# JUDGMENT OF THE COURT (Fifth Chamber)
10 December 1998 *

In Case C-221/97 P,

**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 in Neuenkirchen (Germany), represented by 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,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 15 April 1997 in Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501, seeking to have that judgment set aside,

the other party to the proceedings being:

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

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the First Chamber, acting as President of the Fifth Chamber, C. Gulmann, D. A. O. Edward, L. Sevón and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1998,

gives the following

## Judgment

1 By application lodged at the Registry of the Court of Justice on 13 June 1997, Mr Schröder, Mr Jan Thamann and Mr Karl-Julius Thamann brought an appeal pursuant to the first paragraph of Article 49 of the EC Statute of the Court of Justice against the judgment of 15 April 1997 in Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501 (hereinafter 'the contested judgment'), by which the Court of First Instance dismissed their action for damages under Article 178 and the second paragraph of Article 215 of the EC Treaty, in which they sought an order that the Commission make good the damage they claimed to have suffered as a result of a series of decisions in connection with the campaign against classical swine fever in Germany.

## Legal background, facts and procedure

2 The legal background and the facts of the dispute are described as follows in the contested judgment:

'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 organisation. 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 [...] [in accordance with the procedure laid down in Article 17]. 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, English Special Edition 1968(II), p. 473], 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 [Council] Directive 91/685/EEC [of 11 December 1991] (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 specialised 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 authorised. 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 ... certain districts of the *Länder* Niedersachsen, ... 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/[EC] 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 [May] 1994.'

3 By application lodged at the Registry of the Court of First Instance on 15 December 1994, Mr Schröder, Mr Jan Thamann and Mr Karl-Julius Thamann submitted that the measures adopted by the Commission had infringed several of their rights and caused them serious damage. They therefore applied for the Commission to be ordered to pay them DM 173 174.45 as compensation for that damage.

## The contested judgment

4 By the contested judgment the Court of First Instance dismissed the action.

5 Having declared the action admissible, the Court of First Instance started by considering the nature of the decisions at issue. It reached the conclusion that those decisions, which were addressed by the Commission to the Member States, constituted *vis-à-vis* individuals not administrative acts, where any infringement of law constitutes illegality which may give rise to liability on the part of the Community, but legislative acts, where liability can be incurred 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 question in the exercise of a wide discretion, the breach must be explicit, that is to say, it must be manifest and serious (paragraphs 49 to 52 and 54 to 62 of the contested judgment).

6 Having found that the Commission did indeed have a wide discretion in the matter, the Court of First Instance considered whether it had manifestly and seriously infringed a superior rule of law for the protection of individuals. The Court examined the appellants' first four pleas in law, namely breach of the principle of non-discrimination, infringement of the right to property and the right to pursue a trade or occupation, breach of the principle of proportionality, and insufficient legal basis. The fifth plea in law, namely infringement of Article 190 of the EC Treaty, was rejected at once by the Court on the ground that insufficient reasoning cannot in any case cause the Community to incur liability (paragraphs 65 and 66).

7 As regards the first plea, the Court of First Instance found that, contrary to the appellants' submission, there had not been a breach of the principle of non-discrimination, either in relation to pig-farmers established in Belgium (paragraphs 77 to 83) or as a result of the definition of bans on dispatch by reference to administrative boundaries (paragraphs 91 to 105) or in relation to undertakings established in the *Land* of Nordrhein-Westfalen (paragraphs 111 to 114). The situations were

not comparable and the criterion used for delimiting the zones had been the most efficient method.

8 As regards the second plea, infringement of the right to property and the right to pursue a trade or occupation, the Court found that even though the appellants' holding was not affected by swine fever, the importance of controlling the spread of that extremely dangerous disease justified accepting adverse consequences even for traders not directly concerned (paragraphs 127 and 128). Moreover, the appellants had not proved that they had been deprived of their rights. In particular, the mere production at the hearing of a list of customers established outside the zones covered by bans could not constitute sufficient proof of such deprivation (paragraphs 129 to 131). In any case, the list had been produced too late (paragraph 130).

9 The third plea alleged breach of the principle of proportionality by the Commission, in that it had rejected a request for emergency vaccination of the animals, which would have constituted a much more reasonable measure and been less harmful to traders. The Court of First Instance rejected this plea on the ground that non-vaccination was consistent with a policy established by the Community institutions acting within their discretion and moreover defined by common agreement with the Member States (paragraphs 140 to 142).

10 Finally, the Court of First Instance rejected the fourth plea, insufficient legal basis, which alleged that the Commission lacked competence to regulate purely national matters and, in particular, that Directive 90/425 did not allow the Commission to adopt protective measures. On this point, the Court found that the directive did indeed extend to protective measures and that, in the circumstances of the case, the regional bans on dispatch had been an indispensable adjunct to the intra-Community bans in order to control the spread of the disease (paragraphs 153 to 161).

