

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

15 April 1997 \*

In Case T-390/94,

**Aloys Schröder, Jan Thamann and Karl-Julius Thamann**, acting in the capacity of partners in Zuchtschweine Epe GbR, a partnership governed by German law, established at Neuenkirchen (Germany), represented by Wilhelm Clages, Gerd Rentzmann and Rudolf Brenken, Rechtsanwälte, Quakenbrück, with an address for service in Luxembourg at the Chambers of Michel Molitor, Pierre Feltgen and André Harpes, 14A, rue des Bains,

applicants,

v

**Commission of the European Communities**, represented by Claudia Schmidt, of its Legal Service, acting as Agent, assisted by Georg M. Berrisch, Rechtsanwalt, Hamburg and Brussels, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: German.

APPLICATION for an award of damages under Article 178 and the second paragraph of Article 215 of the EC Treaty against the Commission for damage allegedly suffered by the applicants as a result of a series of decisions adopted by the Commission to control classical swine fever in the Federal Republic of Germany,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, J. Azizi and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 12 November 1996,

gives the following

## Judgment

### Legal background

- 1 With a view to the completion of the internal market and in order to guarantee free movement of animals, the Community adopted a whole series of measures, including Council Directive 90/425 EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224,

p. 29, hereinafter ‘Directive 90/425’), which provides in particular that veterinary checks are essentially to be carried out at the place of dispatch and that they may take place in the Member State of destination only in the form of spot checks and, secondly, that a Member State should immediately adopt the provisions provided for by Community law in the event of the outbreak of certain diseases on its territory, such as classical swine fever.

2 Article 10 of Directive 90/425 lays down the respective obligations of the Member States of dispatch, of the Member States of destination and of the Commission with regard to the prevention and combating of any disease likely to constitute a serious hazard to animals or to human health.

3 Article 10(3) provides:

‘If the Commission has not been informed of the measures taken, or if it considers the measures taken to be inadequate, it may, in collaboration with the Member State concerned and pending the meeting of the Standing Veterinary Committee, take interim protective measures with regard to animals [...] from the region affected by the epizootic disease or from a given holding, centre or organization. These measures shall be submitted to the Standing Veterinary Committee as soon as possible to be confirmed, amended or cancelled in accordance with the procedure laid down in Article 17.’

4 Article 10(4) is worded as follows:

‘The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the animals [...] referred to in Article 1 [...]. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.’

5 The Standing Veterinary Committee, established by Council Decision 68/361/EEC of 15 October 1968 (OJ 1968 L 255, p. 23), is composed of experts representing the Member States and chaired by the Commission. Plans to adopt or amend protection measures under Article 10(4) of Directive 90/425 must be referred to it by the Commission.

6 Council Directive 80/217/EEC of 22 January 1980 introducing Community measures for the control of classical swine fever (OJ 1980 L 47, p. 11, hereinafter 'Directive 80/217') introduces Community measures for the control of classical swine fever.

7 Article 3 provides:

'Member States shall ensure that the presence and suspected presence of swine fever are compulsorily and immediately notifiable to the competent authority'.

8 According to Article 4, where a holding contains one or more pigs suspected of being infected with swine fever, the official means of investigation must be set in motion immediately. In accordance with that same provision, the holding must be placed under official surveillance and, in particular, no pigs may be allowed to enter or leave the holding. Article 5 provides that, in cases where the presence of swine fever is officially confirmed, all pigs on the holding must be slaughtered without delay under official supervision and destroyed in such a way that there is no risk of the swine fever virus spreading. Under Articles 7 and 8, epizootiological enquiries must be carried out in order, in particular, to establish the possible origin of the infection and to investigate whether the virus could have spread through contact with other herds.

9 Article 9(1) of Directive 80/217, as amended by Directive 91/685/EEC (OJ 1991 L 377, p. 1, hereinafter 'Directive 91/685'), provides:

'Immediately after the diagnosis of classical swine fever has been officially confirmed in pigs on a holding, the competent authorities shall establish a protection zone with a radius of at least three kilometres around the outbreak site, which shall itself be included in a surveillance zone of a radius of at least 10 kilometres.'

10 Article 9(2) of the same directive lists a series of factors to be taken into consideration by the competent authority in each instant case when establishing protection and surveillance zones. Those factors are, in particular, the results of the epidemiological studies carried out in accordance with Article 7, the geographical situation, particularly natural boundaries, the location and proximity of holdings, patterns of trade and facilities for carrying out checks.

11 Pig production normally comprises four stages (production of farming breeds, rearing of gilts, production of fattening pigs and fattening), each one representing a specialized activity. Those activities give rise to intense trade in animals, in particular between Member States.

12 Classical swine fever is an acute contagious viral infection in pigs with a mortality rate which may reach 100% in the case of typical infection. Although not transmissible to man, it may spread quickly and permanently threaten the existence of pig herds. Depending on how the disease develops, the incubation period is from two to 20 days. Before the disease becomes manifest and identifiable, the pathogenic agent may already have been transmitted several times. This is explained in particular by the fact that holdings engaged in the rearing of gilts and the production of fattening pigs often resell their animals to a number of holdings.

- 13 In order to control classical swine fever, the Community follows a policy of non-vaccination like the United States of America, Australia, Canada, New Zealand, Norway, Hungary, Poland and the Czech Republic. Many countries prohibit the importation of pigs from regions in which vaccination is authorized. Similarly, only pigs coming from regions in which, during the last 12 months, no case of classical swine fever has been reported and in which no vaccination against the disease has been carried out may be imported into the Community.

**The cases of classical swine fever which appeared in Germany in 1993-1994 and the measures taken by the Commission**

- 14 In 1993, 100 cases of classical swine fever were reported in Germany, as against 13 in 1992 and six in 1991. Those 100 cases were spread over seven Länder, the most affected being the Land of Niedersachsen with 60 cases, of which 18 occurred in the period from 25 May to 16 June 1993 alone.
- 15 Relying on Article 10(4) of Directive 90/425, the Commission adopted Decision 93/364/EEC of 18 June 1993 concerning certain protection measures relating to classical swine fever in Germany (OJ 1993 L 150, p. 47, hereinafter 'Decision 93/364'). Since, according to the preamble, the risk of infection was limited to a geographically limited area, Article 1 provided that 'Germany shall not send to other Member States live pigs coming from those parts of its territory described in Annex I' of the decision, namely to certain districts of the Länder Niedersachsen, (West) Mecklenburg-Vorpommern, Schleswig-Holstein, Nordrhein-Westfalen and Rheinland-Pfalz. Whilst noting that Germany had taken measures and, in particular, established protection and surveillance zones in accordance with Directive 80/217, the Commission, however, obliged it, in Article 2 of Decision 93/364, to introduce appropriate measures of an equivalent level to ensure that the disease was not spread from those parts of its territory which were

subject to restrictions to other parts. Article 3 of Decision 93/364 provided that Germany was not to send to other Member States fresh pigmeat and pigmeat products obtained from pigs coming from holdings situated in parts of its territory described in Annex I.

