OPINION OF ADVOCATE GENERAL JACOBS

delivered on 17 March 2005 [1]

1. In these two references from the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry), the Netherlands, the Court has been asked whether the Dangerous Substances Directive [2] permits a Member State to lay down additional conditions for the placing on the market and use of a biocidal product the active substance of which is included in Annex I to that directive.

Community legislation

2. Relevant to this case are both the Dangerous Substances Directive and the Biocidal Products Directive. [3] The former harmonises conditions for the marketing and use of certain dangerous substances and preparations listed in an annex, which has been amended on a number of occasions. The latter seeks to harmonise conditions for the authorisation and placing on the market of biocidal products (previously known as non-agricultural pesticides) whose permitted active substances are to be exhaustively listed in various annexes. However, the lists of substances to be included in those annexes have not yet been established, so that the provisions of the directive are not yet fully effective.

3. Those two directives, and the amendments to the former, were adopted variously on the basis of Articles 100 and 100a of the EC Treaty (now, after amendment [4] Articles 94 and 95 EC).

4. Article 94 EC provides for the Council, acting unanimously, to issue directives for the approximation of such laws, regulations

1 — Original language: English.

2 — Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201), as amended in particular by Council Directive 83/478/EEC of 19 September 1983 (OJ 1983 L 263, p. 33), Council Directive 89/677/EEC of 21 December 1989 (OJ 1989 L 398, p. 19) and European Parliament and Council Directive 94/60/EC of 20 December 1994 (OJ 1994 L 365, p. 1).

3 — Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, p. 1).

4 — In the case of Article 100a.

or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

5. Article 95(1) EC provides, by way of derogation from Article 94 and subject to certain exceptions, for the Council, acting by qualified majority, to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

6. Article 95 further provides that if, after adoption of a harmonisation measure, a Member State deems it necessary to maintain [5] or to introduce [6] national provisions inter aliarelating to the protection of the environment, it is to notify the Commission of the provisions and the grounds for maintaining or introducing them. The Commission is to approve or reject the national provisions involved after verifying whether they are a means of arbitrary discrimination, a disguised restriction on trade between Member States or an obstacle to the functioning of the internal market. [7]

5 — Article 95(4).

6 — Article 95(5); the proposed provisions must be based on new scientific evidence.

7 — Article 95(6).

The Dangerous Substances Directive

7. The Dangerous Substances Directive was based on Article 100 of the EC Treaty (now Article 94 EC). Its preamble includes the following recitals:

'Whereas any rules concerning the placing on the market of dangerous substances and preparations must aim at protecting the public, and [in] particular persons using such substances and preparations;

Whereas they should contribute to the protection of the environment from all substances and preparations which have characteristics of ecotoxicity or which could pollute the environment;

Whereas they should also aim to restore, preserve and improve the quality of human life;

Whereas dangerous substances and preparations are governed by rules in the Member States; whereas these rules differ as to the conditions of their marketing and use; whereas these differences constitute an obstacle to trade and directly affect the establishment and functioning of the common market;

Whereas this obstacle should therefore be removed; whereas this entails approximating the laws governing the matter in the Member States'. [8]

8. Article 1(1) provides:

'Without prejudice to the application of other relevant Community provisions, this Directive is concerned with restricting the marketing and use in the Member States of the Community, of the dangerous substances and preparations listed in [Annex I].' [9]

9. The first sentence of Article 2 provides:

'Member States shall take all necessary measures to ensure that the dangerous substances and preparations listed in [Annex I] may only be placed on the market or used subject to the conditions specified therein.'

10. Directive 89/677 [10] amended Annex I to the Dangerous Substances Directive so as to include arsenic compounds. Directive 89/677 was based on Article 100a of the EC Treaty (now, after amendment, Article 95 EC). The first recital in its preamble states:

'Whereas measures for the progressive establishment of the internal market over the period up to 31 December 1992 have to be adopted; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed'.

11. The eighth recital states:

'Whereas certain anti-fouling preparations applied as protective coatings to boat hulls and/or underwater equipment have harmful effects on living aquatic organisms as a result of the use of certain chemical compounds and in particular arsenic, mercury and tin compounds; whereas, in order better to protect the environment, the use of such compounds in preparations of this type should be regulated'.

8 — First, second, third, fourth and fifth recitals.

9 — Directive 83/478, cited in footnote 2, amended the Dangerous Substances Directive so that the Annex became Annex I.

