2. Article 5 of Regulation No 141/64 is to be interpreted as meaning that sorghum flakes are produced from hulled sorghum grain. The grain is hulled when part or the whole of the pericarp is removed so that in most cases the floury kernel becomes partially visible on the outside of the grain.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 July 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 4 JUNE 1981 [1]

Mr President,
Members of the Court,

1. The main purpose of this reference for a preliminary ruling is to obtain an interpretation of the concept of flaked cereal, other than barley and oats, as used in the Community rules under the system of levies and refunds for products processed from cereals and rice (Article 5 (1) B (b) of Regulation No 141/64 of the Council of 21 October 1964, Journal Officiel 1964, p. 2666 [2]).

I shall briefly summarize the facts. Between 21 June and 18 August 1964 Ludwig Wünsche & Co, a company which operates in the Federal Republic of Germany and deals in cereals, exported sorghum flakes and obtained refunds in the form of licences for the duty-free importation of 180 kg of sorghum for every 100 kg of flakes. The Federal Office for the Organization of Agricultural Markets [Bundesanstalt für landwirtschaftliche Marktordnung] granted the refunds but subsequently revoked them by decision of 8 December 1966 on the ground that the goods exported were not flakes but rolled cereal; and it restricted its authorization to the importation of sorghum free of levy in the amount of 102 kg for every 100 kg of rolled cereal. Wünsche

1 — Translated from the Italian.
2 — *Translator's note:* There is no authentic English text of this regulation.

appealed against the new decision to the Hessisches Finanzgericht [Finance Court, Hesse], which referred the following questions to this Court by an order dated 25 June 1980:

"(a) Do 'flakes of sorghum' [Flocken von Sorghum] (Article 1, Point (d), of Regulation (EEC) No 19 in conjunction with the annex thereto) of the type referred to in Article 5 (1) B (b) of Regulation (EEC) No 141/64 ([having an ash-content of] 2% or less by weight on the dry product) differ from sorghum flakes [Sorghumflocken] of the type referred to in Article 5 (1) B (c) of Regulation (EEC) No 141/64 merely by their ash-content or should flaked sorghum [having an ash-content of] 2% or less by weight also be hulled?

(b) In the context of Question (a) was it possible for the Explanatory Notes to the Customs Cooperation Council Nomenclature, which made the character of 'flaked' dependent on hulling (Explanatory Note No 62 to tariff heading No 11.02), to be used as an aid to interpretation in relation to exports in the year 1965?

(c) Did the term 'hulling' as used in Note 2 to tariff heading No 11.02 mean, even in relation to sorghum which is a so-called naked cereal [Nacktgetreide], that the pericarp including the aleuron cells should have been removed in such a way that the floury kernel was 'generally' visible? Did 'generally' mean: for the most part (more than 50%) or almost entirely (more than 75%)?

(d) (By way of a complement to the above or — if Questions (a) to (c) are answered in the negative — alone). In interpreting the concept of 'flakes' should recourse be had to the penultimate paragraph in the preambles to Regulation (EEC) No 55 and Regulation (EEC) No 141/64, the first paragraph of Article 2 of Regulation (EEC) No 92 and the first paragraph of Article 15 of Regulation (EEC) No 141/64, according to which refunds for processed products were to be calculated on the basis of the levy applicable in respect of the basic products required for their manufacture?"

2. In order to understand the references to the Community rules in the first question let us first recall that Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the markets in cereals (Journal Officiel 1962, p. 933 [1]) introduced a system of levies applicable to trade both between Member States and between Member States and non-member countries (Article 1), and at the same time empowered Member States to grant refunds on exports "to enable exports to non-member countries to be made on the basis of the rates prevailing on the world markets", so as to offset the difference between those rates and prices in the exporting Member State (Article 20 (2)). The list of the products subject to common organizations of the markets in cereals included (Article 1 (d)) "the processed products listed in the annex to [the] regulation"; in particular "rolled cereal (including flakes)" appeared in the category corresponding to heading 11.02 of the Common Customs Tariff.

Regulation No 141/64 of the Council, which was specifically concerned with the rules governing products processed from cereals and rice, provided for its part for a system of levies and refunds and in Article 5 (1) (concerning the fixing of the variable component of the levy) dealt with the products "under Common Customs Tariff No ex 11.02", including "rolled cereal (including

1 — *Translator's note:* There is no authentic English text of this regulation.

flakes)", and among them "flakes" (B), which fall into three groups: flakes of barley or oats (B a), flakes of other cereals (B b) and "other cases" (B c). It must be noted that those classifications were important because on them depended the various quantities of the basic product allowed in each group for calculating the amount of the levies and refunds: in the case of flakes of barley and of oats the quantity for the purposes of calculating the refund was 200 kg of the basic product, that being the amount it was permitted to import free of levy for every 100 kg of flakes exported; for flakes of other cereals the coefficient fell to 180 kg for 100 kg of exported goods, and in the "other cases" it was 102/100. On the other hand the rule which we are examining stipulated that in the case of "flakes of other cereals" (Group B (b)) the ash-content calculated on the dry product must be "2% or less by weight". In view of that the court trying the substance of the case wishes to know whether compliance with that condition is sufficient for flakes of sorghum to be classified in Group B (b).