- 16 Since, in the meantime, fresh outbreak sites were confirmed in Germany, Commission Decision 93/497/EEC of 15 September 1993 amending Decision 93/364 (OJ 1993 L 233, p. 15, hereinafter 'Decision 93/497') enlarged the part of the territory concerned by the bans on the export of pigs.
- 17 When a first case of classical swine fever had been diagnosed in Belgium in pigs imported from Germany, Belgium, by Ministerial Decree of 14 October 1993, prohibited the importation of pigs from Germany and the Commission, by Decision 93/539/EEC of 20 October 1993 concerning certain protection measures relating to classical swine fever in Germany and repealing Decision 93/364 (OJ 1993 L 262, p. 67, hereinafter 'Decision 93/539') extended the prohibitions on the exportation of pigs to the entire territory of Germany.
- 18 Commission Decision 93/553/EEC of 29 October 1993 amending Decision 93/539 (OJ 1993 L 270, p. 74) prolonged until 4 November 1993 the export prohibitions initially applicable until 29 October 1993.
- 19 The Commission then adopted, still on the basis of Article 10(4) of Directive 90/425, Decision 93/566/EC of 4 November 1993 concerning certain protection measures relating to classical swine fever in Germany and replacing Decision 93/539 (OJ 1993 L 273, p. 60, hereinafter 'Decision 93/566'). Under that decision, Germany was not to send live pigs (Article 1) nor fresh pigmeat or pigmeat products (Article 2) coming from the districts referred to in Annex I not only to other Member States but also to other parts of its own territory (hereinafter 'bans on dispatch').

- 20 The district of Osnabrück in which the applicants' holding is located was one of the districts of the Land of Niedersachsen listed in Annex I referred to above.
- 21 Commission Decision 93/621/EC of 30 November 1993 amending Decision 93/566 and replacing Decision 93/539 (OJ 1993 L 297, p. 36, hereinafter 'Decision 93/621') defined the territory covered by the bans on dispatch according to communes and no longer according to districts. According to the Commission, all communes whose territory was included in total or in part in a radius of 20 km around the holdings in which cases of classical swine fever had been reported were covered. The commune of Bramsche in which the applicants' holding is located was amongst the communes of the district of Osnabrück listed in the new Annex I to the amended Decision 93/566.
- 22 Commission Decision 93/671/EC of 10 December 1993 (OJ 1993 L 306, p. 59, hereinafter 'Decision 93/671'), as well as Commission Decision 93/720/EC of 30 December 1993 (OJ 1993 L 333, p. 74, hereinafter 'Decision 93/720'), amending for the second and third time Decision 93/566 and replacing Decision 93/539, adjusted the extent of the territories covered by the bans on dispatch in order to take account of the changing pattern of outbreaks of classical swine fever.
- 23 Commission Decision 94/27/EEC of 20 January 1994 concerning certain protection measures relating to classical swine fever in Germany and repealing Decision 93/566 (OJ 1994 L 19, p. 31, hereinafter 'Decision 94/27'), based on Article 10 of Directive 90/425, changed the extent of the territories covered by the bans on dispatch. Only certain communes of three districts of the Land of Niedersachsen remained covered by the bans. The commune of Bramsche was amongst the communes listed in Annex I to that decision.
- 24 When new cases of classical swine fever were reported in other regions of Niedersachsen, Article 1(1) of Commission Decision 94/178/EC of 23 March 1994 concerning certain protection measures relating to classical swine fever in Germany



and repealing Decisions 94/27/EC and 94/28/EC (OJ 1994 L 83, p. 54, hereinafter 'Decision 94/178') extended to the entire territory of the Land of Niedersachsen the bans on dispatch not only to other Member States but also to other parts of Germany. Furthermore, Article 1(2) of the same decision laid down a ban on movement within Niedersachsen itself as regards the parts of its territory particularly threatened, namely the area mentioned in Annex II to that decision to the area mentioned in Annex I.

25 As a result of the reappearance of an increased number of outbreaks of classical swine fever in the Land of Niedersachsen, Commission Decision 94/292/EC of 19 May 1994 (OJ 1994 L 128, p. 21, hereinafter 'Decision 94/292'), amended Decision 94/178 for the purposes, in particular, of adjusting the area defined in Annex II.

26 The applicants are engaged in the rearing of gilts of the JSR hybrid breed on their pig farm located at Epe, in the commune of Bramsche, in the district of Osnabrück in Niedersachsen. The holdings supplied by the applicants are, according to their information, mainly in the districts of Vechta, Diepholz and Osnabrück and in the neighbouring region of the land of Nordrhein-Westfalen.

27 The applicants' holding has not been affected by classical swine fever but is located in the parts of the territory covered by the bans on dispatch imposed by the abovementioned decisions which the Commission adopted between 4 November 1993 and 19 November 1994.

### **Procedure and forms of order sought by the parties**

28 Those were the circumstances in which the applicants, on 15 December 1994, brought this action for damages.

29 Upon hearing the Report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and adopt measures of organization of procedure under Article 64 of the Rules of Procedure, consisting in requesting the parties to reply in writing to a number of questions. This request was duly met.

30 The parties presented oral argument and answered questions put to them by the Court at the hearing on 12 November 1996.

31 The applicants claim that the Court should:

- order the defendant to pay them damages of DM 173 174.45 as compensation for the damage suffered as a result of the contested decisions;
- order the defendant to pay the costs.

32 The Commission contends that the Court should:

- declare the action inadmissible or dismiss it as unfounded;
- order the applicants to pay the costs.

### Admissibility

33 According to the Commission, the application is inadmissible because it has been brought by 'Aloys Schröder, Jan and Karl-Julius Thamann, Zuchtschweine Epe

GbR', which is a Gesellschaft bürgerlichen Rechts (GbR) (a partnership under the Civil Code), within the meaning of Paragraph 705 et seq. of the German Civil Code. Under German law, such a partnership does not have a capacity to bring legal proceedings.

34 The Commission's position cannot be accepted. As the applicants rightly point out, it is clear from the heading of the application and from the summary of pleas and arguments and from the authority to act in legal proceedings which mentions 'the applicants' and not 'the applicant', that the action was brought by the natural persons Aloys Schröder, Jan Thamann and Karl-Julius Thamann in their capacity as partners in the partnership Zuchtschweine Epe GbR and not by that partnership.

35 It follows that the action is admissible.

## Substance

36 The applicants maintain that Commission Decisions 93/566, 93/621, 93/671, 93/720, 94/27, 94/178 and 94/292 are vitiated by illegality and that they have caused them damage which the Community must make good pursuant to the second paragraph of Article 215 of the EC Treaty.

37 The Commission contends that the conditions under which the Community incurs liability for the acts of its institutions are not fulfilled.

A — *The nature of the acts in question**Arguments of the parties*

- 38 In the applicants' view, the decisions in question, are, as opposed to legislative acts, administrative acts which have only to be unlawful for the Community to incur liability. Consequently, the principles developed by the Court for making good damage caused by an act of the administration are to be applied (Case 4/69 *Lütticke v Commission* [1971] ECR 325) and not those relating to Community liability arising from legislative acts involving choices of economic policy (Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975).
- 39 In this regard, the applicants point out first of all that all the cases in which the Court has held that liability for legislative measures must be assessed according to the most strict criteria concerned regulations or implementing regulations within the meaning of the second paragraph of Article 189 of the Treaty. According to the case-law of the Court (Joined Cases 16/62 and 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes and Others v Council* [1962] ECR 471), a measure can only be legislative in character and correspond to the legislative function if its regulatory content is sufficiently abstract and it is of general application. As it is, only regulations have these characteristics.
- 40 The applicants further contend that a decision, within the meaning of the fourth paragraph of Article 189 of the EC Treaty, constitutes a specific individual measure appropriate for performing an administrative act, the Commission being the institution charged with adopting such decisions as the executive organ of the Community.