11 The Court of First Instance concluded that the appellants had not shown that by adopting the decisions at issue the Commission had manifestly and seriously infringed a superior rule of law for the protection of individuals. It accordingly dismissed the action as unfounded (paragraph 164).

## The appeal

12 The appellants base their appeal, first, on certain procedural errors before the Court of First Instance, which in their submission thus breached their rights of defence.

13 They submit, second, that the Court of First Instance erred in law by regarding the Commission's decisions as legislative rather than administrative measures. Similarly, it made incorrect assessments with respect to the principle of non-discrimination, their right to property and right to pursue a trade or occupation, and the principle of proportionality.

14 Third, the appellants submit that the Court of First Instance disregarded the fact that the Commission's acts had no valid legal basis.

15 The Commission considers for its part that the appeal is inadmissible, since the appellants, instead of raising points of law, merely criticise assessments of fact and repeat the assertions they made at first instance. In any event, in its submission, the appeal is unfounded.

*The first plea in law*

16 In their first plea in law the appellants submit that the Court of First Instance infringed their rights of defence, in particular their right to a judicial hearing, because it failed to take into consideration substantial parts of their written and oral submissions. By so doing it reached incorrect conclusions.

17 Thus in paragraph 26 of the contested judgment the Court of First Instance stated that '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' [in the German text of the judgment: the region bordering on Nordrhein-Westfalen ('in dem an das Land Nordrhein-Westfalen angrenzenden Gebiet')]. It was clear, however, that they supplied not only holdings established in Niedersachsen but also holdings in Nordrhein-Westfalen. The production by the appellants at the hearing of a list of their regular customers was rejected as being too late, which constituted an obvious breach of the right to be heard.

18 In paragraph 95 of the contested judgment the Court of First Instance found that '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'. Yet the appellants had shown, using extensive cartographical material, that the criterion of geographical distance from the sites of infection was the only appropriate means of controlling the infection.

19 Also in paragraph 95 of the contested judgment, the Court of First Instance stated that 'according to the statements of the Commission, not denied by the applicants, the district of Osnabrück in which the appellants' 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'. The appellants assert, however, that at the hearing they challenged the correctness of those facts.

20 In paragraph 99 of the contested judgment the Court of First Instance found that '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'. The appellants point out, however, that they did in fact contest those assertions.

21 Similarly, the statement, in paragraph 103 of the contested judgment, that the appellants had observed that boundaries of administrative units generally take account of natural geographical features is a distortion of what they said. In fact they expressly stated that administrative boundaries 'do not follow closely the courses of roads, watercourses or other demarcations visible on the ground'.

22 The appellants submit that the Court of First Instance also infringed their rights of defence by failing to take account of the statements by the head of the veterinary service of the *Land* of Niedersachsen, who was present at the hearing, that the imposition of bans on dispatch on the basis of administrative units was inappropriate for controlling swine fever, in particular because of the size of districts in Niedersachsen.

23 Finally, the applicants submit that the statements in paragraph 129 of the contested judgment that 'the restrictions applied only to geographically limited parts of territory which were particularly at risk' also show that the Court of First Instance did not take account of their assertions that the duration of the protective measures was excessive because they were still in force although there was no longer any risk. Similarly, they had vainly tried to draw the Court's attention to the fact that after 30 November 1993 they had no longer been able even to supply all their customers in their own district.

24 It must be pointed out that the right to be heard in the context of judicial proceedings does not mean that the court has to incorporate in full in its decision all the submissions put forward by each party. The court, after listening to the submis-

sions of the parties and assessing the evidence, has to decide whether or not to grant the relief sought in the application and give reasons for its decision.

25 The appellants' submissions under the first plea in law do not disclose any breach of those principles by the Court of First Instance. As the Advocate General also observes in point 22 of the Opinion, the first plea does not contain any point of law requiring analysis, but merely records disagreement on the facts found by the Court of First Instance. In particular, the appellants have not shown that the alleged failure by the Court of First Instance to consider certain parts of their arguments affected the outcome of the proceedings and so adversely affected their interests.

26 What the appellants are really seeking by means of the various allegations under this plea is to obtain from this Court a new assessment of the facts found by the Court of First Instance. However, under Article 168a of the EC Treaty and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may only be based on pleas relating to the breach of rules of law, any assessment of the facts being excluded. The plea seeking a review of the facts by the Court of Justice is therefore inadmissible.

