JUDGMENT OF THE COURT (First Chamber)

19 March 2009 *

In Case C-309/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hessischer Verwaltungsgerichtshof (Germany), made by decision of 13 June 2007, received at the Court on 5 July 2007, in the proceedings

Baumann GmbH

v

Land Hessen,

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,

* Language of the case: German.

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,

after considering the observations submitted on behalf of:

— Baumann GmbH, by L. Liebenau and M. Stephani, Rechtsanwälte,

— Land Hessen, by H. Nebel, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher and M. Vollkommer, acting as Agents,

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

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation, first, of Article 5(3) 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 and consolidated by Council Directive 96/43/EC of 26 June 1996 (OJ 1996 L 162, p. 1) ('Directive 85/73') and, secondly, of point 4(a) of Chapter 1 of Annex A of that directive.

2 This reference was made in the course of proceedings between Baumann GmbH ('Baumann') and the *Land* Hessen regarding the calculation of the fees payable for veterinary inspections and controls of fresh meat.

Legal context

Community legislation

3 Article 1 of Directive 85/73 provides:

'Member States shall ensure, in accordance with the arrangements laid down in Annex A, that a Community fee is collected to cover the costs occasioned by inspections of and controls on the products listed in that Annex, including those aimed at ensuring animal production in slaughterhouses, in accordance with the requirements of Directive 93/119/EEC.'

4 Article 5(1), (3) and (4) of Directive 85/73 provides:

'1. The Community fees shall 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,

— administrative costs incurred in carrying out controls and inspections, which may include the expenditure required for in-service training of inspectors,

for the controls and inspections referred to in Articles 1, 2 and 3.

…

3. Member States shall 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.

4. Without prejudice to the choice of the authority empowered to charge Community fees, Community fees shall 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 Articles 1, 2 and 3 and the certification thereof.

This directive shall not prevent Member States from charging fees forcombating epizootic and enzootic diseases.'

5 Point 1 of chapter I of Annex A to Directive 85/73 fixes the standard amounts for inspection costs relating to slaughter. The detailed rules for the financing of the controls and inspections connected with cutting operations are set out in point 2 of that chapter. Points 4(a) and (b) of Chapter I provide:

'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.

Apart from that laid down in point 5(a), the conditions to be met might be the following:

…

— higher costs due to special travelling times,

— more time taken up on inspections due to frequently changing slaughter periods beyond the control of inspection staff,

…

— inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours.

The amount of the increases in the central standard rate for fees depends on the level of the costs to be covered;

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

National legislation

6 As is apparent from the order for reference, Directive 85/73 was transposed into German law in part by provisions laid down by the federal authorities and in part by provisions adopted by the *Länder*.

7 The legislature of the *Land* Hessen, on the basis of the Veterinärkontroll-Kostengesetz (Law on charges for veterinary inspections) of 3 November 1998 (GVBl. 1998 I, p. 414), which implements certain provisions of federal law, adopted the Verwaltungskostenordnung für den Geschäftsbereich des Ministeriums für Umwelt, ländlichen Raum und Verbraucherschutz (Administrative charges order for the portfolio of the Ministry of the Environment, Rural Areas and Consumer Protection) of 16 December 2003 (GVBl. 2003 I, p. 362) ('the Administrative Charges Order'), and the Änderungsverordnung (amending order) of 31 January 2005 (GVBl. 2005 I, p. 74).

8 Under Paragraph 4(6) of the Law on charges for veterinary inspections, undertakings in which there are more than 1 500 slaughters per month are regarded as 'large undertakings' ('Großbetriebe') and may be made subject, on the basis of specific controls, to payment of specific fees in relation to the costs occasioned by those controls.

9 Paragraph 5 of the Law on charges for veterinary inspections provides:

'An increase in the fee may be demanded for official acts which are carried out on special request outside normal slaughtering hours. The special costs incurred in order to carry out official acts outside normal slaughtering hours may, in particular, be invoiced additionally. Normal slaughtering hours are:

— as regards large undertakings, from 06.00 hrs to 18.00 hrs on working days and from 06.00 hrs to 15.00 hrs on Saturdays;

— for other undertakings, from 07.00 hrs to 18.00 hrs on working days and from 07.00 hrs to 15.00 hrs on Saturdays.'

10 According to the national court, the Administrative Charges Order lays down, for each of those two categories of undertaking, diminishing fee scales in respect of the various types of animal slaughtered which do not reproduce strictly the scheme and structure of point 1 of chapter I of Annex A to Directive 85/73.

11 Under the Administrative Charges Order, the increase in the fees provided for in Paragraph 5 of the Law on charges for veterinary inspections is one of 25% as against the fees normally payable.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 As is apparent from the file sent to the Court, the dispute in the main proceedings concerns notices issued by the *Land* Hessen for the recovery of the fees payable for veterinary inspections and controls of fresh meat in premises belonging to Baumann. Bauman brought proceedings before the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt) as it took the view that the legislation of that *Land* setting out the scales for those fees is contrary to secondary Community law. By judgment of 6 July 2006, the Verwaltungsgericht Darmstadt granted Baumann's application and held that the Administrative Charges Order does not constitute a valid conferral of authority which permits the *Land* Hessen to depart, to the detriment of economic operators, from the standard fees provided for in point 4(a) of chapter I of Annex A to Directive 85/73.