41 The applicants then go on to dispute that the legislative or administrative nature of a measure can depend on the institution adopting it having a discretionary power.

42 According to the applicants, the legislative character of an act justifies the most strict conditions required by the case-law on Community liability. Underlying that case-law is the concern not to impede the Community's legislative action by the possibility of claims for damages. In this regard, in paragraph 11 of its judgment in *Zuckerfabrik Schöppenstedt v Council*, cited above in paragraph 38, the Court judiciously attenuated the Community's liability for damage suffered by an individual on the ground that that case concerned legislative action which involved 'choices of economic policy'.

43 The applicants also contend that the Court recognizes a discretionary power in economic policy only as far as the Community legislature is concerned. They emphasize that it is in principle the Council which exercises the legislative function and that the Commission acts in this capacity only in exceptional cases in which, on the basis of specific authority, it is invested with power to adopt legislative measures, an implementing regulation representing the typical case of such authority.

44 The applicants consider that the aforementioned Commission decisions adopted between 4 November 1993 and 19 May 1994, enacting bans on dispatch to specific regions, constitute sufficiently specific individual measures based on Article 10(4) of Directive 90/425. However, in their view, that provision did not confer on the Commission specific authority to legislate pursuant to a discretion in matters of economic policy but authority to apply the law to particular concrete cases, if need be on the basis of a discretionary power.

45 Finally, the applicants contend that the decisions in question allow the pig producers and exporters concerned, established in Germany, to be identified individually. Those decisions are therefore administrative measures concerning concrete facts and do not concern general and abstract matters of regulation.

46 The Commission contends that the principles relating to Community liability for legislative action involving choices of economic policy are applicable to this case, the concept of legislative action used by the Court in the *Zuckerfabrik Schöppenstedt* judgment, cited above in paragraph 38, and in subsequent judgments covering all the acts mentioned in Article 189 of the Treaty, including decisions addressed to the Member States.

47 The decisions called in question involve 'choices of economic policy', a concept covering all decisions adopted in the exercise of a discretion and intended to organize a sector, in particular a common organization of the market (Case 43/72 *Merkur-Außenhandels v Commission* [1973] ECR 1055; Case T-472/93 *Campo Ebro Industrial and Others v Council* [1995] ECR II-421, paragraph 42). In this regard, in adopting the contested decisions and in particular in determining the regions to be subject to the bans on dispatch, the Commission had to balance the general interest of the functioning of trade in pigs within the Community, the interest of health protection and preserving pig herds in the Community and the interests of pig producers in the regions of Germany in which classical swine fever had broken out.

48 The Commission further makes reference to the case-law of the Court according to which the Community incurs liability only exceptionally and in special circumstances on account of a legislative measure involving choices of economic policy, so as to ensure that, in economic matters the institutions are not hindered in making [their] decisions by the prospect of applications for damages whenever [they] have occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals (Joined Cases 83/76 and 94/76, 4/77,

15/77 and 40/77 *HNL and Others v Council and Commission* [1978] ECR 1209, paragraph 5). In the Commission's view, that case-law is applicable in the present case since if the Commission were to fear actions for damages each time it was obliged to adopt measures to control outbreaks of epizootic diseases, it would be considerably hampered in its range of action. In such cases, in which very rapid action is normally required, it can incur liability only exceptionally and in special circumstances.

### *Findings of the Court*

- 49 The second paragraph of Article 215 of the Treaty provides that, in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions in the performance of their duties.
- 50 It is settled case-law that, in order for the Community to incur liability, a set of conditions must be met: the conduct alleged against the Community institution must be illegal, there must be actual damage and there must be a causal link between the unlawful conduct and the damage claimed (Case T-575/93 *Koelman v Commission* [1996] ECR II-1, paragraph 89).
- 51 As regards the first condition, relating to the existence of unlawful conduct, the Court has consistently held that, in the field of administrative action, any infringement of law constitutes illegality which may give rise to liability on the part of the Community (Case 145/83 *Adams v Commission* [1985] ECR 3539).

52 In the field of legislative action, on the other hand, the Community can incur liability only if there has been a breach of a superior rule of law for the protection of individuals. If the institution has adopted the measure in the exercise of a wide discretion, Community liability further requires that the breach be explicit, that is to say it must be manifest and serious (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 81).

53 The question to be examined, therefore, is whether the contested decisions are legislative or administrative in nature and, in such a case, whether the Commission had a wide discretion for their adoption.

54 It must be pointed out first of all that, contrary to the applicants' contention, the concept of legislative measure within the meaning of the case-law may apply to all the measures referred to by Article 189 and not only to regulations. According to settled case-law, the nature of a measure is not to be sought in its external form, but rather in whether or not the measure at issue is of general application (*Exporteurs in Levende Varkens and Others v Commission*, cited above in paragraph 52, paragraph 86).

55 In order to determine the nature of the measures in question, the following considerations must be taken into account.

56 First, the contested decisions produce with regard to the applicants effects which are those of a measure of general application, in the same way as a regulation prohibiting all pig producers and exporters established in certain parts of a Member State's territory from dispatching specific animals or products to other Member States or to other parts of that Member State's territory.



57 That conclusion is not invalidated by the applicants' argument that it is possible to identify all the pig producers and exporters established in Germany covered by the contested decisions. It is settled case-law that the legislative nature of a measure is not called in question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it is established that it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 18).

58 Second, the contested decisions have been adopted in the field of common agricultural policy, as is clear both from their content and the reference made to Article 43 of the Treaty by Directive 90/425, on the basis of which they were adopted; in this field, the institutions normally have a broad discretion.

59 Third, in order to adopt protective measures, such as the contested bans and the definition of the parts of territory subject to those bans, the Commission has to balance the general interests of free movement of animals within the Community, health protection and preservation of pig herds in the Community with the individual interests of the pig producers affected by the bans.

60 Fourth, in view of the intensive trade in pigs between Member States and in view of the extremely contagious nature of the pathogenic agent causing classical swine fever, its relatively short incubation period and its fatal outcome for the animals affected, controlling the spread of classical swine fever in general requires rapid action on the Commission's part.

61 Finally, in a recent judgment (*Exporteurs in Levende Varkens and Others v Commission*, cited above in paragraph 52, paragraph 87), the Court of First Instance has already held that a decision adopted by the Commission on the basis of Article 1(4) of Directive 90/425 imposing a ban on the export of live pigs from one Member State to another is a legislative measure.

62 It follows from the foregoing that the contested decisions are legislative measures involving choices of economic policy for the adoption of which the institution has a broad discretion.

63 According to the settled case-law cited above, such measures may give rise to liability on the Community's part only exceptionally and in special circumstances so as to ensure that the Community institutions are not hindered in adopting measures by the prospect of actions for damages whenever they have occasion to adopt legislative measures in the public interest which may adversely affect the interest of individuals (*HNL and Others v Council and Commission*, cited above in paragraph 48, paragraph 5).

64 Consequently, the Community can incur liability in the present case only if the Commission has manifestly and seriously disregarded a superior rule of law for the protection of individuals.

