OPINION OF ADVOCATE GENERAL JACOBS
delivered on 25 June 1992 *

My Lords,

1. In this case the Verwaltungsgericht, Schleswig-Holstein, has referred for a preliminary ruling three questions on the interpretation of Community rules harmonizing fees charged for health inspections at slaughterhouses. The Verwaltungsgericht seeks guidance, in particular, on whether certain provisions in such rules have direct effect, and on whether a Community provision can have direct effect before the period prescribed for implementing it has expired. The provisions in question are contained in Council Decision 88/408/EEC of 15 June 1988 (OJ 1988 L 194, p. 24), which was adopted pursuant to Article 2(1) of Council Directive 85/73/EEC of 29 January 1985 (OJ 1985 L 32, p. 14).

2. The plaintiff in the national proceedings, Hansa Fleisch Ernst Mundt GmbH&Co. KG, is a German company which operates a slaughterhouse, cutting plant and refrigeration unit in Schleswig-Holstein. The request for a preliminary ruling has been made in the course of the plaintiff's appeal against a number of decisions of the Landrat of the district of Schleswig-Flensburg ('the Landrat'), rejecting complaints raised by the plaintiff about the amount of fees charged for inspection of the plaintiff's premises. Under German law such fees are charged and collected under the legislation of the individual *Länder*, rather than under federal German law. Thus, the fees in issue were charged on the basis of a regulation made by the *Land* Schleswig-Holstein, although that regulation, which was adopted on 3 April 1987, was made pursuant to Paragraph 24 of the federal Meat Hygiene Law ('Fleischhygienegesetz') inserted by the Law of 13 April 1986.

3. The fees in question were charged on a daily basis between 23 May 1989 and 27 June 1990, and the decisions of the Landrat against which the plaintiff appeals were made between 31 October 1989 and 9 July 1990. I shall refer to the fees which are the subject of the plaintiff's complaint as the 'contested fees'.

The Community provisions

4. Community harmonization of inspection fees took place in two stages. Article 1(1) of Directive 85/73 provides that:

* Original language: English.

'As from 1 January 1986 the Member States shall ensure that:

— fees are collected when the animals referred to in paragraph 2 are slaughtered for the costs occasioned by health inspections and controls,

...

— any direct or indirect refund of fees is prohibited.'

Article 2(1) provides that the Council shall, before 1 January 1986, take a decision on the standard level or levels of such fees and on the 'detailed rules and principles for the implementation of this Directive, and on possible exceptions'. Article 2(2) provides that:

'Member States shall be 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.'

Although, as we have seen, the Council was required to fix the standard levels of fees before 1 January 1986, that was not in fact done until the adoption on 15 June 1988 of Decision 88/408. Article 2(1) of the decision fixes the standard levels of inspection fees for certain kinds of animal. By Article 2(2):

'... Member States where salary costs, the structures of establishments, and the ratio between veterinarians and inspectors differ from those 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.

Member States shall have recourse to the exemptions laid down in the first paragraph on the basis of the principles set out in the Annex.

In no case shall the application of the exemptions provided for in the first paragraph lead to reductions of more than 55% up to and including 31 December 1992 or, as from 1 January 1993, 50% of the average levels set out in paragraph 1.'

The Annex to the decision specifies that Member States may provide for a general reduction in the standard rates, where there are substantial differences in the cost of living and salary costs, or may do so in certain circumstances for individual establishments. The Annex also gives a number of examples of circumstances in which Member States may increase rates in order to cover costs. By Article 11 of the decision:

'Member States shall implement the provisions of this Decision not later than 31 December 1990.'

The questions referred

5. From the Order for Reference, it appears that the plaintiff argued in the main proceedings that the contested fees exceed the levels permitted by Decision 88/408, and that that decision was, in effect, already transposed into German law by Paragraph 24 of the Fleischhygienegesetz. It is to be noted however that Paragraph 24 refers only to Directive 85/73, and not to the implementing decision of the Council, which had of course not yet been adopted when Paragraph 24 was inserted into the Fleischhygienegesetz on 13 April 1986. The Landrat, on the other hand, did not accept that Decision 88/408 had already been transposed into German law at the time the contested fees were charged, and denied that the decision could be relied upon by the plaintiff before the expiry of the period for implementation prescribed by its Article 11.

6. The Verwaltungsgericht has accordingly referred the following three questions to the Court:

(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?

