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

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

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

Delivered in open court in Luxembourg on 20 June 1973.

A. Van Houtte
Registrar

R. Lecourt
President

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

Mr President,

Members of the Court,

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

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

The Hoofdproduktschap voor Akkerbouwprodukten, the competent Dutch

1 — Translated from the French.

authority, considered, in accordance with the opinion of the General Inspection Service of the Ministry of Agriculture and after analysis carried out by the National Agricultural Inspection Establishment at Maastricht, that these goods in reality comprised 'bran, sharps and other residues derived from the sifting, milling or working of cereals', and came under heading 23.02.

As refunds relating to the products classified as coming within Chapter 23 were substantially lower than those for the products which come under Chapter 11, the Hoofdproduktschap voor Akkerbouwprodukten claimed the repayment of the sums paid in error, *viz.* 212 958·93 florins. This is the decision contested before the Dutch court, which raises the question of the interpretation of the Community rules relating to processed products based on barley.

With technical progress and an expanded production of products derived from barley, these rules become increasingly strict; they prescribe an extremely elaborate hulling process for barley in order that it may be classified as 'hulled or pearled barley' and thus benefit from the correspondingly increased refunds, as emerges from the very wording of the preamble to Regulation No 821/68 of the Commission, which reads as follows: 'Whereas the export refund should take into account the quality of the product processed from cereals — in this case pearled barley — which qualifies for it lest public funds contribute to the export of goods of inferior quality . . .'.

The plaintiff firm kept abreast of these developments; as its export manager explained to the inspectors of the Ministry of Agriculture on 30 October 1968, to obtain 'pearled barley' as defined by the Community rules, it is necessary first of all to effect the operation known as 'initial hulling', in the course of which, besides the 'initially hulled' barley, flour derived from shelling is obtained — this is a by-product representing approximately 20 % grain and with a starch content of between 10 and 15 %. The next process is 'final hulling' from which is obtained, besides the 'pearled barley' properly so-called a pre-eminently 'high-grade' product — pearled barley flour, which was formerly exported as such but which, according to the Dutch administration, was only a by-product 'low-grade flour').

The plaintiff assumed that it was sufficient that the product which he exported had a starch content exceeding 28 % (calculated on the dry material) for it to come under heading 11.01 and not under heading 23.02 A II, and made a blend in accordance with strict proportions:

— 53 % pearled barley flour with starch content of 43 % and

— 47 % flour derived from middlings with a starch content of 9·7 %

with which he made up a product having an effective starch content of approximately 30 %, which the plaintiff described as 'barley flour'.

Thus, according to the defendant authority, the plaintiff, who processes barley coming from third countries, claims that from an imported product for which he has paid the levy at a relatively low rate, he has manufactured two principal products from the first processing (pearled barley and barley flour), with practically no waste or by-products and on this ground claims the refund due on the export of this barley flour.

The Dutch authority consequently classified the goods under heading 23.02 A, on the basis of Regulations Nos 122, 372 and 814/68, laying down the rates for refunds adopted in implementation of Regulation No 360/67 which applied to the first four lots exported by the plaintiff between 22 February and 23 July 1968. Furthermore, it classified the final lot, which the plaintiff exported on 16 August, under the same heading by applying Regulation No 1138/68 founded on Regulation No 1052/68.

On the basis of certain contradictions, apparent or real, between the Regulations establishing a common market in cereals on the one hand and the Regulation establishing the Common Customs Tariff on the other hand, the College van Beroep voor het Bedrijfsleven considered that it must request your interpretation.

In an endeavour to reply to the questions placed before you, it is necessary to investigate on the basis of what criteria and by what techniques it is possible to distinguish between the products coming under the two abovementioned tariff headings.

But it must also be established whether the same product could be classified differently according to whether it has been imported, giving rise to the collection of a levy or a customs duty under the Common Tariff, or whether it has been exported, giving the right to the grant of a refund on the basis of the agricultural regulations.

As far as possible different treatment of a product, depending on whether it is in the context of a levy or of a refund, is to be avoided, although speculators for their part do not refrain from 'downgrading' the product in their import declarations with a view to paying the lowest possible levy and 'upgrading' the product which they export with a view to collecting the refund at a maximum rate, endeavouring moreover to pass off goods of a quality only just sufficient to entitle them to that refund.

On the other hand the system of refunds provided for by Regulation 120/67 concerning cereals is undoubtedly independent of the system of levies, with regard both to its legal foundation and to the interests involved. But it refers to the nomenclature of the Common Customs Tariff for the designation of the products which are taken into account for the refunds.

In the first place the rules of interpretation relevant to the system of refunds must be investigated, and in the second place, recourse must be had if necessary to the principles which apply to the interpretation of the nomenclature of the Common Customs Tariff. If there are divergences between the designation of the goods in the Common Customs Tariff and the nomenclature of the agricultural regulations, preference must be given to the agricultural regulations. If on the contrary, there is no disparity between the agricultural regulations and the Common Customs Tariff, the solution must be derived from the Customs nomenclature itself.

In this respect we find that neither basic Regulation No 120/67 nor the first Regulation on refunds No 360/67 nor the implementing provisions adopted by the Commission, which lay down the amounts of the refunds, enable precise and specific criteria for the definition of the products in question to be laid down; in other words, so far as these Regulations refer to the tariff headings of the Common Customs Tariff, they have purely and simply adopted that tariff nomenclature. Regulation No 1138/68, which governs the last export in dispute does not expressely contain rules of its own whereby the classification of the product exported may be decided, but Article 1 thereof refers to the text of Regulation No 1052/68, which relates both to levies and refunds. This Regulation contains, in the Annex thereto, a precise nomenclature which is accompanied, in relation to Tariff Heading 11.01, by a footnote containing criteria for distinguishing between the products coming under the said heading and those coming under Tariff Heading 23.02.

This footnote renders inclusion under headings 11.01 or 11.02 subject to the conditions that a product made from cereals has a starch content exceeding 45 % and an ash content not exceeding for products based on barley, 3 %. It is stated that if either of these two conditions is not fulfilled, the product in question shall be classified under heading 23.02 *on the basis of its starch*

content. This note forms an integral part of Regulation No 1052/68, having binding force, and moreover, you have already used the information which it contains as the basis for your finding that the classification, with regard to levies, of the products which come under heading 23.02 A must be made in the light of their starch content and not, for example, in accordance with the processing method which has been applied (judgment of 30 November 1972, Case 18/72, Granaria, Rec. 1972, p. 1170).

As we shall see the distinction between the barley flour of heading 11.01 and the brans and sharps which come under heading 23.02 has been definitively settled through the work of the Customs Cooperation Council of Brussels in the same sense and according to the same criteria. However, the rules of classification proceeding from the footnote to the Annex to Regulation 1052/68 cannot have a retrospective effect; therefore only the classification of the final lot exported subsequently to the coming into force of this Regulation can be acscertained on the basis of the requirements of that footnote, and on the contrary cannot be adopted, as such, for the previous exports.

However, the solution cannot, in my opinion, be different in the case of the exported products which fall within the domain of Regulations Nos 122, 372 and 814/68. The system of refunds has adopted the tariff headings of the nomenclature of the Common Customs Tariff purely and simply, without modifying them at all; the rules of interpretation of this tariff must therefore be definitively adopted within the framework of the system of refunds, as the latter contains no indication to the contrary with regard to the classification of products.

Now, in the absence of an explicit classification rule within the terms themselves of the tariff headings and any supplementary notes which may accompany the tariff nomenclature, you have acknowledged that reference may be made for the classification of certain products to the existing explanatory notes, *viz* the explanatory notes to the Brussels Nomenclature.

In the edition prior to 1968, these documents treated the products of the milling of cereals falling under Chapter 11 as restricted to products which had undergone milling or the processes provided for by the various headings of this Chapter, such as malting, extraction of starch or of gluten etc. . . On the other hand, brans, sharps and other residues derived from the sifting, milling or other working of cereals of heading 23.02 were excluded from Chapter 11. While a classification opinion of the Customs Cooperation Council, laying down the distinction between the products derived from wheat in Chapter 11 and the products in Chapter 23 in the light of a starch content of 45 % and an ash content of 2·5 %, has indeed been in existence since April 1967, it does not appear possible to found the classification of products derived from barley on this opinion, which is concerned only with wheat. Moreover, while the criteria laid down by that opinion were extended in 1967 to products of the milling of other cereals, barley was not mentioned among them. Only after they were brought up to date in 1969 have the classification opinions indicated that products from the milling of barley which appear in Chapter 11 must have a starch content exceeding 45 % and an ash content not exceeding 3 % only in 1972 was the matter finally put beyond all doubt by the Customs Cooperation Council of Brussels. In the latest edition of the nomenclature a special note relating to Chapter 11 was inserted in the Common Customs Tariff; with regard to barley, this note adopts identical criteria to those contained in the footnote appended to Regulation 1052/68.

With regard to the first four exports which were effected in this case, it is therefore open to you to reply to the national judge that there was at the time

no definite criterion such as would permit the classification of the goods which were exported. But despite the absence of a precise rule of classification, I think that it is possible to create an objective distinction between barley flour and brans and sharps of barley. As you have pronounced in your judgment of 23 March 1972 — Case 36/72 Henck, Rec. 1972, p. 198 — the decisive criteria for classification in the Common Customs Tariff are as a rule provided by the characteristics and objective properties of the products. You added that the classification of a product under a tariff heading within the system of the common organization of the markets depends on the components and the use of the product and not on the working which it has undergone. As the Commission points out, this implies that specification may be effected on the basis of the specific contents and essential ingredients of the products in question, where these ingredients can be ascertained with a sufficient degree of certainty by modern methods of analysis. Now in the case of products from the milling of cereals, the essential factors to bear in mind are, principally, starch content and, as a subsidiary factor, ash and cellulose content. This emerges moreover from your decisions in Case Nos 72/69, *Bremer Handelsgesellschaft,* and 74/69, *Krohn,* (Rec. 1970, p. 434 and p. 462). In these cases questions were brought before the Court which in certain respects resemble those raised in the present dispute. Was the expression 'manioc flour' which appears in the Annex referred to by Article 1 (d) of Regulation No 19/62 of the Council, to be interpreted in such a way that it embraces, without regard to the manufacturing process, all products derived from manioc roots when their starch content exceeds 40 %, or were maximum or minimum contents of other components, such as crude fibres, sugar or proteins to be taken into consideration? You held that the interpretation of one tariff heading by analogy with another must, in case of doubt, take account both of the role of the Customs Tariff in relation to the requirements of the system of organization of the markets and of its purely customs role, and that in the case of manioc 'starch residues' and 'flours' fall to be distinguished on the basis of starch content alone without taking account of any working, which the roots may have undergone.

These decisions were confirmed in the Henck cases of 12 and 14/71 by judgment of 14 July 1971.

By application of the same criterion it is thus open to you to reply to the essential question put by the national court, which wishes to know whether, for products derived from barley, a starch content of not less than 28 % or 45 % is required. I should like in the first place to point out that the criterion of a starch content of not less than 28 % is not taken into account to classify goods either under heading 11.01 or under heading 23.02. This criterion only appears for classification purposes to distinguish between two subheadings of heading 23.02. On the other hand, milled basic products, in this case barley, fall to be classified under Chapter 11, either after milling without additional preparation or with the waste and by-products removed before or after the milling operation. The product in question must then have a starch content not less than that of barley and a crude cellulose content necessarily less than that of barley.

Products with a starch content less than than of barley and a cellulose content exceeding that of barley must on the other hand be placed in Chapter 23.

Transposing the findings of the Court in the Henck case 36/71, it may be said that heading 23.02 has in mind products which have undergone definitive processing or have been produced by mixing different substances and which are fit only for animal feeding. Contrary to what the plaintiff alleges, the sole fact that the starch content exceeds 28 % is insufficient to require that the product

shall automatically be classified as 'barley flour'. On the the contrary, this starch content must exceed 45 %. This attribute seems to me the sole determining factor. In this case, moreover, the product which was exported had a starch content of approximately 30 %, which was incontestably lower by a considerable degree than the percentage which would establish a classification under heading 11.01.

I shall turn now to the questions relating to the methods of analysis. The first point — raised in questions 2 and 3 of those asked by the national court — is whether classification of the product in dispute may be effected on the strength of the products chemical analysis alone (content in starch, cellulose, ash) or whether, on the contrary, equal weight must be given to visual (microscopic) observation of the product. In my opinion the reply is not in doubt, taking account of the terms of the nomenclature which result from the application of the regulations relating to the common organization of the market in cereals and of the description of the goods in the Common Customs Tariff: regard must be had to both chemical analysis and visual observation.

Furthermore, without wishing to encroach on the application in the case in question of the criterion of chemical analysis alone, it may be pointed out that the National Agricultural Inspection Establishment of Maastricht found that the samples examined had a crude cellulose content considerably exceeding that of barley and a starch content less than that of barley. It is to be noted that the 'flours and sifted flours' which are obtained by milling or grinding barley must of necessity have a cellulose content less than that of barley and a starch content exceeding that of barley.

These data corresponded to those emerging from visual observation, from which it appeared that the samples examined had a quantity of teguments exceedings, and a quantity of particles of almond flour less than those of barley. The 'flours and sifted flours' obtained by processing barley are characterized by the presence of a quantity of teguments which can, at its highest, equal that of barley before the latter has been worked, and by the presence of a quantity of particles of almond flour which is at least equal to that of barley.

With regard to the second point, it asks whether the starch content must be calculated on the goods as such or on the dry material. It is established that the National Agricultural Inspection Establishment of Maastricht calculated the starch content of the samples taken in accordance with the Ewers method, but without relating it to the dry material. The Establishment explained that it omitted to do so intentionally, since the description of goods under subheading 23.02 *A* is concerned with products whose starch content *by weight* does not exceed 28 %. If it had been considered necessary to carry out the analysis on the dry material, the text would have said so expressly. Such was not the case. Furthermore, the provisions of Regulation No 228/67, which specifies the means of ascertaining the starch content by weight on which the ascertainment of the variable component of the levy is based, likewise do not state whether this operation must be effected on the product as such or dry.

Granted that the content calculated on the product as such is essentially different from the content calculated on the dry material, it is inconceivable that the authors of the Regulation could have intended, without saying anything, that the content should be related to the dry material.

Moreover, only the supplementary note to Chapter 11 of the Common Customs Tariff, as it emerges from Regulation No 2451/69, which only came into force on 1 January 1970, specifies that in order to come under heading 11.01 and not under subheading 23.02 A the product must *inter alia* have a starch content exceeding 45 % calculated on the dry material. Regulation 1052/69 which

refers, for the first time, to this rate of 45 % in the footnote to the Annex thereto, does not contain this specification.

We now turn to the questions bearing on the validity of the footnote to the Annex to Regulation 1052/68. Both the Dutch authority and the Commission endeavour to evade the criticisms which the plaintiff in the main action raises on this point by affirming that the disputed classification of the products was not ascertained in the light of the information or specificaties of that footnote. They deduce from this that the questions which have been asked are not relevant to the solution of the dispute which has been brought before the national court.

As is known, on any interpretation, the footnote could only provide a legal foundation for the classification of the fifth and final lot of exported goods. On the other hand, I am of the opinion that, even before Regulation 1052/68 came into force, the same criteria of classification as those which have been laid down by that footnote required, on the basis of the nomenclature in force, to be applied as objective and reasonable criteria, taking into account the essential ingredients of the products, there are in fact grounds for considering that all discussion of the validity or the meaning of that note is futile. I shall none the less give my opinion on the questions which the Dutch court has asked in this sphere.

