Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

16 September 2013*

(Non-contractual liability — Animal health — Protective measures in situations of crisis — Protection measures in relation to highly pathogenic avian influenza in certain third countries — Ban on imports of birds caught in the wild — Sufficiently serious breach of rules of law conferring rights on individuals — Manifest and serious disregard of the limits on discretion — Directives 91/496/EC and 92/65/EC — Precautionary principle — Duty of diligence — Proportionality)

In Case T-333/10,

Animal Trading Company (ATC) BV, established in Loon op Zand (Netherlands),

Avicentra NV, established in Malle (Belgium),

Borgstein birds and Zoofood Trading vof, established in Wamel (Netherlands),

Bird Trading Company Van der Stappen BV, established in Dongen (Netherlands),

New Little Bird's Srl, established in Anagni (Italy),

Vogelhuis Kloeg, established in Zevenbergen (Netherlands),

Giovanni Pistone, residing in Westerlo (Belgium),

represented by M. Osse and J. Houdijk, lawyers,

applicants,

v

European Commission, represented by F. Jimeno Fernández and B. Burggraaf, acting as Agents,

defendant,

ACTION for compensation in respect of the harm suffered by the applicants on account of the adoption of Commission Decision 2005/760/EC of 27 October 2005 concerning certain protection measures in relation to highly pathogenic avian influenza in certain third countries for the import of captive birds (OJ 2005 L 285, p. 60), as extended by Commission Regulation (EC) No 318/2007 of 23 March 2007 laying down animal health conditions for imports of certain birds into the Community and the quarantine conditions thereof (OJ 2007 L 84, p. 7).

* Language of the case: Dutch.

THE GENERAL COURT (First Chamber)

composed of J. Azizi, President, S. Frimodt Nielsen and M. Kancheva (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2012,

gives the following

Judgment

Background to the dispute

A – *Presentation of the applicants*

1 The applicants, Animal Trading Company (ATC) BV, Avicentra NV, Borgstein birds and Zoofood Trading vof, Bird Trading Company Van der Stappen BV, New Little Bird's Srl, Vogelhuis Kloeg and Giovanni Pistone, carry out the activity of importing into the European Union birds caught in the wild intended for stocking aviaries, particularly psittaciformes, such as parrots, parakeets and cockatoos, as well as passerine birds. They are established or reside in the Netherlands, Belgium and Italy. They are members of the European Association of Im- and Exporters of Birds and Live Animals ('the European association of bird traders').

B – *Directives 91/496 and 92/65*

2 On 15 July 1991, the Council of the European Communities, acting under Article 37 EC on the common agricultural policy, adopted Directive 91/496/EEC laying down the principles governing the organisation of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268, p. 56).

3 Under Article 18(1) of Directive 91/496, the adoption of protective measures is permitted subject to the following conditions:

'If a disease referred to in Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community, a zoonosis or other disease or phenomenon liable to present a serious threat to animal or human health occurs or spreads in the territory of a third country, or if any other serious animal health reason so warrants, in particular in the light of the findings of its veterinary experts, the Commission may, acting on its own initiative or at the request of a Member State, adopt one of the following measures without delay and depending on the gravity of the situation:

— suspend imports from all or part of the third country concerned, and where appropriate from the third country of transit,

— set special conditions in respect of animals coming from all or part of the third country concerned.'

4 Furthermore, Article 18(7) of Directive 91/496 provides that decisions to extend, amend or repeal measures decided on pursuant to paragraphs 1 to 3 and 6 of that directive must be taken in accordance with the comitology procedure laid down in Article 17 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13).

5 On 13 July 1992, the Council adopted Directive 92/65/EEC laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(I) to Directive 90/425/EEC (OJ 1992 L 268, p. 54). That directive determines the particular requirements to be met by the country and operator of origin, lays down rules on the animal health certificates that must accompany animals and establishes which examinations animals must undergo.

6 Article 17(2) and (3) of Directive 92/65 provides, in particular and essentially, that only animals from a third country included in a list of third countries or parts of third countries offering guarantees equivalent to the requirements applying to trade within the European Union may be imported into the European Union.

C – *Decision 2000/666*

7 Commission Decision 2000/666/EC of 16 October 2000 laying down the animal health requirements and the veterinary certification for the import of birds, other than poultry and the conditions for quarantine (OJ 2000 L 278, p. 26) authorised imports of birds from third countries belonging to the International Office of Epizootics (OIE according to the French acronym, now the World Organisation for Animal Health), provided that certain conditions were met, including containment in quarantine for at least 30 days.

D – *The first EFSA opinion*

8 On 14 and 15 September 2005, following a request from the Commission of the European Communities in 2004, the European Food Safety Authority (EFSA) issued a scientific opinion on the animal health and welfare aspects of avian influenza (EFSA Journal [2005] 266, 1-21, 'the first EFSA opinion').

9 In view of the mandate that had been conferred on it, EFSA's opinion only addressed the risk of infection of EU poultry with avian influenza.

10 In the introduction to its opinion, EFSA recalled that avian influenza, or bird flu, appeared in two distinct clinical forms in poultry: highly pathogenic avian influenza ('HPAI') and low pathogenic avian influenza. HPAI is caused by viruses of the H5 and H7 subtypes, which exhibit certain molecular characteristics capable of producing systemic infection, characteristics which are absent from low pathogenic avian influenza. The H5N1 virus is one of these virus subtypes causing HPAI.

11 Furthermore, EFSA stated that when its opinion was drawn up, the extensive circulation of the virus at the root of avian influenza in Asia could be at the origin of a pandemic virus for humans and a great number of questions had been raised with a view to finding a way to combat the ongoing avian influenza crisis. EFSA considered that, based on the scientific data available, it was able, in its opinion, to draw some conclusions on certain issues included in its mandate, although those conclusions did not cover the human health aspects of avian influenza infections.

12 EFSA also pointed out that shortly before adopting its opinion, following an unusual situation of endemicity of the H5N1 virus affecting poultry in some Asian countries, the H5N1 virus had infected the wild bird population. That epidemiological situation, which, according to EFSA, had never occurred in the past, might give rise to unpredictable consequences. However, in view of the lack of knowledge on HPAI infections in wild birds, EFSA considered that an assessment of the situation and any prediction of future trends could not be substantiated by sufficient scientific data. Thus, according to EFSA, as a consequence of the HPAI H5N1 epidemic in South-East Asia, this infection had spread to

resident and migratory wild bird populations, which could represent a means for the virus to reach the European Union. Nevertheless, EFSA took the view that a multidisciplinary effort was needed to clarify the likelihood and implications of such an occurrence.

13 As regards the dangers faced by EU poultry from caged birds — which include, in particular, ornamental and pet birds — EFSA found that those birds could be infected with avian influenza viruses, including those of the H5 and H7 types, and therefore, when imported, could represent a risk of introducing the viruses into the European Union. However, EFSA considered that in the case of legally traded birds, this risk was largely reduced by the legislation in place on the importation of birds other than poultry.

E – *Decision 2005/760*

14 On 27 October 2005, the Commission adopted Decision 2005/760/EC concerning certain protection measures in relation to HPAI in certain third countries for the import of captive birds (OJ 2005 L 285, p. 60), which suspended imports of live birds other than poultry into the European Union.

15 That decision followed the detection, on 21 October 2005, of the HPAI H5N1 virus in two imported birds which had been held at a quarantine centre located in Essex, in the United Kingdom, since September 2005. One of those birds had reportedly come from Taiwan and the other from Surinam.

16 In recitals 1 and 2 of Decision 2005/760, the Commission put forward its reasons for the suspension, declaring, first, that avian influenza was an infectious viral disease in poultry and birds, causing mortality and disturbances which could quickly take epizootic proportions liable to present a serious threat to animal and public health and to reduce sharply the profitability of poultry farming. It also stated that there was a risk that the disease agent might be introduced via international trade in live birds other than poultry. Furthermore, following the detection of HPAI in imported birds in quarantine in the United Kingdom, the Commission considered that it appeared appropriate to suspend imports of birds from certain areas at risk and to use for the definition of the areas a reference to the relevant Regional Commissions of the OIE.

17 Article 1(1) of Decision 2005/760 provides:

‘Member States shall suspend the importation from the third countries or parts thereof belonging to the OIE Regional Commissions listed in the Annex of:

(a) live birds other than poultry, as defined in the third indent of Article 1 of Decision 2000/666/EC,

…’

18 The Annex to Decision 2005/760 states:

‘Third countries belonging to the OIE Regional Commissions, as referred to in Article 1, of:

— Africa,

— Americas,

— Asia, Far East and Oceania,

— Europe, and

— Middle East.’

19 Article 6 of Decision 2005/760 provides that the decision will apply until 30 November 2005.

F – *The report of the National Emergency Epidemiology Group of the United Kingdom*

20 On 11 November 2005, the National Emergency Epidemiology Group published a document entitled 'Epidemiological Report on Avian Influenza in Birds in a Quarantine Premises in Essex'. According to that report, the presence of the H5N1 virus at the Essex quarantine centre was only detected in birds from Taiwan, in Asia, and not from Surinam, in South America. The error regarding Surinam was the result of a mix-up of samples taken at the quarantine centre.

G – *The first four extension decisions*

21 By Decision 2005/862/EC of 30 November 2005 amending Decisions 2005/759/EC and 2005/760 relating to measures to combat avian influenza in birds other than poultry (OJ 2005 L 317, p. 19), the Commission extended the measures adopted in Decision 2005/760 until 31 January 2006.

22 In recital 4 of Decision 2005/862, the Commission put forward its reasons for the extension, stating that since new cases of avian influenza had been reported in certain member countries of the OIE, it was appropriate to suspend the movement of pet birds and imports of other birds from certain areas at risk.

23 By letters of 7 December 2005 and 3 and 18 January 2006, the European association of bird traders drew the Commission's attention to the consequences of the ban, particularly the risk that a market for illegal imports might develop, which would increase the risk of avian influenza spreading within the European Union. The association also asked the Commission to meet its representatives and to refrain from extending the ban further. Its letter of 3 January 2006 was accompanied by a document entitled 'Report on the Independent Review of Avian Quarantine', which was adopted on 7 December 2005 by the Department for Environment, Food and Rural Affairs of the United Kingdom Government ('the DEFRA report').

24 By Decision 2006/79/EC of 31 January 2006 amending Decisions 2005/759/EC and 2005/760 as regards an extension of their period of application (OJ 2006 L 36, p. 48), the Commission extended the measures adopted by Decision 2005/760 until 31 May 2006.

25 In recital 3 of Decision 2006/79, the Commission put forward its reasons for extending the two decisions in question, stating that since new cases of avian influenza had been reported in certain member countries of the OIE, it was appropriate to continue the restrictions concerning the movements of pet birds and imports of other birds from certain areas at risk.

26 By letter of 16 February 2006, the Commission replied to the letters referred to in paragraph 23 above. In that reply, the Commission explained that an increasingly significant body of fresh evidence showed that wild birds might play a major role in spreading HPAI and that the first case of the Asian strain of HPAI detected in Europe at a quarantine centre, in October 2005, had led the Commission to suspend all imports of birds other than poultry. Furthermore, it indicated that the suspension had been extended until 31 May 2006 by Decision 2006/79 in view of the outbreak of the disease in Turkey, where it had spread rapidly, and given the scarcity of information available on the monitoring of the disease by countries sharing a border with Turkey. Finally, the Commission added that even though the scale of the problem as regards wild birds was not yet clear, there was growing evidence that the threat was not confined to just one third country, which was why imports from all third countries had been suspended.

27 By letter of 7 March 2006, the European association of bird traders sent additional information to the Commission concerning wild bird imports from third countries.