10 — Cited in footnote 2.

12. Point 20 of Annex I to the Dangerous Substances Directive as amended includes 'Arsenic compounds' and point 20.1 sets out the conditions for placing on the market or using such compounds, stating in particular that they:

'1. May not be used as substances and constituents of preparations intended for use:

...

(b) in the preservation of wood.

In this case, the ban does not apply to solutions of inorganic salts of CCA (copper — chromium — arsenic) type employed in industrial installations using vacuum or pressure to impregnate wood.

...'

13. Directive 94/60 [11] amended Annex I to the Dangerous Substances Directive so as to include creosote. Directive 94/60 was based on Article 100a of the EC Treaty (now, after amendment, Article 95 EC). Its preamble states:

'Whereas measures should be adopted for the achievement of the internal market; whereas the internal market is an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed;

Whereas work on the internal market should also gradually improve the quality of life, health protection and consumer safety; ...

...

Whereas creosote, as defined in the Annex to this Directive, may be damaging to health because of its content of known carcinogens; whereas for these reasons the use of creosote in wood treatment and the marketing and use of creosote-treated wood should be limited;

11 — Cited in footnote 2.

Whereas some of the components of creosote are poorly degradable and deleterious to certain organisms in the environment; whereas these components may enter the environment as a result of the use of treated wood;

...

Whereas restrictions already adopted by certain Member States on the marketing and use of [creosote] or the preparations containing [it] directly affect the establishment and functioning of the internal market; whereas it is therefore necessary to approximate the laws of the Member States in this field and consequently amend Annex I to [the Substances Directive]'. [12]

14. Point 32 in Annex I to the Dangerous Substances Directive as so amended lists 'Substances and preparations containing one or more of the following substances', which include creosote, creosote oil and distillates (coal tar). Point 32.1 sets out the conditions of placing on the market or using such substances and preparations, stating that they:

'May not be used for wood treatment if they contain:

(a) benzo-a-pyrene at a concentration of greater than 0.005% by mass; or

(b) water extractable phenols at a concentration of greater than 3% by mass or both (a) and (b).

Furthermore, wood so treated may not be placed on the market.

12 — First, second, tenth, eleventh and fourteenth recitals.

However by way of derogation:

(i) Relating to the substances and preparations: these may be used for wood treatment in industrial installations if they contain:

(a) benzo-a-pyrene at a concentration of less than 0.05% by mass; and

(b) water extractable phenols at a concentration of less than 3% by mass.

...'

The Biocidal Products Directive

15. The Biocidal Products Directive [13] was based on Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

16. Recitals 12 and 26 in its preamble state:

'Whereas it is necessary to establish a Community list of active substances permitted for inclusion in biocidal products;

...

Whereas, since the full implementation of this Directive, and especially the review programme, will not be achieved for several years, [the Dangerous Substances Directive] provides a framework to complement the development of the positive list by limitations of the marketing and use of certain active substances and products or groups thereof'.

17. Article 1(1) states that the directive concerns (a) the authorisation and the placing on the market for use of biocidal products within the Member States; (b) the

13 — Cited in footnote 3

mutual recognition of authorisations and (c) the establishment at Community level of a positive list of active substances which may be used in biocidal products.

18. Article 1(3) provides that the directive 'shall apply, without prejudice to relevant Community provisions or measures taken in accordance with them, in particular, to' a series of legislative measures including the Dangerous Substances Directive.

19. Article 2(1)(a) defines 'Biocidal products' for the purposes of the directive as 'Active substances and preparations containing one or more active substances, put up in the form in which they are supplied to the user, intended to destroy, deter, render harmless, prevent the action of, or otherwise exert a controlling effect on any harmful organism by chemical or biological means' and provides that an exhaustive list of 23 product types with an indicative set of descriptions within each type is given in Annex V. That Annex includes under the heading 'Product-type 8: Wood preservatives':

'Products used for the preservation of wood, from and including the saw-mill stage, or wood products by the control of wood-destroying or wood-disfiguring organisms.

This product type includes both preventive and curative products.'

20. Article 3(1) requires Member States to 'prescribe that a biocidal product shall not be placed on the market and used in their territory unless it has been authorised in accordance with this Directive'.

21. Article 5(1)(a) provides that Member States are to authorise a biocidal product only if 'the active substance(s) included therein are listed in Annex I or IA and any requirements laid down in these Annexes are fulfilled'.

