provision may be relied on by individuals as against a Member State only after that period has expired if the Member State fails to implement the decision or does so incorrectly.

The fact that the decision allows its addressees to derogate from clear and precise provisions in it cannot in itself deprive those provisions of direct effect. In particular, such provisions may have direct effect where recourse to the possibilities of derogation thereby granted may be reviewed by the Court.

Member State in order to oppose the collection of fees in excess of the amount provided for by that provision where the conditions to which Article 2(2) of the decision subjects the possibility of increasing the level of fees laid down by Article 2(1) are not satisfied, namely where the circumstances prevailing in the Member State concerned diverge from the Community average and the fees do not exceed the actual costs of the inspection. However, Article 2(1) of the decision may be relied on only in order to challenge demands for the payment of fees issued after the expiry of the period laid down by Article 11 of that decision.

2. Article 2(1) of Decision 88/408 on the levels of the fees to be charged for health inspections and controls of fresh meat pursuant to Directive 85/73 may be relied on by a private individual as against a Member State in order to oppose the collection of fees in excess of the amount provided for by that provision where the conditions to which Article 2(2) of the decision subjects the possibility of increasing the level of fees laid down by Article 2(1) are not satisfied, namely where the circumstances prevailing in the Member State concerned diverge from the Community average and the fees do not exceed the actual costs of the inspection. However, Article 2(1) of the decision may be relied on only in order to challenge demands for the payment of fees issued after the expiry of the period laid down by Article 11 of that decision.

Article 2(2) of Decision 88/408 must be interpreted as allowing a Member State to delegate to regional or local authorities the exercise of the power conferred on it by that provision.

REPORT FOR THE HEARING
in Case C-156/91 *

I — Facts and procedure

1. *Community legal background*

Council Directive 85/73/EEC of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultry meat (OJ 1985 L 32, p. 14) harmonizes the rules for the financing of such inspections and controls. The object pursued is to prevent the functioning of the common organizations of the market from being affected by distortions of competition resulting from

* Language of the case: German.

divergences between national laws on the financing of health inspections and controls.

Article 1(1) of Directive 85/73 requires Member States to ensure that from 1 January 1986 fees are collected for the costs occasioned by health inspections and controls when the animals referred to in the directive are slaughtered. Under Article 2(1) of Directive 85/73 the Council had to fix the standard level of fees before 1 January 1986. Member States were nevertheless authorized 'to collect an amount exceeding the level or levels referred to in paragraph 1 provided that the total fee collected for each Member State remains lower than or equal to the real figure for inspection costs' (Article 2(2) of Directive 85/73).

The period allowed to the Member States, other than the Hellenic Republic, for transposing Directive 85/73 into national law expired on 1 January 1986 (Article 4 of Directive 85/73).

The standard level of fees referred to in Article 2(1) of Directive 85/73 were fixed by Council Decision 83/408/EEC of 15 June 1988 on the levels of the fees to be charged for health inspections and controls of fresh meat pursuant to Directive 85/73/EEC (OJ 1988 L 194, p. 24, hereinafter 'Decision 88/498'. Article 2(1) of the decision fixes one or more standard fees for each type of animal. Article 10 provides a procedure for review of the fees in order to take account of the change in the cost inspections and controls.

The first subparagraph of Article 2(2) of Decision 88/408 provides:

'Until the review provided for in Article 10, Member States where salary costs, the structure of its establishments and the ratio between veterinarians and inspectors differ from the rules of the Community average adopted for the calculation of the standard amounts laid down in paragraph 1 may depart from them through increases or reductions up or down to the real figure for inspection costs.'

The conditions which must be satisfied before a Member State may reduce or increase the fees are set out in an annex to Decision 88/408. As regards increases, that annex refers first of all to the principle according to which Member States may increase the standard level of fees to cover higher costs. It then cites by way of example various circumstances likely to increase the costs of controls and inspections such as longer waiting periods for inspection staff owing to inadequate advance planning by the establishment of animal deliveries or lack of uniformity in the animals for slaughter from the point of view of age, size, weight and health.

Article 7 of Decision 88/408 provides that checks may be carried out in order to verify 'the application in the Member States or in the case of individual establishments, particularly in the event of recourse to the

exemptions provided for in Article 2(2), of the rules for calculation adopted by this decision ...'.