28 By Decision 2006/405/EC of 7 June 2006 amending Decisions 2005/710/EC, 2005/734/EC, 2005/758/EC, 2005/759/EC, 2005/760, 2006/247/EC and 2006/625/EC as regards certain protection measures in relation to HPAI (OJ 2006 L 158, p. 760), the Commission extended the measures adopted by Decision 2005/760 until 31 July 2006.

29 In recital 8 of Decision 2006/405, the Commission put forward its reasons for this extension, stating that the threat posed to the European Union by the Asian strain of the avian influenza virus had not abated and that the disease continued to affect wild birds in the European Union and wild birds and poultry in several third countries, including member countries of the OIE. Furthermore, the Commission considered that the virus was appearing to become more and more endemic in certain parts of the world. In recital 11 of the same decision, the Commission also explained that, in the interests of animal health and in view of the epidemiological situation, it was necessary to ensure the continuity of the protection measures provided for, particularly, in Decision 2005/760, so that the provisions of Decision 2006/405 had to have retroactive effect.

30 By Decision 2006/522/EC of 25 July 2006 amending Decisions 2005/759/EC and 2005/760 as regards certain protection measures in relation to HPAI and movements of certain live birds into the Community (OJ 2006 L 205, p. 28), the Commission extended the measures adopted by Decision 2005/760 until 31 December 2006.

31 In recital 1 of Decision 2006/522, the Commission stated that, following the outbreak of avian influenza in South-East Asia in 2004, caused by a highly pathogenic strain of the virus, it had adopted several protection measures in relation to that disease, including Decision 2005/760. In recital 7 of Decision 2006/522, the Commission stated that, at that moment, a substantial amendment to the rules laid down in Decision 2005/760 would mislead the operators and other stakeholders on the possible future development of European Union policy on this matter. It considered that, in light of the animal health situation regarding avian influenza and pending the intended adoption of the EFSA opinion in October 2006, it was appropriate to continue the restrictions relating to the imports of birds other than poultry and, therefore, extend the application of Decision 2005/760 until 31 December 2006.

32 By application lodged at the Court Registry on 10 August 2006, the European association of bird traders, together with three other applicants, brought an application for interim measures before the Court in order to have the enforcement of Decision 2006/522 suspended and to have provisional measures taken in that regard, at the same time as bringing an action for annulment in relation to that decision by a separate document. The application for interim measures and the action for annulment were dismissed, respectively, by the order of 26 October 2006 in Case T-209/06 R, *European Association of Im- and Exporters of Birds and live Animals and Others* v *Commission*, not published in the ECR, and the order of 11 June 2008 in Case T-209/06, *European Association of Im- and Exporters of Birds and live Animals and Others* v *Commission*, not published in the ECR.

33 By letter of 26 September 2006, the European association of bird traders wrote to the Commission pointing out that, in essence, the worldwide import ban imposed by Decision 2005/760 and the decisions extending it were disproportionate, while alerting it to the serious and irreversible consequences of those decisions for its members.

H – *The second EFSA opinion*

34 On 27 October 2006, following a request from the Commission dated 25 April 2005, EFSA issued a scientific opinion on the animal health and welfare risks associated with the import of wild birds other than poultry into the European Union (EFSA Journal [2006] 410, 1-55, 'the second EFSA

opinion'). The opinion contains various recommendations on the health and welfare of birds caught in the wild. In that opinion, EFSA took account of a number of agents that are infectious to birds, including avian influenza.

35 With respect to the health aspects, EFSA considered that the probability of infectious agents being introduced into the European Union by the release from quarantine of captured wild birds varied from negligible to very high. According to EFSA, the probability of any individual captured wild bird being infected upon release from quarantine depends on the species and the probability of pre-clinical infection. These findings led EFSA to recommend that the need to continue the importation of captive wild birds had to be carefully considered.

36 Furthermore, EFSA pointed out that 95% of birds imported into the European Union belonged to one of the following three families: passeriformes (64%), psittaciformes (17%) and galliformes (14%). In addition, in 2005, 88% of wild bird imports came from Africa and 78% from five African States.

37 EFSA also stated that wild birds could become infected due to lateral spread from other infected wild birds, from a contaminated environment or from infected poultry.

38 As regards avian influenza specifically, EFSA took the view that the most commonly imported bird species, namely passeriformes and psittaciformes, did not play a major role in the epidemiology of avian influenza. It also pointed out that all HPAI viruses present in birds had restricted zoonotic potential. However, according to EFSA, since the genome of the avian influenza virus, or a part thereof, had been involved in severe pandemics in the past and, when the opinion was drawn up, in the H5N1 virus, a good surveillance program could prevent avian influenza viruses from entering the European Union through legally imported birds. In addition, EFSA observed that, particularly for passerine and gallinaceous birds, the HPAI viruses had very short incubation periods and clinical courses, leading to a high mortality in a few days, while the incubation period for anseriformes could be far longer. EFSA also considered that, given the short incubation period, a bird which either arrived at quarantine infected with an avian influenza virus or which became infected during the quarantine period would display clinical signs during the quarantine period. The probability of such a bird being released undetected from quarantine was therefore low, or even negligible. However, EFSA did state that there was a risk that birds which had been subject to sub-clinical infections might be released infected.

39 Finally, EFSA recommended that the need to continue importing wild birds had to be carefully considered and that preference had to be given to importing eggs, given the risk of introducing significant infectious agents into the European Union. It also recommended that regular assessments of the risk of importing infectious diseases be undertaken in order to identify high risk zones and countries and high risk species, as these varied over time.

I – *The last two extension decisions*

40 By letters of 13 and 23 November 2006, 9 December 2006 and 8 January 2007, the European association of bird traders again wrote to the Commission pointing out that, in essence, the worldwide import ban imposed by Decision 2005/760 and the decisions extending it were disproportionate, while alerting it to the serious and irreversible consequences of those decisions for its members.

41 By Decision 2007/21/EC of 22 December 2006 amending Decision 2005/760 as regards certain protection measures in relation to HPAI and imports of birds other than poultry into the Community (OJ 2007 L 7, p. 44), the Commission extended the measures adopted by Decision 2005/760 until 31 March 2007.

42 In recital 1 of Decision 2007/21, the Commission reiterated that it had adopted Decision 2005/760 following the outbreak of avian influenza in South-East Asia in 2004, caused by a highly pathogenic strain of the virus. In recital 4 of Decision 2007/21, the Commission stated that it had started the evaluation of the second EFSA opinion immediately after its release. However, in the light of the world animal health situation regarding avian influenza, it was appropriate to continue the restrictions provided for in Decision 2005/760 for a short transitional period in order to allow the Member States, as well as the Commission, in close cooperation with the Member States, to finalise that evaluation and to prepare the measures to be laid down.

43 By letter of 31 January 2007, the Commission replied to the letters referred to in paragraphs 33 and 41 above, pointing out that wild birds had played a major role in spreading avian influenza in 2006, whereas in the past it had always been assumed that their role was a minor one on account of the high mortality rate of birds infected with a highly pathogenic virus. The Commission had therefore decided to continue the worldwide ban on imports of wild birds until 1 July 2007. The Commission also stated that, after that date, different rules would apply seeking not to ban imports of captured birds, but to impose stricter import conditions designed to minimise health risks. Finally, the Commission submitted that, for animal health reasons, it was preferable for breeding programmes to take place in the Member States of the European Union instead of importing live animals bred in third countries into the European Union. It therefore invited the European association of bird traders to consider that option more closely.

44 By Decision 2007/183/EC of 23 March 2007 amending Decision 2005/760 (OJ 2007 L 84, p. 44), the Commission extended the measures adopted by Decision 2005/760 until 30 June 2007. In recitals 4 to 6 of Decision 2007/183, the Commission put forward its reasons for the extension, pointing out, first, that as the new animal health conditions provided for in Regulation (EC) No 318/2007 of 23 March 2007 laying down animal health conditions for imports of certain birds into the Community and the quarantine conditions thereof (OJ 2007 L 84, p. 7) were stricter than those in force at that time, the regulation would not enter into force until 1 July 2007 in order to give Member States and the third countries exporting such birds to the European Union time to adapt to the new measures. It also stated that, in the light of the second EFSA opinion and the world animal health situation regarding avian influenza, imports of such birds without stringent import requirements were not to take place. Consequently, the Commission considered that the protection measures provided for in Decision 2005/760 had to continue to apply until 30 June 2007.

J – *Regulation No 318/2007*

45 On 23 March 2007, the Commission adopted Regulation No 318/2007 on the basis of, in particular, the second subparagraph of Article 10(3) and the first subparagraph of Article 10(4) of Directive 91/496 as well as Article 17(2)(b), Article 17(3) and the first and fourth indents of Article 18(1) of Directive 92/65. The regulation entered into force on 1 July 2007 pursuant to Article 20 thereof and, pursuant to Article 19 thereof, it repealed and replaced both Commission Decision 2000/666/EC of 16 October 2000 laying down the animal health requirements and the veterinary certification for the import of birds, other than poultry and the conditions for quarantine (OJ 2000 L 278, p. 26) and Decision 2005/760.

46 Recital 9 of Regulation No 318/2007 states that, taking into account the role played by migratory wild birds in the spread of avian influenza from Asia to Europe in 2005 and 2006, it is appropriate to limit imports of birds, other than poultry, only to birds bred in captivity.

47 As set out in recital 10 of Regulation No 318/2007:

'It is seldom possible to distinguish with certainty between birds that have been caught in the wild and captive bred birds. Methods of marking can be applied to both types of birds without it being possible to distinguish between them. It is therefore appropriate to limit imports of birds, other than poultry, to breeding establishments that are approved by the competent authority of the third country of export, and to lay down certain minimum conditions for such approval.'

48 Article 1 of Regulation No 318/2007, entitled 'Subject matter', states:

'This Regulation lays down the animal health conditions for imports of certain birds into the [European Union], from the third countries and parts thereof referred to in Annex I, and the quarantine conditions for such imports.'

49 Article 2 of Regulation No 318/2007, entitled 'Scope', is worded as follows:

'This Regulation shall apply to animals of the avian species.

However, it shall not apply to:

(a) fowl, turkeys, guinea fowl, ducks, geese, quails, pigeons, pheasants, partridges and ratites (Ratitae) reared or kept in captivity for breeding, the production of meat or eggs for consumption, or for re-stocking supplies of game (poultry);

(b) birds imported for conservation programmes approved by the competent authority in the Member State of destination;

(c) pet animals referred to in the third paragraph of Article 1 of Directive 92/65/EEC, accompanying their owner;

(d) birds intended for zoos, circuses, amusement parks or experiments;

(e) birds destined for bodies, institutes or centres approved according to Article 13 of Directive 92/65/EEC;

(f) racing pigeons which are introduced to the territory of the [European Union] from a neighbouring third country where they are normally resident and then immediately released with the expectation that they will fly back to that third country;

(g) birds imported from Andorra, Liechtenstein, Monaco, Norway, San Marino, Switzerland, and the Vatican City State.'

50 Article 5 of Regulation No 318/2007, entitled 'Import conditions', provides:

'Imports of birds from approved breeding establishments in accordance with Article 4 shall comply with the following conditions:

(a) "captive bred birds" [defined in Article 3(c) of the regulation as "birds that have not been caught in the wild but have been born and bred in captivity from parents that mated or had gametes otherwise transferred in captivity"];

(b) the birds must originate from third countries or parts thereof referred to Annex I;

(c) the birds were subjected to a laboratory virus detection test 7 to 14 days prior to shipment with negative results for any avian influenza and Newcastle disease virus;

(d) the birds have not been vaccinated against avian influenza;

(e) the birds are accompanied by an animal health certificate in accordance with the model set out in Annex III (the animal health certificate);

(f) the birds are identified with an individual identification number by means of a uniquely marked seamlessly closed leg-ring or a microchip …;

(i) the birds are transported in new containers which are individually identified externally with an identification number that must correspond with the identification number indicated on the animal health certificate.'