The first question

7. It is clear from the case-law of the Court that a decision, in particular one addressed to the Member States, is a measure which, like a directive, is capable in principle of having direct effect: that is to say which may, in certain circumstances, be relied upon by individuals before the national court in the absence of national implementing measures. As the Court observed in Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825, at paragraph 5 of the judgment:

'It would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision.'

In order for provisions of Community law to have direct effect, however, they must be

unconditional and sufficiently precise. As the Court stated in Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313, at paragraph 16 of the judgment, if those conditions are satisfied, a directive:

'may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State'.

8. As we have seen, it is Decision 88/408 which lays down the standard levels of inspection fees. In its first question, the Verwaltungsgericht asks not whether Decision 88/408 has direct effect, but rather whether Directive 85/73 has such effects 'in conjunction with' Decision 88/408. It does not seem to me however that Directive 85/73 imposes any obligations on Member States which are of immediate relevance to the present case. It will be recalled that Article 1 of the directive requires Member States to collect fees for the costs occasioned by health inspections and controls at slaughterhouses, and forbids the direct or indirect refund of such fees. It is not however disputed that the plaintiff could be charged such fees, the issue being rather whether the level of fees charged exceeded the maximum permissible under Decision 88/408.

9. Article 2(1) of Directive 85/73, moreover, does not impose obligations of any kind upon the Member States, but rather requires the Council to take a decision on the standard levels of fees and other matters implementing the directive. Nor, it seems to me, is Article 2(2) of the directive intended to impose any obligations on the Member States. That provision presupposes the fixing of fee levels by the Council pursuant to Article 2(1) of the directive, and envisages that Member States may under certain conditions derogate from those levels. However, until those standard fee levels come into effect, the limits on the Member States' powers to derogate from those levels, referred to in Article 2(2) of the directive, cannot have any application. As we have seen, those limits are in any case specified in more detailed terms in Article 2(2) of Decision 88/408, which implements Article 2(2) of the directive. The first question referred by the Verwaltungsgericht is therefore better understood as asking simply whether Decision 88/408 has direct effect, although it is clear that an implementing decision must in any case be interpreted in the light of the provisions it implements.

10. In its written observations submitted to the Court, the Landrat suggests that the fee levels set by Article 2(1) of Decision 88/408 are not capable of having direct effect, since Article 2(2) of the decision gives the Member States a discretion to depart from those levels in certain circumstances which are, moreover, subject to continual variation. Accordingly, in the view of the Landrat, the provisions of Article 2 are not

sufficiently precise and unconditional to have direct effect, and may not therefore be relied upon by the plaintiff.

11. In its own written observations, however, the German Government appears to accept that there are circumstances where an individual may be able to rely upon the direct effect of the standard levels of fees set by Article 2(1) of the decision. The German Government mentions the case where the discretion to depart from the standard fee levels cannot lawfully be exercised because those levels already correspond to real inspection costs. More generally, it seems to me that Article 2(1) is capable of having direct effect wherever the Member State in question has not lawfully exercised its discretion to derogate from the standard levels. Thus, where Member States are given a margin of discretion permitting them to derogate from an obligation laid down by Community law, it may still be necessary for the national court to determine whether the measures taken fall within the margin permitted. For, if the measures fall outside the permitted margin, the Member State will not be able to rely upon its discretion to escape the direct effect of provisions which are otherwise unconditional and sufficiently precise: see Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, at paragraph 7 of the judgment, and Case 51/76 *Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten* [1977] ECR 113, at paragraph 29. Contrary to the view of the Landrat, moreover, it does not seem to me that such a direct effect would be precluded by the circumstance that the factual conditions relevant to the exercise of the Member State's power of appraisal may be continually changing: that would merely be one of the factors to be taken into account in deciding whether the national authorities had, in all the circumstances, made a proper exercise of their discretion.

12. The German Government suggests that, in the present case, no evidence has been put forward suggesting that the margin of appraisal allowed by Article 2(2) of Decision 88/408 has been exceeded. The plaintiff, on the other hand, argues that the discretion which Germany enjoys under Article 2(2) has been exercised wrongly in two respects: first, the levels of fees which have been set exceed what is necessary to cover real inspection costs, contrary to the first subparagraph of Article 2(2); and secondly, Article 2(2) does not permit fees to be set by the authorities of the individual *Länder*, rather than on a uniform basis for the Federal Republic as a whole. The first of those issues involves questions of fact which can only be determined by the national court. The second issue, on the other hand, is clearly a matter for this Court. Since however it is in substance the issue raised in the third of the questions referred, I shall discuss it under that heading: see paragraphs 28 to 31 below.

