OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 16 June 1998 *

1. The appellants contest the judgment of 15 April 1997 in Case T-390/94, in which the Court of First Instance dismissed their claim for compensation under Article 178 and the second paragraph of Article 215 of the EC Treaty. [1] They had claimed that the Court of First Instance should order the Commission to pay them compensation of DEM 173 174.45 for the damage suffered as a result of a series of decisions adopted by the Commission in order to control classical swine fever in the Federal Republic of Germany in 1993 and 1994.

2. The Court of First Instance considered, in short, that one of the requirements which have to be satisfied in order for the Community to incur non-contractual liability for acts of its institutions had not been met: the contested decisions had not been adopted in breach of a superior rule of law, which was sufficient reason to dismiss the claim for compensation.

* Original language: Spanish.

1 — Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501.

The facts of the case according to the Court of First Instance

3. Having regard to the sequence of events, which led the Commission to adopt a series of decisions over a very short time, I consider that the preferred course is simply to transcribe the section of the judgment of the Court of First Instance headed 'The cases of classical swine fever which appeared in Germany in 1993-1994 and the measures taken by the Commission'.

In 1993, 100 cases of classical swine fever were reported in Germany, as against 13 in 1992 and six in 1991. Those 100 cases were spread over seven *Länder*, the most affected being the *Land* Niedersachsen with 60 cases, of which 18 occurred in the period from 25 May to 16 June 1993 alone.

Relying on Article 10(4) of Directive 90/425, the Commission adopted Decision 93/364/EEC of 18 June 1993 concerning certain protection measures relating to classical swine fever in Germany (OJ 1993 L 150,

p. 47, hereinafter 'Decision 93/364'). Since, according to the preamble, the risk of infection was limited to a geographically limited area, Article 1 provided that 'Germany shall not send to other Member States live pigs coming from those parts of its territory described in Annex I' of the decision, namely to certain districts of the *Länder* Niedersachsen, (West) Mecklenburg-Vorpommern, Schleswig-Holstein, Nordrhein-Westfalen and Rheinland-Pfalz. Whilst noting that Germany had taken measures and, in particular, established protection and surveillance zones in accordance with Directive 80/217, the Commission, however, obliged it, in Article 2 of Decision 93/364, to introduce appropriate measures of an equivalent level to ensure that the disease was not spread from those parts of its territory which were subject to restrictions to other parts. Article 3 of Decision 93/364 provided that Germany was not to send to other Member States fresh pigmeat and pigmeat products obtained from pigs coming from holdings situated in parts of its territory described in Annex I.

Since, in the meantime, fresh outbreak sites were confirmed in Germany, Commission Decision 93/497/EEC of 15 September 1993 amending Decision 93/364 (OJ 1993 L 233, p. 15, hereinafter 'Decision 93/497') enlarged the part of the territory concerned by the bans on the export of pigs.

When a first case of classical swine fever had been diagnosed in Belgium in pigs imported from Germany, Belgium, by Ministerial Decree of 14 October 1993, prohibited the importation of pigs from Germany and the Commission, by Decision 93/539/EEC of 20 October 1993 concerning certain protection measures relating to classical swine fever in Germany and repealing Decision 93/364 (OJ 1993 L 262, p. 67, hereinafter 'Decision 93/539'), extended the prohibitions on the exportation of pigs to the entire territory of Germany.

Commission Decision 93/553/EEC of 29 October 1993 amending Decision 93/539 (OJ 1993 L 270, p. 74) prolonged until 4 November 1993 the export prohibitions initially applicable until 29 October 1993.

The Commission then adopted, still on the basis of Article 10(4) of Directive 90/425, Decision 93/566/EC of 4 November 1993 concerning certain protection measures relating to classical swine fever in Germany and replacing Decision 93/539 (OJ 1993 L 273, p. 60, hereinafter 'Decision 93/566'). Under that decision, Germany was not to send live pigs (Article 1) or fresh pigmeat or pigmeat products (Article 2) coming from the districts referred to in Annex I not only to

other Member States but also to other parts of its own territory (hereinafter 'bans on dispatch').