22. When the Biocidal Products Directive was adopted, those annexes had no content. The directive laid down a procedure for the inclusion of active substances in the annexes after an evaluation process.

23. Article 16(1) provides:

'By way of further derogation from Articles 3 (1), 5(1) ... and without prejudice to paragraphs 2 and 3, a Member State may, for a period of 10 years from [14 May 2000], continue to apply its current system or practice of placing biocidal products on the market. It may, in particular, according to its national rules, authorise the placing on the market in its territory of a biocidal product containing active substances not listed in Annex I or IA for that product type. Such active substances must be on the market on [14 May 2000] as active substances of a biocidal product ...'

24. Article 16(2) provides that, following adoption of the directive, the Commission is to commence a 10-year programme of work for the systematic examination of all such active substances. During that 10-year period, it may be decided pursuant to a prescribed procedure that an active substance should or should not be included in Annexes I, IA or IB and, if so, under what conditions. Article 16(3) provides that, following such a decision, Member States are to ensure that authorisations for biocidal products containing such active substances are granted, modified or cancelled as appropriate.

25. It appears that no such decision has yet been taken. Annexes I, IA and IB are accordingly still empty.

National legislation

26. It is common ground that the relevant Netherlands legislation [14] requires an authorisation to be held by any person who supplies, possesses, stocks or imports pesticides. In the absence of an authorisation, the above transactions are prohibited. According to the referring court, the conditions imposed by the Netherlands legislation for the grant of an authorisation have the objective of enhanced environmental protection.

The main proceedings and the reference to the Court

27. The applicants in Case C-281/03 are former holders of and/or applicants for authorisations for certain non-agricultural

14 — Bestrijdingsmiddelenwet (Law on Pesticides) 1962, *Staatsblad* 1962, 288; Regeling milieutoelatingseisen niet-landbouwbestrijdingsmiddelen (Regulation laying down environmental authorisation requirements for non-agricultural pesticides), *Staatscourant* 1998, 15; Besluit milieutoelatingseisen niet-landbouwbestrijdingsmiddelen (Decree laying down environmental authorisation requirements for non-agricultural pesticides), *Staatsblad* 1998, 499; as amended, *Staatsblad* 1999, 309.

pesticides (in the broad sense of biocides) used as wood preservatives and based on the active substance coal-tar oil distillate (carbolineum and creosote). The applicants have appealed to the referring court against decisions of 6 July 2000 and 28 June 2002 by which the College voor de toelating van bestrijdingsmiddelen (Pesticides Authorisation Board; 'PAB') declared unfounded their objections to earlier decisions which essentially either did not unconditionally renew, or did not grant, authorisation for such pesticides.

28. Case C-282/03 concerns an appeal against a decision of 2 August 2002 by which the PAB declared unfounded the applicant's objection to decisions revoking its authorisation of a wood-impregnating agent which contains compounds based on copper, chromium and arsenic and rejected its application for renewal of the authorisation of that product.

29. It is common ground that the products concerned fall within the derogations in points 20 and 32 of Annex I to the Dangerous Substances Directive. That directive accordingly does not require Member States to restrict their marketing or use as wood preservatives. The effect of the contested decisions, in contrast, is that, under the relevant Netherlands legislation, the applicants are prohibited from supplying, possessing, stocking or importing the products.

30. The PAB took the view in particular that it was not obliged to authorise the products simply because certain applications of wood-impregnating products containing creosote or compounds based on copper, chromium and arsenic are exempted in the Dangerous Substances Directive from the prohibition on the use of such substances. Article 2 of the Dangerous Substances Directive provides that the substances and preparations concerned may be marketed subject to the conditions laid down in that directive and not that they must be authorised. The Dangerous Substances Directive does not preclude the laying down of more stringent requirements by the Member States.

31. Considering that the wording of the Dangerous Substances Directive provided no clear answer to the question whether it contained an exhaustive set of rules with regard to substances to which it applied or whether it afforded scope for additional national conditions, the College van Beroep voor het bedrijfsleven has referred to the Court in each case the question whether that directive permits a Member State to lay down additional conditions for the placing on the market and use of a biocidal product the active substance of which is included in Annex I thereto.