13. For the purpose of answering the first question referred, it is sufficient to observe that Article 2(1) of Decision 88/408 may only be relied upon by an individual before a national court where the Member State concerned has failed properly to exercise its discretion under Article 2(2), whether by not taking any implementing measures or by exercising its discretion incorrectly. On the other hand, there is I think no doubt that the provisions of Article 2(1) are, in themselves,

sufficiently precise and unconditional to have direct effect, so that they may be relied upon against a Member State which has failed properly to exercise its discretion under Article 2(2).

The second question

14. By its second question, the Verwaltungsgericht asks, in effect, whether the direct effect of Decision 88/408 depends on whether the period prescribed for implementation by Article 11 of the decision has expired. It will be recalled that the prescribed period did not expire until 31 December 1990, whereas the contested fees were all levied between 23 May 1989 and 27 June 1990. As we have seen, Directive 85/73 does not in itself impose any obligation on Member States relating to the maximum levels of the fees charged, and it is accordingly not material that the deadline for the implementation of the directive expired on 1 January 1986.

15. In its written observations, the plaintiff maintains that the insertion, on 13 April 1986, of the new Paragraph 24 into the Fleischygienegesetz, had the effect of implementing Decision 88/408 into German law as soon as the latter decision was adopted by the Council. According to the plaintiff, therefore, the standard fee levels set by Article 2(1) of the decision were implemented into German law as from 15 June 1988. In its written observations, the German Government confirms that Paragraph 24 is intended to transpose into national law not only Directive 85/73, but also any implementing decision of the Council adopted pursuant to Article 2 of the directive; although the German Government explained at the hearing that that transposition was not intended to come into effect until the end of the period laid down by Article 11 of the decision.

16. It does not seem to me that Paragraph 24 of the Fleischhygienegesetz could be regarded as a satisfactory means of implementing Decision 88/408 into German law. Such a method of implementation would, to say the least, lack the necessary transparency, particularly in view of the fact that Paragraph 24 does not state at what time the implementation is supposed to come into effect. It is however for the national court to rule on the question whether the plaintiff can invoke any rights under German law. To the extent that the plaintiff can invoke such rights, it will of course be unnecessary to rely upon the direct effect of the Community provisions. For the purposes of this Opinion, therefore, I shall proceed on the assumption that, at the time the contested fees were levied, Decision 88/408 had not been fully implemented into German law.

17. In Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, at paragraphs 46 and 47 of the judgment, the Court stated the principles underlying the doctrine of direct effect as follows:

'It is necessary to recall that, according to a long line of decisions of the Court ..., wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State *where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.*

That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails' (my emphasis).

That statement applies, *mutatis mutandis*, also to decisions addressed to the Member States which require implementation into national law by the end of a prescribed period.

18. It is of course clear that, where a Member State has taken no action, a directive or decision cannot have direct effect before the expiry of the time-limit laid down for its implementation: see Case 148/78 *Ratti* [1979] ECR 1629, at paragraphs 24 and 43 of the judgment. The passage from the *Marshall* case which has just been cited, read literally, might however appear to leave open the possibility that a directive (or a decision) could have direct effect as against a Member State even before the deadline for implementation has passed, in circumstances where the State has attempted to implement the directive before the end of the prescribed period, but has done so incorrectly. The argument would be that, although a Member State is not obliged to implement before the expiry of the time-limit, nevertheless if it chooses to do so, it must comply with the terms of the directive: see T. C. Hartley, *The Foundations of European Community Law*, 2nd edition, Oxford, 1988, p. 205. A distinction would then be drawn between the cases where the Member State has taken no action during the prescribed period, and those where it has acted, albeit incorrectly. As we have seen, the plaintiff argues in the present case that Paragraph 24 of the Fleischhygienegesetz, together perhaps with the implementing regulation of the *Land* Schleswig-Holstein, was intended to implement Decision 88/408 into German law as soon as the latter was adopted on 15 June 1988. It might then be argued that, to the extent that the attempted implementation was defective, the decision was capable of having direct effect from that date.

19. In my opinion, however, no distinction should be drawn, for the purposes of the doctrine of direct effect, between a case where a Member State has taken no action to implement Community legislation within the prescribed period, and a case where a Member State has taken such action, but where its implementation has been defective. It seems to me that, in either case, the legislation can only have direct effect once the deadline for implementation has passed. Any other conclusion would lead to arbitrary distinctions between different cases, and would not be justified by the underlying rationale of the doctrine of direct effect.