27 As to the rejection as too late of the production by the appellants of a document at the hearing, reference should be made to paragraph 130 of the contested judgment, in which the Court of First Instance found that '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'. It follows that the Court examined the document in question, despite its late production, and considered that it was not sufficient to constitute the necessary proof. In those circumstances, the argument that the rights of the defence were infringed because the document was rejected on the ground that it was produced too late is of no effect.

*The second plea in law*

First part

28 In the first part of the second plea in law, the appellants submit that, having regard to the system of Community acts established by Article 189 of the EC Treaty, the contested decisions do not constitute legislative measures but fall within its administrative activity. The Court of First Instance thus erred in law by applying the very strict criteria for Community liability for a legislative measure, namely that only a breach of a superior rule of law for the protection of individuals can give rise to such liability, rather than the criteria which have been developed in relation to liability for an administrative measure, namely that any infringement of law suffices.

29 On this point, it should be observed that, to challenge the measures adopted by the Commission, the appellants raised before the Court of First Instance, first, alleged breaches of fundamental rights, namely the principle of non-discrimination, the right to property and the right to pursue a trade or occupation, and the principle of proportionality, and second, breach of the obligation to state reasons under Article 190 of the Treaty. The Court addressed all those criticisms and concluded that none of those rules had been breached.

30 In those circumstances, there is no need to differentiate between legislative and administrative measures in order to assess the Community's liability, since such liability presupposes that the measure is unlawful, regardless of whether it is administrative or legislative.

31 Consequently, the first part of the second plea is of no effect and therefore unfounded.

Second part

32 In the second part of the second plea, the appellants submit that the Court of First Instance, when ruling in paragraphs 125 to 131 of the contested judgment on the question of fundamental rights to property and to the pursuit of a trade or occupation, did not take sufficiently into consideration the individual's subjective fundamental right to observance of his individual fundamental rights. They submit that the same criticism applies generally to the case-law of the Court of Justice.

33 They submit, in particular, that the Court of First Instance examined the aim pursued by the Commission's decisions and related it to the dispatch bans in the abstract only, without considering the individual interest in the maintenance of the appellants' positions as regards the right to property and the right to pursue a trade or occupation.

34 According to the appellants, even in Community law fundamental rights are intended to provide a subjective right of defence, which means that measures that are lawful in themselves may give rise in a particular case to an obligation to make compensation. If, as in the present case, the persons concerned suffer damage and a special burden is imposed on them, they should be awarded compensation.

35 On this point, it is sufficient to observe that the appellants' arguments do not indicate in a sufficiently precise and substantiated manner the pleas in law relied on to show an infringement of the law by the contested judgment. By virtue of the first paragraph of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal. The Court of Justice

has consistently held that that requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance (see, *inter alia*, Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873, paragraph 56).

36 The second part of the second plea is therefore inadmissible.

Third part

37 Under the third part of the second plea in law, the appellants challenge the refusal by the Court of First Instance to accept that they were victims of breaches of the principles of non-discrimination and proportionality. They refer on this point to their pleadings at first instance.

38 It is sufficient to point out, as the Advocate General does in points 46 to 48 of the Opinion, that this argument in fact aims at having this Court reexamine the arguments put forward before the Court of First Instance. As stated in paragraph 35 above, it is not for this Court to carry out such a review in the appeal procedure.

39 The third part of the second plea is therefore inadmissible.

*The third plea in law*

40 In the third plea the appellants submit that the Court of First Instance infringed Community law in that it regarded Article 10(4) of Directive 90/425 as a sufficient legal basis for the Commission's decisions.

41 They submit that the enabling power in question, in the form attributed to it by the contested judgment, infringes the principle that in a State governed by the rule of law the law must be clearly defined, a principle on which Community law too is based, since the persons concerned could not, in view of the special rules adopted by the Commission to control the disease, foresee that the Commission would impose dispatch bans of such great extent. This was so *a fortiori* in that, in the present case, this was the first time that the Commission applied that legal basis to bans on dispatch within a Member State; previously it had applied it solely to bans relating to trade between Member States.

42 In this plea the appellants are once again merely repeating arguments already put forward by them at first instance, where they attempted to show that the provision in question contains no indications as to the measures the Commission may take and does not make it possible to determine the manner in which such measures must be taken. However, no precise criticism of the legal reasoning of the Court of First Instance has been adduced.

43 Consequently, for the same reasons as those for which the second part of the second plea has been rejected, the third plea must be held to be inadmissible.

44 The appeal must therefore be dismissed.

## Costs

45 Under Article 69(2) of the Rules of Procedure, which apply to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Since the appellants have been unsuccessful, they must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

**1. Dismisses the appeal;**

**2. Orders the appellants to pay the costs.**

Jann Gulmann Edward

Sevón Wathelet

Delivered in open court in Luxembourg on 10 December 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber