Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, 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 question referred to it by the Bundesfinanzhof by order of that court dated 14 August 1973, hereby rules:

The existence of a rule of domestic law whereby a court is bound on points of law by the rulings of a court superior to it cannot of itself take away the power provided for by Article 177 of referring cases to the Court of Justice of the European Communities.

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

Delivered in open court in Luxembourg on 16 January 1974.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 12 DECEMBER 1973

My Lords,

These two references (Cases 146 and 166/73) to the Court for preliminary rulings raise a most important question of interpretation of Article 177 of the EEC Treaty.

The references themselves are incidents in a long legal battle between the plaintiff, a German exporter of cereal products, and the defendant, the German intervention agency for cereals and feedingstuffs. That battle was originally about claims by the plaintiff for refunds on certain exportations of wheat meal and of pearl barley which the plaintiff effected between December 1964 and December 1965. The claims relating to

the exportations of wheat meal have been disposed of during the course of the litigation and the only questions now outstanding relate to the exportations of pearl barley.

Your Lordships will remember that during the period when those exportations took place there was in force Regulation No 19 of the Council, of 4 April 1962, providing for the gradual establishment in the then Member States of a common organization of the market for cereals, and that one of the features of the system instituted by that Regulation was that it permitted Member States to provide for the payment, through their intervention agencies, of refunds on exports, the rates of refund permitted for exports to third countries being higher than those permitted for exports to other Member States.

In its applications for refunds on the exportations in question the plaintiff stated that those exportations were to third countries and it was granted by the defendant the refunds appropriate to such exportations. Later, as a result of an inspection of the plaintiff's records, the defendant asserted that the exportations had in fact been to other Member States and revoked its decision to grant those refunds.

The plaintiff took the matter to the Hessisches Finanzgericht, but that Court on 12 August 1968 gave Judgment in favour of the defendant.

The plaintiff appealed to the Bundesfinanzhof, which referred to this Court for preliminary ruling a number of questions, including the question what constituted in Community law an exportation to a third country. This Court held (see Case 6/71, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Rec. 1971, p. 823) that such an exportation involved at least that the goods concerned should be put into free circulation in a third country, but that Member States were free to prescribe additional requirements. This was because, under the system instituted by Regulation No 19, the Member States were in no way bound to grant any refunds at all, but were merely permitted to do so within certain limits. Within those limits they were free to add to the conditions required for the grant of a refund. The Court has dealt with this aspect of the system very recently in Case 142/73, *Firma Hugo Mathes & Schurr KG v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.* Your Lordships will remember that Case 6/71 was the first cas in the line of authority that I cited in my Opinion in Case 142/73.

On the basis of the rulings of the Court in Case 6/71 the Bundesfinanzhof delivered Judgment on 8 November 1972 affirming (for reasons that are not now material) the decision of the Hessisches Finanzgericht in so far as it related to the exportations of wheat meal, but quashing it in so far as it related to the exportations of pearl barley, on the grounds (i) that the Hessisches Finanzgericht's findings of fact were made on insufficient evidence and (ii) that, even if those exportations were properly found to have been made to other Member States and not to third countries, the plaintiff was entitled to keep so much of the refunds as was appropriate to exportations to such Member States. The Bundesfinanzhof accordingly remitted the case to the Hessisches Finanzgericht.

On 7 May 1973 the Hessisches Finanzgericht made an Order referring three questions to this Court for preliminary ruling. They are, shortly, these:

1. Whether, under Article 177 of the EEC Treaty, a Court against whose decisions there is a judicial remedy under national law (which I propose to call, for the sake of brevity, a 'lower Court') may refer a question of Community law to this Court only when the case in which that question

arises comes before it for the first time or whether it may do so also when reconsidering the case after a previous judgment of a Court of first instance has been quashed by a superior Court.

If the answer to the latter part of that question be in the affirmative:

2. Whether, under the relevant provisions of Regulation No 19 and of Regulation No 141/64/EEC (which was adopted in implementation of it), an importer who claimed to have exported pearl barley to a specified third country, and who received the refund appropriate to such an importation, was entitled, if a subsequent investigation revealed that in fact he exported that barley to a Member State, to keep so much of the refund as was appropriate to an exportation to a Member State, or whether he must then forego the whole refund; and

3. Whether, under those provisions, an exporter was entitled to a 'third country refund' only if he exported the goods to the third country specified in his application for a refund or whether it was enough that he exported them to some third country.