13 The *Land* Hessen brought an appeal against that judgment before the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse), which, taking the view that the decision in the case depended on the interpretation of Directive 85/73, decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a national legislature, when availing itself of the power laid down in Article 5(3) of [Directive 85/73] and in point 4(a) of Chapter I of Annex A thereto to increase the standard amounts of fees for individual establishment and in point 4(b) to collect a fee which covers actual costs, strictly bound by the fee structure laid down in points 1 and 2(a) of Chapter I of Annex A (according to type of animal, young or adult animals, carcase weight, etc.) or may it make a distinction, when setting the amounts of scales of fees, between inspections of slaughtering units in large establishments and other inspections and, in addition, also within those two groups adjust the rate of fees on a diminishing scale according to the number of animals slaughtered within the animal types, provided only that that reflects the actual costs?

2. On the basis of the abovementioned provisions, may a national legislature collect, in respect of slaughtering carried out outside normal slaughtering hours at the request of the owner, an additional fee on a percentage basis on top of the fee collected for slaughtering inspections in normal slaughtering hours when that increase reflects the additional actual costs, or must those costs be contained in the standard (increased) fee for all persons subject to a fee?'

The questions referred for a preliminary ruling

The first question

14 In order to answer the first question, it is necessary to distinguish the power granted to the Member States by point 4(a) of chapter I of Annex A to Directive 85/73 from that made available to them by point 4(b) thereof.

15 As regards the first of those two provisions, it must be pointed out that it permits Member States, in order to cover costs higher than those provided for by Directive 85/73, to increase 'the standard amounts of fees' as laid down in points 1 and 2(a) of chapter I of Annex A 'for individual establishments'.

16 In that regard, clearly, first, it is apparent from the wording of point 4(a) that that provision applies only to 'individual' establishments, and thus a Member State may use it only on a case-by-case basis and may not, on the basis of such a provision, categorise slaughterhouses, as in the main proceedings, on the basis of size.

17 Furthermore, that interpretation is borne out by the list of conditions in point 4(a) of chapter I of Annex A to Directive 85/73 that might justify the application of the increase in question, conditions which, first, all relate to specific factors which serve to distinguish one establishment from another and, secondly, are open to judicial review (see to that effect, Case C-374/97 *Feyrer* [1999] ECR I-5153, paragraphs 26 and 27).

18 Secondly, in so far as point 4(a) of chapter I of Annex A to Directive 85/73 refers expressly to the standard amounts of fees laid down in points 1 and 2(a) of chapter I, the increase which Members States may make pursuant to point 4 may apply only to those standard amounts of fees and must, therefore, comply with the scheme and structure thereof.

19 It follows that a Member State may not, pursuant to point 4(a) of chapter I of Annex A to Directive 85/73, charge a fee the scale of which varies according to the size of the establishment and the number of animals slaughtered.

20 As regards point 4(b) of chapter I of Annex A to Directive 85/73, it must be borne in mind, first, that that provision makes available to the Member States an option which they may exercise generally and at their own discretion, provided only that the fee does not exceed the actual costs incurred (see *Feyrer*, paragraph 27).

21 Secondly, a fee charged pursuant to that provision must not take the form of a standard amount (see, to that effect, Case C-270/07 *Commission* v *Germany* [2009] ECR I-1983, paragraph 32).

22 In so far as compliance with the actual costs incurred is the sole condition which Member States must observe, they may, when relying on point 4(b) of chapter I of Annex A to Directive 85/73, vary the amount of that fee according to the size of the

undertaking and the number of animals slaughtered only where it is established that those factors have had an actual effect on such costs.

23 It is for the national court to ascertain whether there is a link between, first, the size of the slaughterhouse and the number of animals slaughtered and, secondly, the actual costs incurred in carrying out the veterinary inspections and controls required by the relevant Community provisions.

24 Having regard to those considerations, the answer to the first question is that:

— point 4(a) of chapter I of Annex A to Directive 85/73 must be interpreted as meaning that it does not permit Member States to deviate from the fee structure laid down in points 1 and 2(a) of Chapter I of Annex A and charge a fee the scale of which varies according to the size of establishments and diminishes according to the number of animals slaughtered per animal type;

— point 4(b) of chapter I of Annex A to Directive 85/73 must be interpreted as meaning that a Member State is not required to comply with the fee structure laid down in points 1 and 2(a) of Chapter I of Annex A and may charge a fee the scale of which varies according to the size of an establishment and the number of animals slaughtered per animal type, where it is established that those factors have an actual effect on the actual costs incurred in carrying out the veterinary inspections and controls required by the relevant provisions of Community law.

