JUDGMENT OF THE COURT (First Chamber)

19 March 2009 *

In Case C-270/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 June 2007,

Commission of the European Communities, represented by F. Erlbacher and A. Szmytkowska, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents, and by U. Karpenstein, Rechtsanwalt,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Borg Barthet, E. Levits and J.-J. Kasel (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to adapt to the Community provisions Paragraph 4 of the law implementing the legislation on the health inspection of meat and poultrymeat in the *Land* Schleswig-Holstein (Ausführungsgesetz zum Fleischhygienerecht und zum Geflügelfleischrecht für das *Land* Schleswig-Holstein) of 12 January 1998 (GVOBl. Schl.-H. 1998, p. 2; the '*Land* of Schleswig-Holstein implementing law'), the Federal Republic of Germany has failed or continues to fail to fulfil its obligations under Articles 1 and 5(3) and (4) of Council Directive 85/73/EEC of 29 January 1985 on the financing of veterinary inspections and controls covered by Directives 89/662/EEC,

90/425/EEC, 90/675/EEC and 91/496/EEC (OJ 1985 L 32, p. 14), as amended by Council Directive 97/79/EC of 18 December 1997 (OJ 1998 L 24, p. 31; 'Directive 85/73'), and, after 1 January 2007, under Article 27(2), (4) and (10) of Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1, and corrigendum OJ 2004 L 191, p. 1), as amended by Commission Regulation (EC) No 776/2006 of 23 May 2006 (OJ 2006 L 136, p. 3; 'Regulation No 882/2004').

Legal context

The Community legislation

2 It is apparent from a combined reading of Article 3(1)(A)(d) and 5(1)(a)(ii) of, and point 40(e) of Chapter VIII of Annex I to, Council Directive 64/433/EEC of 26 June 1964 on health conditions for the production and marketing of fresh meat (OJ, English Special Edition 1963-1964, p. 185), as amended and consolidated by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69; 'Directive 64/433'), that post-mortem examinations of fresh meat are to include, if necessary, laboratory examinations involving, as appropriate, a bacteriological examination and a search for residues of substances with a pharmacological effect.

3 Directive 64/433 was repealed, with effect from 1 January 2006, by Directive 2004/41/EC of the European Parliament and of the Council of 21 April 2004 repealing certain directives concerning food hygiene and health conditions for the production and placing on the market of certain products of animal origin intended for human consumption and amending Council Directives 89/662/EEC and 92/118/EEC and Council Decision 95/408/EC (OJ 2004 L 157, p. 33).

4 Under Article 4(1) of Directive 2004/41, the references in particular to Directive 64/433 are to be construed as references made, as the context demands, to Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55) and to Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption (OJ 2004 L 139, p. 206, and corrigendum OJ 2004 L 226, p. 83).

5 It is apparent from a combined reading of Article 5(1)(d) and (f) of Regulation No 854/2004 and Annex I, Chapter II, D and F thereto that post-mortem inspections of fresh meat must, whenever considered necessary, include laboratory testing in order to reach a definitive diagnosis or to detect, inter alia, the presence of an animal disease or factors that might require the meat to be declared unfit for human consumption or restrictions to be placed on its use. The official veterinarian must ensure that any other necessary laboratory testing takes place.

6 As regards the financing of the inspections and controls at issue, Article 1 of Directive 85/73 provides that the Member States are to ensure that a Community fee is collected to cover the costs occasioned by those inspections and controls.

7 Pursuant to Article 5(1) of Directive 85/73, the Community fee is to be set at a level which covers the costs borne by the competent authority in respect of salary costs and social-security costs involved in the inspection service and administrative costs incurred in carrying out controls and inspections, which may include the expenditure required for in-service training of inspectors. In addition, Member States, by virtue of Article 5(3), are to be authorised to charge an amount exceeding the levels of the Community fees, provided that the total fees charged by each Member State do not exceed the actual cost of inspection. Article 5(4) provides that the Community fees are to replace all other health-inspection charges or fees levied by the Member States' national, regional or local authorities for the inspections and controls referred to in Article 1 of that directive.

8 Point 1 of Chapter I of Annex A to Directive 85/73 fixes the standard fees in respect of the inspection costs relating to slaughter. The means of financing the controls and inspections connected with cutting operations are set out in point 2 of that chapter. Point 4(a) and (b) of Chapter I provides:

'In order to cover increased costs, Member States may:

(a) either: increase the standard amounts of fees as laid down in points 1 and 2(a) for individual establishments.

