JUDGMENT OF THE COURT
26 May 1993 *

In Case C-52/92,

Commission of the European Communities, represented by José Luis Iglesias Buhiges and Antonio Caeiro, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Roberto Annechino, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Portuguese Republic, represented by Luis Fernandes, Maria Luisa Duarte, Angelo Seiça Neves, respectively director of the Legal Service, legal adviser and lawyer in the Directorate-General for the European Communities of its Ministry of Foreign Affairs, and Antonio Cortes Simões, Head of Division in the Directorate-General for Stockbreeding, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

defendant,

APPLICATION for a declaration that, by deciding to close its borders to pig imports from other 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 (OJ 1991 L 106, p. 67) and has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), R. Joliet, J. C. Moitinho de Almeida, F. Grévisse, P. J. G. Kapteyn and D. A. O. Edward, Judges,

* Language of the case: Portuguese.

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 31 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 5 May 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 February 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by deciding to close its borders to pig imports from other Member States, the Portuguese Republic had infringed Commission Decision 91/237/EEC of 25 April 1991 concerning further protection measures relating to a new pig disease (OJ 1991 L 106, p. 67) and failed to fulfil its obligations under the EEC Treaty.

2 Decision 91/237, which was adopted on the basis of Article 10 of Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), lays down measures to combat the spread of the new pig disease appearing in certain Member States. In particular, the decision defines the obligations of Member States of dispatch, which must destroy all products from infected holdings and may not send pigs from these holdings to other Member States. It specifies that Belgium, Germany and the Netherlands must not export production pigs from high-health-risk municipalities.

3 On 9 May 1991, the Portuguese Republic decided to close its borders, until further notice, to live pig imports from Germany, the Netherlands, Belgium and Spain. That measure was taken on the basis of 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 (OJ, English Special Edition 1963-1964, p. 164) and purportedly 'pursuant to Articles 36 and 100a(4) of the Treaty'.

4 The Commission takes the view that the measure adopted by the Portuguese authorities, which is in direct contravention of Decision 91/237 in that it bans imports permitted under that decision, cannot legally be based either on Article 9 of Directive 64/432, which is no longer in force, or on Articles 100a and 36 of the Treaty, which the Portuguese Republic invoked during the pre-litigation procedure.

5 The Portuguese Republic has argued before the Court, on the other hand, that it was entitled, on the basis of Article 9 of Directive 64/432 and of Article 36 of the Treaty, to adopt the contested measure as an objective precautionary measure required to protect the health of pigs against the new disease. Firstly, it argues, the said Article 9 remains applicable until the deadline for entry into force laid down in Article 26 of Directive 90/425. Secondly, even if it had to be accepted that by 9 May 1991 Article 9 of Directive 64/432 could no longer provide a legal basis for the contested measure, that measure could be adopted on the basis of Article 36 of the Treaty, given the inadequacy of the measures adopted by the Commission in a situation where the national systems for monitoring the movement of live animals within the Community were not fully harmonized.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant Community and national provisions, the procedure and the pleas and arguments of the parties, which are mentioned hereinafter only so far as is necessary for the reasoning of the Court.

Applicability of Article 9 of Directive 64/432

7 To enable the full scope of the Portuguese Republic's arguments to be appreciated, some indication should be given of the structure of the Community provisions applicable to the facts of the case.

8 Article 9 of Directive 64/432, which set out the precautionary measures open to Member States where there was a danger of the spread of diseases of bovine animals and swine and which the Portuguese Government has invoked, was replaced, pursuant to Article 14 of Directive 90/425, by a new Article 9 which radically changes the subject-matter of the article. However, Article 10 of Directive 90/425 provides for a new system of precautionary measures intended, as indeed the Portuguese Republic concedes, to replace that set out in Article 9 of Directive 64/432. Under the said Article 10 it is the Commission which is mainly entrusted with taking the necessary measures.

9 Article 10 sets out the respective obligations of the Member States and the Commission to prevent and combat any disease likely to constitute a serious hazard to animals or to human health. In particular, it provides that it is the Commission which is to adopt the necessary measures after reviewing the situation in the Standing Veterinary Committee. A Member State of destination may, if it detects a disease in the course of a check, only take the preventive measures provided for in the Community rules and, on serious public or animal health grounds, may take strictly limited interim protective measures pending the measures to be taken by the Commission. Unlike Article 9 of Directive 64/432, therefore, this new system of precautionary measures does not allow a Member State to impose on a temporary basis a general ban on imports of pigs from another Member State.

10 Decision 91/237, which the Commission adopted pursuant to Article 10 of Directive 90/425, does not offer any greater scope for a general ban, even of a temporary nature, on animal imports. It merely outlines the measures which all Member States must take to prevent the spread of the new pig disease and bans the export of animals, variously according to the category of pig and the Member State of

dispatch, from an infected holding, from a holding into which pigs from an infected holding have been introduced or from high-health-risk municipalities.