Finally Article 11 of Decision 88/408 provides:

'Member States shall implement the provisions of this Decision not later than 31 December 1990. They shall forthwith inform the Commission thereof.'

2. *National legal background*

In the Federal Republic of Germany the charging of fees for the costs incurred on health controls and inspections of animals to be slaughtered is based on Paragraph 24 of the Fleischhygienegesetz (Law on meat hygiene Bundesgesetzblatt I, p. 649), which was inserted into that law by the Law of 13 April 1986 (Bundesgesetzblatt I, p. 398). Paragraph 24 provides:

'1. Fees shall be payable to cover costs pursuant to administrative measures adopted under the present law and regulations governing its application.

2. Measures which involve costs under subparagraph 1 shall be determined by the law of the Land. Fees shall be calculated pursuant to Council Directive 85/73/EEC of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultry meat (OJ L 32, p. 14) ...'.

On 3 April 1987 the *Land* Schleswig-Holstein adopted a regulation amending the regulation on administrative fees in matters of veterinary administration (Gesetz-und Verordnungsblatt für Schleswig-Holstein 1987, p. 173, hereinafter 'the *Land* Regulation 1987'). That regulation fixes the amount of fees for health checks and inspections. It is more than the standard levels provided for in Article 2(1) of Decision 88/408.

3. *The main proceedings and the preliminary questions*

Hansa Fleisch Ernst Mundt GmbH&Co KG ('Hansa Fleisch') operates a slaughterhouse, a cutting plant and refrigeration unit licensed for Community trade in meat. Meat inspection is carried out by staff of the Veterinary and Food Inspection Department under the authority of the Landrat des Kreises Schleswig-Flensburg. It charges fees for the inspections carried out mainly on the basis of the *Land* Regulation 1987.

Hansa Fleisch objected to the fees from 23 May 1989 onwards. The Landrat rejected its objections on the basis of the *Land* Regulation 1987. Hansa Fleisch thereupon brought an action against the decisions of

rejection by the Landrat before the Verwaltungsgericht Schleswig-Holstein.

It claimed in particular before the Verwaltungsgericht that the *Land* Regulation 1987 on which the notification of fees issued by the Landrat were based was contrary to the combined provisions of Paragraph 24 of the Law on meat hygiene and Decision 88/408 to which, in Hansa Fleisch's view, Paragraph 24(2) of that Law by implication refers.

According to the national court, the merits of the action brought by Hansa Fleisch turn on the question whether and to what extent Hansa Fleisch can rely on the provisions of Decision 88/408.

In that respect, the national court queries whether the fact that Member States were given a period expiring on 31 December 1990 to implement Decision 88/408 is relevant it might not be possible to raise. In its view, it might not be possible to raise the existence of that period against Member States such as the Federal Republic of Germany which had transposed Directive 85/73 into national law when Decision 88/408 was adopted.

Furthermore, the national court points out that only unconditional provisions of Community law may have direct effect in the national legal systems of the Member States. In that respect, it considers that the possibilities of derogation provided for by Article 2(2) of Decision 88/408 may prevent direct effect from being accorded to the provisions of Article 2(1) which fix the standard levels of fees which are in principle applicable. However, the national court queries whether in any event the Federal Republic of Germany could use those possibilities of derogation. It points out that there is no provision of German law which provides for recourse to those derogations by the State as such and considers that recourse to the possibilities of derogation provided for by Article 2(2) of Decision 88/408 is possible in the Federal Republic of Germany only if the constituent parts of the State, such as the *Länder*, were authorized individually to use them.

In those circumstances, on 15 March 1991 the Verwaltungsgericht Schleswig-Holstein stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Does Council Directive 85/73/EEC, in conjunction with Council Decision 88/408/EEC, lend itself to direct application so that in reliance thereon a Community national may successfully claim before a court of a Member State, the Federal Republic of Germany, that at the latest from the date of the entry into force of Council Decision 88/408/EEC the Member State is no longer empowered to charge fees within the meaning of Article 1 of that decision that exceed the standard fee levels indicated in Article 2(1) thereof?