The district of Osnabrück in which the applicants' holding is located was one of the districts of the *Land* Niedersachsen listed in Annex I referred to above.

Commission Decision 93/621/EC of 30 November 1993 amending Decision 93/566 and replacing Decision 93/539 (OJ 1993 L 297, p. 36, hereinafter 'Decision 93/621') defined the territory covered by the bans on dispatch according to communes and no longer according to districts. According to the Commission, all communes whose territory was included in total or in part in a radius of 20 km around the holdings in which cases of classical swine fever had been reported were covered. The commune of Bramsche in which the applicants' holding is located was amongst the communes of the district of Osnabrück listed in the new Annex I to the amended Decision 93/566.

Commission Decision 93/671/EC of 10 December 1993 (OJ 1993 L 306, p. 59, hereinafter 'Decision 93/671'), as well as Commission Decision 93/720/EC of 30 December 1993 (OJ 1993 L 333, p. 74, hereinafter 'Decision 93/720'), amending for the second and third time Decision 93/566 and replacing Decision 93/539, adjusted the extent of the territories covered by the bans on dispatch in order to take account of the changing pattern of outbreaks of classical swine fever.

Commission Decision 94/27/EEC of 20 January 1994 concerning certain protection measures relating to classical swine fever in Germany and repealing Decision 93/566 (OJ 1994 L 19, p. 31, hereinafter 'Decision 94/27'), based on Article 10 of Directive 90/425, changed the extent of the territories covered by the bans on dispatch. Only certain communes of three districts of the *Land* Niedersachsen remained covered by the bans. The commune of Bramsche was amongst the communes listed in Annex I to that decision.

When new cases of classical swine fever were reported in other regions of Niedersachsen, Article 1(1) of Commission Decision 94/178/EC of 23 March 1994 concerning certain protection measures relating to classical swine fever in Germany and repealing Decisions 94/27/EC and 94/28/EC (OJ 1994 L 83, p. 54, hereinafter 'Decision 94/178') extended to the entire territory of the *Land* Niedersachsen the bans on dispatch not only

to other Member States but also to other parts of Germany. Furthermore, Article 1(2) of the same decision laid down a ban on movement within Niedersachsen itself as regards the parts of its territory particularly threatened, namely the area mentioned in Annex II to that decision to the area mentioned in Annex I.

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

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

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

The grounds of the judgment of the Court of First Instance

4. After dismissing the objection of inadmissibility raised by the Commission, the Court of First Instance began its examination of the substance of the case by describing the contested decisions as '... legislative measures involving choices of economic policy for the adoption of which the institution has a broad discretion' (paragraph 62). It thus rejected the Commission's contention that the decisions were merely administrative measures.

5. The Court of First Instance went on to consider four of the five pleas which the applicants submitted in order to demonstrate that the contested decisions were unlawful. It first rejected the fifth plea (insufficient reasoning in the decisions) as incapable of causing the Community to incur liability.

6. The first plea in the action for compensation alleged breach of the principle of non-discrimination in relation to Belgium and the *Land* Nordrhein-Westfalen and discrimina-

tion arising from the definition of areas according to administrative boundaries.

7. The Court of First Instance analysed the differences between the situations in the *Land* Niedersachsen (where there was a very high level of outbreaks of classical swine fever) and in Belgium and the *Land* Nordrhein-Pfalz: the differences were such that the situations were not comparable. As regards the criterion of delimiting areas according to administrative boundaries, the Court found that this offered the best guarantees of efficaciously monitoring and implementing the measures adopted and that it did not infringe the principle of non-discrimination.