The alternative suggested by the national court is that the flakes in question require, in addition, hulling. The explanation for that alteration is that the case-law of this Court contains a precedent of great interest, namely the judgment of 8 April 1976 in Case 106/75 *Merkur* v *Hauptzollamt Hamburg-Jonas* ([1976] ECR 531).

That case, too, concerned the classification of products coming within tariff heading 11.02 which were declared by the exporter to be flakes of barley but were classified by the German customs authorities as rolled barley; there, too, the payment of export refunds was involved. In order for the product to be classified in subheading 11.02 E I (b) of the Common Customs Tariff (flaked barley) it was necessary in fact to establish whether the manufacture of flakes implied that in addition to crushing or rolling the cereal grains must be subjected to hulling, which entails the removal from the grain of a portion of the seed envelope. The court held that flaked barley "is manufactured from grains subjected to hulling which removes part of their husk" (paragraph 5 of the decision), whereas rolled barley grains "are merely subjected to treatment which, while modifying their form, does not remove most of their husks, which, according to the Brussels Explanatory Notes, adhere too firmly to the grain kernel to be separated by mere threshing or winnowing" (paragraph 4 of the decision).

The last phrase shows clearly that the Court took into account the Explanatory Notes to the Customs Cooperation Council Nomenclature (the so-called "Brussels Nomenclature"). It also stressed the fact that Note (3) of tariff heading 11.02 defined hulled grain as "grain which has been hulled or otherwise worked to remove wholly or partially the pericarp (the skin beneath the husk). Grains of the bracteiferous varieties of barley are also classified in this heading if their 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". It was further pointed out in the judgment that in Note (6), again in relation to heading 11.02, "flaked

grains" meant "hulled and rolled grains which frequently still retain part of the husk" [1] (see paragraph 4 of the decision).

3. The judgment of 8 April 1976 thus defines with adequate precision the concept of flaked cereal used in the same tariff heading as that referred to in Article 5 of Regulation No 141/64, and of which the subcategory comprising flakes of cereals other than barley and oats is the subject-matter of the present dispute. If the interpretation given by the Court in that decision is followed the reply to the first question which has been referred by the German court must be that in order to qualify for classification in subparagraph B (b) of Article 5 (1) sorghum flakes must have two characteristics: first, the grain must have been subjected to hulling and second, the ash-content must not be greater than 2%.

Such a solution has been criticized by the national court. In the order making the reference to this Court it observes that "flaked" cereal must be defined exclusively in accordance with the provisions of the Community regulations in question (primarily on the basis of Article 1 (d) of Regulation No 19/62 and Article 5 of Regulation No 141/64), without having recourse to the Explanatory Notes to the Customs Cooperation Council Nomenclature as a supplementary aid to interpretation. The Community provisions on the subject are, according to that court, sufficiently clear in that they only require, for the purpose of defining flaked cereal, that there should be a certain percentage of ash, and not that there should be hulling as well. Thus the condition which must be met in order to be able to refer to the Explanatory Notes to the Customs Cooperation Council Nomenclature, namely that the text must be ambiguous, is not fulfilled.

I do not think that argument can be accepted. The Court has already had occasion to state that in the absence of relevant provisions of Community law the Explanatory Notes of the Brussels Convention on the nomenclature of goods in the Customs Tariff are an authoritative source of interpretation of the various customs headings (judgment of 8 December 1970 in Case 14/70 *Bakels* [1970] ECR 1001 and judgment of 15 December 1971 in Case 21/71 *Brodersen* [1971] ECR 1069). In the first of those judgments, in particular, it was stated that "where no Community explanatory notes have yet been issued in respect of the tariff headings to the Common Customs Tariff, the observance of these explanatory notes and opinions" (issued by the Brussels Customs Cooperation Council) "is a useful means of ensuring that the common external tariff is uniformly interpreted and applied at all the frontiers of the common market". In the present case the rule of interpretation to be applied is precisely that stated in the above decision: for Article 5 of Regulation No 141/64 uses the expression "flakes of ... cereals" with reference to heading 11.02 of the Common Customs Tariff but does not provide the material which would make it possible to define the concept of flakes, and it is known that at the time of the facts in question the Explanatory Notes to the Common Customs Tariff did not exist. As to the restriction on the ash-content, which according to Article 5 must not exceed a certain amount, it

1 — *Translator's note:* These words do not occur in the English-language version of the Explanatory Notes.

leaves entirely open the question how to define "flakes of cereals" for tariff purposes. It seems to me, therefore, that reference may properly be made to the Explanatory Notes to the Customs Cooperation Council Nomenclature in order to interpret that concept.