51 Article 11(1) of Regulation No 318/2007, entitled 'Quarantine provisions', provides:

'The birds shall be quarantined for at least 30 days in an approved quarantine facility or centre (the quarantine).'

52 Annex I of Regulation No 318/2007, entitled 'List of third countries which can use the animal health certificate in Annex III', provides:

'Third countries or parts thereof listed in columns 1 and 3 of the table in Part 1 of Annex I to Commission Decision 2006/696/EC, where column 4 of that table provides for a model veterinary certificate for breeding or productive poultry other than ratites (BPP).'

53 Commission Decision 2006/696/EC of 28 August 2006 laying down a list of third countries from which poultry, hatching eggs, day-old chicks, meat of poultry, ratites and wild game-birds, eggs and egg products and specified pathogen-free eggs may be imported into and transit through the [European Union] and the applicable veterinary certification conditions, and amending Decisions 93/342/EEC, 2000/585/EC and 2003/812/EC (OJ 2006 L 295, p. 1), referred to in Annex I of Regulation No 318/2007, was repealed and replaced by Commission Regulation No 798/2008 of 8 August 2008 laying down a list of third countries, territories, zones or compartments from which poultry and poultry products may be imported into and transit through the [European Union] and the veterinary certification requirements (OJ 2008 L 226, p. 1).

Procedure and forms of order sought by the parties

54 By application lodged at the Registry of the General Court on 17 August 2010, the applicants brought the present action for compensation.

55 The applicants claim that the Court should:

— order the European Union or the Commission to pay them compensation in respect of the harm they suffered as a result of the adoption by the Commission of Decision 2005/760 or the extension thereof by way of Decisions 2005/862, 2006/79, 2006/405, 2006/522, 2007/21 and 2007/183, and the adoption of Regulation No 318/2007;

— order the European Union or the Commission to pay the costs.

56 The Commission contends that the Court should:

— dismiss the action for compensation as unfounded;

— order the applicants to pay the costs.

57 On 29 May 2012, following changes to the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the First Chamber, to which this case has therefore been allocated.

58 Upon hearing the report of the Judge-Rapporteur, the General Court (First Chamber) decided to open the oral procedure.

59 The parties presented oral arguments and replied to the General Court's oral questions at the hearing on 20 November 2012.

Law

A – *The conditions for non-contractual liability of the European Union*

60 Pursuant to the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the European Union must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

61 According to settled case-law, the non-contractual liability of the European Union — within the meaning of the second paragraph of Article 340 TFEU — for the unlawful conduct of its institutions or organs is subject to the fulfilment of a set of cumulative conditions, namely the unlawfulness of the conduct alleged against the institution or organ of the European Union, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, paragraph 26, and Case T-16/04 *Arcelor* v *Parliament and Council* [2010] ECR II-211, paragraph 139 and the case-law cited).

62 As regards more particularly the first condition, relating to the unlawful conduct alleged against the institution or organ concerned, the case-law requires there to be a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive test for finding that a breach is sufficiently serious is whether the EU institution or organ concerned manifestly and seriously disregarded the limits on its discretion. It is solely where that institution or organ has only considerably reduced, or even no, discretion, that the mere infringement of Community law may suffice to establish the existence of a sufficiently serious breach (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 42 to 44; Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54; Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134; and *Arcelor* v *Parliament and Council*, paragraph 61 above, paragraph 141).

63 However, that case-law does not acknowledge the existence of an automatic link between, on the one hand, the absence of discretion on the part of the institution concerned and, on the other, the classification of the infringement as a sufficiently serious breach of EU law. The extent of the discretion enjoyed by the institution concerned, although determinative, is not the only yardstick. In that connection, the Court of Justice has repeatedly held that the system of rules which the Court has worked out in respect of the second paragraph of Article 340 TFEU also takes into account, notably, the complexity of the situations to be regulated and the difficulties in the application or interpretation of the legislation. In particular, where the Commission's discretion is limited, considerably reduced, or

indeed non-existent, the Court of Justice has confirmed the correctness of the General Court's examination of the complexities of the situations to be regulated when assessing whether the breach of EU law was sufficiently serious. It follows that only the finding that an irregularity would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence enables the liability of the European Union to be established. It is therefore for the European Union judicature, after determining, first of all, whether the institution concerned had a margin of discretion, to then take account of the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error made was intentional or inexcusable (see, to that effect, Case T-429/05 *Artegodan* v *Commission* [2010] ECR II-491, paragraphs 59 to 62 and the case-law cited).

64 As regards the application of the requirement for there to be a sufficiently serious breach in the context of this case, it must be pointed out that any sufficiently serious breach of the rules of law at issue must be based on a manifest and serious disregard of the limits on the broad discretion enjoyed by the EU legislature when exercising its powers on the common agricultural policy under Article 37 EC (see, to that effect and by analogy, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 80; Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 135; Case C-425/08 *Enviro Tech (Europe)* [2009] ECR I-10035, paragraph 47; Case T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305, paragraph 166; Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] II-4945, paragraph 201; and Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission* [2004] ECR II-521, paragraph 101 and the case-law cited). The exercise of that discretionary power implies the need for the EU legislature to anticipate and evaluate ecological, scientific, technical and economic changes of a complex and uncertain nature (see, to that effect and by analogy, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraphs 57 to 59, and *Arcelor* v *Parliament and Council*, paragraph 61 above, paragraph 143).

65 In that connection, it must be recalled that the requirement of a sufficiently serious breach of EU law seeks, whatever the unlawful nature of the measure in question, to avoid the situation where the risk of having to bear the losses alleged by the undertakings concerned hinders the ability of the institution concerned to fully exercise its competences in the general interest, both in the context of its activities that are regulatory or involve economic policy choices and in the sphere of its administrative competence, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct (see *Artegodan* v *Commission*, paragraph 63 above, paragraph 55 and the case-law cited).

66 In the present case, the applicants essentially argue that the Commission committed a sufficiently serious breach of rules of law intended to confer rights on them, causing them genuine and certain damage, by, first, provisionally banning imports of birds caught in the wild through the adoption of Decision 2005/760, second, continuing that ban through extension decisions and, third, making the ban permanent 'de facto' through the adoption of Regulation No 318/2007.

67 The Court considers it appropriate to begin by examining whether there was unlawful conduct on the part of the Commission, in the light of the principles described in paragraphs 62 to 65 above.

B – *The existence of unlawful conduct*

68 In their pleadings, the applicants claim that the Commission engaged in three instances of unlawful conduct: first, the ban on imports of birds caught in the wild imposed by Decision 2005/760; second, the continuance of that import ban by the extension decisions; and, third, the 'de facto' definitive import ban established by Regulation No 318/2007.

69 For each instance of unlawful conduct claimed, the applications essentially raise three pleas in law. Those pleas in law allege, first, that the Commission lacked power or manifestly and seriously disregarded the limits on its discretion pursuant to the legal bases underpinning Decision 2005/760, the extension decisions and Regulation No 318/2007 (taken together, 'the contested measures'), second, that the Commission committed a sufficiently serious breach of rules of law conferring rights on individuals and, third, the existence of liability for a measure that, although lawful, caused them harm.

70 The Court considers it appropriate to examine these three pleas in law separately for each instance of unlawful conduct claimed against the Commission, namely the contested measures.

1. *The Commission's lack of power or its manifest and serious disregard of the limits on its discretion pursuant to the legal bases underpinning the contested measures*

a) The lawfulness of Decision 2005/760

The first plea in law, alleging that the Commission manifestly and seriously disregarded the limits on its discretion under Article 18(1) of Directive 91/496 and failed to comply with its duty of diligence

– Scope of the first plea in law

71 By their first plea in law, the applicants claim that the Commission was not empowered to adopt the contested measures and that, in those circumstances, the mere infringement of EU law was sufficient to establish the existence of a breach in accordance with the case-law cited in paragraph 62 above. The applicants also submit that by adopting Decision 2005/760, the Commission manifestly and seriously disregarded the limits on the discretion conferred on it by Article 18(1) of Directive 91/496.

72 In support of these various grounds of challenge, the applicants essentially claim that, pursuant to Article 18(1) of Directive 91/496, the Commission is only permitted to adopt protective measures in very limited circumstances and, therefore, in the context of circumscribed powers. First, according to the applicants, the Commission can only enact measures where there is a serious threat to animal or human health or for other serious animal health reasons. Second, the Commission must choose one of the two measures provided for in that provision, namely either to suspend imports or to set special conditions. Third, those measures may be limited to all or part of the third country concerned and, where appropriate, to the third country of transit. The applicants submit that the Commission exceeded its powers by suspending imports from all countries belonging to the OIE Regional Commissions, including entire continents not affected by avian influenza, instead of limiting itself to specific areas at risk. In that connection, the applicants point out that the Commission should have drawn a distinction in its decision between, on the one hand, countries where avian influenza had already broken out and where, as a consequence, there was a real risk or there was transit from or to such countries and, on the other, countries where no cases of contamination had arisen or where there was no risk warranting the imposition of an import ban. Thus, imports from, inter alia, Central and South America and Oceania should not have been suspended. By failing to carry out a specific examination of the situation and risks in each third country or each third country of transit, the Commission not only manifestly and seriously disregarded the limits on its powers and acted in a particularly arbitrary fashion, but also failed to comply with its duty to exercise care and diligence.

73 The Commission disputes the applicants' arguments and essentially contends that it enjoys a broad discretion when implementing, inter alia, Article 18(1) of Directive 91/496.

74 The Court considers its appropriate to examine, first of all, whether the Commission enjoyed a broad discretion when adopting the contested measures and, secondly, whether it complied with its duty of diligence for the purpose of observing the limits on, and fully exercising, such a broad discretion.

– The existence of a broad discretion under Article 18(1) of Directive 91/496

75 As a preliminary point, the Court notes that Decision 2005/760 is based on, in particular, Article 18(1) of Directive 91/496.

76 Furthermore, it follows from both the wording of recital 2 of Decision 2005/760, which states that 'it appears … appropriate to suspend imports … from certain areas at risk', and the context in which the imported birds infected with HPAI were detected at the Essex quarantine centre in October 2005 (see paragraph 15 above) that, in the present case, the specific legal basis relied on by the Commission was the first ground referred to in Article 18(1) of Directive 91/496, namely the occurrence or spread of a zoonosis or other disease or phenomenon liable to present a serious threat to animal or human health in the territory of a third country, and not the second ground referring to any other serious animal health reason.

77 The Court also considers that Article 18(1) of Directive 91/496, especially the term 'serious threat to animal or human health', must be interpreted in the light of the principles governing the European Union's policy on the protection of human and animal health, particularly the precautionary principle, which that provision specifically applies.

78 As is apparent from Article 174(1) and (2) EC, the protection of human health falls under the European Union's policy on the environment, which aims at a high level of protection and is based, inter alia, on the precautionary principle and the principle that preventive action should be taken. The requirements of that policy must be included in the definition and implementation of the other policies of the European Union. Moreover, as provided in Article 152 EC, requirements relating to the protection of human and animal health are a part of all the policies and actions of the European Union and must therefore be taken into account in the implementation of the common agricultural policy by its institutions. The precautionary principle applies where the institutions of the European Union take measures to protect human and animal health under the common agricultural policy (see Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I-13533, paragraphs 71 and 72 and the case-law cited).

79 The precautionary principle constitutes a general principle of EU law, stemming from Articles 3(p) EC, 6 EC, 152(1) EC, 153(1) and (2) EC and 174(1) and (2) EC, requiring the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests (see Case T-475/07 *Dow AgroSciences and Others* v *Commission* [2011] ECR II-5937, paragraph 144 and the case-law cited).

