On the one hand, the said Article 10, which replaces the said Article 9, gives the Commission the power to adopt the measures necessary to deal with any serious hazard to animals and to human health and henceforth only leaves Member States with the option, if they detect a disease in the course of a check, of taking the preventive measures provided for in the Community rules, or, on serious health grounds, strictly limited protective measures pending the measures to be taken by the Commission. On the other hand, the fact that Article 10 refers to inspection measures set out in other provisions of the directive, the deadline for transposition of which only expires subsequently, is irrelevant, as a Member State which has not yet carried out such transposition may implement such measures on the basis of Directive 64/432 which remains in force until Directive 90/425 has been fully transposed.

Since, in the fields they cover, Directives 64/432 and 90/425 have brought about the full harmonization of the animal-health measures which Member States may take, Member States may no longer invoke Article 36 of the Treaty to justify measures banning or restricting imports in intra-Community trade.

Consequently, when the Commission, faced with the threat posed by the emergence of a new pig disease, has taken measures in a decision adopted on the basis of Article 10 of Directive 90/425 requiring Member States where the disease is rife to destroy products from infected holdings and not to export animals from high-health-risk municipalities, a Member State which decides to close its borders to imports from the Member States concerned until further notice is failing to fulfil its obligations under the Treaty.

REPORT FOR THE HEARING
in Case C-52/92 *

I — Background to the dispute and pre-litigation procedure

A — *The relevant Community provisions*

Under 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), a Member State may temporarily prohibit or restrict the introduction of bovine animals or swine from a Member State in the event of an outbreak of an epizootic disease or another serious contagious disease in that State.

* Language of the case: Portuguese.

Article 9 has now been amended by Article 14 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). It provides that a Member State which has a national control programme for certain contagious diseases may submit it to the Commission for approval provided it complies with certain criteria.

Article 10 of Directive 90/425 sets out the measures to be taken by Member States of dispatch and destination and by the Commission to prevent and combat zoonoses and other diseases. Under that article, it is the Commission which adopts the necessary measures after reviewing the situation in the Standing Veterinary Committee, while the Member State of destination may only implement the precautionary measures provided for in Community rules and under certain conditions may take interim protective measures pending the measures to be taken by the Commission.

Article 26 of Directive 90/425 lays down two different deadlines for Member States to bring into force the national provisions necessary to comply with the various provisions of the directive:

— for Article 10 only, the deadline was two months after the date of notification of the directive;

— for the other provisions of the directive, the deadline was 31 December 1991 (subsequently extended to 1 July 1992).

In accordance with Article 10 of Directive 90/425 the Commission took protective measures against a new pig disease in 1991. Decision 91/237/EEC of 25 April 1991 (OJ 1991 L 106, p. 67), which repealed and replaced an earlier decision of 1 March 1991 on the subject, lists measures to prevent the spread of the disease and imposes new obligations on Member States of dispatch. In particular, under Articles 2 to 6 of Decision 91/237 they must destroy all products from infected holdings and may not send to other Member States pigs originating from these holdings; it is also specified that Belgium, Germany and the Netherlands may not send to other Member States production pigs from high-health-risk municipalities.

B — *The contested national measures*

By Decision of the Director-General for Stockbreeding of 9 May 1991, the Portuguese Republic, invoking Article 9 of Directive 64/432, and purportedly 'pursuant to Articles 36 and 100a(4) of the EEC Treaty', closed its borders to 'imports of live pigs of all types from Germany, the Netherlands, Belgium and Spain until the situation permits revocation of this Decision'.

The grounds given for this Decision stress 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.

C — *Pre-litigation procedure*

Taking the view that the measure adopted by the Portuguese Republic on 9 May 1991 was contrary to Decision 91/237, on 7 June 1991 the Commission sent the Portuguese Government a letter before action inviting it to submit its observations on the subject in accordance with Article 169 of the Treaty.