B — *Whether a superior rule of law for the protection of individuals has been manifestly and seriously disregarded*

65 In substance, the applicants rely on five pleas to demonstrate that the contested decisions are unlawful: (i) breach of the principle of non-discrimination; (ii) breach of the right to property and the right to pursue an occupation or trade; (iii) breach of the principle of proportionality; (iv) insufficient legal basis for the contested decisions, and (v) breach of Article 190 of the Treaty.

- 66 Whilst the first four pleas all relate to a breach of a superior rule of law for the protection of individuals, there is, however, no need to examine the merits of the fifth plea. For, according to settled case-law, insufficient reasoning in a regulatory measure cannot cause the Community to incur liability (Case 106/81 *Kind v EEC* [1982] ECR 2885, paragraph 14; Case T-167/94 *Nölle v Council and Commission* [1994] ECR II-2589, paragraph 57).

*Plea alleging breach of the principle of non-discrimination*

- 67 This plea is in three parts. The applicants allege (i) discrimination in relation to Belgium, (ii) discrimination arising from the determination of areas according to administrative boundaries and (iii) discrimination in relation to the Land of Nordrhein-Westfalen.

First part: discrimination in relation to Belgium

— Arguments of the parties

- 68 The applicants consider that they are discriminated against in relation to pig farmers established in Belgium. Pointing out that classical swine fever has broken out in Belgium, in the commune of Wingene in Western Flanders, at roughly the same time as in Germany, they state that, in that region, only the measures applicable to the protection and surveillance areas provided for by Article 4 of Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine (OJ, English Special Edition 1963-1964, p. 164, hereinafter 'Directive 64/432') and by Directive 80/217 have been taken by the Belgian authorities, without the Commission adopting any additional protection measure for the administrative territorial units (districts and communes) affected or in close proximity to those affected by the outbreak of classical swine fever.

69 The substantial differences in the bans applicable to Belgium and to the Land of Niedersachsen are not objectively justified and the Commission decisions called in question contain no objective explanations justifying this discrimination.

70 The classical swine fever epidemics in Belgium and Niedersachsen were comparable. The comparison did not have to be made exclusively on the basis of the absolute number of outbreaks of classical swine fever. This number does not reflect the extent of the economic damage and a precise and detailed analysis supports the conclusion that the pattern and effects of swine fever epidemics during the years 1993 and 1994 were quite comparable in Belgium and Niedersachsen. In Western Flanders and in Niedersachsen the same 'Lorraine' strain was found, there was a similar structure of pig production and the same high pig density and contamination at the same time of the year. Consequently, it cannot be stated that the Belgian authorities, apart from the fact that they immediately established 20 km protection zones had been more efficient than the German authorities in controlling classical swine fever during the period in question.

71 The applicants claim that the Commission has not adduced specific evidence of the failure for which the Niedersachsen authorities are criticized in comparison with the Belgian authorities. On the contrary, the Commission expressly admitted in the seventh recital of the preamble to Decision 93/566 that 'Germany [had] taken measures in accordance with Directive 80/217/EEC and, furthermore, [had] introduced further measures within the affected areas'.

72 Finally, even if a difference of treatment was objectively justified, it had to be in fair proportion to the circumstances relied on (Case 114/76 *Bela-Mühle* [1977] ECR 1211, Joined Cases 63/72 to 69/72 *Werhahn Hansamühle and Others v Council* [1973] ECR 1229 and *Merkur-Außenhandel v Commission*, cited in paragraph 47 above). In so far as the bans on dispatch had the aim, according to the Commission, of preventing the spread of classical swine fever by defining wide areas around the infected holdings, they ought to have been linked to the precise place in which the disease had broken out. Consequently, it is inappropriate and

without any relation to the aim of the bans on dispatch to apply administrative delimitation criteria no longer exhibiting any such link, in particular when, as in Niedersachsen, the administrative territorial divisions are very big. The amendment of Decision 93/566 by Decision 93/621 defining the areas covered by the bans according to communal borders at a time when the disease was not spreading show that the Commission was aware that the bans on movement applied on the basis of district borders were inappropriate and disproportionate.

73 The Commission maintains that the situations in Belgium and Germany with regard to classical swine fever were different.

74 It points out that in 1993 only seven outbreaks of classical swine fever were reported in Belgium whereas at the same period 100 outbreaks had been reported in Germany (as against 13 in 1992 and six in 1991) of which 60 were in Niedersachsen alone. In controlling classical swine fever, it is the number of declared cases and not the extent of the economic damage caused by the slaughtering of pigs which must determine the adoption of bans on dispatch. A criterion based on the number of outbreaks allows it to be determined whether the national authorities will be able to manage to stem the spread of the epidemic and allows it to be ascertained whether it is prudent to impose bans on dispatch.

75 The Belgian authorities were more efficient in controlling classical swine fever, mainly because, from the very beginning, they had established additional areas having a 20 km radius and carried out more extensive epizootiological investigations. It is pointless, in the present case, to consider how the Niedersachsen authorities acted wrongly since it was unquestionable, in view of the high number of cases of classical swine fever which had broken out, that they had not managed to control the epidemic and that there was a risk of it spreading. Similarly, the German authorities, unlike the Belgian authorities which had kept the Commission constantly informed of the situation, had not sent to the Commission, on their own initiative, any information either on how the epidemic was developing or on

the situation on the ground. As it is, the Commission depends on that kind of collaboration in drawing up bans and taking all the protective measures necessary.

- 76 Finally, even supposing that the situations in Belgium and Germany were comparable, the difference in treatment was objectively justified since the Commission must, in the interests of maintaining trade in pigs in the Community and in order to protect pig herds in other Member States, intervene only when the national authorities are no longer able to control and effectively combat the disease. As it is, the Belgian authorities had shown themselves to be dependable in controlling classical swine fever whereas, on 4 November 1993, the date on which the first of the contested decisions was adopted, 92 outbreaks of classical swine fever had already broken out on German territory in that year.

— Findings of the Court

- 77 The second subparagraph of Article 40(3) of the Treaty provides that the common organization of the agricultural markets to be established pursuant to the common agricultural policy 'shall exclude any discrimination between producers or consumers within the Community'. It is settled case-law that the prohibition on discrimination laid down by that provision is simply a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law (Case T-571/93 *Lefebvre and Others v Commission* [1995] ECR II-2379, paragraph 78).
- 78 The principle of non-discrimination has the character of a superior rule of law for the protection of individuals the breach of which may cause the Community to incur liability (see, for example, the judgment in Case T-120/89 *Stahlwerke Peine-Salzgitter v Commission* [1991] ECR II-279, at paragraphs 117 and 118).

79 It is therefore necessary to ascertain whether, in adopting the contested decisions, the Commission manifestly and seriously infringed that principle which, according to case-law, requires that comparable situations should not be treated differently unless a difference in treatment is objectively justified (*Campo Ebro Industrial and Others v Council*, cited above at paragraph 47, paragraph 82).

80 The applicants cannot maintain that they were discriminated against in relation to pig farmers established in Belgium. In 1993, only seven cases of classical swine fever were reported in Belgium whereas, during the same period, 100 cases occurred in Germany, of which 60 occurred in the Land of Niedersachsen alone. In a region with a very high concentration of pig farms, the number of outbreaks of classical swine fever is, as the Commission has rightly pointed out, a proper criterion for assessing the risk of the disease spreading and the need for Commission intervention to protect pig herds in the Member States.

