OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 11 December 1986 *

Mr President,
Members of the Court,

1. In this dispute between the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as 'the Federal Office'], that is to say the German intervention agency, and Raiffeisen Hauptgenossenschaft eG [hereinafter referred to as 'Raiffeisen'], the Bundesverwaltungsgericht [Federal Administrative Court] is asking the Court to give a ruling on the interpretation and validity of the fifth indent of Article 6 (1) of Commission Regulation (EEC) No 1570/77 of 11 July 1977 on price increases and reductions applicable to intervention in cereals (Official Journal 1977, L 174, p. 18). According to that provision, national intervention agencies 'may apply, at the time of intervention, a special increase of 3.11 units of account per tonne in respect of rye in production regions . . . where that cereal is regularly sold for bread-making . . . '. However, the grant of that increase is subject to one condition, namely the rye must be of 'particularly good quality' which means that 'the amylogram units, based on full milling, including the germ, with a hardening temperature of the starch of at least 63°C, are not less than 200 units'.

That wording may seem obscure. In fact, in order to understand the scope of that provision, it is sufficient to bear in mind that: (a) the requirement to which it refers concerns the suitability for baking of flour made from bread rye; (b) the suitability of the flour depends on the hardening capability of the dough; and (c) the degree of hardening, which is measured in amylogram units, depends on the relationship between the temperature and the viscosity of the dough. Hardening is measured by the Brabender method. A rye-flour suspension is heated in an amylograph vessel at a constantly rising temperature. As the temperature rises, the progressive swelling of the starch grains increases the viscosity of the paste. Beyond a certain temperature, further swelling causes the grains to burst and spill out their contents, which reduces the viscosity of the paste. The degree of viscosity is measured by a curve consisting of four sections, which rises in the first two sections and falls in the next two. The maximum of 200 amylogram units is reached in the first section, surpassed in the second and third sections and reached once more in the final section.

2. Facts of the case: between August 1978 and January 1979 the Federal Office bought into intervention from Raiffeisen over 29 000 tonnes of bread rye harvested in 1978. On several occasions Raiffeisen applied for the price increase referred to in Regulation No 1570/77. However, its applications were rejected by the Federal Office on the ground that the rye of which it had taken delivery did not satisfy the requirements laid down in the fifth indent of Article 6 (1) of that regulation. Tests carried out on the rye revealed an amylogram curve showing that the maximum of 360 amylogram units had already been reached at a temperature of 60°C, whilst at the temperature required by the aforesaid provision, namely 63°C, the number of units on the now redescending amylogram curve was only 280.

* Translated from the Italian.

Raiffeisen then instituted proceedings in the Verwaltungsgericht [Administrative Court], Frankfurt am Main, challenging the importance attached by the Federal Office to the path of the curve and asking for the Federal Office's decisions to be annulled. However, the action was dismissed by judgment of 24 September 1981. The court took the view that, at a temperature of at least 63°C, the number of amylogram units was to reach 200 for the first time, and consequently the required coordinate (200 units at a temperature of 63°C) had to be on a rising amylogram curve.

Raiffeisen appealed against that judgment to the Verwaltungsgerichtshof [Higher Administrative Court] Hessen. That court allowed the appeal and ordered the Federal Office to grant the price increase sought by Raiffeisen. It held that the fifth indent of Article 6 (1) does not expressly provide that the figure of 200 amylogram units at a temperature of 63°C, which is a precondition for the grant of the increase, must be reached in the first section of the curve. The condition laid down by that provision may therefore be regarded as satisfied even where the figures concerned are found together on a falling amylogram curve.

The Federal Office appealed against that judgment. In the proceedings before the Bundesverwaltungsgericht, it argued that the only rational interpretation of the contested provision was that the number of amylogram units is to be measured at the summit of the curve and that the temperature is to be recorded at the time of maximum viscosity. The reason for that requirement is simple: rye-flour becomes less suitable for baking where the curve is falling. It follows that where rye has already passed the figure of 200 amylogram units on reaching the threshold temperature of 63°C, it no longer has the properties needed for the grant of a price increase.

