REPORT FOR THE HEARING
delivered in Case 215/85 *

I — Facts and procedure

A — *Legal background and facts of the case*

1. Commission Regulation (EEC) No 1570/77 of 11 July 1977 on price increases and reductions applicable to intervention in cereals provides in the fifth indent of Article 6 (1) that intervention agencies may apply, at the time of intervention, a special price increase in respect of rye where its particularly good quality is suitable for bread-making provided 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'.

2. Raiffeisen Hauptgenossenschaft eG, a cooperative society (hereinafter referred to as 'Raiffeisen'), applied on several occasions for the grant of that special price increase in respect of a total quantity of 29 706 tonnes of bread rye harvested in 1978 and bought into intervention by the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as 'the Federal Office'] between August 1978 and January 1979.

Raiffeisen's applications were rejected by the Federal Office in a series of decisions on the ground, in each case, that the rye did not satisfy the quality requirements laid down in the fifth indent of Article 6 (1) of Regulation No 1570/77.

The tests carried out to determine the quality of the rye revealed an amylogram curve showing that the maximum of 360 amylogram units, based on full milling, including the germ, had already been reached at a hardening temperature of the starch of 60°C. At a hardening temperature of the starch of at least 63°C, specified in the aforesaid provision, the amylogram curve began to redescend and the number of units shown on it was only 280.

According to the Federal Office, the fact that at a hardening temperature of the starch of 63°C the required minimum of 200 amylogram units, based on full milling, including the germ, were reached on a falling amylogram curve was insufficient for the grant of a price increase.

3. Raiffeisen challenged the importance attributed to the path of the amylogram curve and brought an action against the rejection of its applications before the Verwaltungsgericht [Administrative Court]. By judgment of 24 September 1981, the action was dismissed as unfounded. At a hardening temperature of the starch of at least 63°C the number of amylogram units, based on full milling, including the germ, was to reach 200 'for the first time'. Accordingly, the required coordinate had to be on a rising amylogram curve.

4. Raiffeisen appealed against that decision to the Verwaltungsgerichtshof [Higher Administrative Court] which, by judgment of 24 October 1983, decided that the price increase should be granted. The Verwaltungsgericht pointed out that there was nothing in the wording of the provision in question to indicate that the number of amylogram units, based on full milling, including the germ, at a hardening temperature of the starch of at least 63°C had to be at least 200 on a rising amylogram curve. In its view, it is irrelevant whether the required coordinate is reached at a time when the viscosity of the starch is increasing or decreasing.

* Language of the Case: German.

5. The Federal Office appealed on a point of law against that judgment on the ground that, in accordance with the intervention guides it had issued, which refer to the 'Brabender method', the fifth indent of Article 6 (1) of Regulation No 1570/77 should be interpreted as meaning that the amylogram units are to be measured at the summit of the amylogram curve. Since the hardening temperature of the starch should be recorded at the time of maximum viscosity, it is not sufficient if the maximum degree of hardening, measured in amylogram units, is reached at a temperature of less than 63°C. The objective reason for that requirement is that rye-flour becomes progressively less suitable for baking as the amylogram curve falls. It follows that where rye has already passed the maximum number of amylogram units on reaching the threshold temperature of 63°C, it no longer has the quality needed for the grant of a price increase.

Raiffeisen considered that the correctness of the Verwaltungsgerichtshof's interpretation of the contested provision was also confirmed by the amendment made to that provision by Article 1 (4) of Commission Regulation (EEC) No 2160/84 of 26 July 1984 (Official Journal 1984, L 197, p. 21). As a result of that amendment, the fifth indent of Article 6 (1) of Regulation No 1570/77 now requires that 'the viscosity of an aqueous suspension of a full milling, including the germ, is not less than 200 units as recorded on a Brabender amylograph at a temperature of at least 63°C at the summit of the curve'. Accordingly, the fact that the earlier provision was expressly amended shows that the amendment cannot be regarded as a mere interpretation of that provision.

6. Taking the view that the case raised a number of questions concerning the interpretation of the relevant rules of Community law, the Bundesverwaltungsgericht stayed the proceedings and decided, pursuant to Article 177 of the EEC Treaty, to seek a preliminary ruling from the Court on the following questions:

'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?'

B — *Observations of the Bundesverwaltungsgericht*

The essential question which arises in this case is, according to the Bundesverwaltungsgericht, whether the bread rye sold by Raiffeisen to the Federal Office satisfies the quality requirement laid down in the fifth indent of Article 6 (1) of Commission Regulation No 1570/77 of 11 July 1977.

The decision to be given by the Bundesverwaltungsgericht on the plaintiff's claim depends on the answers given to the questions referred to the Court. The Bundesverwaltungsgericht has expressed the following views on those questions.

It emphasizes in the first place the difficulties raised by the interpretation of the expression 'hardening temperature' used in the aforesaid provision.

On the basis of the Verwaltungsgerichtshof's findings of fact, the Bundesverwaltungsgericht observes that the suitability for baking of the rye-flour made from bread rye depends on the hardening capability of the dough made from rye-flour and that the hardening properties of that dough result from the degree of viscosity of the starch paste at different temperatures.

The Bundesverwaltungsgericht describes the process used to measure the hardening capability of the dough and comes to the conclusion that the hardening process is one of a certain duration, in which as the temperature rises the viscosity of the starch paste first increases and from a certain temperature diminishes.

After making those observations the Bundesverwaltungsgericht raises the question of how the expression 'hardening temperature' is to be interpreted and, if all the temperatures passed through during the hardening process are to be regarded as the hardening temperature, how the contested provision as a whole is to be interpreted.

In its view, since the threshold of a hardening temperature of 63°C is reached either on a rising or on a falling amylogram curve, and since in both cases the amylogram units (based on full milling, including the germ) are not less than 200, the terms of the contested provision are satisfied in both cases.

The use of the expression 'at least' 63°C does not mean, contrary to the argument put forward by the Federal Office, that the threshold for a hardening temperature of 63°C must be reached on a rising amylogram curve. Moreover, the Bundesverwaltungsgericht challenges the reference made by the Commission in the preamble to Regulation No 2160/84 of 26 July 1984 amending Regulation No 1570/77; according to that preamble the amylogram data are already designed in the regulation as originally enacted to record the maximum viscosity of the dough. The Bundesverwaltungsgericht, however, considers that the 'implied' aim in the mind of the legislature cannot be decisive in interpreting the provision as originally enacted since such an aim must be expressed sufficiently clearly in the provision itself and it is doubtful whether that is so in this case.

With regard to the third and fourth questions referred to the Court, the Bundesverwaltungsgericht points out that it is necessary to begin by resolving the problem whether it can be determined with sufficient certainty that the bread rye in respect of which it is sufficient if just 200 amylogram units are reached at the summit of the amylogram curve at a hardening temperature of 63°C is of a better quality than bread rye in respect of which, at the same temperature, the amylogram units are still considerably in excess of 200 on a falling amylogram curve. The rye purchased from Raiffeisen falls into the latter category, according to the figures set out in Annexes 1 and 2 to the order for reference.

The Bundesverwaltungsgericht does not regard that rye as being of a lower quality than the rye referred to in the contested provision but it takes the view, none the less, that, as this is a question of fact, an expert's report will have to be sought. The Bundesverwaltungsgericht has also attached to its order for reference two articles, by Professor H. Bolling and Dr D. Weipert, dealing with problems concerning the quality of rye (Annexes 3 and 4).

C — *Written procedure*

1. The order of the Bundesverwaltungsgericht was received at the Court Registry on 17 July 1985.

2. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 9 September 1985 by the Federal Office, the appellant on a point of law, represented by Mr Stockburger, Rechtsanwalt, on 7 October 1985 by Raiffeisen, the respondent in the appeal on a point of law, represented by Mr Festge, Rechtsanwalt, and on 8 October 1985 by the Commission of the European Communities, represented by its Legal Adviser, Dierk Booss.

3. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it decided to ask the parties to appear at the hearing accompanied by an expert on the subject of the baking quality of rye.

By decision of 16 May 1986, the Court decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the Third Chamber.

II — Written observations submitted to the Court

A — *First and second questions*

1. *Observations submitted by Raiffeisen*

According to Raiffeisen, it is clear from an analysis of the precise course of the operation carried out to measure and record the viscosity of rye-flour, by means of a Brabender amylograph, that the amylogram curve starts at a temperature of 25°C and stops at 90°C. That is also confirmed by the amylogram curves in Annexes 1 and 2 to the Bundesverwaltungsgericht's order for reference.

During that rise in temperature (spanning 65 degrees), the point at which the hardening process begins, the increase in viscosity, the time of maximum viscosity and the time and the speed at which it subsequently decreases are recorded. The hardening of the starch does not occur suddenly but extends over a fairly lengthy period and that is why the expression 'hardening temperature' in the fifth indent of Article 6 (1) of Regulation No 1570/77 cannot be interpreted as meaning the temperature recorded at the time of maximum viscosity.

On the contrary, it is the entire range of temperatures from 25°C to 90°C, recorded during the measuring process, which should be regarded as the hardening temperature since viscosity is established throughout that process or in any event it is at the very least the range of temperatures between approximately 48°C and 75°C, in which the hardening sharply increases and then decreases, that constitutes the hardening temperature.

Raiffeisen maintains that this interpretation is supported by the actual wording of the fifth indent of Article 6 (1) of Regulation No 1570/77, by the meaning and purpose of that provision, and by its historical background.

According to Raiffeisen, it is clear from the wording of the provision in question that if the authors of Regulation No 1570/77 had intended the only relevant temperature to be that reached at the time of maximum viscosity, they would not have referred generally to the 'hardening temperature' but specifically to the 'final hardening temperature'. Moreover, that provision was subsequently formulated in different terms when the amending regulation, Commission Regulation No 2160/84 of 26 July 1984, was adopted.

Raiffeisen adds that, even on the assumption that the author of the regulation tacitly intended the aforesaid provision to mean something other than what, on an objective view, is expressed by its wording, he must expect to be confronted by way of rebuttal by the wording chosen. By virtue of the principle of the protection of legitimate expectation, which also applies under Community law, the aforesaid provision should be applied in a manner consistent with the way in which Raiffeisen and any objective third party were bound to have understood it.

The interpretation favoured by Raiffeisen is also borne out by the meaning and purpose of Article 6.

Raiffeisen distinguishes between the different qualities of rye produced on the basis of two principal categories: first, rye intended as feed for animals, and secondly rye for bread-making.

According to Article 7 of Regulation No 2727/75 of the Council of 29 October 1975, rye offered to intervention agencies must be bought in like any other cereal.

Since the intervention price of rye depends on a specified standard quality, price increases and reductions are applied depending on whether the quality of the product offered to the intervention agency is inferior or superior to the standard quality.

Commission Regulation No 1570/77 which fixes the price increases and reductions applicable to intervention in cereals also provides for the grant of a special price increase for bread rye; the purpose of that increase and the criteria applicable to it are set out in the fifth recital in the preamble to the regulation.

Raiffeisen considers that the minimum technical criterion as to quality specified in the preamble to the regulation is sufficient since that criterion leaves intact a broad discretion which corresponds, within the range of bread ryes, to the difference between minimum quality and maximum quality. Accordingly, any rye with a sufficient number of amylogram units to make it suitable for bread-making must be covered by the fifth indent of Article 6 (1) of Regulation No 1570/77.

Finally, the historical evolution of Article 6 also confirms that Raiffeisen's argument is correct.

The fourth indent of Article 6 (1) of Regulation (EEC) No 1415/69 of the Commission 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 the Commission of 13 July 1971 (Official Journal, English Special Edition 1971 (II), p. 509) provided, as originally enacted, that a price increase was to be granted for rye provided that 'the amylogram units are not less than 330 units'.

Those provisions were based only on the level of amylogram units and it was only with the adoption of Commission Regulation (EEC) No 1833/76 of 28 July 1976 (Official Journal 1976, L 203, p. 28) that Article 6 (1) of Regulation No 1493/71 was amended and a second criterion, namely a temperature of 63°C, was introduced.

It is also apparent from Commission Regulation No 2160/84 of 26 July 1984, which is expressly described as an amending regulation, that previously there was no need to rely on the newly introduced factor, namely 'the summit of the curve'.

Nor can any other inference be drawn from the third recital in the preamble to Regulation No 2160/84 or from the reference to the Brabender method, since that method is based exclusively on the level of amylogram units and does not involve any reference to the hardening temperature.

Accordingly, it is sufficient, in Raiffeisen's view, if, at a hardening temperature of at least 63°C, the units on a falling amylogram curve are not less than 200.

2. *Observations submitted by the Federal Office*

The Federal Office has not submitted any written observations in addition to those submitted to the Bundesverwaltungsgericht in the grounds of its appeal on a point of law of 7 June 1984 and in its further pleading of 7 March 1985.

In its appeal on a point of law, the Federal Office contended that, in accordance with its guidelines on the subject of intervention, the specific requirements relating to the quality of rye for the purposes of the fifth indent of Article 6 (1) of Regulation No 1570/77 are fulfilled only if, when the maximum degree of hardening is reached, the number of amylogram units, based on full milling, including the germ, is at least 200 at a minimum temperature of 63°C. Accordingly, the number of amylogram units was to be measured at the summit of the amylogram curve and the temperature was to be read off at the time of maximum viscosity. According to the Federal Office, when the amylogram curve is falling the quality of flour made from rye rapidly becomes less suitable for baking even where the number of amylogram units recorded is still above the threshold of 200 units at a hardening temperature of 63°C.

The Federal Office challenges the judgment of the Verwaltungsgerichtshof essentially in two respects.

The first concerns the literal interpretation of the provision at issue. The wording of that provision envisages a control procedure in accordance with the Brabender method, as defined in the intervention guidelines. However, the decisive criterion for establishing that flour is of bread-making quality is the relationship between temperature (63° C) and maximum viscosity (equal to the summit of the amylogram curve). Accordingly, the expression 'not less than 200 units' in the fifth indent of Article 6 (1) of Regulation No 1570/77 can only refer to the summit of the amylogram curve.

The second concerns the wording of the fifth recital in the preamble to Regulation No 1570/77. The fact that it is drafted in abstract terms makes it impossible to define the physical and technological criteria which rye suitable for bread-making must satisfy in order to qualify for a price increase. It has also proved to be impossible to deduce from the wording of that recital any criteria for interpreting the relationship between the number of amylogram units, based on full milling, including the germ, and the hardening temperature of the starch.

Finally, in its further pleading of 7 March 1985, the Federal Office challenges Raiffeisen's argument to the effect that the description of Commission Regulation No 2160/84 of 26 July 1984 as an 'amending' regulation is evidence of an alteration in the legal position.

The Federal Office maintains, on the contrary, that it is clear from the wording of the preamble to Regulation No 2160/84 that the Community legislature intended to supplement the wording of the fifth indent of Article 6 (1) of Regulation No 1570/77 solely with a view to clarifying and defining the legal position which has obtained since the adoption of Regulation No 1570/77. Moreover, the Federal Office draws attention to the fact that the expressions 'amending regulation' or 'amending law' are used, from the point of view of the legislative technique, not only to make substantive legal amendments but also merely to introduce drafting amendments, whilst the legal position remains unchanged.

3. *Observations submitted by the Commission*

The Commission refers in the first place to the difficulties raised by the interpretation of the fifth indent of Article 6 (1) of Regulation No 1570/77 owing to the fact that the hardening temperature is not defined therein. Those difficulties also explain why, when the Commission adopted its amending regulation, No 2160/84 of 26 July 1984, it formulated the fifth indent in such a way as to make the concept of hardening temperature redundant. The reasons for that amendment were explained in the third recital in the preamble to that regulation.

The Commission also considers that there is no justification for interpreting a provision adopted in 1977 exclusively in the light of a provision which was adopted seven years later where that interpretation demands the attribution to the later provision of a scope not expressly stated therein. In that regard, it refers to the position taken by the Court in its judgment of 15 September 1983 in Case 283/82 *Papierfabrik Schoellershammer* v *Commission* [1983] ECR 4219, paragraph 6 of the decision, namely that it is not possible to draw from the subsequent amendment of a regulation which had the effect of clarifying it any inferences regarding the interpretation to be attributed to the regulation as originally enacted. An analysis of the spirit and scheme of the provision, solely on the basis of its original wording, will determine which interpretation is correct.

The meaning and purpose of the provision in question emerge, according to the Commission, from Article 7 (2) of Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals, as amended by Council Regulation (EEC) No 1143/76 of

17 May 1976 (Official Journal 1976, L 130, p. 1); according to that provision, when the intervention price is fixed, a special price increase may be applied for bread-making rye with certain quality characteristics.

Article 6 (1) of Regulation No 1570/77 specifies those characteristics by stating that the rye must be of 'particularly good quality', which is defined in detail.

It follows from a comparison between that provision and Article 5 (2) of Commission Regulation (EEC) No 1629/77 of 20 July 1977 laying down detailed rules of application for special intervention measures to support the development of the market in common wheat of bread-making quality (Official Journal 1977, L 181, p. 26) that common wheat of bread-making quality plainly does not have to be of particularly good quality since it is accepted for intervention if it is 'sound, fair and of marketable quality'. Moreover, that is why some of the criteria laid down in Article 5 (2) of that regulation are less strict than the corresponding criteria set out in Article 6 (2) of Regulation No 1570/77.

The Commission therefore considers that the provision in question is designed to ensure that only rye of particularly good quality qualifies for a price increase.

In that regard, the Commission mentions the two scientific articles annexed to the order for reference and to ICC Standard Method No 126 of the International Association for Cereal Chemistry, dated March 1976, all of which refer to the summit of the amylogram curve and are based on the premise that the Brabender method should be used and that the number of amylogram units should be measured at the time of maximum viscosity.

The Commission adds that the Brabender method, which consists in measuring the number of amylogram units at the time of maximum viscosity, had already been recognized before 1984 at international level and in Germany. That is the method which is applied in the fifth indent of Article 6 (1) of Regulation No 1570/77, and the hardening temperature within the meaning of that provision is therefore the temperature at which maximum viscosity is attained. Accordingly, there is no need to answer the second question submitted for a preliminary ruling.

B — *Third and fourth questions*

1. *Observations submitted by Raiffeisen*

Raiffeisen states its view on the other two questions submitted for a preliminary ruling only as a secondary matter.

With regard to the third question, it states in the first place that the principle according to which identical facts must be treated in the same manner and the principle of non-discrimination resulting therefrom constitute a thread which runs throughout the EEC Treaty.

Next, Raiffeisen points out that the general principle of equality is one of the fundamental rights of the Community and that observance thereof ranks among the general principles of law protected by the Court of Justice. In that regard, it refers to the Court's judgment of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 at p. 1134.

According to that principle, which is one of the fundamental principles of Community law, comparable situations are not to be treated differently unless differentiation is objectively justified. That is clear from the case-law of the Court of Justice and in particular from the judgments of 19 October 1977 in Joined Cases 117/76 and 16/77 'Quellmehl' [1977] ECR 1753 at p. 1770 and in Joined Cases 124/76 and 20/77 'Maize groats and meal' [1977] ECR

1795 at p. 1812), the judgments of 25 October 1978 in Case 125/77 'Isoglucose' [1978] ECR 1991 and in Joined Cases 103 and 145/77 'Isoglucose' [1978] ECR 2037, the judgment of 27 March 1980 in Joined Cases 66, 127 and 128/79 'The effect in point of time of preliminary rulings' [1980] ECR 1237 and the judgment of 8 October 1980 in Case 810/79 'German voluntary insurance' [1980] ECR 2747.

That rule, according to which identical situations must be treated in the same manner, must be observed by the Council and the Commission in the exercise of their legislative powers.

With regard to the fourth question submitted by the Bundesverwaltungsgericht, Raiffeisen refers to the Aberham Laboratory Report (Annex 1).

The result of the baking tests and analyses carried out show that rye for which the number of units on the amylogram curve is 470 to 610 at a temperature of 61°C must be regarded as being of the same quality as rye for which the number of units at a hardening temperature of at least 63°C is not less than 200 on the rising amylogram curve. That is also confirmed by Professor A. Bolling and Dr M. Weipert in their article which is attached as Annex 3 to the Bunderverwaltungsgericht's order for reference.

However, if the two bread ryes are of the same quality, there is no objective justification for differentiating between them. Raiffeisen considers that the legislative authority is then under a duty to assess identical circumstances in the same manner and to grant the special price increase in respect of both qualities of bread rye.

2. *Observations submitted by the Commission*

With regard to Questions 3 and 4 submitted by the Bundesverwaltungsgericht, the Commission states in the first place that Community law contains a general principle of equality which requires that similar situations are not to be treated differently unless differentiation is objectively justified.

The Commission considers, however, that it is justified to treat the rye delivered by the plaintiff to the Federal Office differently from rye which satisfies the criteria laid down in the fifth indent of Article 6 (1) of Regulation No 1570/77, with the result that the principle of equality has not been violated.

Since only a measurement carried out in accordance with the Brabender method, under which maximum viscosity is reached at a temperature of 63°C makes it possible to establish that rye is of particularly good quality within the meaning of Article 6 (1) of the aforesaid regulation, it follows that, if the path of the amylogram curve is different, the quality may also be good but it no longer corresponds to the particularly good uniform quality required by the Community legislature.

In that regard, the Commission relies on the opinion expressed by the authors of the article in Annex 3 to the order for reference, according to which the 'maximum hardening temperature must be regarded as a quality criterion for starch', and in paragraph 4 (2) of the article attached as Annex 4 to the order for reference, which states by way of explanation that 'where the number of amylogram units in products is high (over 350) 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'.

J. C. Moitinho de Almeida
Judge-Rapporteur