32. Written observations have been submitted by the applicants in both cases, the PAB, the Danish and Netherlands Governments and the Commission. The applicants, the Stichting Behoud Leefmilieu en Natuur Maas en Waal (Maas and Waal Foundation for Conservation of the Living Environment and Nature ('the Foundation'), party to the main proceedings in Case C-282/03), the Netherlands Government and the Commission were represented at the hearing.

33. The PAB, the Foundation and the Danish and Netherlands Governments submit that the question referred should be answered in the affirmative, on the basis essentially that the Dangerous Substances Directive is a minimum standards directive, that the relevant national measures do not fall within its scope and/or that use of the products at issue is governed by the Biocidal Products Directive, which prevails over the Dangerous Substances Directive. The applicants and the Commission take the contrary view, on the basis essentially that the Dangerous Substances Directive effects a complete harmonisation of matters within its scope.

Assessment

34. It is clear that the Dangerous Substances Directive is a harmonising measure, adopted principally with a view to removing the obstacle to trade constituted by the different national rules governing the conditions for the marketing and use of dangerous substances and preparations: that follows from its legal basis (Article 100 of the EC Treaty, now Article 94 EC) and from the fourth and fifth recitals in the preamble. [15]

35. The same may be said of Directives 89/677 and 94/60, which respectively added points 20 and 32 to Annex I to the Dangerous Substances Directive, including the derogations at issue in the present cases: each was adopted on the basis of Article 100a of the EC Treaty and the first recital in the preamble to each [16] stresses the internal market objective of the legislation.

36. It is also clear that Directive 89/677, which introduced the provisions at issue concerning arsenic, did so additionally with the objective 'better to protect the environment', [17] and that Directive 94/60, which

15 — Set out in point 7 above.

16 — Set out in points 10 and 13 above.

17 — See the eighth recital in the preamble, set out in point 11 above.

introduced the provisions at issue concerning creosote, did so additionally with a view to reducing harm to the environment. [18]

37. Where the objectives of a directive regulating dangerous substances include the elimination of obstacles to trade in the substances in question within the Community, the rules of that directive are not meant to be rules providing a minimum degree of protection which leave the Member States free to widen the obligations provided for therein, but are intended to be exhaustive. [19] That proposition reflects the broader principle established by the Court that where the Community legislature has adopted a harmonising directive in a given area, the Member States may not maintain or enact measures in the same area which are inconsistent with that directive. [20]

38. In my view, therefore, the Dangerous Substances Directive *prima facie* precludes a Member State from setting in its national legislation conditions for the marketing and use of the substances and preparations covered by the directive which are stricter than the conditions specified therein for such marketing and use. The substances covered by the directive include preparations containing on the one hand arsenic compounds and on the other creosote and coal-tar distillates. The products at issue are therefore clearly within the field of application of the directive. That fact is sufficient to distinguish the present proceedings from *Burstein* [21] and *Toolex*, [22] relied on by the Danish and Netherlands Governments, both of which cases concerned products which were not within the scope of the directive. The effect of the national measures in the present cases moreover is to prohibit the use of such products as wood preservatives, a use which is explicitly regulated by the directive, in circumstances where the directive expressly permits such use.

39. Various arguments have been raised against that interpretation.

40. First, the Foundation and the Danish and Netherlands Governments submit that the Dangerous Substances Directive effects only minimal harmonisation.

18 — See the 11th recital in the preamble, set out in point 13 above.

19 — See for example Case 278/85 *Commission* v *Denmark* [1987] ECR 4069, paragraph 22; see also Case 148/78 *Ratti* [1979] ECR 1629, paragraphs 24 and 26, and, with particular reference to the Dangerous Substances Directive, the comments of Advocate General Saggio in Case C-127/97 *Burstein* [1998] ECR I-6005, points 22 and 23, and the penultimate paragraph of point 31, of the Opinion.

20 — See for a recent application of the principle Case C-154/00 *Commission* v *Greece* [2002] ECR I-3879.

21 — Cited in footnote 19.

22 — Case C-473/98 [2000] ECR I-5681.

41. The Danish Government relies in particular on the fact that the directive contains no free movement clause (prohibiting Member States from preventing the sale, use or possession of a product conforming to the directive) or safeguard clause (permitting Member States in certain conditions to prohibit the marketing of products conforming to the directive).

42. I do not consider that anything may be deduced from the first omission. As the Court made clear in *Ratti,* [23] a free movement clause in the context of a directive seeking to eliminate differences in national rules which impede the internal market may have no independent value, simply complementing the substantive provisions contained in the directive in question and being designed to ensure the free movement of the products in question.