80 Thus, where there is scientific uncertainty as to the existence or extent of risks to human health, the precautionary principle allows institutions to take protection measures without having to wait until the reality and the seriousness of those risks become fully apparent (see *Gowan Comércio Internacional e Serviços*, paragraph 78 above, paragraph 73 and the case-law cited) or until the adverse health effects materialise (see, to that effect, *Pfizer Animal Health* v *Council*, paragraph 64 above, paragraphs 139 and 141, and Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495, paragraphs 152 and 154).

81 Furthermore, where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the

precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (see *Gowan Comércio Internacional e Serviços*, paragraph 78 above, paragraph 76 and the case-law cited).

82 It follows from the principles set out above that, when the Commission plans to adopt a protective measure on the basis of the first ground under Article 18(1) of Directive 91/496, namely the occurrence or spread of a 'zoonosis or other disease or phenomenon liable to present a serious threat to animal or human health', it enjoys a broad discretion under the precautionary principle. Thus, in accordance with that principle, the Commission can take protective measures to halt the potential spread of such diseases, when justified by serious animal health reasons. In addition, it has been held that the institutions of the European Union also enjoy a broad discretion when determining the level of risk deemed unacceptable for society for the purpose of applying the precautionary principle and, in particular, adopting protective measures (see, to that effect and by analogy, *Pfizer Animal Health* v *Council*, paragraph 64 above, paragraph 167, and *Alpharma* v *Council*, paragraph 80 above, paragraph 178 and the case-law cited).

83 In the light of the foregoing, the applicants' claim that the Commission did not enjoy a broad discretion under Article 18(1) of Directive 91/496 and that its powers were circumscribed must be rejected.

– Compliance with the duty of diligence

84 Where an institution of the European Union has a broad discretion, the review of the observance of guarantees conferred by the European Union's legal order in administrative procedures is of fundamental importance. Those guarantees include, in particular for the competent institution, the obligations to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see, to that effect, Case C-405/07 P *Netherlands* v *Commission* [2008] ECR I-8301, paragraph 56, referring to, inter alia, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; and *Dow AgroSciences and Others* v *Commission*, paragraph 79 above, paragraph 154). Compliance with the duty of the Commission to gather, in a diligent manner, the factual elements necessary for the exercise of its broad discretion as well as the review thereof by the European Union Courts are all the more important because the exercise of that discretion is only subject to a limited judicial review of the merits, confined to examining whether a manifest error has been committed. Thus, the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case is a necessary prerequisite to enable the European Union Courts to ascertain whether the elements of fact and of law on which the exercise of that broad discretion depends were present (see, to that effect, *Enviro Tech (Europe)*, paragraph 64 above, paragraphs 47 and 62; *Pfizer Animal Health* v *Council*, paragraph 64 above, paragraphs 166 and 171, and Case T-285/03 *Agraz and Others* v *Commission* [2005] ECR II-1063, paragraph 49).

85 In that connection, it has already been held that a scientific risk assessment carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures (*Pfizer Animal Health* v *Council*, paragraph 64 above, paragraph 172). Consequently, it has been found that the first ground under Article 18(1) of Directive 91/496 was likely to be made out when new information significantly alters the perception of the danger represented by the disease (see, to that effect and by analogy, Case C-346/09 *Denkavit Nederland and Others* [2011] ECR I-5517, paragraph 51 and the case-law cited).

86 In the present case, the inevitable conclusion is that since the legal basis relied on by the Commission was the first ground under Article 18(1) of Directive 91/496, which expressly referred to the occurrence or spread of 'a zoonosis or other disease or phenomenon liable to present a serious threat to animal or human health … in the territory of a third country', it was required to demonstrate that

the protective measures taken were sufficiently directly linked to 'all or part of the third country concerned', that is to say to third countries where cases of avian influenza had occurred, 'and where appropriate … third countr[ies] of transit'. The Commission was required to discharge that burden of proof and comply with the obligation to give reasons all the more so because, in recital 2 of Decision 2005/760, it clearly referred to the need 'to suspend imports of these birds from certain areas at risk'.

87 It is apparent from reading recital 2 in conjunction with Article 1 of, and the annex to, Decision 2005/760 that, in the light of the two cases of HPAI detected in September 2005, which reportedly originated in Surinam and Taiwan (see paragraph 76 above), the Commission decided to extend the suspension of all bird imports from all third countries belonging to the five OIE Regional Commissions, namely Africa, the Americas, Asia, including the Far East and Oceania, Europe and the Middle East — therefore, from the whole world.

88 However, notwithstanding the fact that, at that stage, the infected birds which had been detected at the quarantine centre in Essex were reputedly from Surinam and Taiwan — and, therefore, from third countries located in South America and Asia, respectively, which could justify suspending imports from those continents — neither the reasons for Decision 2005/760 nor the documents produced by the Commission in the course of the proceedings demonstrate that the Commission took any steps to ascertain whether the serious threat or risk to health attributable to birds from those third countries was likely to materialise, in a similar way, in third countries located in, inter alia, Africa or Oceania. Indeed, there is nothing in the documents before the Court to show that, when Decision 2005/760 was adopted, the Commission was in possession of relevant information permitting it to extrapolate its conclusions relating to the existence of such a threat or risk as regards bird imports from areas very far from the third countries concerned, even as transit countries, or that it sought out such information or actually exercised its broad discretion in that respect.

89 The first EFSA opinion and, therefore, the only relevant scientific opinion in the Commission's possession at that stage, confined itself to finding that there was an unusual endemic situation of the H5N1 virus having infected wild birds in 'some Asian countries', while recognising that, given the unprecedented nature of the situation and the lack of knowledge on that phenomenon, its consequences could be unpredictable and were not substantiated by sufficient scientific data (see paragraph 12 above). Moreover, according to a report from the OIE dated 19 August 2009, which contains a list of third countries where cases of HPAI had arisen between 2004 and October 2005, comprising solely Asian countries and some European countries, such information was nevertheless actually available and was such as to show that other continents and countries had not yet been exposed, at the material time, to the spread of HPAI. Since the Commission claims, very vaguely and solely in its defence, that it was only in possession of the first EFSA opinion at that stage and that it was impossible to specify, at the outset, which countries and areas were at risk on account of 'the migration of wild birds from one continent to another and the fact that little [was] known about migration patterns', it suffices to state that the Commission did not put forward, in the reasons for Decision 2005/760 or in the course of the proceedings, any evidence substantiated by scientific assessment reports capable of demonstrating that there was a risk of the migration of wild birds from Surinam or Taiwan affecting, inter alia, Africa and Oceania or that proof of migration patterns was in fact impossible. In its defence alone, the Commission confined itself to invoking the migration of wild birds from one continent to another, asserting — without any supporting evidence — that since little was known about migration patterns, it was impossible at the outset to divide up the countries into different risk areas in a realistic way. All the same, in its letter to the European association of bird traders of 31 January 2007, the Commission itself pointed out that prior to 2006, it had always been assumed that wild birds played a minor role on account of the high mortality rate of birds infected with highly pathogenic viruses.

90 However, the fact remains that in the present case, having regard to the case-law cited in paragraph 84 above, the Commission, when applying the first ground under Article 18(1) of Directive 91/496 and fully exercising its broad discretion in that regard, was not able to avoid investigating and examining

(a) whether and to what extent the third countries concerned at that stage, namely Surinam and some Asian countries, formed part of more extensive territorial areas likely to be exposed to the spread of HPAI, that is to say, in particular, the countries bordering those countries, including countries of transit, and, above all (b) whether and to what extent other third countries, even other continents outside of South America and South-East Asia, might be affected by the spread of HPAI or be involved in it. The Commission cannot also argue that by then, in April 2005, it had requested a second opinion from EFSA in order to comply with its duty to investigate in that respect. Indeed, EFSA's requested mandate was limited to a qualitative assessment of the animal health and welfare risks associated with the import of wild birds. It did not extend to a quantitative analysis of the areas at risk, particularly on account of the migration patterns of wild birds, or of the risks to human health, and was unconnected to the incidents that had occurred at the Essex quarantine centre in October 2005.

91 In the absence of reasons and specific factual evidence substantiated by sufficient data from a scientific perspective (see the case-law cited in paragraph 85 above), which would have vindicated the overall approach taken in Decision 2005/760, and in the absence of any enquiries by the Commission for that purpose, it must be held that, in the present case, the Commission failed to comply with both its duty of diligence and its obligation to give reasons. The Commission cannot plead that it was required to adopt urgent protective measures either. The Commission did not mention such a ground of urgency in Decision 2005/760 or in the documents lodged before the Court. Furthermore, the possible urgency of the situation in question does not explain the Commission's complete failure to, first, carry out a careful and full examination of the relevant information available at that stage for the purpose of obtaining a scientific assessment of the risks that was as thorough as possible, ensuring the scientific objectivity of the planned measures and precluding any arbitrary measures, and second, give sufficient reasons in the decision at issue.

92 The Commission cannot, in its defence alone, invoke the need to protect staff at quarantine centres to combat HPAI. First, there is nothing in the documents in the case to show that, by adopting Decision 2005/760, the Commission actually found that such a risk existed. Second, and in any event, the Commission could only prevent that risk, even if proved, by dropping quarantine for imported birds entirely. On the same date as the adoption of Decision 2005/760, the Commission also adopted Decision 2005/759/EC concerning certain protection measures in relation to HPAI in certain third countries and the movement from third countries of birds accompanying their owners (OJ 2005 L 285 p. 52), which specifically retained the quarantine arrangements for such birds.

93 In the light of the documents before the Court, the applicants have proved that, in the present case, the Commission failed to comply with its duty of diligence and, therefore, infringed a rule of law conferring rights on individuals (see, to that effect and by analogy, Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 76), by engaging in conduct that a diligent institution in the same circumstances as those prevailing when the Commission adopted Decision 2005/760 would not have engaged in. The Commission was unable to refute this. Therefore, the inevitable conclusion is that in view of the Commission's failure to comply with its duty of diligence, which is a prerequisite for the full exercise of its broad discretion under Article 18(1) of Directive 91/496, and to observe the precautionary principle, the breach of the principle of diligence is sufficiently serious to trigger the non-contractual liability of the European Union as regards the unlawful adoption of Decision 2005/760.

94 Consequently, the first plea in law must be upheld in so far as the applicants complain that the Commission failed to comply with its duty of diligence, without there being any need to rule on the other grounds of challenge put forward by the applicants in that respect.

95 Since the Court considers that the Commission enjoyed a broad discretion when implementing Article 18(1) of Directive 91/496, it is also appropriate to assess the second plea in law which alleges, in particular, that the Commission exceeded the limits on its discretion on account of a serious breach of the principle of proportionality.

The second plea in law, alleging that the Commission exceeded the limits on its discretion on account of a serious breach of the principle of proportionality

96 In their second plea in law, the applicants essentially submit that even if the Commission enjoyed a broad discretion under Article 18(1) of Directive 91/496 when adopting Decision 2005/760, it exercised that discretion in an improper manner, exceeding its limits, particularly on account of its failure to observe the principle of proportionality. Indeed, the strict closure of borders to imports of all wild bird species was a manifestly disproportionate measure in view of, inter alia, the proper working of the quarantine system checks, the need to remove incentives to the illegal trade in wild birds and the inadequate nature of an import ban as a means of tackling the far greater threat of contamination from migratory wild birds living freely. In essence, the applicants state that instead of suspending wild bird imports from 167 countries, even though those countries posed no risk of spreading avian influenza, the Commission should have adopted measures to contain that risk in October 2005 which were far less restrictive in a number of respects. Thus, it could have banned imports from certain specific areas at risk while permitting imports from all other countries which, at the material time, were free from infection or posed no risk of spreading avian influenza, and which, moreover, were not countries of transit.

97 The Commission disputes the applicants' arguments, referring to, in particular, its broad discretion under, inter alia, the precautionary principle and contending that the suspension of imports established by Decision 2005/760 was not manifestly disproportionate.