…

(b) or: charge a special fee covering actual costs.'

9 Article 27 of Regulation No 882/2004 provides:

'1. Member States may collect fees or charges to cover the costs occasioned by official controls.

2. However, as regards the activities referred to in Annex IV, section A, and Annex V, section A, Member States shall ensure the collection of a fee.

…

4. Fees collected for the purposes of official controls in accordance with paragraph 1 or 2:

(a) shall not be higher than the costs borne by the responsible competent authorities in relation to the items listed in Annex VI; and

(b) may be fixed at a flat-rate on the basis of the costs borne by the competent authorities over a given period of time or, where applicable, at the amounts fixed in Annex IV, section B or in Annex V, section B.

…

10. Without prejudice to the costs deriving from the expenses referred to in Article 28, Member States shall not collect any fees other than those referred to in this Article for the implementation of this Regulation.

…'

National legislation

10 Paragraph 4 of the *Land* of Schleswig-Holstein implementing law provides as follows:

'(1) The fee levels for the ante and post-mortem inspections, including the searches for residues, trichinae and the health controls, shall be set by animal, depending on the species; in cutting plants in which the meat is cut or boned they shall be set by metric tonne of meat on the bone.

(2) The calculation of the fee levels shall include:

1. the salaries and social security contributions of the inspection staff,

2. the administrative costs of the performance of the controls and inspections, to which the costs of the in-service training of the inspection staff may be added.

(3) The administrative fees shall be increased by a proportion which may be:

1. up to 100% where the official act is carried out on request between 1800 hrs and 0700 hrs, between 1800 hrs and 0600 hrs in large undertakings, on Saturdays after 1500 hrs and on Sundays and statutory public holidays.

2. up to 50% where the official act is carried out on request outside regular inspection hours or slaughtering days.

(4) …

In addition to the fees, the following costs … shall be charged:

…

2. delivery expenses for bacteriological examinations (bacteriological samples, BSE samples and other suspect samples, with the exception of those of searches for residues …) and

3. inspection costs concerning the samples referred to in paragraph 2 …'

The pre-litigation procedure

11 Following a complaint, the Commission sent the Federal Republic of Germany a letter of formal notice on 21 March 2005 informing that Member State that it was of the

opinion that Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law did not comply with the relevant provisions of Directive 85/73, as interpreted by the Court in Joined Cases C-284/00 and C-288/00 *Stratmann and Fleischversorgung Neuss* [2002] ECR I-4611.

12 On 20 May 2005, the German authorities responded to that letter of formal notice, stating that the Commission's doubts as to the correct transposition of Directive 85/73 into national law were unfounded and that the judgment in *Stratmann and Fleischversorgung Neuss* is irrelevant to the present case.

13 Since it was not satisfied with that reply, the Commission issued a reasoned opinion on 4 July 2006 in which it repeated the objections in the letter of formal notice and called upon the Federal Republic of Germany to adopt the measures necessary to comply with that reasoned opinion within two months of its receipt.

14 Since that Member State did not respond to the reasoned opinion, the Commission decided to bring the present action.

The action

Arguments of the parties

15 The Commission submits that, pursuant to Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law, the competent authorities in that *Land* can charge sums corresponding to the costs incurred for the performance of bacteriological inspections

of fresh meat over and above the standard amount of the Community fee. In *Stratmann and Fleischversorgung Neuss*, the Court held that it follows from both the wording of Directives 64/433 and 85/73 and their purpose that the expenses of those examinations are to be covered by the Community fee charged by the Member States under the last-mentioned directive.

16 The entry into force of the new Community legislation, namely Regulations Nos 853/2004 and 854/2004, with effect from 1 January 2006, and Regulation No 882/2004, with effect from 1 January 2007, has not changed that situation in any way. First, it is apparent from the wording of the relevant provisions in those regulations that bacteriological inspections are still included within the obligatory health inspections and controls, the costs of which are covered by the Community fee. Those inspections could not therefore give rise to any levy other than that relating to that fee. Secondly, Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law is contrary to the purpose of the relevant Community provisions, which seek, as the Court has already declared in *Stratmann and Fleischversorgung Neuss* — which may be applied to the new Community legislation by analogy — to remedy distortions of competition which would lead to discrepancies in the financing of inspections and controls. There is a risk that that objective may not be attained if certain inspection measures laid down by Community law were to be excluded from the thus harmonised Community financing system and might be subject to specific national fees.