11 Article 26 of Directive 90/425 provided for two different deadlines for the implementation by Member States of the provisions necessary to comply with that directive. The first deadline, for the provisions in Article 10 of the directive only, was set at two months after the date of notification of the directive, that is a date before the decision adopted by the Portuguese authorities on 9 May 1991. The second deadline, for the other provisions of the directive, was 31 December 1991 at the latest, which was subsequently, after the date of the contested decision, extended to 1 July 1992.

12 While it does not dispute the deadline thus fixed for the entry into force of the provisions of Article 10, the Portuguese Republic contends that Article 10 could not be implemented by Member States of destination before the actual implementation of the inspection measures set out in Article 5 of the directive and the measures necessary for the quarantining of animals provided for by other provisions of the directive. It considers that as long as the Portuguese authorities had not taken those various measures, which they were not bound to do before the deadline for transposing the whole of Directive 90/425, Article 9 of Directive 64/432 remained in force as a safeguard clause.

13 With regard to the quarantining of animals, suffice it to say that this preventive measure is included as such in the system of precautionary measures in Article 10 of Directive 90/425 and that it is, as the third subparagraph of Article 10 makes clear, a measure already provided for in Community rules. The Portuguese Government cannot therefore validly argue that it could not be implemented before the transposition of the whole directive.

14 As for checks on arrival at destination, while Article 10 of Directive 90/425 expressly mentions those set out in Article 5 of the directive, until the measures laid down by Article 5 were implemented, other Community provisions

were applicable in this area, such as those in Directive 64/432, which, with the sole exception of those provided for by the original wording of Article 9, remained in force until the provisions of Directive 90/425 other than Article 10 were transposed into national law. Those provisions included in particular Article 6 of Directive 64/432 which enabled each country of destination to require the consignor to provide it with information in advance of the entry of animals into its territory and for veterinary examinations at borders with a view to taking specific preventive measures.

15 In order to meet its obligation to transpose Article 10 by the deadline set by the directive for that article, the Portuguese Republic therefore had a choice of means to identify situations which might call for the implementation of the precautionary measures provided for by Article 10. It could, if it considered it essential, immediately bring into force the provisions required to comply with Article 5 and carry out the checks on arrival at destination provided for by that article. If it considered such immediate implementation impossible, it could also use the other inspection measures already provided for by Community rules, in particular those laid down by Article 6 of Directive 64/432, in the version applying before the transposition of the provisions of Directive 90/425 other than Article 10.

16 It is clear from the above that, contrary to what the Portuguese Government maintains, Article 10 of Directive 90/425 was in fact applicable on the date of the contested decision and consequently that decision could not properly be based on Article 9 of Directive 64/432, which was no longer in force.

Applicability of Article 36 of the Treaty

17 The provisions laid down by Article 36 of the Treaty to protect health and human and animal life in intra-Community trade cannot be invoked to justify measures banning or restricting imports when Community directives provide for the harmonization of the measures necessary to guarantee the protection of animal and

human health and when they establish procedures to check that they are observed (Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369, paragraph 14).

18 The Court has already held that Directive 64/432 brought about complete harmonization of the animal-health measures which Member States may adopt in the field of intra-Community trade in bovine animals and swine and that, consequently, Member States of destination have no power to adopt, in the field covered by the directive, measures other than those exhaustively laid down therein (Case C-304/88 *Commission* v *Belgium* [1990] ECR I-2801, paragraphs 16 and 19).

19 Article 10 of Directive 90/425, which establishes a new system of precautionary measures implemented very rapidly in order to combat effectively the spread of diseases likely to constitute a serious hazard to animals or to human health, brings about the complete harmonization of the precautionary measures against such diseases and defines precisely the respective obligations and tasks of the Member States and of the Commission in this field. The Member States thus have no power, in the area covered by that article and by Decision 91/237, adopted in implementation of that article, to take measures other than those expressly provided for therein.

20 It follows that the measure adopted unilaterally by the Portuguese authorities to close the borders could not validly be based on Article 36 of the Treaty.

21 A declaration that the Portuguese Republic has failed to fulfil its obligations should therefore be made in the terms sought by the Commission.

Costs

22 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Portuguese Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by deciding to close its borders to pig imports from other 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 and failed to fulfil its obligations under the EEC Treaty;

2. Orders the Portuguese Republic to pay the costs.

Due Rodríguez Iglesias Zuleeg Murray

Joliet Moitinho de Almeida Grévisse Kapteyn Edward

Delivered in open court in Luxembourg on 26 May 1993.

J.-G. Giraud — Registrar

O. Due — President