98 The Court recalls that the principle of proportionality, which is among the general principles of EU law and is referred to in Article 5(4) TEU, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. However, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45 and the case-law cited).

99 As regards judicial review of the implementation of that principle, bearing in mind the wide discretion enjoyed by the EU legislature where the common agricultural policy is concerned, the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue (Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 82; see, to that effect and by analogy, *Gowan Comércio Internacional e Serviços*, paragraph 78 above, paragraph 82 and the case-law cited). Thus, the criterion to be applied is not whether the measures adopted by the EU legislature are the only ones or the best ones possible, but whether they are manifestly inappropriate in terms of the objective pursued (see, to that effect, *Jippes and Others*, cited above, paragraph 83).

100 In addition, having regard to the case-law cited in paragraph 62 above, it is necessary to examine whether the EU legislature manifestly and seriously disregarded the limits on its discretion in order to determine whether there has been a sufficiently serious breach of the principle of proportionality.

101 It should be noted that, also in the context of recourse to the precautionary principle and, in particular, the assessment of risks, which presupposes that the EU institutions have a scientific assessment of the risks and that they determine what level of risk is deemed unacceptable for society, entailing a political choice on their part (see, to that effect, *Dow AgroSciences and Others* v *Commission*, paragraph 79

above, paragraphs 145 and 148 and the case-law cited), that choice must comply with the principle that the protection of public health, safety and the environment is to take precedence over economic interests, as well as with the principles of proportionality and non-discrimination (see, to that effect, *Artegodan and Others* v *Commission*, paragraph 64 above, point 186, and Case T-392/02 *Solvay Pharmaceuticals* v *Council* [2003] ECR II-4555, paragraph 125).

102 In the present case, the Court observes that the objective pursued by the suspension of wild bird imports under Decision 2005/760 was to protect animal and human health, as is apparent from recital 1 of that decision.

103 In the light of the considerations set out in paragraphs 84 to 94 above — finding that the Commission committed a sufficiently serious breach of its duty of diligence and also failed to properly exercise its broad discretion under Article 18(1) of Directive 91/496 and in terms of the implementation the precautionary principle — it must also be concluded that, having regard to the lack of scientific evidence capable of justifying a temporary suspension of wild bird imports of general application, such a measure was manifestly disproportionate, at the very least from a geographic standpoint. Put another way, in view of the fact that the Commission failed to comply with its obligation to conduct a careful and impartial examination of the facts enabling it to extrapolate the suspension to imports from all of the areas listed in the annex to Decision 2005/760, and even completely failed to exercise its discretion in that respect, it has not proved that there were no less restrictive measures available, namely an import suspension covering a narrower geographical area. It is therefore impossible to find that, in the present case, the suspension of wild bird imports from all third countries belonging to the OIE Regional Commissions was necessary and appropriate for the pursuit of the objective targeted by that decision, namely the protection of animal and human health.

104 Accordingly, it must be concluded that, by adopting Decision 2005/760, the Commission manifestly and seriously disregarded the requirements stemming from the principle of proportionality and, therefore, the limits on its discretion under Article 18(1) of Directive 91/496 and in terms of the implementation of the precautionary principle.

105 Thus, the Commission must be found to have committed a sufficiently serious breach of the principle of proportionality which is capable of rendering the European Union liable. Consequently, the second plea in law must be upheld.

106 In those circumstances, there is no need to rule on the other claims and arguments put forward in connection with the second plea in law challenging the lawfulness of Decision 2005/760, or on the third plea in law, which was put forward in the alternative.

107 The next question to be determined is whether and to what extent the lawfulness of the extension decisions is vitiated by the same illegal acts as those vitiating Decision 2005/760.

b) The lawfulness of the extension decisions

Summary of the arguments of the parties

108 The applicants allege that the Commission committed a sufficiently serious breach of rules of law intended to confer rights on individuals when it adopted the decisions extending Decision 2005/760, namely Decisions 2005/862, 2006/79, 2006/405, 2006/522, 2007/21 and 2007/183. They reiterate the arguments put forward in relation to Decision 2005/760 and submit, in essence, the additional observations set out below.

109 First, the ground relied on in support of the adoption of Decision 2005/760 was vitiated by error, as the truth is that the mesia bird infected with HPAI which was detected at the quarantine centre in Essex came from Taiwan and not Surinam. That error, which the Commission became aware of when the DEFRA report was published on 11 November 2005 (see paragraph 23 above), could no longer be used in support of the extension decisions. Second, by relying on the detection of new cases of HPAI in the European Union, particularly in recital 4 of Decision 2005/862, the Commission overlooked the fact that the root cause of that contamination could not be attributed to wild birds captured in their natural habitat, imports of which had been suspended since Decision 2005/760, but was instead due to migratory wild birds. Third, by relying on the first and second EFSA opinions in support of the argument that all wild birds posed a risk of spreading HPAI, the Commission failed to take account of the fundamental distinction between species as regards their sensitivity to HPAI, as EFSA did in its second opinion. Fourth, by only mentioning the outbreak of HPAI in South-East Asia from Decision 2006/79 onwards, the Commission sought to justify the adoption of Decision 2005/760 after the event.

110 The Commission disputes the applicants' arguments. As regards the extension decisions, it essentially confines itself to stating that those decisions were warranted by the continued threat to animals posed by avian influenza. At the material time, the whole world was faced with an extremely unstable and unprecedented situation. Indeed, before the extensions, cases of avian influenza had been reported in Djibouti, Burkina Faso, Niger, India and Romania. After the extensions, the virus resurfaced in Thailand and South-East Asia. In addition, according to the Commission, there was significant uncertainty surrounding the progress and causes of the rapid spread of the virus, as well as the risk of mutation of the virus and the potential threats to human health as a result. An additional period of time was needed to study and analyse the progress of the spread, the causes, the risks and the experience acquired by the different countries before it could contemplate lifting the import ban.

111 In the present case, it is necessary to examine the lawfulness of Decisions 2005/862, 2006/79, 2006/405, 2006/522, 2007/21 and 2007/183 separately, in the light of the respective reasons underpinning them as well as the relevant information that was or could have been available to the Commission when the decisions were adopted, that is, excluding information subsequent to those dates (see, to that effect and by analogy, Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 54).

The lawfulness of Decision 2005/862

112 Recital 4 of Decision 2005/862 states, inter alia and as an additional factor with regard to the reasons underpinning Decision 2005/760, that '[n]ew cases of avian influenza have been reported in certain member countries of the OIE' which would warrant '[extending t]he suspension of movement of pet birds and of imports of other birds from certain areas at risk', in other words, from all countries belonging to the OIE Regional Commissions listed in Annex I, Part B, of that decision.

113 The fact remains, however, that the Commission does not specify, either in the reasons for Decision 2005/862 or in its pleadings before the Court, which countries, in its view and at that stage, fall within those 'areas at risk'. The Commission's assertion, in its defence, that cases of avian influenza had been reported in Djibouti, Burkina Faso, Niger, India and Romania, before the extension decisions, is very vague, is not supported by documentary evidence and makes no reference to when such cases appeared or the date on which the Commission became aware of them. It is apparent from a report by Professor D., which was produced by the applicants and is based on data from the World Health Organisation (WHO) — data that was not disputed by the Commission — that between October 2005 and the end of 2005, Kuwait and Ukraine were the only third countries where new cases of contamination by the H5N1 virus had been detected. Even if the Commission had been in possession of such information at that stage, the fact remains that it clearly failed to seek out and explain the

relevant empirical and scientific reasons showing why, when Decision 2005/862 was adopted, the extension of the import suspension continued to cover all countries belonging to the OIE Regional Commissions.

114 It should also be noted, as the applicants did, that Decision 2005/862 does not show that the Commission took account of the results of the report by the National Emergency Epidemiology Group (see paragraph 20 above), either. This report explained that, following a mix-up of samples, a bird infected with the H5N1 virus, detected at the quarantine centre in Essex, had been wrongly classed as coming from Surinam, in South America, when in actual fact it was from Taiwan, in Asia. Notwithstanding this information, which is highly relevant for the purpose of properly specifying the areas at risk under Article 18(1) of Directive 91/496, the Commission failed to explain, both in Decision 2005/862 and in these proceedings, why it nevertheless considered it necessary to continue the suspension of wild bird imports from South America, or indeed the entire American continent.

115 It therefore follows that, like the adoption of Decision 2005/760, the adoption of Decision 2005/862 is seriously vitiated by the Commission's lack of diligence and its failure to give reasons. It also follows that, in the light of the information that was or could have been in the Commission's possession at that stage if it had properly discharged its duty to investigate and exercised its discretion in that respect, continuing the suspension of wild bird imports from all of the countries belonging to the OIE Regional Commissions was manifestly disproportionate. Indeed, having regard to the lack of proof of infection in birds imported from South America and the spread of the H5N1 virus epidemic to Kuwait and Ukraine alone, the Commission was not permitted, in the absence of other relevant empirical information and scientific evidence, to continue the suspension of wild bird imports from all countries belonging to the OIE Regional Commissions, as given effect to by Decision 2005/760.

116 Consequently, the conclusion to be drawn is that Decision 2005/862 is also vitiated by a sufficiently serious breach of the principles of diligence and proportionality, which is capable of rendering the European Union liable.

The lawfulness of Decision 2006/79

117 Recital 2 of Decision 2006/79 states, inter alia, that '[f]ollowing the outbreak of avian influenza, caused by a highly pathogenic H5N1 virus strain, in south-eastern Asia starting in December 2003, the Commission adopted several protection measures in relation to avian influenza'. In addition, recital 3 of that decision states:

'Since new cases of avian influenza have been reported in certain member countries of the [OIE], the restrictions concerning the movements of pet birds and imports of other birds from certain areas at risk should be continued. Therefore it is appropriate to extend the application of Decisions 2005/759 … and 2005/760 ...'

118 As is clear, besides the reference to the outbreak of avian influenza caused by a highly pathogenic H5N1 virus strain in South-East Asia starting in December 2003, the Commission does not specify the geographic origin of those 'new cases of avian influenza' in the reasons for Decision 2006/79 or in its pleadings. Only the Commission's letter of 16 February 2006 produced by the applicants — a letter which, moreover, postdates the adoption of Decision 2006/79 — shows that the main reason for the extension decision was the outbreak and rapid spread of the H5N1 virus in Turkey, as well as the fact that there was little, if any, information on the monitoring of avian influenza by countries sharing a border with Turkey. Furthermore, the overview of the OIE's reports between 2004 and 2007, which was submitted by the applicants and whose content was not disputed by the Commission, shows that between 30 November 2005 and 31 January 2006, new cases linked to the H5N1 virus were identified in third countries, in this instance China, Croatia, Indonesia, Romania, Russia, Thailand, Turkey, Ukraine and Hong Kong.

119 However, even if, when adopting Decision 2006/79, the Commission had relied on the information described in the previous paragraph — although the Commission has not established that such information was in its possession or used by it before the adoption of the extension decision at issue, albeit that the information might explain the Commission's vague assertion referred to in paragraph 113 above — it still failed (a) to elucidate its conclusion that 'new cases' warranted extending the ban on wild bird imports from all countries belonging to the OIE Regional Commissions, and (b) to produce evidence in support of that conclusion. In particular, the mere fact that the epidemic had spread to Turkey did not, in the absence of other relevant explanations and evidence, warrant suspending wild bird imports from South America and Oceania.

120 It must therefore be concluded that when the Commission adopted Decision 2006/79, it also failed to comply with its duty of diligence and infringed the principle of proportionality in such a way as to render the European Union liable.

The lawfulness of Decision 2006/405

121 Recital 8 of Decision 2006/405 states:

'The threat posed to the [European Union] by the Asian strain of the avian influenza virus has not abated. Outbreaks are still detected in wild birds in the [European Union] and in wild birds and poultry in several third countries, including member countries of the World Organisation for Animal Health (OIE). In addition, that virus appears to become more and more endemic in certain parts of the world. The validity of the protection measures laid down in Decisions … 2005/759 [and] 2005/760 … should therefore be extended.'