17 Contrary to what the Federal Republic of Germany submits, a provision such as Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law cannot take as its basis point 4 of Chapter I of Annex A to Directive 85/73. In *Stratmann and Fleischversorgung Neuss*, the Court expressly excluded the possibility of relying on point 4(b) in order to take into account costs incurred for bacteriological inspections over and above the standard level of the fee. In that judgment, the Court also held that a fee received under that provision should take the form of a standard-rated payment. However, the present case does not involve a general increase in the standard amount of the Community fee covering all the actual costs. Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law thus infringes the first subparagraph of Article 5(4) of Directive 85/73.

18 The Commission also submits that Case C-374/97 *Feyrer* [1999] ECR I-5153, relied on by the Federal Republic of Germany in support of its position, is not relevant to the present case. The issues dealt with by the Court in that judgment are very different to those raised here.

19 The Federal Republic of Germany claims that the *Land* of Schleswig-Holstein implementing law was adopted on the basis of the combined provisions of Article 1 of Directive 85/73 and point 4(b) of Chapter I of Annex A thereto, under which the Member States may charge a fee covering the actual costs of the inspections and health controls of freshly-slaughtered meat.

20 First of all, that Member State observes that the fee provided for in the *Land* of Schleswig-Holstein implementing law in respect of the inspection of animals for slaughter and health controls does not include the costs of the transport and inspection of samples taken in order to carry out bacteriological tests. That is, moreover, consistent with the national law according to which a fee cannot in any event cover such costs. It is therefore legitimate to levy the sums intended to cover such fees separately.

21 Secondly, the Federal Republic of Germany submits that the *Land* Schleswig-Holstein does not charge, by way of fees for the inspections and controls of fresh meat, either the standard amounts referred to in points 2 and 3 of Chapter I of Annex A to Directive 85/73 or the fees intended to increase the standard amounts pursuant to point 4(a) of that chapter. It cannot therefore be maintained, as the Commission does, that those sums are charged 'over and above' the standard Community fee. There is, in this respect, a marked difference between the *Land* of Schleswig-Holstein legislation and the legislation at issue in the case which gave rise to the judgment in *Stratmann and Fleischversorgung Neuss*. Furthermore, in accordance with paragraph 32 of *Feyrer*, the Member States may exercise the option available under point 4(b) of Chapter I of Annex A to Directive 85/73, provided only that the special fee does not exceed the actual costs incurred, no further condition being imposed. Consequently, where that

condition is observed, special fees could be charged in respect of various services. However, as in the present case, there must be no double-payment.

22 Lastly, the Federal Republic of Germany contends that Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law infringes neither the wording nor the purpose of point 4(b) of Chapter I of Annex A to Directive 85/73. First, it follows from a combined reading of several language versions of that provision that it does not preclude the charging of several partial fees or the charging of cumulated fees and charges constituting a 'total fee'. Secondly, the aim of that directive, namely the harmonisation of the bases for the calculation of fees, should not lead to a harmonisation of the applicable rates since the directive itself provides for exceptions allowing the Member States to take into account differing cost structures.

23 That Member State adds that it is, moreover, inevitable that the amount of the fee at issue should vary in individual cases, since the costs taken into account vary according to the conditions in the slaughtering undertakings and the types of inspections to be performed. A fee intended to cover the costs actually incurred may precisely be distinguished from a standard fee by the fact that, in the former case, the costs depend on the slaughtering undertaking concerned, whereas in the latter case those costs are applied to all slaughtering undertakings. A provision such as Paragraph 4(4) of the *Land* of Schleswig-Holstein implementing law would not conflict in any way with the prohibition on exceeding the actual costs of the inspections set out in Article 5(3) of Directive 85/73.

24 Since Regulations Nos 853/2004 and 854/2004, applicable since 1 January 2006, and Regulation No 882/2004, applicable since 1 January 2007, do not change that situation in any way, the arguments raised by the Federal Republic of Germany referred to in paragraphs 19 to 23 of this judgment are applicable by analogy to those new regulations.

Findings of the Court

25 As a preliminary point, it must be observed that the Commission is raising two grounds of challenge in support of its action, alleging infringement of the obligations on the Federal Republic of Germany under, first, Articles 1 and 5(3) and (4) of Directive 85/73 and, secondly, Regulation No 882/2004.