Against that Order for Reference the plaintiff appealed to the Bundesfinanzhof, with the result that the Bundesfinanzhof, on 14 August 1973, made an Order referring to this Court the question whether, under Article 177, a lower Court has a completely unfettered right to refer questions to this Court or whether that Article leaves unaffected rules of national law to the contrary, under which a Court is bound on points of law by the judgments of the Courts superior to it in the hierarchy.

My Lords, the reference from the Hessisches Finanzgericht is Case 146/73. That from the Bundesfinanzhof is Case 166/73.

It seems to me, my Lords, that the first question posed by the Hessisches Finanzgericht, in the form in which it is posed, can admit of only one answer. The mere circumstance that a case is being reconsidered by a lower Court, after an earlier decision of that or of another such Court has been quashed by an appellate Court, cannot, of itself, preclude a reference to this Court. Suppose that, on an appeal against a judgment of (say) the High Court in England, the Court of Appeal were to order a new trial and that, at the new trial, facts emerged or arguments were put forward that gave rise to a question of Community law not raised either at the first trial or in the Court of Appeal. It would to my mind be absurd that the new trial Judge should be unable to refer that question to this Court simply because he was a new trial Judge and not the first trial Judge.

Indeed the argument of the Plaintiff in this Court did not go that far. It was confined to a much narrower point, reflecting the situation that actually obtains in this case.

It is implicit in the Judgment of the Bundesfinanzhof of 8 November 1972 that, in the view of that Court, it is a question of German law and not of Community law whether the plaintiff, if in fact it exported the pearl barley to Member States, is entitled to keep so much of the refunds as was appropriate to such exportations, and it is explicit in that Judgment that the answer to the question is 'Yes'. Had the Bundesfinanzhof considered the question to be one of Community law, it would, as a Court of last instance, have been bound to refer it to this Court, which it did not do. Under paragraph 126 (5) of the Finanzgerichtsordnung, which contains the rules of procedure applicable in the Finanzgerichte the Hessisches Finanzgericht was bound on points of law by the Judgment of the Bundesfinanzhof. So, runs the argument for the plaintiff, the Hessisches Finanzgericht was bound to accept the views of the Bundesfinanzhof

on those questions and was not entitled to seek to escape from them by invoking the jurisdiction of this Court. That argument is echoed in the Grounds of the Bundesfinanzhof's Order for Reference in Case 166/73.

The crucial question is therefore truly that posed by the Bundesfinanzhof in that Order.

One's immediate inclination is to answer it in such a way as to avoid impairing the general principle that a lower Court should respect and be loyal to the decisions of Courts that are superior to it. This principle does not apply only in Germany and, indeed, its importance is such that, to my mind, it is more than a mere rule of procedure, although of course effect may be given to it by rules of procedure.

I have, however, come to the conclusion that to hold, as I would, that Article 177 does confer on every lower Court in every Member State a power to refer questions of Community law to this Court that cannot be fettered by any rule or provision of national law does not really involve a breach of that principle. The lower Court, in a situation such as obtains in this case, is not seeking directly to substitute its own view for that of the superior national Court. It is seeking the view of this Court on what it conceives to be a doubtful question of Community law, consistently with the principle enshrined in Article 177 that, on such a question, no national Court, however high, may rule definitively. Moreover, as the Commission points out in its Observations, the question referred by the lower Court to this Court in such a case may not be the same as that decided by the superior Court: it may merely overlap it. But whether it is the same, or merely overlaps it, the ruling of this Court upon it, assuming it really to be a question of Community law, must in the end prevail over that of any national Court.

My Lords, I can see no logical stopping point between, on the one hand, holding that no fetter can be placed by national law on the power of a lower Court in any Member State to refer questions of Community law to this Court and, on the other hand, holding that each Member State is free to qualify Article 177, in its application to that State's own Courts and Tribunals, in any way that it considers reasonable — free, in other words, to write its own chosen provisos into Article 177. To say that that Article must yield to the general principle of respect by lower Courts for the decisions of higher Courts would in practice mean that it must yield to a whole variety of rules differing in their detailed content from Member State to Member State.

There are to my mind three obvious objections to the adoption of the view that Member States are, in effect, free to enact their own provisos to Article 177. First, and most obviously, it involves empowering the Member States to qualify by national legislation the terms of the Treaty. Secondly it opens the way for the Treaty to apply differently in different Member States. One Member State might circumscribe the discretion of its lower Courts to refer questions to this Court more tightly than another. This, clearly, could injure both the uniform application of Community law and its balanced development. Thirdly it means that, in deciding upon the admissibility of particular references, this Court must be faced with an impossible choice. It must either embark upon the interpretation and application of provisions of national law, including procedural ones — which is not its role — or it must ignore those provisions and thus allow to subsist a situation in which a reference may be admissible in Community law but inadmissible in national law.

My Lords, my Opinion could almost end at this point were it not for a difficulty I feel. I think that, as a matter of logic, the view I am inviting Your Lordships to adopt necessarily entails holding that national legislation cannot effectively provide for a right of appeal against an order of a lower Court referring a

question to this Court. This is a far-reaching conclusion, since procedural rules in force in most of the Member States envisage, either expressly or implicitly, such a right of appeal. It is moreover a conclusion that is inconsistent with two authorities in this Court.

The first of those authorities is Case 13/61, commonly called the *Bosch* case (Rec. 1962, p. 89), which was the first case ever referred to this Court under Article 177. It was a reference by the Gerechtshof of The Hague. Against that Court's Order for Reference the defendants in the case appealed to the Hoge Raad of the Netherlands. It was argued for them, and also for the French Government, before this Court, that the effect of that appeal according to the Dutch code of civil procedure was to suspend the operation of the Order for Reference and that this Court should accordingly stay its proceedings until the Hoge Raad had given judgment on the appeal. The argument seems to have been that, on the true interpretation of Article 177, the jurisdiction of this Court did not arise until the order for reference had become finally binding in the eyes of the relevant national law. The Court held that its jurisdiction depended only on the existence of an order for reference and that it was not concerned to consider whether that order had become finally binding in national law. It therefore proceeded to rule on the reference. To that extent the decision is consistent with my view. There is, however, a dictum in the Judgment to the effect that the Treaty did not preclude the Hoge Raad from hearing the appeal but left the question of its admissibility to be decided by that Court. This leaves unanswered the question what was to happen to the ruling of this Court if the Hoge Raad quashed the Order for Reference. Mr Advocate-General Lagrange, whom the Court was following, envisaged that, in that event, the ruling of this Court would simply be deprived of any effect, except as an addition to its body of case law.

My Lords, I respectfully agree of course with the Opinion of Mr Advocate-General Lagrange in that case insofar as he there said that it was not for this Court to pronounce upon questions of national law. But I cannot bring myself to agree with it insofar as he accepted the possibility of an appeal, under national law, against an order for reference under Article 177. It is naturally with the greatest diffidence that I differ from him, but it does seem to me that his approach to the question was wrong. It consisted primarily in looking at the rules applicable in France and in Germany to references for preliminary rulings between Courts having jurisdiction in different spheres; finding that, with one exception, appeals were permissible from orders for reference made by such Courts; and concluding that, against that background, it was unreasonable to suppose that the authors of the Treaty intended to exclude any right of appeal in the case of orders for reference to this Court. But, my Lords, if it be right that the question is to be answered by means of an exercise in comparative law, rather than by reference to basic principles of interpretation, the precedent that seems to me the most pertinent is the one noted by Mr Advocate-General Lagrange as exceptional, namely that of references by German Courts to the Bundesverfassungsgericht, for that is the only example he gave of references to a Court competent to rule definitively on questions pertaining to a higher legal order. The analogy is not perfect, of course, because, so I believe, the Bundesverfassungsgericht goes further than this Court in practice does in considering the relevance of the questions referred to it. But there is an analogy. I understand, incidentally, that in Italy also an order for reference to the Constitutional Court cannot be the subject of an appeal.

During the argument in the *Bosch* case

reliance was placed on Article 20 of the Statute of the Court. I think a consideration of this does reinforce the view I take of the correct interpretation of Article 177. Your Lordship will remember that Article 177 provides that where a question of Community law is raised before any court or tribunal of a Member State '*that* court or tribunal may, if *it* considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon' while Article 20 of the Statute provides that 'the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court, shall be notified to the Court *by* the court or tribunal concerned'.

There is not provision, either in the Treaty or in the Statute, for this Court to take into account any document emanating from any Court other than that making the reference, and in particular no provision for it to take into account any document emanating from a Court of appeal. It seems to me, my Lords, that, if the authors of the Treaty had envisaged that the decision of the Court making the reference might be open to appeal, they would have prescribed at least some machinery for dealing with the eventuality of such an appeal.

