normally applied to the wheat-based products referred to in headings 11.01 and 11.02 and which at present appears at the beginning of Chapter 11. This is also the method rightly preferred by the German legislature in its decrees concerning refunds but which was set aside by the Einfuhr- und Vorratsstelle and, subsequently, by the Federal Minister for Finance who arbitrarily required additional criteria to be fulfilled.

Finally Brodersen proposed that the following replies be given to the questions submitted by the Finanzgericht, Kassel:

The first question

'(a) Hulled grains: barley ("geschliffen") are barley grains from which the bracts have been removed and which have been hulled to the point at which its ash content, expressed as a ratio of the dry material, does not exceed 1.3%.

(b) pearled grains of hulled barley ("geschält perlförmig geschliffen") are barley grains from which the bracts have been removed and which have been hulled ("geschält und geschliffen") to the point at which their ash content, expressed as a ratio of the dry material, does not exceed 1.1%.'

The second question

'For hulled barley to be classified as pearled barley it is not necessary for the grains to be approximately pearl-shaped and no longer to show grooves or traces of embryo. It is sufficient for the ash content to be no higher than 1.1%. This or a lower content is sufficient to guarantee that the goods are of high quality, that the pericarp has been almost entirely removed and that the two ends of the grain are sufficiently rounded, so that the traces of embryo can no longer adhere in excessive quantities.'

The *Commission of the European Communities* observe that, in the context of the application of the rules concerning refunds on exports of processed cereal products, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel only granted refunds in respect of goods which satisfy the additional quality conditions fixed by this body itself. It has thus restricted the concept of 'pearled grains: barley' for the purposes of the refund. The question therefore arises to what extent each Member State was empowered, within the context of the scheme of refunds established by Regulation No 19, at the national level to give, by means of definition adopted unilaterally, more precise particulars of the common description of goods. This question, which has not yet been settled by the case-law of the Court, must be considered in order to give a comprehensive reply to the questions referred by the Finanzgericht.

In this connexion the Commission observes that the common organization of the market in cereals, established by Regulation No 19, did not set up a

single internal market in the Community but allowed the markets in the various Member States to continue to exist. In particular, the rules on prices were not yet entirely centralized and this applies especially to refunds. Unlike the levies, which were obligatory in nature, the Community regulations concerning refunds simply gave States the power to grant refunds and fixed the maximum amounts thereof. In these circumstances there was nothing to prevent each State from using its discretionary power and subject the refund to additional conditions based on the quality of the products.

As regards the definition of the concepts of hulled barley grain in Community law, the Commission observes that as the right to the refund claimed by the plaintiff in the main action is determined by the legal position existing at the date of exportation, the concepts referred to must be interpreted on the basis of the scheme of refunds applicable on 29 June 1967. Annex A to EEC Regulation No 821/68, which establishes criteria for distinguishing between 'hulled grains' and 'pearled grains', is thus inapplicable in the present case.

As the scheme of refunds established by Regulation No 19 again adopted without any amendment the phrases 'hulled grains: barley' used in tariff heading 11.02, these concepts must not in principle be understood to have a different meaning in this scheme from that used in the context of the levy system. Consequently, for the purposes of the scheme governing refunds, the Explanatory Notes to the Brussels Nomenclature may constitute a valid means of interpreting these concepts.

The meaning of the German phrase 'geschälte oder geschliffene Getreidekörner' is no different from that of 'geschalte Getreidekörner'. The Commission considers that the term 'geschliffen' is a special feature of the terminology of the German text which is not found in the other official languages.

The Explanatory Notes to the Brussels Nomenclature regarding tariff heading 11.02 define hulled grains ('geschälte Getreidekörner') as grain from which the pericarp (the skin beneath the husk) has been partially removed and, in the particular case of grains of the bractiferous varieties, as grains from which the husks (or hulls) have been removed (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).

The Commission maintains that in the technique of manufacture of hulled barley the term 'schleifen' describes the normal process for barley, which goes beyond mere husking and is intended to round the hulled grains from which the bracts have been removed. Grains which have been ground three times are scarcely changed from their original elongated shape. Grains which have been ground six to eight times are semi-spherical in shape and become spherical after being ground nine to twelve times. The more the barley grains are ground, the more of the pericarp is removed and the points on the barley grains, which were originally long, became rounded off. As a result, the Explanatory Notes to the Brussels Nomenclature define pearled grains, principally of barley, as follows: 'Grain from which practically the whole pericarp has been removed; these are more rounded at the ends'.

