# OPINION OF ADVOCATE GENERAL TESAURO
delivered on 5 May 1993 *

*Mr President,*
*Members of the Court,*

1. In these proceedings the Commission seeks a declaration by the Court that by deciding to close its borders to pig imports from certain Member States the Portuguese Republic has infringed Commission Decision 91/237/EEC of 25 April 1991 concerning further protection measures relating to a new pig disease [1] and has failed to fulfil its obligations under the EEC Treaty.

2. The decision to close its borders 'to imports of live pigs of all types from Germany, the Netherlands, Belgium and Spain' taken by the Director-General for Stockbreeding on 9 May 1991 purports to be based on Article 9 of Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine, [2] and on Articles 36 and 100a(4) of the Treaty. The statement of reasons for the decision alleges that the contested measure was necessary because of the inadequacy of Community protection measures relating to the new pig disease and the risk of infection in Spain, the main supplier of pigs to Portugal.

For the sake of completeness, I would add that during the course of the infringement procedure the Portuguese Republic extended its ban on imports in three successive decisions to France (1 July 1991), the United Kingdom (21 November 1991) and to Denmark (10 March 1992). The Portuguese Government stated at the hearing that the ban on pig imports from these countries was lifted from 1 April 1993.

3. The pre-litigation procedure is described in detail in the Report for the Hearing to which you are referred. However, to aid your understanding of the comments which follow, it is necessary to give a brief summary of the relevant Community provisions.

The first relevant piece of legislation is Directive 64/432/EEC, which took the first steps towards the harmonization of animal health measures. Article 9 above, which the Portuguese Government considers to be a legal basis for the contested national measure, authorizes Member States temporarily to prohibit or restrict the introduction of bovine animals or swine from other Member States in the event of an outbreak of an epizootic disease or another serious contagious disease.

* Original language: Italian.
1 — OJ 1991 L 106, p. 67.
2 — OJ, English Special Edition 1963-1964, p. 164.

However, the harmonization measures set out in Directive 64/432/EEC were amended by Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market. [3] In particular, Article 14 replaced Article 9 of Directive 64/432/EEC, formally at least, by a new Article 9, which in fact tackles a problem of a different type in that it provides that a Member State which has a national control programme for certain contagious diseases may submit that programme to the Commission for approval provided it meets certain criteria.

The question of precautionary measures, on the other hand, is covered in Article 10 of Directive 90/425/EEC, which sets out the duties of Member States of dispatch and destination and of the Commission to prevent and combat zoonoses and other diseases. Under that article the Commission is to adopt the necessary measures after reviewing the situation in the Standing Veterinary Committee (paragraph 4), while the Member State of destination may only take the precautionary measures provided for in Community rules following the checks referred to in Article 5 of the directive (paragraph 1, third subparagraph) and, under certain circumstances, may take interim protective measures pending the measures which are normally to be taken by the Commission (paragraph 1, subparagraph 4).

Under Article 26 of Directive 90/425/EEC there were two different deadlines for Member States to comply with the provisions of the directive: the deadline for compliance with Article 10 is two months after notification, that is 27 September 1990; and the deadline for compliance with all the other articles was 31 December 1991, subsequently extended to 1 July 1992. [4]

It was precisely Article 10(4) of Directive 90/425/EEC that the Commission took as the legal basis for its Decision 91/237/EEC, which lists measures to prevent the spread of a new pig disease and places certain obligations on Member States of dispatch. Under Articles 2 to 5 they are obliged to destroy all products from infected holdings and may not send to other Member States pigs from these holdings. In particular, Belgium, Germany and Holland may not send to other Member States production pigs from high-health-risk municipalities. [5]

4. The essence of the dispute is that the Commission considers the measure closing borders to be a clear contravention of Decision 91/237/EEC, since it prevents imports which are permitted under the decision. Again in the view of the Commission, such a measure cannot be justified either by Article 9 of Directive 64/432/EEC, since this provision has been replaced by Article 10 of Directive 90/425/EEC and is thus no longer in force, or by Articles 36 and

3 — OJ 1990 L 224, p. 29.

4 — See Article 27 of Council Directive 91/496/EEC of 15 July 1991 (OJ 1991 L 268, p. 56).

5 — By Decision 91/332/EEC of 8 July 1991 the Commission extended this ban to the United Kingdom.

100a of the Treaty as the sector is one that has been completely harmonized.

The Portuguese Government claims that it adopted its decision not to protect its domestic market but as a precautionary measure objectively required for the protection of health and it believes that Article 9 of Directive 64/432/EEC does provide a legal basis for this measure. Whilst it accepts that the provisions of Article 10 of Directive 90/425/EEC are intended to replace the safeguard mechanism in Article 9 of Directive 64/432/EEC and that, in principle, under Article 26 of Directive 90/425/EEC those provisions should come into operation two months after the date of notification of the directive, the Portuguese Government points out that Member States of destination could not implement Article 10 before the inspection measures set out in Article 5 of the Directive were actually implemented, and that the deadline of 1 July 1992 for their transposition into national law had not yet expired on the date when the decision was taken to close the borders.

5. In essence then, the Commission claims that the Portuguese Government has adopted precautionary measures unilaterally in addition to those the Commission had already adopted in Decision 91/237/EEC on the basis of Article 10 of Directive 90/425/EEC, whereas the Portuguese Government takes the view that, at the material time, it was still entitled to apply Article 9 of Directive 64/432/EEC since it was still in force and, in any event, because the applicability of Article 10 above was dependent on the implementation of other measures provided for by Directive 90/425/EEC in the case of Member States of destination.