The reply which I propose should be given to the second question posed by the national court, on whether it is possible to employ the said Notes "as a supplementary aid to interpretation" in a case the facts of which date back to 1965, is now plain. In truth, I think there can be no argument to the contrary. Furthermore, I would add that the substantial similarity between the Explanatory Notes to the Customs Cooperation Council Nomenclature and the later Explanatory Notes to the Common Customs Tariff, a similarity which was noted in the *Merkur* decision cited above, provides additional proof of the value of the former as an aid to interpretation.

4. Returning to the first question, I shall begin by reminding the Court that, according to Note (6) to heading 11.02 of the Customs Cooperation Council Nomenclature, in order to process cereal grains into "flaked grain" the former must be crushed or rolled and must retain a portion of the outer skin. What does the phrase "conservant encore une partie de leur pellicule" [1] mean? It has already been interpreted by this Court as meaning that the grain must have been subjected to a hulling process and, more precisely, that part of the husk (that is to say, the pericarp) must have been removed from the grain (see paragraph 4 of the decision in the judgment of 8 April 1976 cited above). The conclusion was arrived at by comparing Note (6) with Note (3) on heading 11.02: Note (3) speaks of "grain which has been hulled ... to remove wholly or partially the pericarp (the skin beneath the husk)". I find that view convincing: it is in fact reasonable to suppose that when Note (6) speaks of the "retention of part of the husk" the word "husk" is used in the same sense as in Note (3), where it is stated that this refers to the pericarp.

Counsel for Wünsche has submitted that in the case of "naked" cereals such as sorghum, hulling of the grains may be accomplished merely by removing the bracts (or glumella), that is to say, the coverings which envelop the spikelets. For the sake of clarity it must be said that "naked" cereal means cereal from which the bracts may be removed by mere threshing whereas cereal of the bracteiferous variety is cereal in which the bracts adhere strongly to the grain even after threshing. Nevertheless, it seems to me that the interpretation suggested by Wünsche is untenable because it runs counter to the wording of Note (6) which requires the removal of at least part of the pericarp in order for there to be flakes.

In support of his submission Counsel for Wünsche advances two main arguments. In the first place he says that the removal of the pericarp would be harmful in that it would diminish the nutritive value of the product, and in the second place the low ash-content required by Article 5 of Regulation No 141/64 would just as well be achieved by merely removing the bracts. As to the first point I must say that I do not think it possible to overcome an extremely clear statement in a text, such as that contained in the

1 — *Translator's note:* These words do not appear in the English-language version.

Explanatory Notes to the Customs Co-operation Council Nomenclature, by means of arguments based on the alimentary function of the product. As far as the second argument is concerned I note that the technical information supplied in Vorweck's expert opinion of 2 February 1980, which was produced to the Court by Counsel for Wünsche, indicates that the percentage of ash in the case of anhydrous sorghum from which only the bracts have been removed may in some cases even exceed 2%: therefore hulling, which brings about a further reduction of the ash-content in addition to that resulting from the removal of the bracts, makes it more certain that the tariff requirements have been fulfilled.

5. In short, I do not think that there is any good reason to depart from the interpretation given by this Court in the *Merkur* judgment of 8 April 1976. That interpretation finds confirmation in the criterion which has been adopted in the Community regulations for fixing the amount of the refunds for processed products and which consists in relating that amount to the amount of the levy applicable to the basic products required for their manufacture. A link has thereby been established between the production process and the amount of refund; the more complex and wasteful the processing of the basic product, the higher the refund for the processed product. That such is the criterion applicable in the system in question may be inferred from the preamble to Regulation No 55 of 30 June 1962 on products processed from cereals, as well as from the preamble to Regulation No 141/64 adopted subsequently, both of which were referred to by the national court in its fourth question. They make it quite clear that the refunds must correspond to the incidence which the levies determined for the basic product have on prices for the processed product (see in particular the third recital in the preamble to Regulation No 141/64).

This indication finds confirmation in the rules applicable to refunds which were laid down in the two regulations to which I have referred and in other Community sources of the legal system governing products processed from cereals. Thus, for example, Article 2 of Regulation No 92 of the Commission of 25 July 1962 (on the refunds applicable to exports of products processed from cereals) provides that for processed cereals, including, of course, flakes, "refunds in relation to non-member countries may be granted in the form of licences to import free of levy the amount of the basic product determined in accordance with Article 16 of Regulation No 55 of the Council . . .". Article 16 of Regulation No 55 states that the refund for processed products must not exceed the refund for exports of the quantity of the basic product which has been used to calculate the variable component. Article 15 of Regulation No 141/64 goes on to provide that the Member States may grant refunds to an extent "determined in particular by taking into account conditions on the world market and prices for the basic products".