8. By the second plea in their action for compensation the applicants alleged that there had been a breach of their right to property and of their right to pursue a trade or occupation. The applicants claimed that the bans on dispatch imposed by the Commission decisions restricted enjoyment of their property in such a way that it was in practice confiscated. Their result was to make the rearing and fattening of pigs impossible. The applicants further claimed that the bans were in fact bans on marketing and constituted an unlawful expropriation which was permissible only on condition that there was a procedure for quick, fair and effective compensation, which was not provided for in the present case. For the same reasons, the contested decisions infringed the applicants' right to pursue a trade or occupation.

9. The Court of First Instance, after pointing out that the rights relied on were not absolute but might be subject to restrictions imposed in the general interest, considered the aim pursued by the measures adopted (to control an epizootic disease which was causing fatalities and might affect the whole of the Community's pig-farming industry) and found it to be of sufficient importance to render the bans on dispatch lawful.

10. The third plea in the action for compensation alleged breach of the principle of proportionality. In the applicant's view the contested decisions were disproportionate because their holding was not affected by classical swine fever and, in those circumstances, preventive or emergency vaccination would have been sufficient.

11. The Court of First Instance pointed out, however, that the use of vaccines against that epizootic disease is in principle prohibited by various Community directives and that, furthermore, even in the exceptional case of emergency vaccination the practical effect of the bans on the movement of live pigs would have been the same.

12. Lastly, the fourth plea in the action for compensation alleged that the applicable directives did not empower the Commission to impose bans on despatch or to adopt protective measures applicable within a Member State.

13. In its answer to this plea the Court of First Instance stated that the Community provisions, as interpreted by the Court of Justice, unquestionably permitted both the adoption of protective measures consisting in bans on the dispatch of animals and the restriction of such bans to certain parts of a Member State.

The objection of inadmissibility raised by the Commission

14. The Commission alleges *in limine* that the appeal is inadmissible, since it disregards the nature of that remedy: instead of relying on pleas in law and legal arguments, as provided for in Article 112 of the Rules of Procedure of the Court of Justice, the applicants are putting forward questions of fact, are criticising certain aspects of the findings of fact in the judgment, even going as far as to offer evidence, are raising new questions and, finally, are merely reiterating the arguments at first instance.

15. Although I agree with a large part of those objections, I consider that the appeal should not be declared inadmissible in its entirety, but that each of the arguments put forward should be examined in order to ascertain whether it is inadmissible or to determine whether or not it is to be upheld. It is evident on reading the appeal that as well as pleas which are manifestly inadmissible it contains others which refer to questions of law susceptible of being examined in the context of an appeal.

First plea

16. The appeal against the judgment at first instance is based on two pleas, which allege breach of the rights of the defence and infringement of Community law.

17. The appellants allege, first, that the Court of First Instance breached the rights of the defence by failing to take account of part of the submissions they had put forward during the proceedings.

18. Under this plea the appellants raise a number of points against the statements in a number of paragraphs of the judgment in support of their claim that the Court of First Instance made incorrect findings of fact or failed to take account of the content of the application and the reply or the arguments put forward at the hearing.

19. The alleged omissions or contradictions are as follows:

(1) Paragraph 26 of the judgment states: '... The holdings supplied by the applicants are, according to their information, mainly in the districts of Vechta, Diepholz and Osnabrück and in the neighbouring region of the *Land* Nordrhein-Westfalen.'

The appellants claim to have maintained that they supplied products to a number of holdings in the *Land* Nordrhein-Westfalen, which formed part of their clientele.

(2) Paragraph 95 of the judgment states: '... Second, the applicants have not shown that a delimitation of the parts of territory affected by the bans on the basis of the sole criterion of geographical distance from the sites of infection would have had the result that their holding would not have been covered by the bans on dispatch. ...'

The appellants claim to have maintained that the delimitation of the areas to those affected by the bans on the basis of administrative boundaries was inappropriate and that the only appropriate means of controlling the epizootic disease was the criterion of distance from the infected herds.

(3) Paragraph 95 also states: '... According to the statements of the Commission, not denied by the applicants, the district of Osnabrück in which the applicants' holding is located, and the neighbouring districts of Vechta and Diepholz, in which numerous cases of classical swine fever were reported, has the highest density of pig-rearing farms in the world.'