81 It must also be borne in mind that Article 10 of Directive 90/425 requires the Member States to inform the Commission immediately of any outbreak of diseases, such as classical swine fever, and of the control or prevention measures adopted and, in paragraph (3), provides that if the Commission has not been informed of the measures taken, it may take protective measures.

82 In the present case, the Belgian authorities, unlike their Germany counterparts, kept the Commission constantly informed of developments on its territory as they happened and of national action taken in order to control the disease. The Commission was therefore fully informed about the situation in Belgium, which was a good reason for it to take different control action to stop the spread of classical swine fever on Belgian territory in relation to the measures imposed on German territory. Since, in any event, the protection measures taken against the spread of classical swine fever depend on the objective situation as regards the risk of the disease spreading, it is not necessary to examine further any failings of the competent national authorities in taking action against classical swine fever.

83 It follows that the situations in Belgium and in Germany were not comparable, so that the first part of the plea alleging a breach of the principle of non-discrimination must be dismissed.

Second part: discrimination arising from the definition of areas according to administrative boundaries

— Arguments of the parties

84 The applicants complain that the Commission drew up bans on dispatch based on administrative areas (communes and district) rather than drawing a radius around the outbreak of the epidemic, as in the case of the protection and surveillance areas provided for by Article 9(1) of Directive 80/217. Defining parts of territory on the basis of administrative criteria takes no account of the actual danger of contamination and has had a discriminatory effect on them in relation to other holdings which are the same distance away from the place of outbreak but located in an administrative area not covered by the bans on dispatch.

85 According to case-law, a measure has no objective justification if it is manifestly inappropriate. Where it is a matter of controlling epizootic diseases, the assessment of appropriateness can depend only on the degree of risk of contamination and of transmission. The applicants consider that if the bans on dispatch relating to the parts of territory defined according to administrative units may actually prevent the spread of classical swine fever outside those units, they still cannot prevent its spread within those units.

86 The Commission contends that, in order to determine the parts of territory subject to bans on dispatch, it must not only apply purely geographical criteria or, a fortiori, take only the distance from the place of outbreak of infection but it may also



use administrative units as a reference. This is clear in particular from Article 9 of Directive 80/217. The Commission has a discretion in delimiting the parts of territory covered by bans adopted on the basis of Directive 90/425, either according to mainly geographical criteria or on the basis of administrative areas, or by combining those criteria, and the limits of that discretion are exceeded only if the measure in question proves to be manifestly inappropriate (Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14). That is not the position in the present case.

87 In this regard, the choice of method of delimitation is a matter of some dispute between the Member States and the question is being discussed within the Standing Veterinary Committee. The Commission takes as much account as possible of the preferred method of the Member State concerned. In the present case, the Federal Republic of Germany itself advocated delimitation on the basis of administrative units, on the ground that veterinary protection is organized at district level. Such a delimitation thus offered the best guarantees for effective control and implementation in that it allowed immediate recourse to administrative structures of operational control.

88 The Commission also points out that, even if the bans on dispatch had been established on the basis of mainly geographical criteria, the applicants' holding could still have been affected by their application. For the bans would not necessarily have been limited to parts of territory situated within a radius of 20 km around an infected site since it would also be necessary to take account of particular geographical criteria, such as natural frontiers and the density of pig-rearing farms. As it is, according to the information provided by the German authorities, the district of Osnabrück and the neighbouring districts of Vechta and Diepholz have the greatest pig-rearing farm density in the world.

89 Moreover, the applicants have not shown that other holdings comparable to theirs, closer to infected sites, would not have been subject to the bans on dispatch.

90 The Commission states, finally, that even though no new outbreak occurred in the district of Osnabrück between 31 October 1993 and 20 January 1994, 13 outbreaks were still reported in Niedersachsen, most of them in the district of Vechta which shares a border with the district of Osnabrück. 12 of the 13 cases were in the administrative district (Regierungsbezirk) of Weser Ems, which is also part of the district of Osnabrück and the district constitutes the administrative unit responsible for coordinating measures to control classical swine fever. The repeated cases of classical swine fever in the district of Weser Ems showed that errors had clearly been committed in the coordination of the measures to eradicate the epidemic, particularly with regard to the epidemiological investigations.

— Findings of the Court

91 Directive 90/425, on the basis of which the contested decisions were adopted, does not lay down any geographical or administrative criterion for delimiting the parts of territory covered by the protection measures enacted by the Commission.

92 The applicants cannot claim that the Commission ought not to have imposed bans on dispatch in respect of parts of German territory situated beyond a radius of three or 10 km around infection sites, as Article 9 of Directive 80/217 provides as regards the establishment of protection and surveillance zones. That provision does not concern protection and safeguard measures which the Commission may decide to adopt if it considers this necessary but only determination of protection and surveillance zones which the competent authorities of the Member States must establish once the diagnosis of classical swine fever has been officially confirmed.

93 The effectiveness of measures adopted by the Commission on the basis of Directive 90/425 would be jeopardized if their adoption could take place only on the same conditions and according to the same criteria as those required for determination by the national authorities of protection and surveillance zones for the purposes of Directive 80/217. On the contrary, under the Community system for controlling the spread of classical swine fever, the Commission is not to intervene except in the case of necessity, where the measures taken by the Member States do not enable the threat to herds in the Member States to be eliminated.

94 It follows that it is not obligatory for the Commission to follow the provisions of Article 9 of Directive 80/217 when adopting measures based on Article 10(4) of Directive 90/425 and that those provisions constitute at most factors from which the Commission may draw guidance in the exercise of its broad discretion.

95 In any event, even when the contested Commission decisions are assessed in relation to the provisions of Article 9 of Directive 80/217, the applicants' argument is still not borne out. First, the radii of three and 10 km around the infected sites laid down in Article 9(1) of Directive 80/217 are only minimum radii for setting protection and surveillance zones. According to the circumstances of each case, that provision therefore allows zones having a larger radius to be established. Second, the applicants have not shown that a delimitation of the parts of territory affected by the bans on the basis of the sole criterion of geographical distance from the sites of infection would have had the result that their holding would not have been covered by the bans on dispatch. Third, under Article 9(2), zones are not to be established only on the basis of geographical criteria or, a fortiori, only on the basis of distance from the infected sites. That provision provides that, in establishing zones, the competent authority must take into consideration a whole series of other factors, including, in particular, patterns of trade in pigs and facilities for carrying out checks. According to the statements of the Commission, not denied by the applicants, the district of Osnabrück in which the applicants' holding is located, and the neighbouring districts of Vechta and Diepholz, in which numerous cases of classical swine fever were reported, has the highest density of pig-rearing farms in the world.