20. In order to draw a distinction between failure to implement, on the one hand, and defective implementation, on the other, it would first of all be necessary to differentiate the two kinds of case. In certain circumstances, however, that distinction might be a tenuous one, and might require an investigation of the intention of the legislative authorities, in order to ascertain whether national measures were indeed intended to implement the directive. The direct effect of Community provisions should however turn, in my

view, on whether the Member State concerned is in breach of its obligations, and not upon its intention or otherwise to implement the provisions; although, as we shall see, the question whether national measures are intended to implement Community provisions may indeed be relevant to the scope of the national court's duty to interpret national law in the light of those provisions: see paragraphs 23 to 26 below.

21. Furthermore, even given a satisfactory means of distinguishing non-implementation from incorrect implementation, the result of making the distinction would be both arbitrary and unjust. A Member State which had made a conscientious attempt to implement a directive before the end of the prescribed period, but had failed to do so entirely correctly, would, during the remainder of the period, be placed in a worse position than the Member State which had done nothing. Indeed a Member State might even have anticipated the prescribed date so that any shortcomings in the national provisions could be remedied before the implementation deadline finally expired. Thus, the Member State which had been particularly diligent in its implementation of Community law would be placed at a disadvantage: compare the remarks of Advocate General Roemer in his Opinion in Case 9/70 *Grad* v *Finanzamt Traunstein,* cited above in paragraph 7, at p. 849.

22. Finally, such a distinction is not compatible, in my view, with the underlying rationale of the doctrine of direct effect. As the Court made clear in the passage from the *Marshall* case which was cited above at paragraph 17, that doctrine is founded on the principle that a Member State may not plead against an individual its own failure to perform a Community obligation. The obligation to implement Community legislation only takes effect, however, at the end of the period prescribed for implementation. In pleading that the period had not elapsed, therefore, the Member State would not be relying upon its own wrong, but correctly denying the existence of an obligation — and indeed only demanding equal treatment as compared with other Member States.

23. The position with respect to direct effect must however be distinguished, in my opinion, from the position with respect to the interpretation of implementing provisions. Even where a Member State could not yet be in breach of its obligation correctly to implement a directive (or other Community legislation), because the period prescribed for implementation has not yet expired, the national courts are still in my view obliged to interpret in conformity with the directive any national measures already in force which are intended to implement it. In such a case, the duty so to interpret implementing provisions arises, not from the expiry of the period prescribed for implementation, but from the duty of the national court to cooperate with the other national authorities in their endeavour to implement the directive. For, once a Member State has decided to implement Community provisions, it seems to me that all the authorities of that State are bound by a general duty, under Article 5 of the Treaty, to facilitate the achievement of the Community's tasks by ensuring the

success of that implementation. The existence of such a duty is not open to the objections against anticipated direct effect which were mentioned in paragraphs 21 and 22 above; and such an obligation would help to avoid such risks to proper implementation as would arise if implementing provisions were interpreted differently before and after the expiry of the period prescribed for implementation. A Member State may moreover be presumed to intend that its implementing measures are to be construed in the light of the legislation they implement.

24. I consider however that, where the prescribed period has not yet expired, the national court's duty to interpret national measures in the light of the Community provisions arises only in respect of measures which are intended to implement those provisions. For otherwise the national court would be placed under a duty to pre-empt the decision of its national legislature, by giving effect to the directive before the time and method of implementation had been selected; and that would in my view be absurd. Until the prescribed period has expired, therefore, the national court's duty is narrower than the duty which arises after the deadline for implementation. After that date, the national court's duty is the wider one of interpreting *all* relevant provisions of national law in the light of the Community provisions: see, as regards the latter duty, Case C-106/89 *Marleasing* [1990] ECR I-4135, at paragraph 8 of the judgment, where the Court stated that:

'... the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts'.

That passage makes it clear, in my opinion, that the wider duty of interpretation is founded on the obligation to implement the directive, which is of course an obligation which arises only when the deadline for implementation has expired.

25. Accordingly, in order to determine the extent of the national court's duty of interpretation, it may be necessary to assess whether the national provisions in question are intended to implement the directive concerned. Such an assessment of the intention of the legislative authorities is however a normal part of the interpretation of any legislation. It does not therefore seem to me unacceptable that the duty to interpret national provisions in the light of Community law should be affected by the outcome of such an assessment. As we have seen, it then follows that, unless an intention to implement the directive has been discerned, the duty to interpret national provisions in the light of the directive arises only when the period prescribed for implementation has expired.

26. It is true that in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, at paragraph 15 of the judgment, the Court stated that:

'As regards the third question [referred by the national court in that case] concerning the limits which Community law might impose on the obligation or power of the national court to interpret the rules of its

national law in the light of the directive, it makes no difference whether or not the period prescribed for implementation has expired.'

It is to be noted however that the Court had answered that third question by stating that, notwithstanding the national court's duty to interpret national legislation in order to achieve the result intended by the directive, a directive cannot of itself have the effect of imposing criminal liability on individuals: see paragraph 14 of the judgment. Clearly, that limitation on the national court's duty of interpretation obtains, whether or not the period prescribed for implementation has expired. It does not seem to me, on the other hand, that the Court intended to state that the expiry of the deadline for implementation could never affect the scope of the national court's duty to interpret national measures in the light of a directive.

27. I conclude, therefore, that Decision 88/408 can only have direct effect from the end of the period laid down in Article 11 of the decision, whether or not any steps have been taken to implement it into national law before the end of that period; however, even before the expiry of that period, any national legislation intended to implement the decision must be construed, as far as possible, so as to attain the result intended to be achieved by the decision.

The third question

28. It will be recalled that the contested fees were levied pursuant to a regulation made by the *Land* Schleswig-Holstein which sets rates exceeding the standard amounts laid down by Article 2(1) of Decision 88/408. According to the plaintiff, only the Federal Government, as opposed to the authorities of the individual *Länder*, is entitled to exercise the discretion to depart from standard fee levels accorded by Article 2(2) of the decision. The German Government, on the other hand, considers that the fixing of fees at the level of the individual *Länder* is the most appropriate way of ensuring, pursuant to Article 2(2), that fees correspond to real inspection costs. In the view of the German Government, therefore, Germany is entitled to delegate to the authorities of Schleswig-Holstein its power to depart from the standard levels of fees.

29. As the Court has consistently held, in implementing Community legislation a Member State is entitled, in principle, to delegate its powers to domestic authorities. Accordingly, a Member State is entitled to implement by means of measures adopted by regional or local authorities, provided that such a division of powers is consistent with the proper implementation of the provisions in question: see Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, at paragraph 12 of the judgment, and Joined Cases 227/85 to 230/85 *Commission* v *Belgium* [1988] ECR 1, at paragraph 9.

30. In my view, there is nothing in Article 2(2) of the decision to suggest that Member States are precluded from delegating to local or regional authorities the power to depart from the standard fee levels set by Article

2(1). Furthermore, from the guidelines laid down by the Annex to the decision, it is clear that Member States are permitted to reduce the standard levels of fees both 'in general' and 'for individual establishments': see paragraphs 1(a) and (b) of the Annex. That suggests that Member States may adapt fee levels to the conditions prevailing in individual establishments, or alternatively set levels corresponding to average costs over a number of establishments, for instance those of a particular locality or region. Although paragraph 2 of the Annex, which relates to *increases* in the standard levels of fees, does not expressly mention the case of a 'general' increase, I can see no reason for increases and reductions to be governed by different principles. In either case, the principle is that any departures from the standard levels should be justifiable in terms of real inspection costs, calculated either for a particular establishment, or as an average level for a group of establishments operating under comparable conditions. It is clearly envisaged that such an average can be calculated for an individual locality or region as well as for an entire Member State.

31. It seems to me, therefore, that the power to depart from the standard fee levels laid down in Article 2(1) can be exercised at a local or a regional, as well as at a national level. That interpretation is confirmed by Article 5(1) of the decision, which provides that:

'The amount referred to in Article 2 shall replace all other health inspection charges or fees levied by the national, regional or local authorities of the Member States ...'.

Thus, the power can be exercised by a local or regional authority setting fees for individual slaughtering establishments or groups of establishment, or setting a standard fee for all establishments of the locality or region concerned.

Conclusion

32. I am accordingly of the opinion that the questions referred by the Verwaltungsgericht should be answered as follows:

(1) Article 2(1) of Council Decision 88/408/EEC may be relied upon by an individual before a national court against a Member State which has failed properly to exercise its discretion under Article 2(2) of the decision, but may be so relied upon only in respect of a period after the date fixed by Article 11 of the decision.

(2) A Member State may delegate the exercise of its powers under Article 2(2) of Decision 88/408/EEC to its regional or local authorities.