The appellants claim to have challenged the accuracy of that information at the hearing.

(4) Paragraph 99 of the judgment states: 'The Commission has stated, without being contradicted by the applicants, that the Federal Republic of Germany itself proposed delimitation on the basis of administrative units (districts and/or municipalities) ...'.

The appellants claim that this statement is inaccurate.

(5) Paragraph 129 of the judgment states: '... Second, the restrictions applied only to geographically limited parts of territory which were particularly at risk. ...'

The appellants maintain that it was impossible for them to sell their pigs to their traditional customers and that the Court of First Instance did not consider the effects of the measures on their holdings.

20. The first plea cannot be upheld. The right to be heard in the course of judicial proceedings does not mean that the court must in its decision deal in full with all the claims of each and every party. The court, after hearing the parties and assessing the evidence, is required to uphold or reject the various heads of claim in the application and to provide reasons for its decision. That is precisely what the Court of First Instance did throughout its lengthy and fully reasoned judgment.

21. The Court of First Instance decided, in one way or another, each and every one of the points to which the first plea refers. It cannot therefore be criticised for failing to state reasons or for infringing the appellants' right to be heard, since it is clear from reading the judgment that the opposite is true.

22. What the appellants are really attempting to do by means of this plea is to challenge the findings of fact made by the Court of First Instance, something which goes beyond what is permissible in the context of an appeal. The first plea does not raise any questions of law that require analysis but is concerned solely with disagreements as to the truth of the facts put forward. The Court of Justice has consistently held that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. [2] The first plea is therefore manifestly inadmissible.

Second plea

23. By their second plea the appellants claim that the Court of First Instance committed a threefold infringement of Community law: (a) it applied a criterion of liability that was incorrect; (b) it failed to take account of their individual rights; and (c) it declined to hold that the Commission decisions lacked a legal basis.

2 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 67, and Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 39 and 40.

(i) *First part of the plea*

24. The appellants maintain that since the contested decisions are not legislative measures it is wrong in law to judge them according to the criteria which the Court of Justice has laid down in relation to Community liability in respect of measures of that type.

25. They further claim that if it had applied the criteria applicable in the case of liability for administrative measures the Court of First Instance would have been bound to hold that the measures adopted by the Commission were unlawful, so that the applicants' right to compensation, resulting from that non-contractual liability, would have been established.

26. As we well know, in interpreting Article 215 of the Treaty the Court of Justice has stated that the requirements which must be satisfied in order for the Community to incur liability are the illegality of the conduct of a Community institution, actual damage and the existence of a relationship of cause and effect between the illegal conduct and that damage.

27. As regards the first requirement, the Court's case-law has drawn a distinction between administrative measures and legislative measures. Liability is incurred in respect of the latter type of measure only where there is a particularly clear breach of Community law, more specifically an infringement of a superior rule of law for the protection of individuals.

28. Furthermore, in the case of legislative measures which imply a decision of economic policy, non-contractual liability is incurred only where the Community institution which adopted the act manifestly and gravely disregarded the limits of the discretion conferred on it.

29. In its judgment in the Cases of *Brasserie du Pêcheur* and *Factortame* [3] the Court of Justice summarised this doctrine on the scope of the non-contractual liability of the Community in the matter of legislative measures as follows:

— 'The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.'

— 'Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.'

3 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* v *Germany* and *The Queen* v *Secretary of State for Transport, ex parte Factortame and Others* [1996] ECR I-1029, paragraphs 43 to 45.

— 'The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraphs 5 and 6).'

30. That case-law, which the Court of Justice itself describes as restrictive and which, in my opinion — which is consistent, in part, with that of other Advocates General —, [4] should perhaps be modified somewhat in order to adapt it to the evolution of the 'general principles common to the laws of the Member States' on the matter (second paragraph of Article 215 of the Treaty), would become even more restrictive if a wider concept of 'legislative measure', such as that reflected in the contested judgment, were adopted.

31. The distinction between a legislative measure and an administrative measure is certainly not too clear and the boundary between those concepts is not clearly defined from the start. Nor, of course, is it as clear-cut as the appellants maintain. Among the criteria which may be used to determine whether a specific measure comes within one or other of those categories, it is necessary to preclude at the outset the purely formal criteria: the official designation (decision, regulation, etc.) does not of itself imply that the measure in question is of one type or the other. It is, on the contrary, the nature and material elements of the measure that must be taken into consideration. The nature of a measure is not to be found in its external form but is determined according to whether or not the measure is one of general application. [5]

32. In theory, a legislative measure is distinguished by being general, abstract and permanent, by being applicable to a succession of different situations and by the fact that the persons for whom it produces legal effects are not identified individually but defined in general terms. An administrative measure, on the other hand, merely implements or applies a pre-existing rule and is addressed to one or

4 — In his Opinion in the *Brasserie du Pêcheur* and *Factortame* Cases, cited above, Advocate General Tesauro observes that this case-law has identified '— in particular with regard to the unlawfulness of the conduct imputable to the institutions — conditions which are so restrictive as to make it extremely difficult to obtain damages against a Community institution' (point 63). Elsewhere in his Opinion (footnote 76) he further points out that, according to the case-law in question, it would seem as if all Community legislative measures involved choices of economic policy.

5 — See, in that regard, Case 101/76 *Koninklijke Schloten Honig* v *Council and Commission* [1977] ECR 797 (paragraphs 7 and 9).

more individually identified persons, while its application in time generally 'exhausts' its effectiveness.

33. In practice things are not usually so simple and there are in fact certain types of measure which include elements of both categories. Thus in the various legal orders there are, on the one hand, 'single-case laws' or 'remedy laws' and, on the other hand, administrative measures whose content is not confined to a single situation and which are closely akin to legislative measures. In particular, in the area of law which affects economic phenomena, it is common to find measures which are legislative in theory but whose content lacks the generality and permanence which typifies such measures because they were adopted in order to avoid or to provide a remedy for a single situation which will not recur.

34. The contested decisions have characteristics of both categories. On the one hand, they are measures designed to provide a remedy for a unique situation, their effectiveness is limited in time and their application 'exhausts' the potentialities of the measure itself, in other words they do not incorporate a general and abstract provision. In that regard they are more akin to the category of administrative measures, since they introduce nothing 'new' into the legal order but represent the application of measures already provided for in pre-existing general legislation. On the other hand, however, the decisions incorporate a provision addressed to persons who are not identified at the outset but are characterised by the fact that they belong to a category defined according to objective criteria. For such persons the decisions are general in scope and produce the same legal effects as any other measure.

35. Where it is mandatory to classify the contested decisions in one category or the other, I would be tempted to call them administrative measures rather than legislative measures, since in my view the fact that they were adopted merely in order to implement pre-existing general rules prevails in this instance. [6] Each of the individual decisions adopted, at a specific time and in response to events, for the purpose of declaring a state of epizootic disease, defining a specific territory and imposing bans on export or transport during the relevant period does not to my mind constitute a legislative measure but rather a 'health control' measure of a typically administrative nature. As such, the decisions are provided for in the laws or regulations which — like Directives 80/217 and 90/425 — regulate action by the national and Community institutions in the event of a crisis of that type. The fact that these authorities enjoy a certain margin of discretion to adopt such measures, in so far as may be necessary, does not prevent them from being administrative measures, since the existence of a margin of discretion is a natural feature of administrative action in this as in so many other areas.

6 — In this case the decisions were adopted pursuant to Council Directive 80/217/EEC of 22 January 1980 introducing Community measures for the control of classical swine fever (OJ 1980 L 47, p. 11) and Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable to intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29).

36. Was it absolutely necessary, then, to place the contested decisions in one or other of the two categories, as though they were watertight compartments? Therein, in my opinion, lies the key to the appeal; and the correct answer, in my view, is that it was not necessary to do so, since whatever the solution adopted, the outcome in the present case would have been the same. It follows that this ground of appeal leads nowhere: even accepting, for the sake of argument, that the contested decisions were merely administrative measures, it has not been demonstrated that, in such a hypothesis, the first requirement to be satisfied in order for the Community to incur non-contractual liability, namely the illegality of the decisions on which the appellants base their claim, was fulfilled. [7]

37. After analysing the applicants' arguments to the effect that the decisions were illegal, the Court of First Instance rejected them: of the five arguments submitted to that end in the application the Court rejected the first four and declined to consider the fifth, since the alleged lack of reasoning in a decision of that type is not sufficient to render the Community liable.

38. The appellants make no comment on this last aspect; and as regards the rejection of the four other fundamental grounds of their claim, which alleged that the Commission had infringed superior rules of law, the decision of the Court of First Instance is applicable irrespective of whether the measures in question were administrative measures or legislative measures.

39. The 'defects' of illegality which the applicants attributed to the contested decisions (by classifying them as administrative measures) were in reality alleged infringements of superior rules of law for the protection of individuals. Had any such infringements been found to exist, the result would have been the same irrespective of whether the decisions were classified as administrative measures or as legislative measures. On the other hand, once their claim had been rejected on this point, the nature of the allegedly illegal measure was irrelevant.

40. Lastly, as regards the alleged lack of reasoning in the decisions, I have already stated that there is no reference to this point in the appeal. It is clear, moreover, that the existence of a mere procedural defect, such as the lack of reasoning in a measure, would not be sufficient to give rise to non-contractual liability on the part of the Community deriving from the content of the measure and its effect on the individual's legal situation. In such a case there would be no relationship of cause and effect between the formal illegality and the harmful consequence.

7 — In reality, the same argument has been defended by the applicants. In their reply in the proceedings before the Court of First Instance (paragraph 132 et seq.) they claimed that even accepting that the measures in question were legislative measures the requirements to be satisfied in order for the Community to incur non-contractual liability were fulfilled, since the decisions infringed, in a sufficiently serious manner, superior rules of law intended to protect the applicants. Those rules were exactly the same as those relied on as against the decisions as administrative measures (breach of the principles of non-discrimination and proportionality, breach of fundamental rights, etc.).

41. The first part of the second plea is therefore of no avail for the purpose of having the judgment set aside: even if, for the sake of argument, its underlying premiss were accepted, upholding this part of the plea would do nothing to establish the illegality of the contested decisions; that illegality, in its turn, formed the basis of their action.

(ii) *Second part of the second plea*

42. In this part of the second plea the appellants allege that the Court of First Instance committed a twofold breach of Community law, in that (a) when considering the breach of the fundamental right to private property and the right to pursue a trade or occupation it 'failed to take account of the protection of fundamental individual rights guaranteed by the Community legal order' and (b) infringed the principles of non-discrimination and proportionality.

(a) The alleged breach of fundamental rights

43. In that regard the appellants call in question not only the judgment at first instance but also, generally, the 'case-law of the Court of Justice', which in their view 'does not take sufficient account of the fundamental subjective right of the individual to observance of and respect for his individual fundamental rights'.

44. As the Commission rightly claims, this part of the second ground is manifestly inadmissible, for two reasons. First, the reference to the legal rule which is supposed to have been infringed is imprecise and inaccurate. The appellants rely on the constitutional traditions common to the Member States and on the European Convention for the Protection of Human Rights and Fundamental Freedoms, without providing further details, in support of a particular theory on the absolute primacy of the right to property (and the right to pursue an occupation or trade) which has no concrete basis either in those constitutional traditions or in that Convention.

45. Second, the new focus which the appellants now seek to give to the action for compensation (since they claim not only that the decisions were illegal but also that even if they were legal they demanded of the appellants a special sacrifice for the common good, which they were required to bear only if they were compensated for their loss) is found for the first time in the appeal and therefore the Court of First Instance was unable to rule on this point in its judgment. The appellants are therefore raising a fresh issue, which is inad-

missible in an appeal directed specifically to obtain a determination on any errors of law contained in the contested judgment. [8]

(b) The alleged breach of the principles of proportionality and non-discrimination

46. This part of the second plea is also inadmissible, since the appellants (a) merely reiterate the allegations set out in their application and their reply before the Court of First Instance and (b) pursue what are pure questions of fact, such as the comparison between certain areas and other areas among those affected by swine fever, or whether or not it would have been more appropriate to use methods of defining areas according to certain technical or other criteria.

47. As the Court of Justice has consistently held, [9] an appeal on points of law must indicate precisely the contested elements of the judgment which it is sought to have set aside and the legal grounds on which the claim to that effect is based. This requirement is not met if the appeal simply repeats or literally reproduces the pleas in law and argument formulated before the Court of First Instance, including those based on facts which that court has found not to be established.

48. As regards the questions of fact referred to above, I refer to what I said when examining the first plea.

(iii) *Third part of the second plea*

49. In the final part of the second plea the appellants allege that Article 10(4) of Directive 90/425 does not provide a 'sufficient legal basis' for the adoption of the contested decisions. Virtually all their arguments in that regard, however, are a mere repetition of those which they formulated before the Court of First Instance, which in its judgment examined them in detail and gave its reasons for rejecting them.

50. Once again the appellants merely reproduce their previous arguments to that effect without undertaking any proper criticism of

8 — I must admit that this focus on the problem seems much more relevant than that adopted by the appellants in their application to the Court of First Instance. The question whether non-contractual liability may be incurred by the Community institutions where their conduct has not been illegal but has demanded that certain economic operators make an *individual* sacrifice not regarded as one of the normal limitations on property, or on other rights, merits careful analysis. The procedural and structural characteristics of an appeal on points of law, however, are such that the question cannot be dealt with in the present proceedings.

9 — See, *inter alia*, Case C-244/92 P *Kupka-Floridi* v *ECS* [1993] ECR I-2041; Case C-26/94 P *X* v *Commission* [1994] ECR I-4379; Case C-62/94 P *Turner* v *Commission* [1995] ECR I-3177; and Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 25 and 26.

the reasoning in the contested judgment in relation to the interpretation of Directive 90/425.

51. The only specific criticism which they make of the judgment in that regard concerns paragraph 156, where the Court of First Instance observed that '... in its judgment in Case C-52/92 *Commission* v *Portugal* [1993] ECR I-2961 the Court of Justice has already confirmed the legality of a Commission decision adopted on the basis of Article 10 of Directive 90/425 which prohibited certain Member States from sending to other Member States production pigs from high-risk municipalities'. In the appellants' opinion that case-law cannot be invoked against their argument, since it does not refer to a ban on dispatches within a Member State.

52. The criticism would be relevant if the Court of First Instance had been endeavouring in that passage to state the reasons for the part of its judgment relating to the justification of the restrictions of movements of animals within a particular State. In reality, however, the Court did that in paragraphs 157 to 161 of the judgment, not in paragraph 156, which relates to another matter.

53. In paragraphs 157 to 161 of its judgment the Court of First Instance analysed the way in which Directive 90/425 allows bans on dispatch within a Member State as a corollary to the bans on dispatch to other States. Paragraph 156 of the judgment, however, cited case-law merely to show that Directive 90/425 generally permits the adoption of protective measures.

54. The criticism of that paragraph of the judgment is therefore manifestly unfounded.

55. It follows, then, that the first plea and the second part of the second plea must be declared inadmissible and the first and third parts of the second plea must be rejected.

56. Under Article 69(2) and Articles 118 and 122 of the Rules of Procedure, where the Court of Justice dismisses the appeal it must order the unsuccessful party to pay the costs.

Conclusion

57. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) dismiss the appeal;

(2) order the appellants to pay the costs.