2. Does the Court's reply to the first question depend on whether the period

prescribed in Article 11 of Council Decision 88/408/EEC has already expired?

3. Does the Court's reply to the first question depend on whether Article 2(2) of Council Decision 88/408/EEC is to be interpreted as meaning that the provision concerning exemptions may be relied upon by a Member State as a whole but not by the individual constituent parts of a Member State, for instance the Bundesländer [Federal States] of the Federal Republic of Germany?'

4. *Procedure before the Court*

The order of the Verwaltungsgericht Schleswig-Holstein was registered at the Court registry on 13 June 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were lodged by Hansa Fleisch, represented by Ingeborg Adrian-Mundt, Rechtsanwalt, Schleswig, the Landrat des Kreises Schleswig-Flensburg, represented by Ulrich Seyffert, of its Legal Office, the Government of the Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of the Economy, and Joachim Karl, Regierungsdirektor at the same ministry, acting as Agents, and the Commission of the European Communities, represented by Dr Ulrich Wölker, of its Legal Service, acting as Agent.

Upon 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. By a decision of 25 March 1992 pursuant to Article 95(1)(2) of the Rules of Procedure the Court assigned the case to the Second Chamber.

II — Written observations submitted to the Court

Questions 1 and 2

Hansa Fleisch considers that Article 2(1) of Decision 88/408 has direct effect and may be relied upon by undertakings such as Hansa Fleisch, to which it is of direct and individual concern, even before the expiry of the period allowed to Member States for its implementation.

In support of that argument Hansa Fleisch states that Decision 88/408 specifies both the nature of the fees falling within its scope and their amount. Furthermore, as regards the possibilities of derogation provided for by Article 2(2) of Decision 88/408, Hansa Fleisch points out that the decision establishes the principles governing recourse to those derogations and specifies in its annex the circumstances in which a Member State may have recourse to them. The Member States have therefore no discretion in the implementation of Decision 88/408.

Hansa Fleisch then states that Article 6(2) of Decision 88/408 defines the group of undertakings required to pay the fees by referring

to the nature of the business engaged in by such undertakings. In Hansa Fleisch's view, Decision 88/408 is of direct and individual concern to those undertakings. Having regard to the precision of the provisions concerning the nature of the fees falling within the scope of that decision, the rates of those fees and the conditions under which Member States may derogate from those rates, the decision falls within the fourth paragraph of Article 189 of the Treaty and is capable of producing its effects in the domestic legal system of the Member States without the need for any measure transposing it. Furthermore, the undertakings referred to in Article 6(2) of the decision form a clearly defined group of operators which it is possible to identify in the same way as if they had been designated by name in the decision.

Hansa Fleisch further argues that Decision 88/408 requires all the undertakings referred to in Article 6(2) to adopt a particular conduct: they are required to pay the fee prescribed by the decision. Therefore, in order to enjoy appropriate legal protection they must, as a counterpart, have the possibility of relying on the provisions of the decision before the national courts if the State (or one of its component parts) adopts, with regard to them, rules contrary to those laid down in Decision 88/408.

According to Hansa Fleisch, that possibility must be accorded to the undertakings in question as soon as the Member State has transposed Directive 85/73 into national law.

In that respect, Hansa Fleisch argues that the transposition of Directive 85/73 into national law — in particular by way of a reference in the national legislation to the provisions — automatic of that directive — entails the adjustment of national law to the provisions of Decision 88/408. There is an indissoluble link between Directive 85/73 and Decision 88/408 since the adoption of the decision was expressly provided for in Article 2(1) of the directive and Article 1 of Decision 88/408 expressly mentions that it was adopted in application of Directive 85/73.

Furthermore, Hansa Fleisch considers that the transposition of Directive 85/73 into national law deprives the Member State of power to legislate which it had in the field covered by the directive. Accordingly, when a Member State has transposed Directive 85/73 into national law it is required to comply with the provisions of Decision 88/408 even before the expiry of the period prescribed by Article 11 of that decision for its implementation by the Member States.

The *Landrat* states, as a preliminary point, that in their relations with the Member States, individuals may rely only on provisions of Community law which are clear, precise and unconditional and in the application of which Member States have no discretion.

According to the Landrat, the Member States have a certain discretion in the application of

Article 2(1) of Decision 88/408. That provision therefore has no direct effect.

The Landrat puts forward two grounds in support of that view. First, when the conditions laid down by Article 2(2) of Directive 85/73 and Article 2(2) of Decisions 88/408 are satisfied the Member State is free to fix the amount of the fees either at the standard rate provided for by Article 2(1) of Decision 88/408 or at the rate corresponding to the actual cost of inspection. Secondly, the conditions laid down in Article 2(2) of Directive 85/73 and Article 2(2) of Decision 88/408 consist of factual circumstances which constantly alter. It is therefore impossible to state categorically that the Member States have no discretion in the application of Article 2(1) of Decision 88/408.

The Landrat considers that Article 2(1) of Decision 88/408 does not in any event have direct effect before the expiry of the period laid down by Article 11 of the decision for its implementation by the Member States, even as regards a Member State which has transposed Directive 85/73 before the expiry of that period.

Referring in particular to the Opinion of Advocate General Roemer in Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825, Case 20/70 *Transports Lesage & Cie* v *Finanzamt Freiburg* [1970] ECR 861 and Case 23/70 *Haselhorst* v *Finanzamt Düsseldorf* [1970] ECR 881, it contends that when a decision is adopted with a view to harmonizing national laws and prescribes a period for that purpose a Member State which complies with the decision before the expiry of the period remains free to amend its legislation up to the date fixed by the decision. The freedom thus allowed to the Member States does not jeopardize the objective of harmonization pursued by the decision and makes it possible to prevent a Member State which implements the decision before the expiry of the period prescribed for that purpose from being penalized in relation to the other Member States.

The Landrat states, furthermore, that the Court has consistently held that the provisions of a directive cannot be relied upon by individuals before national courts until the expiry of the period prescribed for the transposition of the directive into national law. The position cannot be different with regard to decisions which have to be implemented only from a certain date.

According to the *Federal Republic of Germany*, it cannot be excluded from the outset that the provisions of Decision 88/408 have direct effect. Although the cases in which the Court has ruled on the direct effect of measures addressed to Member States concerned directives, it cannot be excluded out of hand that the other classes of measures referred to in Article 189 of the Treaty may have the same effect. Furthermore, Decision 88/408 implements and supplements Directive 85/73. Accordingly, for the purposes of considering the possible direct effect of the provisions concerning fees, Decision 88/408 and Directive 85/73 must be regarded as constituting a whole.

The Federal Republic of Germany nevertheless considers that an undertaking such as the plaintiff in the main proceedings cannot rely

on Article 2(1) of Decision 88/408. It gives two reasons for this.

First, Article 2(1) is not an unconditional provision inasmuch as it establishes the standard levels of fees. Article 2(2) allows the Member States to derogate, under certain conditions, from the standard levels laid down in paragraph 1. It is apparent from the order of reference that in the present case the conditions laid down in Article 2(2) of Decision 88/408 are satisfied. In particular, the cost of inspection and control is higher than the standard amount of the fee provided for by Article 2(1) of Decision 88/408.

Secondly, under Article 11 of Decision 88/408 Member States have until 31 December 1990 to comply with the provisions of the decision. Article 2(1) of Decision 88/408 can therefore in any event be relied upon as against Member States only from that date.

The *Commission* considers that the plaintiff in the main proceedings cannot rely on Article 2(1) of Decision 88/408.

The Commission first maintains that the reference to Directive 85/73 in Paragraph 24 of the German Law on Meat Hygiene cannot in any event be interpreted as containing an implied and definitive waiver of the possibilities of derogation provided for by Article 2(2) of Decision 88/408. Paragraph 24 of the Law on meat hygiene was adopted at a time when the content of the decision, and in particular the possibilities of derogation from the standard rates, were not yet known.

The Commission then points out that under Article 11 of Decision 88/408 Member States have a period expiring on 31 December 1990, in which to indicate whether they intend to make use of the possibilities of derogation provided for in Article 2(2). Member States would be deprived of that possibility if, before that date, individuals could set up against them Article 2(1) of the decision.