The Bundesverwaltungsgericht is a court of last instance. It therefore stayed the proceedings and decided, pursuant to the third paragraph of Article 177 of the EEC Treaty, to refer the following questions to the Court for a preliminary ruling:

'1. How is the expression "hardening temperature" contained in the fifth indent of Article 6 (1) of Commission Regulation (EEC) No 1570/77 of 11 July 1977 on price increases and reductions applicable to intervention in cereals, as originally enacted, that is to say before its amendment by Article 1 (4) of Commission Regulation (EEC) No 2160/84 of 26 July 1984, to be interpreted, and in particular is it to be interpreted as meaning that:

(a) all temperatures passed through during the hardening process constitute "hardening temperatures", or

(b) only the temperature reached at the time of maximum viscosity constitutes the "hardening temperature"?

2. If part (a) of Question 1 is answered in the affirmative, how is the fifth indent of Article 6 (1) as a whole to be interpreted, and in particular is it to be interpreted as meaning that:

(a) the coordinate of not less than 200 units at a hardening temperature of at least 63°C must be reached on a rising amylogram curve, or

(b) is it sufficient if, at a hardening temperature of at least 63°C, the units on a redescending amylogram curve are not less than 200?

3. If part (b) of Question 1 or part (a) of Question 2 is answered in the affirmative, does Community law contain a general principle of equality corresponding to Article 3 (1) of the Grundgesetz [Basic Law] of the Federal Republic of Germany, to the effect that the Council and the Commission, when enacting regulations, are under an obligation, in laying down the rules applicable to factual situations, to treat the same (equivalent) situations in the same manner and therefore to attach the same legal consequences to them?

4. If Question 3 is answered in the affirmative, is the fifth indent of Article 6 (1) of the aforementioned regulation contrary to the obligation of equal treatment and therefore unlawful in so far as, as is alleged by the plaintiff,

(a) the bread rye referred to in that provision, the amylogram units of which (based on full milling, including the germ) are not less than 200 on the rising amylogram curve at a hardening temperature of at least 63°C, and

(b) the bread rye at issue, the amylogram units of which (based on full milling, including the germ) in certain cases

(i) reach 610 or 470 units on the rising amylogram curve at a hardening temperature of 61°C, and, subsequently,

(ii) still reach 560 or 390 units on the falling amylogram curve at a hardening temperature of 63°C

are of the same quality and should therefore qualify for the same price increase based on quality?'

3. I propose to consider Question 1 first. I would recall that Raiffeisen favours the interpretation set out in Question 1 (a) (the expression 'hardening temperature' encompasses all the temperatures passed through during the hardening process), whilst the Commission and the Federal Office favour the opposite interpretation (that expression refers only to the temperature reached at the time of maximum viscosity of the dough).

Raiffeisen starts from the 'factual' premise that hardening does not occur suddenly but is the result of a process consisting of various stages (setting in motion, swelling, shrinking) and spans a certain period of time. If, therefore, it is to reflect that state of affairs, the expression 'hardening temperature' can refer only to a group of temperatures, namely those which are recorded between 48°C and 75°C, which correspond to the start of the increase in hardening and the abrupt end of the process respectively.

That interpretation, moreover, is supported by a number of factors, starting with the wording of the contested provision. According to Raiffeisen, it is indisputable that, had it considered the temperature at the time of maximum viscosity to be decisive, the legislature would have used the expression 'final hardening temperature' or would have required the temperature of 63°C to be measured 'at the summit of the curve'. That is borne out by the fact that those expressions are used in the amendment which was made to the provision in question, albeit after the material events in this case, by Commission Regulation (EEC) No 2160/84 of 26 July 1984.

Further proof is furnished by earlier versions of the fifth indent of Article 6 (1). Originally, the Commission had laid down that the number of amylogram units shown on the curve should not be less than 330 (see the fourth indent of Article 6 (1) of Regulation (EEC) No 1415/69 of 22 July 1969, *Journal Officiel* 1969, L 182, p. 11; and the fifth indent of Article 6 (1) of Regulation (EEC) No 1493/71 of 13 July 1971, Official Journal, English Special Edition 1971 (II), p. 509). The requirement that the temperature was to be at least 63°C for the grant of that increase was introduced only with the adoption of Regulation (EEC) No 1833/76 of 28 July 1976 (Official Journal 1976, L 203, p. 28), which at the same time reduced the number of amylogram units to 200.