122 It should again be noted that the Commission does not specify, either in Decision 2006/405 or in its pleadings, which countries are concerned when it refers, particularly vaguely, to 'several third countries, including member countries of the [OIE]'. However, it is apparent from the overview of the OIE's reports between 2004 and 2007 (see paragraph 118 above) that the new cases which appeared in third countries between 31 January and 31 May 2006 did not affect the Americas or Oceania. Accordingly, even if the Commission had been in possession of that information at the relevant time, which might explain its vague assertion referred to in paragraph 113 above, it did not produce evidence to show that it had complied with its duty of diligence, had observed the principle of proportionality and, therefore, had grounds to continue the suspension of wild bird imports from all countries belonging to the OIE Regional Commissions.

123 In those circumstances, the conclusion to be drawn is that the illegal acts committed by the Commission starting with the adoption of Decision 2005/760 did not cease when Decision 2006/405 was adopted.

The lawfulness of Decision 2006/522

124 For the purpose of justifying a further extension to the suspension of wild bird imports, recital 7 of Decision 2006/522 refers to 'the current animal health situation regarding avian influenza and … the intended adoption of the EFSA opinion in October'.

125 The overview of the OIE's reports between 2004 and 2007 (see paragraph 118 above) shows that, when Decision 2006/522 was adopted, some parts of the world were free from new cases of avian influenza, including, in particular, South America and Oceania. Furthermore, the mere fact that EFSA was in the process of drawing up and adopting a second opinion — whose purpose was not to determine the geographic scope of the risk of spreading avian influenza associated with, especially, the migration patterns of wild birds (see paragraph 90 above) — was not capable of relieving the Commission of its

duty of diligence and its obligation to give reasons as regards the possible explanations for continuing the suspension of wild bird imports from all countries belonging to the OIE Regional Commissions, or of its obligation to observe the principle of proportionality.

126 Accordingly, by adopting Decision 2006/522, the Commission perpetuated the illegal acts committed when Decision 2005/760 was adopted.

The lawfulness of Decision 2007/21

127 Recital 2 of Decision 2007/21 refers to the adoption, on 27 October 2006, of the second EFSA opinion, which was published on 14 November 2006. Recital 4 of that decision states:

'With regard to the measures laid down in Decision 2005/760 …, the Commission has started the evaluation of the Opinion immediately after its release and a first analysis of the Opinion and the possible modifications to these measures has taken place during an expert working group meeting in the framework of the Standing Committee on the Food Chain and Animal Health on 14 November 2006 and in the meeting of the Standing Committee on the Food Chain and Animal Health on 27 November 2006. However, in the light of the current world animal health situation regarding avian influenza, in order to allow the Member States as they indicated at the meeting of 27 November 2006 and the Commission, in close cooperation with the Member States, to finalise this evaluation and to prepare the measures to be laid down, the restrictions provided for in Decision 2005/760 … should be continued for a short transitional period.'

128 Clearly, given the restricted subject-matter of the scientific assessment requested for the purpose of drawing up the second EFSA opinion (see paragraph 90 above), the Commission's provisional appraisal of the content of that opinion could not justify the illegal acts it had committed up to that point, which culminated in the continuance of an unreasonable suspension of wild bird imports from the whole world. Thus, the Commission was not able to rely on the analysis of that opinion to show that it had discharged its duty of diligence and its burden of proving that the conditions had been met for a blanket suspension of imports covering, inter alia, the Americas and Oceania. Furthermore, the Commission did not supply any information, either in Decision 2007/21 or in the course of the proceedings, enabling the Court to assess the substance and relevance of the 'world animal health situation' to which it makes a particularly vague reference in the last sentence of recital 4 of that decision.

129 Finally, even if account is taken of the fact that the Commission stated in its letter of 31 January 2007 — that is, after the adoption of Decision 2007/21 — that wild birds had played a major role in the spread of avian influenza since 2006, which would have provided grounds for extending the suspension of wild bird imports until 1 July 2007, the fact remains that the Commission failed to explain why that finding justified retaining the worldwide scope of the suspension to include areas where no cases of avian influenza had been recorded.

130 Accordingly, it must be concluded that, by adopting Decision 2007/21, the Commission continued to commit sufficiently serious breaches of the principles of diligence and proportionality.

The lawfulness of Decision 2007/183

131 Recital 3 of Decision 2007/183 refers to the second EFSA opinion and recital 4 thereof refers to Regulation No 318/2007, which provided for new animal health conditions that were 'stricter than those currently in force' and were scheduled to enter into force on 1 July 2007. Recitals 5 and 6 of that decision state that '[i]n the light of the [second EFSA opinion] and the current world animal

health situation regarding avian influenza, imports of such birds without stringent import requirements should not take place', so that '[t]he protective measures provided for in Decision 2005/760… should therefore continue to apply until 30 June 2007'.

132 The reasons referred to in the previous paragraph show that, when Decision 2007/183 was adopted, the Commission plainly failed to put an end to the illegal acts committed from the adoption of Decision 2005/760 onwards: the particularly vague grounds justifying the extension of the suspension of wild bird imports from the whole world continued to be the second EFSA opinion, the 'current world animal health situation' and the planned entry into force of Regulation No 318/2007 allegedly establishing stricter animal health conditions. The Commission has not demonstrated whether and to what extent the second EFSA opinion, in particular, permitted it to retain a blanket suspension of that kind, at the very least from a geographic standpoint.

133 Therefore, irrespective of the lawfulness of Regulation No 318/2007, the conclusion to be drawn is that, by adopting Decision 2007/21, the Commission continued to commit sufficiently serious breaches of the principles of diligence and proportionality, as established above.

c) The lawfulness of Regulation No 318/2007

The scope of the dispute concerning Regulation No 318/2007

134 The applicants essentially submit: (a) in the first and second limbs of the first plea in law, that Regulation No 318/2007 has no legal basis and cannot be founded on the second EFSA opinion; (b) in the first and second limbs of the second plea in law, put forward by way of alternative submission, that the regulation was adopted in breach of, firstly, the principles of proportionality and equal treatment, as the ban on wild bird imports was not an appropriate means of halting the spread of avian influenza and the measures taken placed wild birds at a disadvantage with respect to other species of birds and, secondly, the right to property and the freedom to carry out an economic activity as recognised by the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), and; (c) in the third plea in law, put forward as a further alternative, that the adoption of the regulation renders the European Union liable for a lawful act.

135 The first limb of the first plea in law should be considered first.

The existence of a sufficient legal basis for Regulation No 318/2007

136 The applicants essentially claim that Regulation No 318/2007 has no legal basis.

137 The Commission disputes that argument and, in essence, dismisses it as irrelevant. It submits that in accordance with Article 33 EC, the objectives of the common agricultural policy include increasing agricultural productivity, stabilising markets and assuring the availability of supplies. Those objectives can only be attained if the animals affected by such activities are protected against contagious diseases, which is clearly apparent from the recitals of Directives 91/496 and 92/65. The Commission also refers to the provisions of Article 17(2)(a) and (3)(a) and (c) of Directive 92/65 and considers that that directive, together with Directive 91/496, permitted it to adopt Regulation No 318/2007.

138 In the present case, Article 5(a) of Regulation No 318/2007 restricts the grant of import authorisation to captive bred birds (see paragraph 50 above). The result is an implicit blanket ban on imports of birds caught in the wild, as confirmed by recital 9 of Regulation No 318/2007 and the repeal, pursuant to Article 19 thereof, of Decision 2000/666, which had initially permitted the import of birds into the European Union from member countries of the OIE (see paragraphs 45 and 46 above). The

Court notes that the Commission, in its pleadings, confirms that all possibility of having recourse to quarantine had been ruled out as far as birds caught in the wild were concerned, whether migratory or not.

139 It is therefore appropriate to examine whether Regulation No 318/2007 has a sufficient legal basis in so far as it imposes a total indiscriminate ban on imports of birds caught in the wild.

140 First, it should be recalled that the rules laying down the animal health requirements governing trade in and imports into the European Union of animals, as set out in, inter alia, Directive 92/65, particularly Article 17(2)(b) and (3), and the first and fourth indents of Article 18(1) of that directive, on which Regulation No 318/2007 is based (see paragraph 45 above), are founded on the principle that, on the grounds of animal health and prevention, all imports of animals from third countries are prohibited unless accompanied by express authorisation tied to the fulfilment of procedural requirements and the performance of prior mandatory checks.

141 The purpose of establishing uniform animal health rules in EU law which govern the placing on the market of animals, as transpires from the second, third and fourth recitals of Directive 92/65, is not only to liberalise the trade in animals and products of animal origin in the internal market, as is apparent from the ninth recital and Chapter II of that directive entitled 'Provisions applicable to trade', but also to lay down the requirements applicable to imports into the European Union of animals from third countries, as is apparent from Chapter III of the same directive entitled 'Provisions applicable to imports into the [European Union]'. Thus, in accordance with the principle of prior authorisation, Decision 2000/666 (see paragraph 7 above), which was based on the same provisions of Directive 92/65 as Regulation No 318/2007, authorised imports into the European Union of birds only from the countries listed as members of the OIE, in accordance with the terms of Annex D thereof, and which ensured compliance with 'general requirements of the section on veterinary ethics and certification for international trade', according to recital 4.

142 Second, the requirement of prior authorisation for all imports from third countries is expressly laid down in the provisions applicable to imports into the European Union, as set out in Chapter III of Directive 92/65, particularly Article 17(2) thereof, which provides, inter alia:

'Only animals … which satisfy the following requirements may be imported into the [European Union]:

a) they must come from a third country on a list to be drawn up in accordance with paragraph 3(a);

b) they must be accompanied by a health certificate …'

143 It follows that imports into the European Union can only take place if the requirements referred to in paragraphs 141 and 142 above are met, including the requirement that imports must come from a third country on a list to be drawn up by the Commission in accordance with the 'comitology' procedure under Article 26 of Directive 92/65, read in conjunction with Article 17 of Directive 89/662 which, in the version applicable to these proceedings, provided for the application of Article 5, concerning the regulatory procedure, of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23). Under Article 17(2) of Directive 92/65, the Commission is therefore entitled to exclude or remove certain third countries from the list, with the result that all imports of animals from those countries is automatically prohibited.

144 Third, as is apparent from Article 17(3)(c) of Directive 92/65, the Commission is also permitted to lay down 'the specific animal health requirements — in particular for the protection of the [European Union] from certain exotic diseases', including avian influenza. Furthermore, pursuant to the first indent of Article 17(4)(a) of the same directive, '[t]he list provided for in paragraph 3 may include

only third countries or parts of third countries … from which imports are not prohibited … as a result of the existence of one of the diseases referred to in Annex A or of any other disease exotic to the European [Union].'

145 Likewise, pursuant to the first and fourth indents of Article 18(1) of Directive 92/65, 'Member States shall ensure that the animals … covered by this Directive are imported into the [European Union]' only if (a) evidence is produced that an official veterinarian has issued a certificate, drawn up depending on the species, and (b) where animals covered by Articles 5 to 10 of the directive are concerned, including birds, the animals have been quarantined before being imported, in accordance with detailed rules to be established under the procedure laid down in Article 26 of the directive. In this connection, it should be noted that Article 7(A) of Directive 92/65 provides that 'Member States shall ensure that birds other than those referred to in Directive 90/539/EEC [, namely poultry and hatching eggs,] may be the subject of trade only if they meet' certain requirements laid down in the alternative, including, inter alia, the requirement that they come from a holding in which avian influenza has not been diagnosed in the 30 days preceding the dispatch or from a holding or an area not subject to restrictions under measures to be applied to combat Newcastle disease, or the requirement that they have been quarantined in the holding to which they were taken after they entered the territory of the European Union.