In the Commission's view, it matters little in that respect that the Member State in question has already transposed Directive 85/73. Article 2(2) of Directive 85/73 itself provides for the possibility of derogating from the standard rates which were to be fixed by the Council in a manner that was in conformity with the principle of covering costs. The application of that principle cannot therefore be excluded, before the expiry of the period prescribed in Article 11 of the decision, with regard to a Member State which transposes Directive 85/73 into its legal system without expressly waiving the possibilities of derogation offered by the directive and given effect in Article 2(2) of Decision 88/408.

Furthermore the Commission maintains that there is nothing in Directive 85/73 which

could lead to a reduction in the rates of fees provided for by the *Land* Regulation 1987.

It is true that by virtue of Article 2(2) of Directive 85/73 the amount of the fees which Member States are recognized to collect may not exceed the real amount of the inspection costs. Nevertheless the exact scope of that restriction is not defined with sufficient precision to allow an individual to rely on the restriction before a national court. Directive 85/73 does not specify whether the real cost of inspection must be calculated at the level of each inspection authority, that of the Member State considered as a whole or at an intermediate level such as that of the *Land*. The principle of covering costs laid down in Article 2(2) of Directive 85/73 cannot therefore directly be applied by national courts.

The Commission therefore proposes that the first two questions put by the national court should be answered as follows:

'1. An individual may rely directly on the standard amounts provided for by Article 2(1) of Council Decision 88/408/EEC of 15 June 1988 before the expiry of the period fixed in Article 11 only if the Member State concerned has shown that it did not intend to use the possibility offered by Article 2(2) to derogate from those amounts.

2. An individual may not rely directly on Council Directive 85/73/EEC of 29 January 1985, taken on its own, before a national court in order to challenge the level of fees fixed by the Member States.'

Question 3

In *Hansa Fleisch*'s view only the Member States as such, and not their various subdivisions (such as the *Länder*), may make use of the possibilities of derogation offered by Article 2(2) of Decision 88/408.

That is clear from the wording of Decision 88/408 and its annex which refer exclusively to the Member States and not to their subdivisions. Furthermore, the objective of that decision, namely the standardization of the financing of fees in order to avoid distortions of competition in the functioning of the common organizations of the market would be adversely affected if the subdivisions of Member States were allowed to have recourse to the derogations provided for by Article 2(2) of Decision 88/408. In addition, recourse to those derogations by the subdivisions of Member States would make it difficult for the Community authorities to check that Decision 88/408 has been complied with.

Since the Federal Republic of Germany has not used the possibilities of derogation under Article 2(2) of Decision 88/408, it may not collect fees higher than those provided for in Article 2(1).

The *Landrat* considers that even though the Member States are the only addressees of Decision 88/408, the subdivisions of the Member States may also use the possibilities of derogation provided for by Article 2(2) of the decision.

The Court has consistently held that Member States are free to allocate powers at the domestic level as they see fit and to implement Community law by means of measures adopted by regional or local authorities (see, in particular, Joined Cases 227 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraph 9). In so far, therefore, as the provisions of Decision 88/408, and in particular the principle of covering costs, are in fact complied with, there is nothing to prevent the *Länder* of the Federal Republic of Germany from making use of the derogating provisions of Article 2(2).

The *Federal Republic of Germany* also considers that the *Länder* may rely on the provisions of Article 2(2) of Decision 88/408.

It would, in practice, be difficult to fix uniform fees for the whole of the State while observing the principle of covering costs laid down in Article 2(2) of Decision 88/408. The structure of the establishments and also certain other factors liable to affect the cost of inspection and control vary from one *Land* to the other. If, therefore, the amount of the fee were fixed uniformly for the whole of the territory of the Federal Republic of Germany it might possibly exceed the costs of inspection and control in one *Land* and, on the contrary, be less than the real cost of those operations in another.

In the opinion of the Federal Republic of Germany, the most appropriate method of ensuring the application of the principle of covering costs when calculating the fee is for the *Länder* to fix the fees. That, precisely, is the method prescribed in Paragraph 24(2) of the Law on meat hygiene. The second sentence of that provision ensures the transposition of Decision 88/408, adopted on the basis of Directive 85/73, into national law and the first sentence ensures its transposition into the law of the *Land*.

In view of the answers which it proposes should be given to the first two questions put by the national court, the *Commission* considers that the third question does not call for an answer.

J. L. Murray
Judge-Rapporteur