The second question

25 By its second question, the national court asks in essence whether points 4(a) and (b) of chapter I of Annex A to Directive 85/73 must be interpreted as meaning that a Member State may charge, in respect of inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours, an 'additional fee on a percentage basis' on top of the fee normally charged for inspections of animals when that increase reflects the additional actual costs incurred.

26 In order to answer that question, it is also necessary to distinguish the power given to the Member States by point 4(a) of chapter I of Annex A to Directive 85/73 from that made available to them by point 4(b) thereof.

27 As regards the first of those two provisions, it must be borne in mind that it permits Member States to increase the standard amounts only for individual establishments, which precludes Member States from making a general increase to the standard amount which has to be paid by all economic operators.

28 It must be added that, in so far as point 4(a) of chapter I of Annex A to Directive 85/73 refers to the amount 'of the increases' in the standard rate, Member States may, if necessary, make more than one increase at the same time without, however, being able to make a general increase to the standard amount.

29 Since the conditions to which such an increase is subject are clearly set out in point 4(a) of chapter I of Annex A to Directive 85/73, that increase cannot be considered to constitute a special fee, of the kind referred to in Joined Cases C-284/00 and C-288/00 *Stratmann and Fleischversorgung Neuss* [2002] ECR I-4611, to be charged on top of the

Community fee in order to cover certain costs incurred in respect of measures of inspection and control which do not take place in every case.

30 In order to comply with the provisions of Directive 85/73, such an increase must, however, reflect the additional costs to be covered.

31 As regards increases in costs which may result from inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours, it must be pointed out that the factors liable to bring about an increase in those costs clearly include the salary costs resulting from the sums paid in respect of the hours, if need be overtime, worked by the persons responsible for carrying out the inspections in question outside their normal working hours.

32 It is for the national court to examine whether, in the main proceedings, the additional amount of 25% on top of the standard amounts of fees referred to in point 4(a) of chapter I of Annex A to Directive 85/73 represents a standard value which reflects the additional costs resulting from inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours.

33 As regards the second of those provisions, namely point 4(b) of chapter I of Annex A to Directive 85/73, it is apparent from paragraph 20 of this judgment that that provision makes available to the Member States an option which they may exercise generally and at their own discretion, provided only that the fee does not exceed the actual costs incurred.

34 As is apparent from paragraph 31 of the judgment in *Commission* v *Germany*, a fee charged pursuant to that provision cannot take the form of a standard amount, with the

result that the overall amount will be apt to vary from case to case according to the actual costs incurred by the competent authority in respect of veterinary inspections and controls in particular establishments.

35 It follows that, even though point 4(b) of chapter I of Annex A to Directive 85/73 does not refer to 'individual establishments', the total amount of the fee payable by each establishment may vary from case to case.

36 In so far as it is not inconceivable that inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours will generate additional costs for the competent authority, inter alia as regards salary costs, it is for the national court to ascertain whether the total fee charged reflects the actual costs incurred.

37 Having regard to those considerations, the answer to the second question is that:

— point 4(a) of chapter I of Annex A to Directive 85/73 must be interpreted as meaning that a Member State may charge, in respect of inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours, an 'additional fee on a percentage basis' on top of the fee normally charged for inspections of animals when that increase represents a standard value which reflects the additional costs to be covered;

— point 4(b) of chapter I of Annex A to Directive 85/73 must be interpreted as meaning that a Member State may charge, in respect of inspections of animals

which, at the request of the owner, are slaughtered outside normal slaughtering hours, an 'additional fee on a percentage basis' on top of the fee normally charged for inspections of animals when that increase reflects the additional actual costs.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Point 4(a) of chapter I of Annex A to 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, as amended and consolidated by Council Directive 96/43/EC of 26 June 1996, must be interpreted as meaning that it does not permit Member States to deviate from the fee structure laid down in points 1 and 2(a) of Chapter I of Annex A and charge a fee the scale of which varies according to the size of establishments and diminishes according to the number of animals slaughtered per animal type;**

Point 4(b) of chapter I of Annex A to Directive 85/73, as amended and consolidated by Directive 96/43, must be interpreted as meaning that a Member State is not required to comply with the fee structure laid down in points 1 and 2(a) of Chapter I of Annex A and may charge a fee the scale of which varies according to the size of an establishment and the number of animals slaughtered per animal type, where it is established that those factors have an actual effect on the actual costs incurred in carrying out the veterinary inspections and controls required by the relevant provisions of Community law.

2. **Point 4(a) of chapter I of Annex A to Directive 85/73, as amended and consolidated by Directive 96/43, must be interpreted as meaning that a Member State may charge, in respect of inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours, an 'additional fee on a percentage basis' on top of the fee normally charged for inspections of animals when that increase represents a standard value which reflects the additional costs to be covered;**

   Point 4(b) of chapter I of Annex A to Directive 85/73, as amended and consolidated by Directive 96/43, must be interpreted as meaning that a Member State may charge, in respect of inspections of animals which, at the request of the owner, are slaughtered outside normal slaughtering hours, an 'additional fee on a percentage basis' on top of the fee normally charged for inspections of animals when that increase reflects the additional actual costs.

[Signatures]