In case 31/68, the *Chanel* case (Rec. 1970, p. 403), the Court departed from the view it had adopted in the *Bosch* case. The Arrondissementsrechtbank of Rotterdam had made an Order for Reference under Article 177 on 3 December 1968. On 29 January 1969 it informed the Court that an appeal against that Order had been lodged with the Gerechtshof of The Hague and that the consequence of that appeal was that the operation of the Order was suspended. The plaintiff then applied to this Court for a stay of the proceedings on the reference pending the determination of the appeal. This the Court refused to grant and the proceedings took the normal course. On 20 May 1969 Mr Advocate-General Roemer delivered his Opinion.

His view was that the Court must defer to the national law. He considered the relevant Dutch law and came to the conclusion that, under that law, the effect of the appeal was indeed altogether to suspend the operation of the Order for Reference. In those circumstances, he was of the opinion that the Court should not deliver Judgment until the outcome of the appeal was known, for he rejected the view taken by the Court in the *Bosch* case that it could at one and the same time acknowledge the admissibility of the appeal under national law and ignore its effects. It was not the function of the Court, he said, to emit legal opinions '*in abstracto*'. In the result he accepted the argument that had been rejected in the *Bosch* case that the jurisdiction of the Court under Article 177 could be founded only on an order for reference that had become finally binding in the eyes of the relevant national law. He pointed out that an order for reference might be challenged on appeal on grounds having nothing to do with Community law, for instance on the ground that the case could be disposed of by applying national law alone. He further pointed out that only the national Court could know if the reference had become pointless by reason of some later event, such as a notice of discontinuance or a compromise between the parties.

The Court followed Mr Advocate General Roemer. On 3 June 1969 it formally decided to defer delivering judgment pending the determination of the appeal. On 12 June 1970 the Registrar received a letter from the Registrar of the Arrondissementsrechtbank saying that the appeal had been allowed by the Gerechtshof. On 16 June 1970, the Court made an Order reciting that, that being so, the reference had become purposeless and ordering it to be removed from the register.

My Lords, I have no doubt, if I may respectfully say so, that Mr Advocate-General Roemer was right first when he said in effect that the *Bosch* case ought not to be followed because it could lead to the Court delivering purposeless opinions and secondly when he said that only the national Court could know whether a reference had become purposeless owing to some supervening event such as a discontinuance or a compromise or (I would add) an amendment of the pleadings. It seems to me clear that, for this reason if for no other, a Court that has made a referance to this Court must retain at all times the power to withdraw it. Indeed I would say that, where an intervening event has rendered the reference purposeless, that Court is under a duty to withdraw it. This does not involve any fettering of the discretion conferred on a lower Court by Article 177. It is merely an application of the general principle that a Court should not be called upon to decide a purely hypothetical question. Where I differ from Mr Advocate-General Roemer — and I differ from him, of course, with as much diffidence as I do from Mr Advocate-General Lagrange — is in his acceptance of the proposition that a reference may be rendered purposeless by an appeal, for this does involve accepting that national law can impose a fetter on that discretion. Moreover Mr Advocate-General Roemer's reasoning involves giving to a national appellate Court the last word on the question whether a particular case gives rise to a question of Community law. That must mean in certain circumstances (well illustrated by the present case) giving to that Court rather than to this Court the last word as to the scope of Community law.

It may well be, of course, that the real explanation of the *Chanel* case lies in the fact that the central question whether national law could impose fetters on the discretion conferred in lower Courts by Article 177 was never raised there, either in the questions referred to the Court by the Arrondissementsrechtbank or by the parties, so that it was difficult for the Court to embark upon a consideration of it.

Be that as it may, the position on the authorities, as I see it, may be summarzied as follows. For the Court to follow the *Bosch* case would be open to the objections pointed out by Mr Advocate-General Roemer in the *Chanel* case, which I need not repeat. For it to follow the *Chanel* case would be open to the objection foreseen by Mr Advocate-General Lagrange in the *Bosch* case — this is indeed underlined by the fact that, in the *Chanel* case, Mr Advocate-General Roemer found himself having to consider and form a view upon procedural provisions of Dutch law. For the Court to follow either of those cases would be open to the additional, and to my mind conclusive, objection that it would involve conceding to the national laws of Member States the power to qualifiy, and that not necessarily uniformly, the unqualified terms of Article 177.

My Lords, I do not propose to add to that discussion of the authorities in this Court, a review of the authorities in national Courts. But it would be wrong, I think, to overlook certain indications we have that different views are held in those Courts on this very important question. Thus the Order for Reference of the Verwaltungsgericht of Frankfurt-on-Main in Case 158/73, *Firma E. Kampffmeyer v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* which is now pending before this Court, states categorically:

'This order cannot be the subject of an appeal.

The decision to suspend the proceedings under Article 177 of the EEC Treaty is a legal procedure in its own right and, in contrast to the suspension under paragraph 94 of the Verwaltungsgerichtsordnung (Rules of the Administrative Courts), can be no more appealed

against than a reference under Article 100 of the Grundgesetz (Basic Law). (On the parallel features of the preliminary rulings procedure and the procedure for testing the constitutionality of laws, cf. Ipsen, *Europäisches Gemeinschaftsrecht*, p. 767 *et seq.*). The independent power of the competent Court on its own initiative to refer a matter to the Court of Justice of the European Communities cannot and must not be limited or in any way, directly or indirectly, made dependent upon the consent of another Court (cf. the Bundesverfassungsgerichtsentscheidungen 1, 202, 204 *et seq.* on the procedure under Article 100 of the Basic Law). This therefore precludes any possibility of testing the decision to suspend the proceedings by way of an appeal.'

In contrast, both the Judgment of the Hoge Raad of the Netherlands in the Bosch case and the Order for Reference of the Bundesfinanzhof in the present case recognize a limited right of appeal against orders for reference made by lower Courts. The limitation is not however in each case the same.

One finds similar divergences in national procedural rules. Thus I understand that in Italy, by virtue of the combined effect of Article 3 of the Statute of 13 March 1958 ratifying the Protocol on the Statute of this Court and of Article 279 of the Code of Civil Procedure, there can be no appeal of any sort against an order for reference to this Court. Indeed Mr Advocate-General Lagrange adverted to this in his Opinion in the *Bosch* case. In England, in contrast, Order 114, rules 5 and 6 of the Rules of the Supreme Court envisage an unlimited right of appeal against an order for reference to this Court made by the High Court. Of course, if the view I take is right, those rules are to that extent void and an English Judge would be bound, under the European Communities Act 1972, so to hold, after, if appropriate, a reference to this Court. In certain other Courts and Tribunals in England, for which no similar rules have been made, the position may not be the same, particularly where general rules permit appeals only on points of law.

My Lords, in taking the view I do, I am comforted by two considerations. The first is that there is no universal rule that a judicial decision must necessarily be open to appeal. The second is that a decision of a lower Court to refer a case to this Court can have no final effect on the rights of the parties: those rights will be determined by the national Courts in the normal way, and with all normal procedural safeguards, once this Court has ruled on the reference.

I am therefore of the opinion that the first question asked by the Hessisches Finanzgericht in Case 146/73 and the question asked by the Bundesfinanzhof in Case 166/73 should both be answered as follows:

'The second paragraph of Article 177 of the EEC Treaty confers on a Court or Tribunal against whose decisions there is a judicial remedy under national law a discretion that is exercisable at any stage of proceedings before it and that cannot be fettered by any rule or provision of national law.'

On that footing I must turn to the second question asked by the Hessisches Finanzgericht in Case 146/73. My Lords, on that question, I cannot usefully add anything to what I said in my Opinion in Case 142/73. What I said there is equally applicable here. In the result I agree with the Bundesfinanzhof that the question is not really one of Community law at all and I am of the opinion that it should be answered as follows:

'Articles 19 (2) and 20 (2) of Regulation No 19 of the Council of the European Economic Community, dated 4 April 1962, taken in conjunction with Articles 14 and 15 of Regulation No 141/64/EEC of the Council, are to be interpreted as having implied that a trader who exported pearl barley to a Member State after having stated that it was to be exported to a specified third country and been granted the refund appropriate to

such an exportation, could not be entitled to keep more of that refund than the amount appropriate to an exportation to that Member State, but no provision of Community law in force during the currency of Regulation No 19 precluded him from keeping that amount. Whether or not he might keep it was a matter to be determined according to the law of the Member State from which the goods were exported.'

There remains the third question posed by the Hessisches Finanzgericht. This calls for an answer on the same lines as that to the second question. The Commission suggests, in its Observations, that the answer should be qualified by reference to the provisions of Articles 5 and 5 A of Regulation No 90 of the Commission, dated 26 July 1962, as amended by Regulation No 163 of the Commission, dated 20 December 1962; but, as those provisions do not apply to exportations of pearl barley, such a qualification seems to me unnecessary in this case.

I am therefore of the opinion that the third question should be answered as follows:

'No provision of Community law in force during the currency of Regulation No 19 precluded a trader who exported pearl barley to a third country, after having stated in his application for a refund that it was to be exported to a different third country, from being entitled to the refund appropriate to an exportation to the former country. Whether or not he was entitled to such a refund was a matter to be determined according to the law of the Member State from which the goods were exported.'