- 96 Consequently, the Commission was entitled to delimit the parts of territory covered by the bans on dispatch on the basis of the borders of administrative units.
- 97 Nevertheless, it is necessary to examine whether, in adopting the contested decisions, the Commission exceeded the limits of its broad discretion.
- 98 In this regard, it must be recalled that Directive 90/425 provides that the Commission must examine, in collaboration with the Member State concerned, the measures which are to be taken and that it must have the Standing Veterinary Committee, composed of representatives of the Member States, examine the situation.
- 99 The Commission has stated, without being contradicted by the applicants, that the Federal Republic of Germany itself proposed delimitation on the basis of administrative units (districts and/or communes) in this case. As the applicants admitted at the hearing, the competent official of the Federal Ministry, who was head of delegation and the only person with whom the Commission had contact, voted in favour of delimitation on the basis of administrative units in spite of an internal disagreement in that delegation owing to the opposition of a representative from Niedersachsen.
- 100 The Commission thus collaborated genuinely with the Federal German authorities in delimiting the parts of territory to be covered by the bans on dispatch according to administrative units. That collaboration reflects, moreover, the Commission's habitual practice of taking into account the wishes expressed by the Member State concerned, at any rate where they appear appropriate for ensuring that the measures adopted are efficacious.
- 101 The method of delimiting areas based on administrative units was all the more justified in this case since it offered the best guarantees of efficaciously monitoring and implementing the measures adopted. Indeed, according to Paragraph 2(1) of

the Ausführungsgesetz zum Tierseuchengesetz (*Niedersächsisches Gesetz-und Verordnungsblatt* No 18, 1994), the statute of the Land of Niedersachsen adopted in implementation of the Tierseuchengesetz, the Federal Law on epizootic diseases, it is the districts and towns not falling within a district which are competent to adopt measures to control epizootic diseases and, in particular, to adopt, monitor and control measures pursuant to Council and Commission acts. However, it is the competent veterinary authorities of the Member State concerned which carry out the monitoring and implementation on the spot, on the efficacy of which depends the success of a ban on movement adopted in order to prevent the spreading of classical swine fever.

102 A delimitation based on pre-existing administrative units also has the advantage of allowing rapid action to be taken. Determining zones on the basis of geographical criteria, on the other hand, requires analysis of the terrain and, in particular, of natural frontiers (watercourses, roads etc.) and of the location of holdings. Recourse to such a method therefore presupposes presentation of detailed information by the competent authorities of the Member State concerned. As it is, it is not contested that this was not the case in this instance.

103 Finally, as the applicants have indicated in their written replies to the questions put by the Court, the limits of administrative territorial units generally take account of natural geographical features (watercourses, roads etc.).

104 In those circumstances, the Court considers that in delimiting zones according to administrative units the Commission did not manifestly or seriously exceed the limits of its discretion.

105 It follows that the second part of the plea alleging breach of the principle of non-discrimination must be dismissed.

## Third part: discrimination in relation to the Land of Nordrhein-Westfalen

## — Arguments of the parties

- 106 The applicants maintain that the bans on dispatch fixed according to administrative frontiers have discriminated against them in relation to certain holdings in Nordrhein-Westfalen in so far as the latter were not affected by the bans when they were the same distance away as their holding from the infected site. The situation in the two Länder can be compared only in relation to the danger represented by the epizootic disease and not, as the Commission does, in relation to the number of outbreaks of classical swine fever.
- 107 The applicants mention in this regard the example of holdings located in the commune of Westerkappeln (north-east part of the district of Steinfurt, in the Land of Nordrhein-Westfalen) which was not subjected to the bans even though they were only 15 km away from the Rieste outbreak (district of Osnabrück, Niedersachsen), and the example of holdings situated in the commune of Stemwede (district of Minden-Lübbecke, Nordrhein-Westfalen), less than 10 km away from the Damme-Rüschendorf outbreak (district of Vechta, Niedersachsen).
- 108 Since the situations were comparable in the two Länder as regards the threat represented by classical swine fever beyond administrative borders and the aim of the measures to be taken to prevent its spread, any difference in treatment was not objectively justified.
- 109 The Commission disputes that the applicants were discriminated against in relation to holdings in Nordrhein-Westfalen. It maintains that the situations were not comparable since the authorities in Nordrhein-Westfalen had shown that they were

able to fight and effectively control the disease since no case was reported during the period covered by the contested decisions. The distance from an outbreak site was not the only criterion taken into consideration by the Commission in imposing the bans on dispatch. In this regard, the authorities of Nordrhein-Westfalen had effectively controlled classical swine fever in such a way that there was no risk of it spreading to other regions or to other Member States. In those circumstances, when adopting the contested decisions, the Commission imposed no ban on Nordrhein-Westfalen, taken into consideration the fact that this Land was, in general, very active in fighting the disease and had one of the most effective veterinary administrations, as is borne out by the low number of cases of classical swine fever on its territory (seven cases in 1993, one in 1994 and two in 1995) compared with the cases which had occurred in Niedersachsen (64 cases in 1993, 66 in 1994 and 23 in 1995).

- 110 The Commission states that, even on the assumption that the situations were comparable, the difference in treatment was objectively justified owing to the fact that the authorities in Nordrhein-Westfalen were able to control classical swine fever effectively so that the risk of it spreading to other territories, in particular to other Member States, did not exist. The Commission points out, however, that the territorial boundaries of the Länder do not enter consideration in the determination of the protection and surveillance zones provided for in Article 9 of Directive 80/217 and that holdings in Nordrhein-Westfalen situated in the immediate proximity to an infection site in Niedersachsen were subject to the restrictions affecting those areas. In its view, the applicants have not proved that holdings in Nordrhein-Westfalen were closer to an infection site than their holding.

#### — Findings of the Court

- 111 Holdings in the Land of Nordrhein-Westfalen located near to an infected site in Niedersachsen were subject to the restrictions applying to the protection and surveillance zones established by the German authorities in accordance with Directive 80/217.

- 112 The situations in the Land of Niedersachsen and in Nordrhein-Westfalen were manifestly not comparable. During the period covered by the contested decisions, no case of classical swine fever was recorded in Nordrhein-Westfalen. Consequently, even though, as the applicants maintain, certain holdings in that Land were actually closer to infected sites than their holding, the Commission was entitled to take the view that the competent authorities of the Land of Nordrhein-Westfalen were in a position to effectively control classical swine fever and that there was no risk in that region of the disease spreading, necessitating the adoption, on its part, of additional protection measures.
- 113 The third part of the plea alleging breach of the principle of non-discrimination is therefore unfounded, too.
- 114 It follows from the foregoing that the Commission did not disregard the principle of non-discrimination. The first plea must therefore be dismissed.

*The plea of breach of the right to property and of the right to pursue a trade or occupation*

#### Arguments of the parties

- 115 The applicants argue that the bans on dispatch imposed by the challenged Commission decisions restricted enjoyment of their property in such a way that it was practically confiscated. Their result was, in effect, to make the rearing and fattening of pigs impossible.
- 116 They maintain that bans on dispatch are an unsuitable means of controlling an epizootic disease and disproportionate to their aim because, unlike the protection and surveillance zones established under Directive 80/217, they are not directly related to the outbreak site but established only on the basis of administrative units



without taking into consideration the specific risk of the epidemic threatening a holding owing to its geographical proximity to the outbreak site.

117 The applicants argue that dispatch bans are in fact bans on marketing and constitute an unlawful expropriation since, according to the case-law of the Court of Justice, prohibiting an owner from disposing of and freely enjoying his property is tantamount to depriving him of it (Case 44/79 *Hauer* [1979] ECR 3727). Under Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as in the constitutional traditions of the Member States, expropriation is permissible only on condition that there is a procedure for quick, fair and effective compensation, which was not provided for in the present case.

118 The applicants dispute the Commission's assertion that bans imposed on the basis of administrative borders are more effective and easier to monitor. According to them, Germany does not have, at the level of communes, districts or Länder, control authorities capable of effectively ensuring compliance with dispatch bans imposed on the basis of administrative units.

119 For the same reasons, the contested decisions infringe the applicants' right to pursue a trade.

120 The Commission points out that a measure cannot be regarded as depriving a person of property when the owner 'remains free to dispose of it or to put it to other uses which are not prohibited' (*Hauer*, cited in paragraph 117 above, paragraph 19). Despite the dispatch bans, the applicants were able to continue to dispose of their property.