Finally, Raiffeisen relies, in support of its argument, on the objectives pursued by Regulation No 1570/77, which contains the provision at issue. The preamble to that regulation states that the price increase is to be granted where the rye 'meets minimum physical and technological criteria as to quality'. Raiffeisen points out that that sentence is deliberately couched in general terms. Thus the legislature's purpose would be frustrated if a court did not treat as eligible for the price increase all rye which, having regard to the degree of hardening of the dough, may be considered suitable for bread-making.

4. I am not swayed by those arguments. In the first place I would point out that, in specifying the threshold temperature at which the number of amylogram units must be not less than 200, the legislature refers to '*a* hardening temperature'. Hence, in my view, to interpret those words as referring to a *range* of temperatures is dangerous to say the least.

Another factor which inclines me in favour of the interpretation suggested by the Commission and by the Federal Office can be derived from Regulation No 2160/84. I am well aware that the latter regulation was adopted subsequently, in relation to the material events in this case, and I do not therefore intend to have recourse to the words ('summit of the curve') which it inserted in the fifth indent of Article 6 (1) in order to clarify the scope of that provision (see, moreover, paragraph 6 of the Court's judgment of 15 September 1983 in Case 293/82 *Papierfabrik Schoellershammer* [1983] ECR 4219). Instead I would draw the Court's attention to the third recital in the preamble to that regulation which states that 'it is established practice' to measure the viscosity of the dough with a Brabender amylograph.

That practice can be traced back to March 1976, when the International Association for Cereal Chemistry adopted Standard Method ICC No 126, which was taken over by the Commission a few months later. That is borne out by the first recital in the preamble to Regulation No 1833/76, which states that since 'the criteria as to quality required for granting the . . . increase no longer correspond to present commercial practices', it is necessary to amend the rules in force 'in accordance with market practices'. If that is so, and if the Community legislature has been referring to the Brabender method since the mid-1970s, Raiffeisen's reference to the earlier versions of the contested provision becomes wholly irrelevant. It is indisputable from a technical point of view that, according to that method, at a temperature of at least 63°C the 200 amylogram units must be measured for the first time on the rising amylogram curve, and consequently at the time of maximum viscosity of the dough.

The plaintiff's final argument is as weak as the other arguments which it has advanced. I do not believe that, merely by stating that rye must meet 'minimum physical and technological criteria as to quality', the fifth recital in the preamble to Regulation No 1570/77 is laying down a general or, to use Raiffeisen's own words, an 'abstract' requirement. That expression is defined by the contested provision which requires not that rye should be 'generally suitable' for bread-making but that it should be of 'particularly good quality' (I would draw attention to the difference between those words and the wording — 'sound, fair and of marketable quality' — used in Article 5 (2) of Commission Regulation (EEC) No 1629/77 of 20 July 1977, Official Journal 1981, L 181, p. 26, to define the properties which common wheat of bread-making quality must possess in order to qualify for intervention).

There is no doubt that only rye dough which has reached maximum viscosity for the first time at a temperature of at least 63°C is of 'particularly good quality'. That was recognized by Raiffeisen's own expert who acknowledged at the hearing that 'where the number of amylogram units in products is high but the hardening temperature of those products is less than 63°C at the summit of the amylogram curve, the crust detaches itself appreciably, there is a tendency for water to accumulate beneath the crust and the elasticity of the crumb is very weak or even defective'.

5. My conclusion renders Question 2 devoid of purpose. With regard to Questions 3 and 4, I would merely point out that the principle of equality exists in Community law and is in no way encroached upon by the fifth indent of Article 6 (1). Since the price increase is granted to producers of rye which is of 'particularly good quality', the different treatment accorded to rye of lesser quality would appear to be objectively justified.

6. In the light of all the foregoing considerations, I suggest that the Court answer the questions submitted to it by the Bundesverwaltungsgericht by order of 9 May 1985 in the proceedings between the Bundesanstalt für landwirtschaftliche Marktordnung and Raiffeisen Hauptgenossenschaft eG in the following manner:

The expression 'hardening temperature' in the fifth indent of Article 6 (1) of Commission Regulation (EEC) No 1570/77 of 11 July 1977 on price increases and reductions applicable to intervention in cereals must be interpreted as referring to a temperature of at least 63°C which is reached, on the curve described by a Brabender amylograph, at the time of maximum viscosity of the dough.