43. With regard to the second omission, it seems paradoxical to argue that, because a directive does not include a clause permitting Member States to take national measures which are inconsistent with it, that directive harmonises to a lesser extent than a directive which precludes any departure from its terms. It may be noted that the applicants in Case C-281/03 draw the opposite, and to my mind more logical, conclusion from the absence of a safeguard clause.

44. The Netherlands Government refers to the Court's statement in *Toolex* [24] that the Dangerous Substances Directive 'does no more than state certain minimum requirements'.

45. In my view however it is misleading to take that quotation out of context. The paragraph reads in full:

'Given that the [Dangerous Substances Directive], in itself, does no more than state certain minimum requirements, as is plain from Article 2 thereof ..., it clearly presents no obstacle to the regulation by the Member States of the marketing of substances that do not fall within its scope ...'

46. It seems therefore that the Court was simply stating that the scope of the Dangerous Substances Directive was limited to (i) the marketing and use of (ii) certain pre-

23 — Cited in footnote 19, paragraph 13. See also the penultimate paragraph of point 1 of the Opinion of Advocate General Reischl.

24 — Cited in footnote 22, paragraph 30.

scribed substances. That interpretation is moreover corroborated by the comments of Advocate General Mischo. [25]

47. The Netherlands Government also referred at the hearing to *Van den Burg*, [26] submitting that the Court in that case ruled that the Wild Birds Directive [27] effected both exhaustive regulation and minimum harmonisation.

48. That ruling has been criticised both for its terminology and for its reasoning on the point concerned. [28] In any event, however, I do not see that it can usefully be transposed to the present cases. The Court was specifically considering the ambit of Article 14 of the Wild Birds Directive, which authorises the Member States to introduce stricter protective measures than those provided for under the directive. There is no equivalent in the Dangerous Substances Directive.

25 — Points 45 and 46 of the Opinion.

26 — Case C-169/89 [1990] ECR I-2143, in particular paragraph 9.

27 — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

28 — See for example P.J. Slot, 'Harmonisation', *European Law Review* 1996, p. 378, at p. 389, and J.H. Jans, *European Environmental Law* (2000), pp. 266-7.

49. Second, the PAB and the Danish Government submit that the national measures at issue do not fall within the scope of application of the Dangerous Substances Directive.

50. The PAB argues that the objective of that directive and in particular of the restrictions on the marketing and use of products containing creosote and arsenic is principally to protect the health and safety of users and consumers; concern for the environment is secondary. The national legislation and the contested decisions based thereon have a specific objective, namely the protection of the environment in the light of the risks posed by wood treated with preservatives containing creosote or arsenic. The Dangerous Substances Directive in contrast regulates the actual treatment, namely the application of those preservatives, from the point of view of health and safety.

51. The Danish Government puts forward an analogous argument, submitting that the regulation of creosote by the Dangerous Substances Directive is based solely on public health, and in particular the risk of cancer; if it were not possible to subject biocidal products containing creosote to a requirement of authorisation, the dangers they pose could not be assessed from any other point of view.

52. Those arguments however appear to me to misrepresent the objectives of the Dangerous Substances Directive: it is clear from the preambles to that directive and to the directives which added the derogations at issue in the present cases [29] that environmental protection was indeed a primary objective of the legislation.

53. Thus the second recital in the preamble to the Dangerous Substances Directive states that rules concerning the placing on the market of dangerous substances and preparations 'should contribute to the protection of the environment from all substances and preparations which have characteristics of ecotoxicity or which could pollute the environment'. That recital comes between recitals stating that such rules 'must aim at protecting the public, and [in] particular persons using such substances and preparations' and 'should ... aim to restore, preserve and improve the quality of human life'.

54. The preamble to Directive 89/677, which added the condition concerning arsenic, and the derogation therefrom, to Annex I to the Dangerous Substances Directive, refers first to the internal market (first recital) and then to health and safety factors, and in particular to the carcinogenic nature of certain substances, in its second to seventh recitals, which deal with a number of products for which conditions are set in points 1, 3, 5 and 13 to 18 of Annex I. Mercury, arsenic and tin compounds, which are the subject-matter of points 19, 20 and 21 respectively of Annex I, are referred to in the eighth recital, which mentions environmental considerations alone.

55. The preamble to Directive 94/60, which added the condition concerning creosote, and the derogation therefrom, to Annex I to the Dangerous Substances Directive, similarly focuses in its first few recitals on the internal market (first and second recitals) and on the need to regulate substances which are carcinogenic, mutagenic or toxic for reproductive purposes (third to ninth recitals). However, Directive 94/60 added point 29 to Annex I to the Dangerous Substances Directive to deal with the carcinogens referred to in the fourth recital (and points 30 and 31 to deal with mutagens and substances which are toxic for reproductive purposes respectively). The 10th and 11th recitals [30] deal separately and specifically with creosote, which is the subject of point 32 of Annex I, at issue in the present cases. Although the 10th recital refers to the fact

29 — Directives 89/677 and 94/60, both cited in footnote 2.

30 — Set out in point 13 above.

that creosote 'may be damaging to health because of its content of known carcinogens', the following recital focuses on its environmental effects.

56. I am not therefore convinced by the argument that the national measures at issue in the present cases fall outside the scope of application of the Dangerous Substances Directive on the ground that protection of the environment is not among the principal objectives of that directive.

57. Third, the PAB, the Foundation and the Danish and Netherlands Governments submit that the use of the products at issue is governed by the Biocidal Products Directive, which in their view prevails over the Dangerous Substances Directive where the two directives overlap and in accordance with which national legislation may set stricter conditions for marketing and use of the products covered.

58. The Dangerous Substances Directive certainly applies 'without prejudice to the application of other relevant Community provisions', [31] while the Biocidal Products Directive applies, 'without prejudice to relevant Community provisions or measures taken in accordance with them, in particular, to' inter aliathe Dangerous Substances Directive. [32] The PAB and the Danish and Netherlands Governments argue essentially that it is clear from that wording, from the scope of the two directives and from the Court's case-law [33] that the two directives exist in parallel, each with its own distinct field of application. The Dangerous Substances Directive seeks in particular to protect the health and safety of users and consumers while the Biocidal Products Directive stresses the protection of the environment. To the extent that there is an overlap, the Biocidal Products Directive, as *lex specialis*, prevails. Since the contested decisions concern the use of biocidal products, the compatibility of those decisions with Community law must be examined in the context of the Biocidal Products Directive and not the Dangerous Substances Directive. The degree of harmonisation achieved by the latter directive is accordingly irrelevant.

59. I am not persuaded by those arguments.

31 — Article 1(1), set out in point 8 above.

32 — Article 1(3), set out in point 18 above.

33 — Case C-293/94 *Brandsma* [1996] ECR I-3159, Case C-400/96 *Harpegnies* [1998] ECR I-5121 and Case C-232/97 *Nederhoff* [1999] ECR I-6385.

60. As a preliminary point, it seems clear that there is an error in the drafting of Article 1(3) of the Biocidal Products Directive in a number of the language versions, including the English, French and German. Those versions suggest that that directive 'applies to' a number of other legislative measures in various different fields. It seems obvious, however, that that cannot have been the intention of the legislature: it clearly makes no sense for a directive regulating one area to apply to another directive or a regulation governing another area.

61. The scheme of the Biocidal Products Directive suggests rather that Article 1(3) means that that directive is to apply 'without prejudice to relevant Community provisions or measures taken in accordance with them, in particular [without prejudice] to' the other legislation listed or measures taken thereunder. That interpretation, which is the unambiguous meaning of, for example, the Dutch, Portuguese, Spanish and Swedish versions, also has the advantage of making sense.

62. In any event, nothing in my view turns on Article 1(3) since the Biocidal Products Directive cannot in any event govern the right of Member States to authorise biocidal products given that its annexes have not yet been adopted. That follows from the fact that the entire system of authorisation which is to be set in place by that directive is dependent on whether the active substance (s) of the biocidal product concerned is listed in one of those annexes.

63. The inchoate nature of the harmonisation envisaged by the Biocidal Products Directive has been recognised by the Court and by the Community legislature.

64. The Court stated in *Schreiber*[34] that, at the time of the facts alleged in the main proceedings in that case (March 2001), 'the harmonisation provided for by [the Biocidal Products Directive] had not been completed in that Annexes I, IA and IB to the directive, listing the active substances whose use is authorised in biocidal products, low-risk biocidal products and products containing only basic substances, were still being compiled at Community level'. That is still the case.

34 — Case C-443/02 [2004] ECR I-7275, paragraph 20.