The first ground of challenge

26 In order to make a decision on the merits of the first ground of challenge it is necessary, first, to establish whether the judgment in *Stratmann and Fleischversorgung Neuss*, relied on by the Commission, is relevant to the present case and to respond to the question whether point 4(b) of Chapter I of Annex A to Directive 85/73 must be interpreted, as that institution argues, to mean that a fee charged under that provision must take the form of a standard-rated payment.

27 As regards, first, the application by analogy of *Stratmann and Fleischversorgung Neuss* to the legal situation at issue in the present case, and as the Federal Republic of Germany points out without being challenged by the Commission on that point, the *Land* Schleswig-Holstein does not charge, by way of fees for the inspections and controls of fresh meat, either the standard amounts referred to in points 2 and 3 of Chapter I of Annex A to Directive 85/73 or the fees intended to increase the standard amounts pursuant to point 4(a) of that chapter.

28 Since it is common ground that, in the present case, the competent national authorities charge only a special fee, even if that fee is composed of various amounts, it must be concluded that the legislation of the *Land* of Schleswig-Holstein differs in an essential respect from the legislation at issue in the case which gave rise to *Stratmann and Fleischversorgung Neuss*.

29 Accordingly, the conclusion reached by the Court in *Stratmann and Fleischversorgung Neuss* cannot be applied by analogy to a situation such as that at issue in the present case.

30 As regards, secondly, the interpretation of point 4(b) of Chapter I of Annex A to Directive 85/73, it must be stated first of all that, contrary to what the Commission claims, the Court did not hold, in paragraph 56 of *Stratmann and Fleischversorgung Neuss*, that the special fee provided for in that provision must take the form of a standard-rated payment.

31 The increases referred to by the Court in paragraph 56 of that judgment are those laid down in point 4(a) of Chapter I of Annex A to Directive 85/73, that provision being the only one to use the terms 'increase' and 'standard amounts'. The second part of paragraph 56, which concerns the option available to the Member States to charge a special fee exceeding the levels of the Community fees, does not refer to a standard-rated payment, but merely makes the use of that option subject to the single condition that that fee must cover the entire actual costs.

32 It follows that that fee must, first, not exceed the amount of the actual costs and, secondly, take into account all those costs, none of which may be excluded. It cannot therefore take the form of a 'standard' fee in the sense in which the Commission construes that term since, as the Court held in paragraph 52 of *Stratmann and Fleischversorgung Neuss*, a standard fee by its very nature exceeds the actual cost of the measures which it is intended to finance in certain cases and is lower than that cost in other cases.

33 It must be added that that interpretation of paragraph 56 of *Stratmann and Fleischversorgung Neuss* is completely consistent with the scheme of that judgment, since that paragraph forms part of a wider argument intended to address the issue of whether the costs of bacteriological examinations and examinations for trichinae carried out in accordance with Community secondary legislation are covered by the Community fee charged by the Member States for health inspections and controls of

fresh meat pursuant to that Community legislation or if that legislation authorises those States to charge a special fee which should be added to the Community fee in order to cover those costs.

34 Since, in addressing the question referred for a preliminary ruling in the case which gave rise to the judgment in *Stratmann and Fleischversorgung Neuss*, the Court did not answer the question whether a fee charged pursuant to point 4(b) of Chapter I of Annex A to Directive 85/73 must take the form of a standard-rated payment, it is impossible to infer any conclusion as to the answer to that question from that judgment.

35 Secondly, it must be pointed out that the judgment in *Feyrer* calls into question an interpretation of point 4(b) of Chapter I of Annex A to Directive 85/73, according to which a fee charged under that provision cannot consist of several elements.

36 In paragraph 26 of *Feyrer*, in which point 4(b) of Chapter I of Annex A to Directive 85/73 is referred to, the Court observed that, pursuant to Article 2(3) of that directive, which is now Article 5(3) thereof, the 'total fee collected' to which that provision refers must not exceed the actual figure for inspections. The 'total' fee necessarily results from the addition of the various constituent elements of that fee.

37 The fact that the fee at issue in this case consists of various cost elements does not, in itself, render that fee incompatible with point 4(b) of Chapter I of Annex A to Directive 85/73.

38 It must be added in this connection that, in the present case, it is common ground that the fee at issue does not exceed the actual costs. Accordingly, the fee does not infringe point 4(b) of Chapter I of Annex A to Directive 85/73 in that regard either (see, to that effect, *Feyrer*, paragraphs 27 and 29).