146 It follows from the provisions and considerations set out above that the Commission enjoys a broad discretion when adopting 'animal health rules … for the placing on the market of animals' within the meaning of the fifth recital of Directive 92/65, which necessarily encompasses the possibility of withholding authorisation to import some species of animals into the European Union from countries which fail to meet the import requirements mentioned above.

147 Fourth, even though the sole basis for Directive 92/65 is Article 37 EC on the common agricultural policy, it must be stated that the directive also dovetails with the implementation of the European Union's policies on the protection of health and the environment under Articles 152 and 174 CE and, therefore, must be interpreted in the light of the precautionary principle (see paragraphs 78 to 80 above). Thus, pursuant to Article 17(3)(c) of Directive 92/65, which refers to the ability of the Commission to lay down 'the specific animal health requirements — in particular for the protection of the [European Union] from certain exotic diseases', the objective of protection and prevention that forms an integral part of the precautionary principle is met. In the light of the Commission's broad discretion when implementing the precautionary principle in that context (see paragraph 82 above), in particular, the provisions of Article 17(3)(c) of Directive 92/65 cannot be interpreted strictly. Therefore, it must be considered that those provisions entitle the Commission to withhold authorisation, as an animal health measure, in respect of imports of certain animals from certain third countries, if those animals pose a risk to human and animal health in terms of the case-law cited in paragraphs 78 and 80 above.

148 In those circumstances, the claim that there was no sufficient legal basis for the adoption of Regulation No 318/2007 and the enactment of a blanket ban on wild bird imports from third countries must be rejected.

The alleged serious breach of the principle of proportionality

149 The applicants submit that Regulation No 318/2007 infringes the principle of proportionality as it bans imports of all wild birds even though only migratory wild birds were to blame for the spread of avian influenza. The applicants also allege that that principle was infringed on the ground that, by authorising imports of captive bred birds and not wild birds, the Commission authorised imports of the most dangerous class of birds. However, unlike their objections in relation to Decision 2005/760

and the extension decisions, the applicants do not contend in their third plea in law that, by adopting Regulation No 318/2007, the Commission infringed the principle of proportionality specifically by reason of the geographic scope of the ban on wild bird imports.

150 First, in so far as the applicants submit that Regulation No 318/2007 infringes the principle of proportionality on the ground that the Commission banned imports of all wild birds, even though only migratory wild birds were to blame for the spread of avian influenza, it should be recalled that in recital 9 of that regulation, the Commission put forward the following reasons for implementing the measures in question in respect of all wild birds:

'Another EFSA recommendation relates to imports of birds caught in the wild. The Scientific Opinion identifies the risk caused by those birds that may be infected due to lateral spread from other infected wild birds and from the contaminated environment, as well as overspill from infected poultry. Taking into account the role played by wild migratory birds in the spread of avian influenza from Asia to Europe in 2005 and 2006, it is appropriate to limit imports of birds, other than poultry, only to birds bred in captivity.'

151 Furthermore, the second EFSA opinion, which the Commission relies on in that context, explains that most imported wild birds other than poultry will not be infected or be carriers of OIE-listed infectious agents. However, EFSA pointed out, inter alia, that avian influenza was an important infectious agent because of its veterinary or zoonotic potential. EFSA also stated in that opinion that wild birds could be infected due to the lateral spread of a disease from other infected wild birds and from the contaminated environment, as well as overspill from infected poultry.

152 In the present case, the parties agree that migratory wild birds are a source of the spread of avian influenza. That assessment is confirmed by the opinion of 27 June 2000 issued by the scientific committee on animal health and welfare of the Directorate-General for Health and Consumers of the Commission ('the opinion of the scientific committee') and by the second EFSA opinion, which indeed states that chronically infected birds and anseriformes in particular may excrete the avian influenza virus for periods longer than a 30-day quarantine period.

153 However, not all wild birds imported from third countries are migratory birds. As EFSA points out in its second opinion, 95% of all bird imports are passeriformes, psittaciformes and galliformes, few of which are migratory birds. Accordingly, that ground, on its own, cannot justify banning imports of all wild birds.

154 In Regulation No 318/2007, the Commission also relies on the risk of lateral spread of a disease from other infected wild birds and from the contaminated environment, as well as overspill from infected poultry.

155 In that respect, it should be observed that migratory birds may infect wild or non-wild birds in both third countries and the European Union.

156 It is also noteworthy that, in its second opinion, EFSA stated that the infection of domestic poultry due to imports of captured birds was rare and that the evidence of such infections was negligible. EFSA also stated that the most commonly imported birds, such as passeriformes and psittaciformes, did not play a major role in the epidemiology of avian influenza. Finally, EFSA nevertheless pointed out that, having regard to the risks of introducing major infectious agents into the European Union, the need to continue imports of wild birds should be carefully considered.

157 In the light of those risks, the issue to be determined is whether the Commission had grounds for considering that, in the present case, and taking account of the objective of health protection, the ban on imports of all wild birds was necessary and appropriate, or whether it ought to have had recourse to a less restrictive measure (see paragraph 98 above).

158 As regards the option of placing wild birds in quarantine, it should be noted that, in its second opinion, EFSA indeed stated that the probability of birds infected sub-clinically during quarantine being released was low. However, it recognised that there was a risk of certain birds being released even though they were infected. It is also apparent from the DEFRA report that since nothing is known about the health history of wild birds, as they are captured shortly before export, the state of their health is also unknown.

159 Therefore, in the light of that risk and the uncertainty surrounding the state of captive wild birds' health, the conclusion to be drawn is that by adopting Regulation No 318/2007, the Commission did not adopt manifestly disproportionate measures with respect to those birds, nor did it manifestly exceed the boundaries of its broad discretion under the precautionary principle, on the ground that it ruled out placing wild birds in quarantine as a less restrictive alternative to the import ban.

160 Second, the applicants consider that the Commission also infringed the principle of proportionality by authorising the import of captive bred birds, namely the most dangerous class of birds, and not wild birds. In support of this ground of challenge, they rely on the report of Professor D. (paragraph 113 above) as well as the fact that captive bred birds are naturally close to each other and have far more contact with humans.

161 In that respect, it is to be noted that according to the opinion of the scientific committee, evidence that infections in domestic poultry have occurred as the result of spread from free-living birds is circumstantial, but overwhelming. Consequently, the applicants are wrong to claim that captive bred birds compose the most dangerous class of birds in terms of spreading the virus.

162 It should also be made clear that wild birds differ from captive bred birds from the standpoint of the need to adopt risk prevention measures. In the case of captive bred birds, it is possible to impose stringent health controls as soon as the birds in question are born. Such controls may even extend to the breeding of such birds in a closed environment. The opinion of the scientific committee indeed states that some poultry facilities were closed in order to resist the invasion of wild birds, a move which, according to one of the scientists cited in the opinion, served to reduce cases of avian influenza at such facilities. By contrast, a health protection measure of this kind is not, by definition, possible for wild birds.

163 Consequently, the applicants cannot argue that the Commission adopted a manifestly disproportionate measure by drawing a distinction between wild birds and captive bred birds.

164 In the light of all of the considerations set out above, the claim that the adoption of Regulation No 318/2007 gave rise to a sufficiently serious breach of the principle of proportionality must be rejected.

165 In the context of the third plea in law, relating to the lawfulness of Regulation No 318/2007, the subject of these proceedings is not to determine whether the Commission infringed the principle of proportionality by reason of the geographic scope of the ban on wild bird imports (see, however, paragraphs 72, 108 and 109 above concerning the first and second pleas in law, relating to the lawfulness of Decision 2005/760 and the extension decisions), as that issue is not apparent from the applicants' pleadings in a coherent and comprehensible manner (see, to that effect, order in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21). Thus, on pain of ruling *ultra petita*, there is no need for the Court to decide on that matter (see, to that effect, Joined Cases T-90/07 P and T-99/07 P *Belgium and Commission* v *Genette* [2008] ECR II-3859, paragraph 72 and the case-law cited).

The alleged sufficiently serious breach of the principle of equal treatment

166 The applicants consider that the provisions of Regulation No 318/2007 are at odds with the principle of equal treatment on the ground that the animal health rules applicable to poultry, racing pigeons, pet animals and birds intended for zoos, circuses, amusement parks or experiments are significantly less strict than those applicable to wild birds. In addition, the applicants submit, in essence, that the principle of equal treatment is also infringed because Regulation No 318/2007 permits imports of captive bred birds, which pose a greater threat than wild birds as far as the spread of avian influenza is concerned.

167 It should be remembered that the principle of equal treatment, as enshrined in the Charter of Fundamental Rights, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraph 64 above, paragraph 26 and the case-law cited, and Case T-334/07 *Denka International* v *Commission* [2009] ECR II-4205, paragraph 169 and the case-law cited).

168 Therefore, the issue to be determined is whether or not the situations of the different classes of birds which the applicants rely on are comparable.

169 Whether one situation is comparable to another must be assessed in the context in which the breach of the principle of equal treatment has been invoked. Indeed, it has been held that the elements which characterise different situations, and hence their comparability, must be determined and assessed in particular in the light of the subject-matter and purpose of the Community act which makes the distinction in question. The principles and objectives of the field to which the act in question relates must also be taken into account (see, to that effect and by analogy, *Arcelor Atlantique et Lorraine and Others*, paragraph 64 above, paragraph 26 and the case-law cited).

170 As stated in paragraph 150 above, it follows from recital 9 of Regulation No 318/2007 that wild birds were excluded from imports into the European Union because of the risk of infection posed by those birds.

171 Therefore, it is necessary to assess whether, from the perspective of risk prevention, wild birds differ from poultry, racing pigeons, pet animals and birds intended for zoos, circuses, amusement parks or experiments.

172 As a preliminary point, it should be noted that in the light of the information in the Commission's possession when it adopted Regulation No 318/2007 (see paragraphs 150 to 157, 161 and 162 above), the Commission was, in principle, able to withhold import authorisation in respect of wild birds as a class. The mere fact that a risk of a level equivalent to that posed by wild birds could, in some circumstances, warrant the exclusion of other classes of birds from the scope of Regulation No 318/2007 was not, in itself, capable of forming the basis of an act of unequal treatment to the detriment of wild birds, since, under the principle of equal treatment, which must be reconciled with the principle of legality, a person may not rely, to his advantage, on an unlawful act committed in favour of a third party (see, to that effect, Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 77 and the case-law cited).

173 First, in respect of the distinction between wild birds and poultry, the second EFSA opinion states that, compared with poultry, little is known of the prevalence of infectious, transmissible diseases of wild birds in their natural environment before capture. That knowledge differential as regards the risk associated with the prevalence of infectious, transmissible diseases means that the situation of poultry is not comparable to that of wild birds in terms of risk assessment.

174 Second, in respect of the distinction between wild birds and racing pigeons, Article 2(f) of Regulation No 318/2007 excludes from the scope of the regulation 'racing pigeons which are introduced to the territory of the [European Union] from a neighbouring third country where they are normally resident and then immediately released with the expectation that they will fly back to that third country'.

175 In that regard, it should be remembered that the first EFSA opinion stated that experimental evidence had shown that it was very difficult to infect pigeons with the avian influenza virus, but there was sufficient evidence to suggest caution in dismissing the likelihood that pigeons posed a risk in terms of the introduction of the avian influenza virus. In the same opinion, EFSA explained that pigeons did not appear to have a relevant role in the epidemiology of avian influenza.

176 In the present case, it must be stated that the applicants do not rely on any experimental evidence showing that it was highly unlikely for wild birds, like pigeons, to be infected. Accordingly, the high unlikelihood of the avian influenza virus infecting pigeons distinguishes them from wild birds with regard to the objective of preventing the risks invoked. The claim alleging breach of the principle of equal treatment cannot therefore be upheld in that context.