By letter of 20 June 1991, the Portuguese authorities replied in substance that Article 9 of Directive 64/432 did provide a legal basis for the contested protection measures, which had been adopted because the Community measures were ineffective, since the deadline for the entry into force of Directive 90/425 had not yet passed.

Taking the view that this reply was without relevance, on 12 September 1991 the Commission delivered a reasoned opinion to the Portuguese Republic pursuant to Article 169 of the Treaty, concluding that it had failed to meet its obligations and inviting it to take the necessary measures to do so.

On 25 September 1991 the Portuguese authorities replied that they maintained their position in this matter, pointing out that the contested measures were also based on Articles 36 and 100a of the Treaty.

II — Written Procedure and forms of order sought

The Commission's application was lodged at the Court Registry on 21 February 1991.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

The *Commission* claims that the Court should:

— declare 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;

— order the Portuguese Republic to pay the costs.

The Portuguese Republic claims that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

III — Pleas in law and arguments of the parties

A — *The complaints of the Commission*

The *Commission* considers that the measure adopted by the Portuguese authorities is a clear contravention of Decision 91/237 as it imposes a ban on imports permitted under that decision.

That measure cannot legally be based on Article 100a(4) of the Treaty which cites major needs referred to in Article 36, as Article 100a is not applicable to measures required for the implementation of the common agricultural policy. Nor can a legal basis be found in Article 9 of Directive 64/432 as this article is no longer in force.

In fact, Decision 91/237 was adopted on the basis of Article 10(4) of Directive 90/425 which, pursuant to Article 26(i) thereof, came into force on 27 September 1990, two months after its notification.

B — *The arguments of the Portuguese Republic*

The *Portuguese Republic* points out, firstly, that it took its decision not to protect its domestic market but as an objective precautionary measure necessary to protect the health of pigs against the new disease.

It maintains, secondly, that the measure has a legal basis in the safeguard clause of Article 9 of Directive 64/432.

Of course, the Portuguese Government recognizes that the provisions of Article 10 of Directive 90/425 are intended to replace the precautionary measures envisaged in Article 9 of Directive 64/432 and that, under Article 26 of Directive 90/425, they were to be applied two months after the date of notification of that directive. However, it points out that Article 10 could not be implemented by Member States of destination before the actual implementation of the inspection measures required by Article 5 of the directive, and that the deadline for transposing that provision into national law had not passed at the time the contested decision was adopted.

Since the Portuguese authorities had not yet made arrangements for such checks on arrival at destination, which they were not obliged to do before the deadline for transposing the whole directive into national law, Article 9 of Directive 64/432 remained in force as a safeguard clause.

Finally, the Portuguese Republic considers that, whilst Article 9 of Directive 64/432 might no longer have provided a valid legal basis for the contested decision by 9 May 1991, that decision could be adopted on the basis of Article 36 of the Treaty. Without prejudice to the formal validity of

Decision 91/237, it maintains that the measures adopted by the Commission are inadequate, given that national systems for monitoring the movement of live animals within the Community are not fully harmonized. The Portuguese decision is therefore an appropriate, essential and proportionate means to protect the vital interests of animal health.

C — *The Commission's responses to these arguments*

The *Commission* considers, firstly, that Portugal, as a Member State of the European Community, may not take protective measures unilaterally and outside the framework of Community law.

Secondly, it points out that, while Article 9 of Directive 64/432 was formally replaced by Article 14 of Directive 90/425, which covers a different area, it is in fact the precautionary measures set out in Article 10 of the latter directive which replace those in Article 9 and it is not disputed that those measures were to have been implemented by the Member States two months after the date of notification of the directive. The Portuguese Republic was therefore bound to take all steps to comply with the new precautionary measures, including, where necessary, arrangements for the inspection measures set out in Article 5 of the directive.

Finally, the Commission points out that Article 36 of the Treaty cannot be invoked in connection with precautionary measures which have been completely harmonized pursuant to Article 10 of Directive 90/425.

F. Grévisse
Judge-Rapporteur