- 121 It points out that both the right to property and the freedom to pursue a trade or occupation may be subjected to restrictions (Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 78).
- 122 It denies that restrictions were imposed in this regard on the applicants' rights. It points out that the applicants' holding is located in the district of Osnabrück, that the holdings of their main customers were located in the neighbouring districts of Diepholz and Vechta and that the dispatch bans covered those three districts. It concludes that the applicants could in principle continue to sell their gilts to their traditional customers, since the Commission decisions allowed pigs to be marketed within the parts of territory in question. Any fall in demand for gilts does not constitute either a restriction or, a fortiori, denial of the applicants' right to property. They cannot claim a right to property on the basis of guaranteed demand.
- 123 The Commission states that the applicants do not explain the reasons for which they could no longer supply their traditional buyers or other buyers. It points out that the applicants have failed to produce to the Court the alleged fixed supply contracts.
- 124 It considers that, even if the contested decisions might have affected the applicants' right to property and freedom to pursue a trade, the restriction involved in this case is one which is allowed under the principles laid down by case-law. The bans in question met the general interest aims of the Community. They were necessary to protect pig herds, maintain trade in pigs and, consequently, to preserve the economic sector of pig production. Consequently, they did not constitute an infringement of the substance of the right to property or of freedom to pursue a trade or occupation.

## Findings of the Court

- 125 According to settled case-law, the fundamental rights relied on by the applicants do not appear to be absolute prerogatives. Restrictions may be imposed on their exercise, particularly in the context of a common organization of the market, provided that the restrictions correspond in fact to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15).
- 126 It is therefore necessary to consider what aim is being pursued by the contested decisions and to determine whether there is a reasonable relationship between that aim and the dispatch bans.
- 127 By definition, any protective measure involves effects which impinge on rights to property and freedom to pursue a trade or business, thus causing damage to parties which bear no responsibility for the situation which led to the adoption of protective measures (see, to this effect, the judgment in Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 22). It follows that the mere fact that the dispatch bans had adverse repercussions on the applicants when their holding was not, according to them, affected or threatened by the disease outbreak cannot on its own imply that the bans were unlawful restrictions.
- 128 Second, the importance of the aims pursued by the contested decisions, namely to control the spread of an epizootic disease, classical swine fever, which was causing such fatalities and disturbance that it threatened to jeopardize in particular the

profitability of the whole of the Community's pig-farming industry, justified accepting adverse consequences, even considerable, for certain traders.

129 However, the measures adopted in the present case have not entailed adverse or even considerable consequences for the pig producers concerned. First, they did not impose radical measures, such as massive slaughtering, but were confined to temporary restrictions on the movement of pigs. Second, the restrictions applied only to geographically limited parts of territory which were particularly at risk. Moreover, as the Court found when considering the plea of breach of the principle of non-discrimination, delimitation of parts of territory on the basis of administrative districts was an appropriate way of controlling the spread of classical swine fever so that in taking such action the Commission did not manifestly and seriously exceed the limits of its discretion.

130 In any event, the applicants have not proved that they were actually deprived of their right to property and the right to pursue their business. According to the statements of the applicants, whose holding is located in the district of Osnabrück, their main customers are located in the districts of Osnabrück, Diepholz and Vechta, all three of which are located in the parts of territory subject to the protection measures imposed by the Commission decisions in question. Since movement within the parts of territory covered has remained essentially free, at least until the additional protection measures were adopted by Decision 94/178, the applicants should have shown how the Commission decisions prevented them from selling to their traditional customers. Mere production at the hearing of a list of other customers established outside the zones covered by bans, which was inadmissible in any case because it occurred at too late a stage, cannot constitute sufficient proof of the existence of the damage alleged by the applicants.

131 It follows that the dispatch bans laid down in the contested decisions cannot be regarded as inappropriate or disproportionate. The plea of infringement of the right to property and the right to pursue a trade must therefore be dismissed.

*The plea of breach of the principle of proportionality*

Arguments of the parties

132 The applicants contend that the contested decisions infringe the principle of proportionality.

133 They refer first of all to the arguments advanced in support of the previous plea and, in particular, to those relating to the delimitation of parts of territory on the basis of administrative units.

134 They argue, next, that the contested decisions are disproportionate because their holding was not affected by classical swine fever and that preventive or emergency vaccination would therefore have been a considerably more reasonable measure in their regard. They believe that the competent German authorities applied for authorization to carry out emergency vaccination but that this request was rejected by the Commission.

135 The Commission reiterates that, in its view, the objection to the delimitation of prohibition zones on the basis of administrative units is unfounded. It also points out that it is settled in case-law (*Germany v Council* cited above in paragraph 121, paragraph 90) that measures adopted in the sphere of the common agricultural policy are disproportionate only if they are manifestly inappropriate with regard to the aim being pursued. It observes that the applicants do not contend that the dispatch bans were manifestly inappropriate for preventing the disease from spreading again and for guaranteeing the functioning of trade in pigs in the Community.

- 136 The Commission also disputes that, as a means of control, vaccination is just as appropriate as dispatch bans. The Community has a deliberate non-vaccination policy for controlling outbreaks of epizootic disease. Emergency vaccinations do not ensure eradication of the virus: infected animals remain undetected. Nor do they prevent the birth of pigs which appear to be healthy but which carry the virus. Furthermore, serological examinations do not make it possible to distinguish whether antibodies come from an infection or from a vaccination. In other words, a vaccinated animal could carry the virus and continue to spread the disease.
- 137 The Commission adds that other reasons militated against granting the authorization to carry out emergency vaccinations requested by the Federal Republic of Germany on 7 February 1994. Having found difficulties and disturbing lacunae, particularly in the identification of animals and the controlling of their movements, the Commission was afraid that vaccinations would cause farmers to neglect protection measures and thus jeopardize the whole of the Community policy for controlling classical swine fever. Besides, an emergency vaccination programme would necessitate an absolute ban on the movement of pigs and pig meat-based products originating in the vaccination zones for a period of 12 months. Maintenance of the non-vaccination policy is also extremely important for commercial relations with non-member countries which are also supposed to follow such a policy.

### Findings of the Court

- 138 The principle of proportionality requires that the measures imposed by a Community act must be appropriate for achieving the objective pursued and must not go beyond what is necessary to that end. It also requires that, where there is a choice between several appropriate measures, recourse must be had to the least restrictive one and that the disadvantages it entails must not be disproportionate to the aims pursued (*Exporteurs in Levende Varkens and Others v Commission*, cited in paragraph 52 above, paragraph 119).

139 It follows from examination of the previous pleas that in the present case the bans imposed in regions defined according to administrative units were an appropriate and not disproportionate means of controlling the spread of classical swine fever.

140 As regards the argument that vaccinations would have been a more reasonable means of controlling the disease, it must be borne in mind first of all that the use of vaccines against classical swine fever is in principle prohibited by Article 14 of Directive 80/217, as amended by Directive 91/685.

141 Although emergency vaccination is permissible in certain circumstances, non-vaccination is the Community's established policy. In this action for damages, there can be no question of judging the merits of the Community's policy on controlling classical swine fever but only of determining whether the Commission acted unlawfully by manifestly and seriously exceeding the limits of its discretion. As far as that question is concerned, the Commission's refusal to allow emergency vaccination, which was consistent with its established policy, cannot be regarded as constituting such an infringement.