177 Furthermore, even if it were to be conceded that wild birds do not pose a higher risk than pigeons, given that, according to EFSA, the most commonly imported birds do not play a significant role in the epidemiology of avian influenza, the fact remains that the unequal treatment which might thereby ensue would be caused by the mere fact that Article 2(f) of Regulation No 318/2007 excludes racing pigeons from the scope of that regulation. On the assumption that such an exclusion is unlawful for the reasons mentioned in the relevant provisions, that unlawfulness would not be capable of forming the basis of a breach of the principle of equal treatment with respect to wild birds, or indeed a sufficiently serious breach of that principle entitling the applicants to receive compensation (see paragraph 172 above).

178 Third, in respect of the distinction between wild birds and pet birds, the Commission rightly states that the latter live in close proximity to their owners. However, such proximity does not preclude those birds becoming infected by the avian influenza virus. Indeed, the assertion of the Commission that they generally live in closed buildings is not substantiated and it is plausible, as the applicants contend, that pet birds may live outdoors in some countries. The risk that pet birds might also become infected by the avian influenza virus was, however, recognised by the Commission, as it took specific protective measures in respect of those birds following the outbreak of HPAI in imported birds in quarantine at the Essex quarantine centre (see paragraph 92 above).

179 Pet birds differ from wild birds as the former are pet animals and, as such, generally receive special attention from their owners, with the result that their health is monitored more closely.

180 None the less, such increased monitoring by the owners of pet birds does not allow the Commission to take the view that those birds posed a lower risk than wild birds. As is apparent from the second EFSA opinion, clinical signs are an unreliable indicator of infection with the avian influenza virus in many imported birds. Besides, the Commission has not put forward any arguments serving to rule out the possibility that those birds might also become infected sub-clinically (see paragraph 158 above).

181 However, the resulting unequal treatment is solely attributable to the specific rules applying to pet birds as referred to in the third indent of Article 1 of Directive 92/65 and cannot affect the lawfulness of Regulation No 318/2007 in so far as the latter does not permit imports of wild birds. It cannot therefore form the basis of a sufficiently serious breach of the principle of equal treatment entitling the applicants to receive compensation (see paragraph 172 above).

182 Fourth, in respect of the distinction between wild birds and birds intended for zoos, circuses, amusement parks or experiments, the Commission relies on the fact that trade in the latter is more individualised. It also relies on Article 13 of Directive 92/65, in conjunction with Annex C thereof, which sets out the conditions that must be satisfied in order for a body, institute or centre to be granted official approval.

183 It is not possible to ascertain from the reasons put forward by the Commission why, in the light of the risks posed by avian influenza especially, it decided to ban all imports of wild birds, while imports of birds intended for zoos, circuses, amusement parks or experiments were authorised subject to compliance with certain animal health rules. In particular, the Commission's vague assertion that trade in such birds is more individualised does not elucidate in what respect such individualisation would limit the risk in question. In addition, the Commission does not explain its reasons for considering that birds intended for zoos, circuses, amusement parks or experiments necessarily come from bodies, institutes or centres with official approval as referred to in Article 13 of Directive 92/65, or why it would not be possible to make the import of wild birds subject to compliance with certain health measures. Finally, there is no evidence to exclude the possibility that birds intended for zoos, circuses, amusement parks or experiments might become infected sub-clinically.

184 However, any resulting unequal treatment would be solely attributable to the fact that Article 2(d) of Regulation No 318/2007 excludes birds intended for zoos, circuses, amusement parks or experiments from the scope of that regulation. On the assumption that the exclusion as such of those birds from the scope of the regulation is unlawful for the reasons mentioned above, that unlawfulness would not be capable of forming the basis of a breach of the principle of equal treatment with respect to wild birds or, *a fortiori*, a sufficiently serious breach of that principle entitling the applicants to receive compensation (see paragraph 172 above).

185 Fifth, in respect of the distinction between wild birds and captive bred birds, it is relevant that, for the reasons set forth in paragraphs 160 to 163 above, there is an objective difference between those types of birds from the standpoint of risk and risk prevention measures. Consequently, the claim alleging that the principle of equal treatment has been infringed must be rejected, in so far as it is based on that distinction.

The alleged sufficiently serious breach of the right to property and the freedom to carry out an economic activity

186 The applicants allege that the effect of the ban on wild bird imports laid down in Regulation No 318/2007 is to empty the freedom to carry out an economic activity and the right to property, enshrined in Articles 16 and 17 of the Charter of Fundamental Rights, respectively, of their content and substance.

187 The Commission disputes the applicants' arguments.

188 It should be remembered that the freedom of enterprise and the right to property are fundamental rights enshrined in Articles 16 and 17 of the Charter of Fundamental Rights. None the less, those rights do not constitute absolute prerogatives, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the right to carry out an economic activity may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, *Arcelor* v *Parliament and Council*, paragraph 61 above, point 153 and the case-law cited).

189 In the present case, it must be stated that the applicants have not set out precisely why the ban on wild bird imports under Regulation No 318/2007 infringes their right to property and their freedom to carry out an economic activity.

190 Nevertheless, the assessment set out in paragraphs 150 to 164 above concerning the proportionality of the measures adopted under Regulation No 318/2007 shows that those measures pursue a legitimate aim of general interest, namely to protect human and animal health against the risk of the avian influenza virus spreading, and are not manifestly disproportionate for that purpose. Therefore, they cannot be regarded as a disproportionate and intolerable interference which infringes upon the very substance of the applicants' rights to property and to carry out an economic activity. In so far as that regulation continues to permit imports of captive bred birds, the economic activity of importing such birds remains possible.

191 Consequently, the applicants' claim that the adoption of Regulation No 318/2007 gave rise to a sufficiently serious breach of their right to property or their freedom to engage in an economic activity must be rejected.

Interim conclusion

192 In light of the foregoing, it must be concluded that with regard to the applicants' claims, the Commission did not, by adopting Regulation No 318/2007, commit a sufficiently serious breach of a rule of law protecting individuals which is capable of rendering the European Union liable.

2. *Conclusions on the unlawful conduct*

193 Having regard to all of the considerations set out above, it must be concluded that by adopting Decision 2005/760 and the subsequent decisions extending it, the Commission committed several unlawful acts of such a kind as to render the European Union liable to compensate the applicants for the harm they suffered as a consequence of the suspension of wild bird imports from third countries belonging to the OIE Regional Commissions, ever since Decision 2005/760 came into force.

C – *Liability for lawful acts*

194 As a further alternative, the applicants claim compensation under the head of liability for lawful acts of the European Union, given that they have not been able to exercise their fundamental rights since Regulation No 318/2007 entered into force. The definitive withdrawal of the possibility for the applicants to exercise those rights, without the appropriate compensation, would render the European Union strictly liable.

195 In that regard, the Court of Justice has held that as EU law currently stands, there is no regime providing for non-contractual liability of the European Union on account of the lawful pursuit by it of its activities falling within the legislative sphere (Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council* [2008] ECR I-6513, paragraphs 176 and 179). It has also stated that if non-contractual liability on the part of the European Union came to be recognised, three cumulative conditions would have to be met, namely the fact of damage, the existence of a causal link between it and the act concerned and the unusual and special nature of the damage (*FIAMM and Others* v *Commission*, cited above, paragraph 169).

196 In the present case, it suffices to state that besides the current absence of a regime providing for non-contractual liability of the European Union on account of a lawful act, the applicants do not explain in their pleadings why the harm they allege to have suffered is, regardless of its exact amount, unusual and special, their complaint of genuine and certain damage being insufficient for that purpose.

197 Consequently, the applicants' claim alleging liability for lawful acts, which was put forward as a further alternative, must be rejected.

D – *Genuineness and extent of the harm caused by the contested measures*

198 As regards the genuineness and extent of the harm suffered, the applicants have reserved the right to quantify the amount of that harm more precisely at a later stage and to provide additional supporting evidence. Likewise, the Commission has reserved the right to take a more detailed view in due course on the harm claimed by the applicants and on the causal link between that harm and its allegedly unlawful conduct.

199 Furthermore, even though the applicants submitted a number of documents as an annex to the application (including various import certificates from 2005 concerning wild birds from third countries belonging to the OIE), documents which, admittedly, demonstrate genuine and certain harm, the Court is not in a position at this stage of the proceedings to rule on the relevance and accuracy of the information supplied and, therefore, on the amount of compensation the European Union should pay each applicant. In view of the fact that it is not yet possible to assess the harm, it is appropriate, for reasons of economy of procedure, to give an initial interlocutory ruling on the liability of the European Union. The determination of the amounts of compensation resulting from the Commission's unlawful acts, either by agreement between the parties or by the Court in the absence of such agreement, is deferred to a subsequent stage (see, to that effect and by analogy, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 23, and Joined Cases T-344/00 and T-345/00 *CEVA and Pharmacia Entreprises* v *Commission* [2003] ECR II-229, paragraph 108 and the case-law cited).

200 As regards the requirement for there to be a causal link between the unlawful conduct and the alleged harm, it should be noted that compensation may only be awarded for damage caused directly by Decision 2005/760 and the subsequent decisions extending it, in so far as those decisions precluded wild bird imports from third countries or from certain areas of third countries — countries and areas in respect of which the Commission had failed to carry out adequate research and prove to the requisite standard, at the relevant time, that they posed a risk of spreading avian influenza (see paragraphs 84 to 133 above).

201 The applicants should therefore be asked, subject to a subsequent decision of the Court, to reach agreement on those amounts in the light of the foregoing considerations and to inform the Court, within a period of three months, of the amounts to be paid, arrived at by agreement, failing which they are to send it a statement of their views with supporting figures within the same period (see, to that effect and by analogy, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraphs 37 and 38).

Costs

202 The costs must be reserved.

On those grounds,

THE GENERAL COURT (First Chamber)

by way of interlocutory judgment, hereby:

1. **Orders the European Union to pay compensation for the damage suffered by Animal Trading Company (ATC) BV, Avicentra NV, Borgstein birds and Zoofood Trading vof, Bird Trading Company Van der Stappen BV, New Little Bird's Srl, Vogelhuis Kloeg and Giovani Pistone as a result of the adoption and implementation by the European Commission of, first, Decision 2005/760/EC of 27 October 2005 concerning certain protection measures in relation to highly pathogenic avian influenza in certain third countries for the import of captive birds; second, Decision 2005/862/EC of 30 November 2005 amending Decisions 2005/759/EC and 2005/760/EC relating to measures to combat avian influenza in birds other than poultry; third, Decision 2006/79/EC of 31 January 2006 amending Decisions 2005/759/EC and 2005/760 as regards an extension of their period of application; fourth, Decision 2006/405/EC of 7 June 2006 amending Decisions 2005/710/EC, 2005/734/EC, 2005/758/EC, 2005/759/EC, 2005/760, 2006/247/EC and 2006/625/EC as regards certain protection measures in relation to highly pathogenic avian influenza; fifth, Decision 2006/522/EC of 25 July 2006 amending Decisions 2005/759/EC and 2005/760 as regards certain protection measures in relation to highly pathogenic avian influenza and movements of certain live birds into the Community; sixth, Decision 2007/21/EC of 22 December 2006 amending Decision 2005/760 as regards certain protection measures in relation to highly pathogenic avian influenza and imports of birds other than poultry into the Community; and seventh, Decision 2007/183/EC of 23 March 2007 amending Decision 2005/760;**

2. **Dismisses the action as to the remainder;**

3. **Orders the parties to inform the Court, within three months from the date of delivery of this judgment, of the amounts of compensation arrived at by agreement;**

4. **Orders that, in the absence of agreement, the parties shall transmit to the Court, within the same period, a statement of their views with supporting figures;**

5. **Reserves the costs.**

Azizi Frimodt Nielsen Kancheva

Delivered in open court in Luxembourg on 16 September 2013.

[Signatures]

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