39 For the same reason, the fee also does not infringe Articles 1 and 5(4) of Directive 85/73.

40 Lastly, it must be held that, in contrast to what the Commission claims, the objectives of transparency and of taking action to counteract distortions of competition do not preclude charging a fee such as that to which the Commission's first ground of challenge relates.

41 As regards, first, the objective of transparency, since that fee shows clearly and in detail the nature of the various elements of which it consists, it allows the person liable to know the exact composition of the total fee and thereby puts him or her in a position, first, to change the organisation of his or her activity in order to optimise its operation, in particular by economising on certain costs, and, secondly, to compare, if necessary, its costs with those of other economic operators.

42 As regards, secondly, the objective of taking action to counteract distortions of competition, that action takes the form, not of the introduction of a fee of a uniform amount applicable throughout the European Community, but of the adoption of harmonised rules on the financing of health inspections and controls of fresh meat (see, to that effect, *Feyrer*, paragraph 40). Accordingly, the measures for inspection and control have been harmonised as have, as is shown by Article 5(1) of Directive 85/73 and points 4 and 5 of Chapter I of Annex A thereto, the various cost elements which may be taken into consideration to determine the Community fee.

43 In so far as it has been neither established nor even argued that the fee set out in Paragraph 4 of the *Land* of Schleswig-Holstein implementing law covers cost elements other than those provided for in the Community legislation or exceeds the amount of the actual costs, that fee is not liable to prejudice the objective pursued by Directive 85/73 of taking action to counteract distortions of competition.

44 In the light of those considerations, the line of argument relied on by the Commission in support of its first ground of challenge cannot be accepted.

45 Accordingly, the first ground of challenge raised by the Commission must be rejected as unfounded.

The second ground of challenge

46 By its second ground of challenge, the Commission criticises the Federal Republic of Germany for having, after 1 January 2007, failed to fulfil its obligations under Article 27(2), (4) and (10) of Regulation No 882/2004 by failing to adapt Paragraph 4 of the *Land* of Schleswig-Holstein implementing law to comply with those provisions.

47 As regards that ground of challenge, it must be observed at the outset that the operative part of the reasoned opinion of 6 July 2006 does not refer to any alleged failure of the Federal Republic of Germany to fulfil its obligations under Regulation No 882/2004, that regulation having moreover entered into force at a later date than that on which that opinion was received by the Member State concerned.

48 Accordingly, it is necessary to examine whether the second ground of challenge relied on by the Commission in support of its action is admissible.

49 It is the Court's settled case-law in that regard that, in the context of proceedings under Article 226 EC, the existence of a failure to fulfil obligations must be assessed in the light of the Community legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion (see, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 32, and Case C-275/04 *Commission* v *Belgium* [2006] ECR I-9883, paragraph 34).

50 Although the heads of claim set out in the application cannot in principle be extended beyond the failures to fulfil obligations alleged in the operative part of the reasoned opinion and in the letter of formal notice, it is none the less the case that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the initial version of a Community measure, subsequently amended or repealed, and which were maintained in force under the new provisions. Conversely, the subject-matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the initial version of the measure in question, as otherwise it would constitute a breach of the essential procedural requirements governing infringement proceedings (see, to that effect, Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraph 22, and *Commission* v *Belgium*, paragraph 35).

51 In the present case, it is common ground that the fees or charges mentioned in Article 27(2), (4) and (10) of Regulation No 882/2004 may, as is evident specifically from paragraph (b) of the second of those provisions, be fixed at a standard rate.

52 Accordingly, it must be held that those fees and charges are fundamentally different from the fees which the Member States could charge under point 4(b) of Chapter I of

Annex A to Directive 85/73, which, as is apparent from paragraph 32 of this judgment, could not take the form of a standard fee, but had to correspond to the actual costs.

53 It follows that, by its second ground of challenge, the Commission has extended the subject-matter of the action as it was stated in the reasoned opinion to an obligation arising under Regulation No 882/2004 which does not correspond to that set out in Directive 85/73 and, consequently, that institution has infringed the essential procedural requirements governing infringement proceedings.

54 Therefore the Commission's second ground of challenge must be rejected as inadmissible.

55 Having regard to the foregoing, the Commission's action must be dismissed in its entirety.

Costs

56 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Federal Republic of Germany has applied for costs and the Commission has been unsuccessful in all its pleas, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]