142 In any event, Article 14(3) and (4) of Directive 80/217, as amended by Directive 91/685, provides that, in the case of emergency vaccination, no live pig may leave the vaccination area for a period of six months following completion of the vaccination operations. So the measure suggested by the applicants would not have been a less restrictive measure in their regard than the bans in question.

143 It follows that the contested decisions did not manifestly and seriously infringe the principle of proportionality.

*The plea of insufficient legal basis*

## Arguments of the parties

- 144 The applicants dispute, first of all, that the health-policy measures such as the dispatch bans laid down by the decisions in question can be based on Article 10(4) of Directive 90/425 whose sole aim is, in their view, to determine the veterinary and zootechnical checks applicable within the internal market and not to impose dispatch bans.
- 145 That position is borne out by the fact that there are special provisions governing health-policy measures with regard to outbreaks of epizootic disease. The applicants point out in this regard that Directive 64/432 as well as Council Directive 72/461/EEC of 12 December 1972 on health problems affecting intra-Community trade in fresh meat (OJ, English Special Edition 1972 (31 December), hereinafter 'Directive 72/461') and Council Directive 80/215/EEC of 22 January 1980 on animal health problems affecting intra-Community trade in meat products (OJ 1980 L 47, p. 4, hereinafter 'Directive 80/215') constitute special rules applying expressly to trade in live pigs, pigmeat and pigmeat products in the event of an outbreak of classical swine fever.
- 146 Secondly, they contend that, even if Directive 90/425 empowers the Commission to adopt protective measures, such as dispatch bans, the Commission has no power to impose bans applicable within a Member State since Directives 64/432, 72/461 and 80/215, relevant in matters of animal health, apply only to cross-border trade between the States and not to trade within a particular Member State.
- 147 The applicants also point out that Article 7a of the Treaty has not abolished frontiers between Member States. The Community has no competence to regulate purely national situations, Article 7a having the sole purpose of abolishing or, where appropriate, harmonizing restrictions between Member States.



148 Finally, they contend that the Commission's argument based on the principle of regionalization is not consistent with the necessity to adopt bans on the basis of administrative districts since the areas in which the risk of infection was high could have been delimited without reference to administrative frontiers.

149 The Commission states, first, that Article 10 of Directive 90/425 is the proper legal basis. It points out that the 10th recital in the preamble to that directive states: '[...] provision must be made for protective measures; [...] in this area, especially for reasons of effectiveness, responsibility must rest firstly with the Member State of dispatch; [...] the Commission must be able to act speedily, in particular by way of on-the-spot visits and adopting measures appropriate to the situation'. Similarly, it points out that Article 10(3) and (4) of that directive expressly provide that the Commission may take protective measures with regard to animals or products from the region affected by the epizootic disease or from a given holding, centre or organization.

150 The Commission contends, secondly, that Article 10(4) of Directive 90/425 allows dispatch bans applicable within a particular Member State to be imposed. It follows from both the title of that directive and from the first two recitals to its preamble that it was adopted for the purposes of the internal market, which, according to the second paragraph of Article 7a of the Treaty, comprises 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'. The territory of the Community must not therefore be considered to be a single market and there are no grounds for making a distinction between the movements of animals from contaminated zones to other Member States and movements of those animals to other zones of the Member State concerned.

151 The Commission adds that, out of respect for the principle of regionalization, protective measures must be limited as far as possible to the region in which the disease broke out, owing to the fact that, in particular, geographically limited measures are a much less restrictive means. It is only in exceptional cases that

the entire territory of a Member State may be barred from intra-Community trade. The Commission points out in this regard that the fifth recital of the preamble to Decision 93/566 states: 'since it is possible to identify geographically limited areas which present a particular risk, the restrictions on trade can be applied on a regional basis'.

- 152 Finally, the Commission points out that it had at first attempted in the present case to prevent the spread of classical swine fever by measures limited to prohibiting movements of pigs within certain affected areas in Germany to other Member States, sales within Germany remaining unrestricted. Those measures did not, however, enable the disease to be effectively controlled and it continued to spread in Germany and even to reach Belgium.

### Findings of the Court

- 153 The applicants' argument that Directive 90/425 does not allow the Commission to adopt protective measures such as dispatch bans is unfounded.
- 154 Contrary to their assertion, the scope of that directive is not limited to the organization of veterinary and zootechnical checks.
- 155 The directive also makes provision, as is stated in its 10th recital, for a system of protective measures. Thus, according to Article 10(3) and (4), the Commission may adopt protective measures with regard to animals or products from the region affected by the epizootic disease and, after examination within the Standing Veterinary Committee, it is to adopt necessary measures.

156 In this regard, it must be remembered that in its judgment in Case C-52/92 *Commission v Portugal* [1993] ECR I-2961 the Court of Justice has already confirmed the legality of a Commission decision adopted on the basis of Article 10 of Directive 90/425 which prohibited certain Member States from sending to other Member States production pigs from high-risk municipalities.

157 Nor can the applicants contend that the Commission has no power to adopt, on the basis of Article 10(4) of Directive 90/425, decisions imposing dispatch bans applying not only to intra-Community trade but also to trade within a Member State.

158 No provision in Directive 90/425 provides that measures adopted by the Commission may concern only trade between Member States.

159 Moreover, whilst the Commission, out of respect for the principle of proportionality, may adopt protective measures not covering the entire territory of a Member State but only the region affected in that State, it is nevertheless obliged to ensure that those measures enable the aim pursued to be achieved. However, measures prohibiting only movements of animals from contaminated regions of one Member State to the other Member States but not to other parts of that Member State's territory would not eliminate the risk of the epizootic disease continuing to spread in the rest of that State's territory and then, from there, into the other Member States. Prohibiting movements of animals from contaminated regions of one State to other parts of that State's territory as well as movements to other Member States may, in some circumstances, constitute an indispensable adjunct to the limitation of prohibitions at regional level.

160 In the present case, it must be concluded that Decisions 93/364 and 93/497, which had prohibited only movements of pigs to other Member States whilst not restricting sales within German territory, provided no effective control against the spreading of classical swine fever which continued to spread in Germany and even reached Belgium.

161 In those circumstances, the prohibitions on dispatch to other parts of German territory enacted by the decisions in question were indeed an indispensable adjunct to the prohibitions of dispatch to other Member States and were thus aimed at controlling the spread of classical swine fever to the other Member States.

162 Without it being necessary to consider the scope of Article 7a of the Treaty, it must therefore be concluded that the decisions in question did not concern a purely national situation.

163 It follows that the plea of insufficient legal basis is unfounded.

164 It follows from all the foregoing considerations that the applicants have not established that in adopting the contested decisions the Commission manifestly and seriously infringed a superior rule of law for the protection of individuals. Consequently, without its being necessary to examine whether the other conditions for Community liability are fulfilled in this case, the action must be dismissed as unfounded.

## Costs

165 Pursuant to Article 87(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they are applied for. Since the applicants have been unsuccessful, they must, in accordance with the Commission's claims, be ordered to bear their own costs and to pay those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;
2. Orders the applicants to pay the costs.

García-Valdecasas

Azizi

Jaeger

Delivered in open court in Luxembourg on 15 April 1997.

H. Jung

R. García-Valdecasas

Registrar

President