I have already had occasion to note that the amount of refunds for flakes of other cereals were fixed by Regulation No 141/64 on the basis of a coefficient of 180/100, which meant that the export of 100 kg of flakes entitled the exporter to a refund in the form of a licence to import 180 kg of the basic product free of levy. The fixing of such a high coefficient was obviously prompted by the assumption that in the course of processing the basic product into flakes a considerable amount of the former was lost. There would have been no reason for maintaining such a high coefficient if treatment of the cereal was limited to removal of the bracts alone and to rolling or crushing the grains. In order to justify, at least to some extent, the coefficient of 180/100 it is logically necessary to suppose that there is some later loss of the basic product, a loss which it is reasonable to attribute to the removal of the pericarp.

The conclusion at which I have arrived enables me to reply to the fourth question put by the German court which is whether, in interpreting the concept of flaked cereal, it is possible to rely on the fact that the rule applied in Regulations No 55 and No 92 of 1962 and Regulation No 141/64 for determining the refunds for processed products was that such refunds "shall be calculated on the basis of the levy applicable to the basic products required for their manufacture". In view of what I have said it is now clear that the meaning I have attributed to the concept of "flakes" finds independent confirmation in the method by which the calculation of the refunds is determined. Strictly speaking, however, the fourth question concerns not the meaning of a provision of Community law but the methods of interpretation which may be used to clarify the concept "flakes of cereals" in Article 5 of Regulation No 141/64. The interpretation of that provision is the subject of the first question and it is the nub of the present dispute. I have already given my views on the subject and set forth the arguments on which my opinion is based. In substance the fourth question merely highlights one of those arguments, and that is precisely the one which I dealt with last. It seems to me, then, to be a question without independent content to which the Court is not required to give a specific reply as it may be considered to be covered by the main question.

6. The third question raised by the German court remains to be examined. Its purpose is to ascertain the meaning of the phrase in Note (3) of the Explanatory Notes to the Customs Cooperation Council Nomenclature in which it is stated that after hulling "generally the floury kernel is then visible". In particular, the national court wishes to know whether the term "generally" means for the greater part (that is to say, more than 50%) or "almost entirely" (which means more than 75%).

Counsel for Wünsche stated that seeds have several coats: on the outside there are the bracts, which may either adhere to the caryopsis or be easily removable, then a further covering called the pericarp and finally a third skin which forms the seed envelope. That being so

the removal, even total, of the pericarp does not reveal the floury kernel which remains enclosed in the third skin. From this Wünsche derives its argument that the wording of Note (3) is wrong. In my opinion, however, it is not difficult to ascertain on careful consideration of the context of the Note in question that in the first place the removal, even partial, of the pericarp is *always* required, and, in the second place, once hulling has been performed the kernel becomes visible, at least *generally,* which means that the phenomenon in question occurs in most instances: that is to say, it occurs when the underlying integument is removed together with the pericarp.

So far as the present case is concerned I consider therefore that the adverb "generally" is used to indicate not the *amount* of the seed covering which must have been removed for it to be said that "hulling" has taken place for the purposes of the tariff, but the frequency with which the floury kernel becomes visible after the hulling. The Explanatory Notes state that this occurs in most cases; but in some cases it is also possible for hulling to be carried out without the floury kernel's being revealed. That is the interpretation to be preferred, in my opinion, since it enables us to avoid criticisms concerning the consistency of the Note in question by relying on the structure of cereal grains.

7. In conclusion, I suggest that the Court reply to the questions which have been referred to it by the Hessisches Finanzgericht in its order of 25 June 1980 as follows:

1. The words "Flakes of cereals ... Other [than] barley and oats" in Article 1, Point (d) of Regulation of the Council No 19 of 1962 in conjunction with the annex thereto and Article 5 (1) B (b) of Regulation of the Council No 141/64 are to be interpreted as referring to rolled cereal grains which have been subjected to hulling and which have an ash-content not greater than 2%. Hulling means a treatment applied to the grains which consists of removing, even partially, the pericarp so that the floury kernel becomes, in most cases, visible. That interpretation applies equally to "naked" cereals, including sorghum.

2. It is permissible to use the Explanatory Notes provided for by the Brussels Convention on the Nomenclature for the classification of goods in the Common Customs Tariff as an aid to interpretation in relation to exports carried out in 1965 when interpreting the concept "flakes of cereals other than barley and oats" in the Community regulations concerning products processed from cereals or rice (Regulation of the Council No 141/64 of 21 October 1964).