It is apparent from the arguments outlined and, indeed, it was stressed at the hearing that the Commission's real complaint against the Portuguese Government is not so much the contravention of Decision 91/237/EEC, which in fact merely imposes certain obligations on Member States of dispatch, as in particular the fact that it has infringed Article 10 of Directive 90/425/EEC in that that article sets out the procedure to be followed where the existence of a contagious disease is established and 'harmonizes' the safeguard mechanism by empowering the Commission to adopt measures in this area.

6. However, I do not consider that the fact that, in the standard form of order sought in its application, the Commission formally charged the Portuguese Government with the contravention of Decision 91/237/EEC rather than of Article 10 of Directive 90/425/EEC can be of crucial importance or the basis for dismissal of the action. To take this line would be not only pedantic in the extreme but, I believe, would also be to misconstrue the real and all too obvious charges made against the Portuguese Government, which in any event has not disputed the form of order sought by the Commission.

In the final analysis, the Commission has in effect charged the Portuguese Government with contravention of Article 10 in connection with a specific national measure rather than contravention of the decision which is mentioned formally only in the form of order sought. The very fact that, throughout the proceedings the parties discussed at length and exclusively whether or not Article 10 had harmonized the procedure for the adoption of precautionary measures and whether that article was fully applicable as of 27 September 1990 quite obviously shows that the issues were clear and well defined.

7. That said, I would point out firstly that, while it is true that Article 9 of Directive 64/432/EEC was formally replaced only on 1 July 1992, there is no doubt that it was impliedly repealed on 27 September 1990 on expiry of the deadline given to the Member States to comply with Article 10 of Directive 90/425/EEC. Clearly the safeguard clause in Article 9 of Directive 64/432/EEC could never co-exist with a 'harmonized' safeguard mechanism such as Article 10 provides for.

However, it remains to establish whether or not, as the Portuguese Government claims, the effective applicability of Article 10 was even partially dependent on the entry into force of the other provisions of Directive 90/425/EEC, and Article 5 in particular.

In this connection I must say straightaway that I reject the Commission's argument that the Portuguese Government should have transposed Article 5 of Directive 90/425/EEC, that is the rules concerning inspection measures, into its national legislation, before the deadline set for transposition by the Directive itself, if it thought it necessary to do so to make Article 10 apply. Indeed, while it is true that the Portuguese Government could have done so, there is obviously no basis for requiring such 'advance' transposition where the applicability of Article 10 would be actually dependent on the entry into force of the inspection measures.

None the less, I take the view that the Portuguese Republic was bound to comply with and implement fully Article 10 of Directive 90/425/EEC as of 27 September 1990 even if it (quite legitimately) had not yet implemented Article 5 regarding inspection measures.

8. Of course it would be trite to point out that the very fact that Directive 90/425 requires Member States to comply with Article 10 by a different deadline than that set for the other measures in the Directive and that there are no further conditions attached to this obligation indicates that Article 10 should have been fully implemented by the deadline set for putting it into effect. However, this conclusion is confirmed by the comments below.

Firstly, as is clear from the actual wording of Article 10, the inspection measures referred to in Article 5 are a means of detecting any contagious pig diseases and are thus a prerequisite for initiating the procedure under

Article 10: from this point of view the only important factor is the actual knowledge of the existence of a disease. Once disease is known to exist, regardless of the means, the mechanism in Article 10 must be set in motion, and hence it is up to the Commission to adopt the necessary measures, which it did in this instance by adopting Decision 91/237/EEC.

Furthermore, the option of carrying out checks at borders and putting infected animals into quarantine, measures which are provided for by Article 5 of Directive 90/425/EEC and on whose implementation the Portuguese Government claims the applicability of Article 10 depends, was in fact already provided for by Directive 64/432/EEC. Article 5 of Directive 90/425/EEC in essence simply reiterates and clarifies the content of Article 6 of Directive 64/432/EEC whereby Member States of destination are empowered to carry out checks on imported animals at borders and if necessary to adopt the measures considered appropriate under the Community legislation on this subject, including the quarantining of the animals in question (see in particular Article 6(3)).

Finally, the Portuguese Government cannot justify the decision to close its borders on the basis of Article 9 of Directive 64/432/EEC, given that this rule was impliedly repealed by Article 10 of Directive 90/425/EEC, which was to have been transposed from 27 September 1990 and whose applicability, as I have just said, is not dependent on the implementation of other provisions of Directive 90/425/EEC.

9. A subsidiary argument of the Portuguese Government was that its decision had a legal basis in Articles 100a(4) and 36 of the Treaty. As far as Article 100a(4) is concerned, I would simply point out that, as the Commission has said, that provision can be invoked only where the Community act in question was adopted on the basis of Article 100a, which is not the case here as Directive 90/425/EEC was adopted on the basis of Article 43 of the Treaty. Moreover, even in its defence, the Portuguese Government had dropped the reference to this provision.

It thus remains to be considered whether the Portuguese Government can legitimately invoke Article 36 as the legal basis for the contested national measure. Its argument is that in a situation where national systems for monitoring the movement of live animals within the Community were not fully harmonized, the measures adopted by the Commission in Decision 91/237/EEC were inadequate and the reliance on Article 36 was thus justified.

However, that argument cannot be accepted. Article 36 cannot be invoked in a case involving precautionary measures which are

fully harmonized within the meaning of Article 10 of Directive 90/425/EEC and the definition of harmonization cannot depend on each Member State's own interpretation thereof. It is therefore not acceptable for the Portuguese Government to adopt unilaterally protection measures outside the framework of Community legislation and thus outside the framework provided for by Article 10.

10. In the light of the above I therefore propose that the Court should uphold the application and order the defendant to pay the costs.