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.

Brodersen has always maintained that it was entitled to the refund provided for pearled barley. The German authorities have always disputed this. After initially refusing to grant any refund, the authorities finally allowed Brodersen the refund in respect of hulled barley, which is, of course, lower than that for pearled barley.

It appears that three different criteria enable hulled barley to be distinguished from pearled barley:

1. A 'visual' or 'granulometric' criterion based on the shape of the grain, its degree of polish and decoration, its dimensions etc.,
2. A criterion based on the ash content of the product,
3. A criterion based on the starch content of the product.

Clearly, these three criteria are not wholly complementary and they are not mutually exclusive, although they may be combined.

For this reason the German rules on refunds which were in force at that period laid down conditions attaching both to the ash content and also to the 'visual' criterion.

The product exported by Brodersen satisfied the condition as to the ash content but, according to the competent German authorities, did not satisfy the visual criterion defined by the German regulations.

When dealing with this matter the Hessisches Finanzgericht clearly considered the question of the compatibility of the national rules which it had to apply with a certain Community concept of the distinction between hulled barley and pearled barley.

This is the essential reason for the submission of the two questions which are before you today.

I

I shall base myself on the method of interpretation adopted in your recent judgment of 24 November 1971 (Case 30/71, *Kurt Siemers & Co.* v *Hauptzollamt Bad Reichenhall,* [1971] ECR 919); and shall suggest that you give to these two questions a single reply which will avoid the need to rule on technical and scientific questions which are difficult to solve and even to understand but which will give to the national court the principles of Community law necessary for its decision and will define for it the scope of these principles on the basis of the facts of the case.

The principles applicable are those which have already been established by your judgment of 27 October 1971 in Case 6/71 (*Rheinmühlen Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* [1971] ECR 823).

The export in question took place on 29 June 1967, that is, before the entry into force of Regulation No 120/67 which applied at the earliest as from 1 July 1967.

It follows that the scheme applying to the refunds was based on Articles 19 and 20 of basic Regulation No 19 of the Council, which enabled the Member States to introduce refunds up to certain maximum amounts fixed by the Community authorities.

In your abovementioned judgment in the Rheinmühlen case you considered that at that time:

1. When fixing the conditions for the grant of the refunds which they decided to award the Member States were bound to respect a certain number of rules or principles which were necessary to the application of the general scheme laid down in Regulation No 19;
2. on the other hand, the Member States were empowered to add to the conditions for granting the refund which were necessary in order to implement the Community system other, in particular more restrictive, requirements.

If these principles are applied to the present case it is undeniable that during

this period it was necessary to have recourse to a certain Community concept of the distinction between hulled barley and pearled barley.

In fact, the regulations adopted in implementation of Regulation No 19 fixed different maximum amounts for the refunds which could be granted according to whether the products concerned were hulled barley or pearled barley; the maximum was higher for the latter than for the former.

The Member States were thus obliged to regard as pearled barley only those products which satisfied a certain Community definition; without this restriction the upper limits set on the refunds to be granted would no longer have had any significance and the Community funds, which already bore a large part of the expense of these refunds, would have been needlessly burdened.

II

It remains to determine what was this 'minimum Community standard' which the Member States were required to observe in distinguishing pearled barley from hulled barley.

In my opinion in the period under consideration, this minimum Community standard consisted solely in the distinction between hulled barley and pearled barley which resulted from the Explanatory Notes to the Brussels Nomenclature.

I consider this solution to result from a combination of the provisions applicable.

1. During the whole of this period the maximum amount of the refund was determined on the basis of the variable component of the levy and it is this system which is reproduced in Article 1 of Regulation No 60/66/EEC of the Commission, the only provision applicable at the date when the export in question took place.

This variable component is calculated, as regards the cereals in question, in accordance with the rules laid down by Regulation No 141/64 of the Council of 21 October 1964 and in particular by Article 5 thereof which refers *inter alia* to the products under heading 11.02 of the Common Customs Tariff.

At this period the Common Customs Tariff did not contain its own explanatory note for this tariff heading. However, this heading in the Common Customs Tariff reproduced exactly a heading in the Brussels Nomenclature and it has been consistently held in the case-law that in the absence of an explanatory note in the Common Customs Tariff itself the Explanatory Notes to this Nomenclature serve to distinguish the products referred to by the various tariff headings.

Thus, the minimum criterion which the Member States were bound to observe in distinguishing between hulled barley and pearled barley was the essentially visual criterion defined by the Explanatory Note to heading 11.02 of the Brussels Nomenclature and, in particular, by paragraphs (3) and (4) thereof.

2. I had also considered whether this 'minimum Community standard' did not also admit of a criterion based on the ash content of the product, which appeared in Regulation No 164/64 of the Commission of 29 October 1964 and was also referred to in Regulation No 11/66 of the Commission. However, a study of these provisions has led me to believe that no such criterion applied at the period in question.

In fact, Regulation No 164/64 was expressly repealed by Regulation No 60/66, which was the only one applicable at the date of exportation.

Regulation No 11/66 merely altered the percentages fixed by Regulation No 164/64. As this latter regulation and the system which it established had been expressly repealed by Regulation No 60/66 the result is, in my opinion, that Regulation No 11/66 was by implication but necessarily repealed at the same time.

Therefore, between the date of the entry into force of Regulation No 60/66 and that of the entry into force of Regulation No 120/67 the only Community criterion which the Member States were bound to observe was that which results from the Explanatory Notes to the Brussels Nomenclature.

In these circumstances, I am of the opinion that you should rule that until the entry into force of Regulation No 120/67 the Member States 'were free to determine the conditions for the grant of the refunds which they were empowered to introduce, to the extent to which conditions were compatible with the rules laid down by the Community authorities.

'As regards the refunds which could be granted on the export to third countries of hulled barley or pearled barley, during the period in which Regulation No 60/66 was in force the Member States were bound, in order to observe the maximum amounts fixed for the refunds by the Community authorities, to regard as pearled barley only those products which satisfied the conditions laid down by the Explanatory Notes to heading 11.02 in the document known as the "Brussels Nomenclature".'

'During this same period the national authorities were entitled to add to those minimum requirements other more restrictive conditions.'