As is shown by Regulation No 11/66/EEC which reduces the maximum amount of the refund provided for in relation to pearled barley when this product exceeds a certain ash content, such a content indicates the intensity of the husking process. However, it cannot be concluded on the basis of this regulation that 'husked' barley of an ash content, expressed as a ratio of the dry material, of less than 1% is necessarily pearled barley. This regulation was not intended to lay down such a definition and its wording indicates

clearly that a product with a higher or lower ash content may also be 'pearled'. Moreover, there is no valid evidence for saying that pearled barley must not show grooves and traces of embryo, as the groove or barley is generally too deep to disappear entirely, with the result that traces of embryo may remain. In conclusion, the Commission considers that the following answers must be given to the questions submitted by the order for reference:

'1. "Pearled grains: barley" are husked barley grains from which practically the whole pericarp has been removed by an intensive reducing process (grinding) and the two ends of which are rounded in shape. Grain fragments rounded by grinding also form part of the same category.
2. "Hulled grains: barley" ("Getreidekörner geschliffen, von Gerste") are all other husked barley grains (from which the bracts have been removed) which has been ground. It is to be regarded as husked barley (from which the bracts have been removed).
3. The Member States were empowered by virtue of the refund scheme established by Regulation No 19 to limit the grant of a refund on exports to third countries to pearled barley of a specific minimum quality and to fix the qualitative characteristics therefor.'

Grounds of judgment

1 By order of 25 February 1971, received at the Court Registry on 27 April 1971, the Hessisches Finanzgericht requested the Court to give a preliminary ruling on the interpretation of the terms of 'Hulled grains: barley' and 'pearled grains: barley' appearing in heading 11.02 of the Common Customs Tariff.

2 The file shows that through this request the Finanzgericht seeks to obtain information on which to establish whether the criteria adopted by the national authorities in order to identify 'pearled barley' for the purposes of the refunds on exports to third countries provided for by Article 20 of Regulation No 19/62 of the Council (JO 1962, p. 933) were in accordance with Community law.

3 In accordance with this provision Regulation No 141/64/EEC of the Council (JO No 169, p. 2666), which was in force during the period in question in this case, governed the power conferred upon each Member State to grant refunds on exports of processed cereal products to third countries by fixing criteria for determining the maximum amount of permitted refunds.

4 This regulation fixed higher maximum amounts for 'pearled barley' than for 'hulled barley'. The terms 'hulled grains' and 'pearled grains' are contained in the Annex to Regulation No 19/62 which refers, in this respect, to heading 11.02 of the Common Customs Tariff which distinguishes between 'hulled grains: barley' and 'pearled grains: barley'. In order to define these concepts in the absence of explanatory notes attaching to the Common

Customs Tariff and in the light of the fact that this tariff heading exactly reproduced a heading in the Brussels Nomenclature, it is necessary to refer to the Explanatory Notes concerning that Nomenclature.

5 Within the context of the optional export refunds provided for by the above-mentioned regulations the Member States were bound, in order to respect the maximum amounts allowed by those regulations, to regard as 'pearled barley' only those products which satisfied at least the conditions laid down by the Explanatory Notes to heading 11.02 in the document known as the 'Brussels Nomenclature'. Therefore, although when fixing the conditions for the grant of the refunds which they decided freely to award, the Member States were bound to observe a certain number of rules or principles which were necessary to the application of the general scheme laid down by Regulation No 19, they had, on the other hand, the power to apply more restrictive criteria than those established by the Community rules. In particular, and without prejudice to the uniform scope of the concepts contained in the Common Customs Tariff, within the limited context of the regulations referred to above and to the extent to which they were free not to grant any export refund on pearled barley, the Member States were *a fortiori* empowered to limit this grant to types of this product which had additional characteristics to those required by the Community rules.

Costs

6 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and 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 Hessisches Finanzgericht, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the parties to the main action and of the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community;
Having regard to Regulation No 19/62 of the Council on the progressive establishment of the common organization of the market in cereals, especially Article 20;
Having regard to Regulation No 141/64/EEC of the Council on the rules applying to processed cereal and rice-based products, especially Article 5;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Hessisches Finanzgericht by order of that court dated 25 February 1971, hereby rules:

1. **Within the context of the application of the scheme of optional refunds on exports of processed cereal-based products to third countries which is laid down in Article 20 of Regulation No 19/62 of the Council, Regulation No 141/64/EEC of the Council and Regulation No 60/66/EEC of the Commission, 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 in the document known as the 'Brussels Nomenclature'.**

2. **Within the context of the application of the abovementioned provisions, the national authorities were entitled to add to those minimum requirements other more restrictive conditions.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 15 December 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 9 DECEMBER 1971[1]

Mr President,
Members of the Court,

On 29 June 1967, the Brodersen company which is a company specializing in grain-husking processes, exported 270 metric tons of barley grain to Denmark. The fixing of the refund which this company could claim on the export gave rise to a dispute with the competent German office, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

1 — Translated from the French.