In the first place, is the footnote an integral part of Regulation 1052/68? I have already given an affirmative reply to this point; the provisions thereof are therefore directly applicable in all the Member States. Your decisions are consistent on this point (judgment of 15 October 1969, Case 14/69, Markus and Walsh, Rec 1969, p. 349; judgment of 24 April 1972, Case 92/71, Interfood, Rec. 1972, p. 231).

Does it require to be adopted for the classification of a product for the purposes of granting a refund as for the purposes of a levy? The Commission opts for a negative answer on the ground that the provisions of the footnote have been expressly adopted only in Regulation 1137/68, which fixes the rate of levies, and not in Regulation 1138/68 which relates to the rates of refunds; contrary to the Commission, I consider myself bound to deduce from the fact that the footnote was appended to the Annex to Regulation 1052, which is concerned with the system both of refunds and of levies, the conclusion that the footnote itself applies to the export as well as to the import of the products with which it is concerned.

Furthermore, even though the provision which the footnote contains were not reproduced in Regulation 1138, it seems to me that the preamble to this Regulation may be invoked in support of the above proposition, since it particularly states:

'Whereas it is therefore advisable, in respect of certain products, to limit the refund to an amount which, while allowing access to the world market, would still ensure that the aims of the common organization of the markets are respected; it is advisable to graduate the refund to be granted to certain processed products on the basis, according to the products, of their content in ash, crude cellulose, tegument, proteins, fat or starch, that content being particularly indicative of the quantity of the basic product actually incorporated in the processed product . . . '

In the third place the introduction of the footnote into Regulation No 1052 does not infringe the principle of legal certainty. As I have said, these provisions have no retrospective effect. Article 12 of Regulation 1052, of which the text was published on 25 July 1968, takes care to state that to facilitate commercial operations 'the import levies and the export refunds fixed for the month of July 1968 on the basis of the tariff nomenclature in force on 1 July 1968 shall remain in force until 31 July'. The provisions of the footnote could not therefore be applied until 1 August 1968.

I do not consider as serious the plea that the statement of the reasons on which the note is based is insufficient. Certainly, one might consider that the reasons for the introduction of this note into Regulation No 1052 are stated only indirectly and succinctly:

'Whereas in the light of experience gained during the first marketing year in which common prices for cereals were applied, the provisions of Regulation No 360/67/EEC should be revised so as to bring them more into line with the actual situation and with the requirements of the trade in products processed from cereals and from rice.'

But the obligation to provide a statement of reasons in regulations, imposed by Article 190 of the Treaty, does not appear, according to your decisions, capale of being interpreted as requiring a specific statement of reasons for each provision of these regulations, far less for simple explanatory notes of nomenclature whose aim is to clarify the criteria of classification of certain products for the purpose of calculating the levy or the refund.

Finally, like Regulation No 360 of 25 July 1967, Regulation No 1052, which contains the note in dispute, is a Regulation by the Council taken on the basis of general Regulation No 120/67 on the common organization of the market in cerals, which was adopted on a proposal from the Commission. It is true that the basic Regulation itself was adopted under the same conditions, but after the opinion of the European Parliament. There is no doubt that if the note were contrary to the provisions of Regulation 120/67 it could have been introduced only in the same form, that is, after the opinion of the European Parliament. But I can find no incompatibility between the footnote and the basic Regulation, as the provisions of that footnote limit themselves to clarifying the criteria of the classification of certain products with which the common organization of the market in cereals is concerned. Moreover the Regulation in question and consequently, the note annexed thereto, relate to the system of levies and of refunds; their validity can only be appraised in relation to Regulation 950/68 on the Common Customs Tariff; they rest on a legal basis, which, as law derived from Article 43 of the Treaty, is autonomous in relation to the customs legislation. Even supposing, therefore, that it were possible to consider that the footnote contradicted Regulation No 950/68, it could not be rendered void on that ground since it has a different legal basis. Also the criteria of classification introduced by the footnote expressly for calculating terms in the Common Customs Tariff in force since 1 January 1972.

I am therefore of the opinion that you should reply to the questions asked by the College van Beroep voor het Bedrijfsleven in accordance with the observations which I have just delivered.