65. The preamble to Directive 2001/90/EC,[35] which amended point 32 in Annex I to the Dangerous Substances Directive relating to creosote, states that the Biocidal Products Directive 'will harmonise the authorisation of biocides at a European level ... Pending harmonisation of rules under [the Biocidal Products Directive] the restrictions on creosote need to be adapted to technical progress'.[36] Directive 2001/90 amended point 32 so as to impose an outright prohibition on the use of creosote to treat wood and on the placing on the market of wood so treated and made yet more stringent the conditions of the derogation from that prohibition.

66. In similar vein, the preamble to Directive 2003/2/EC,[37] which amended point 20 in Annex I to the Dangerous Substances Directive relating to arsenic, states that, 'pending harmonisation of rules under [the Biocidal Products Directive], it is necessary to adapt the restrictions on arsenic in [the Dangerous Substances Directive] to technical progress'.[38] Directive 2003/2 amended point 20 so as to impose an outright prohibition on the placing on the market of wood treated by preparations including arsenic compounds and made yet more stringent the conditions of the derogation from that prohibition.

67. The Biocidal Products Directive, therefore, was not at the time of the facts which gave rise to the main proceedings (and is still not) fully applicable. The PAB and the Danish Government argue however that the Member States may retain their national systems for the regulation of biocidal products during the transitional period envisaged by Article 16(1) of that directive, which permits a Member State for a transitional period of 10 years to 'continue to apply its current system or practice of placing biocidal products on the market'.

68. I do not accept that, pending full application of the Biocidal Products Directive, Article 16(1) confers on Member States unfettered discretion in authorising products which fall within the scope of both that directive and the Dangerous Substances Directive. It is expressly stated in the preamble to the Biocidal Products Directive that 'full implementation ... will not be achieved for several years' during which time the Dangerous Substances Directive will provide a complementary framework limiting the marketing and use of certain active substances and products.

35 — Commission Directive of 26 October 2001 adapting to technical progress for the seventh time Annex I to Council Directive 76/769/EEC (OJ 2001 L 283, p. 41). The directive requires Member States to adopt implementing measures by 31 December 2002 and to apply them by 30 June 2003.

36 — Recital 5.

37 — Commission Directive of 6 January 2003 relating to restrictions on the marketing and use of arsenic (tenth adaptation to technical progress of Council Directive 76/769/EEC) (OJ 2003 L 4, p. 9). The directive requires Member States to adopt implementing measures by 30 June 2003 and to apply them by 30 June 2004.

38 — Recital 8.

69. Thus although Article 16(1) provides that during that transitional period a Member State may continue to apply its current system or practice of placing biocidal products on the market, it is clear that that system must be in accordance with other provisions of Community law. Where a Member State seeks to regulate the marketing and/or use of products falling within the scope of the Dangerous Substances Directive, its national rules must therefore be consistent with that directive.

70. I do not consider that the case-law [39] invoked by the Netherlands Government supports its assertion that the Dangerous Substances Directive and the Biocidal Products Directive exist in parallel, each with its own distinct field of application. In *Brandsma*, which in any event considerably pre-dated the Biocidal Products Directive, the active ingredient in the product at issue was not covered by the Dangerous Substances Directive. [40] In *Harpegnies*, the facts of which again occurred before the Biocidal Products Directive was adopted, the Court proceeded on the basis that there were no harmonised rules at Community level covering either the production or the marketing of the products at issue; [41] that is not the case in the present proceedings. In *Nederhoff*, as the referring court points out, the national legislation at issue did not impose conditions on the marketing or use of a substance within the scope of the Dangerous Substances Directive; rather it concerned pollution of surface waters by products treated with that substance. The Court ruled first that Directive 76/464 [42] was applicable to that situation; that directive moreover expressly authorises Member States to take more stringent measures than those provided for therein. Since Article 1(1) of the Dangerous Substances Directive states that it applies without prejudice to the application of other Community provisions, the Court decided that Directive 76/464 prevailed. I do not see how that ruling may be transposed to the present cases, where the Biocidal Products Directive is not applicable.

71. Finally the Netherlands Government submitted at the hearing that it would be illogical if on the one hand a Member State could not regulate biocidal products containing dangerous substances within the scope of the Dangerous Substances Directive while on the other hand it could regulate less harmful biocidal products not containing such substances, such as the cedarwood blocks at issue in the recent decision in *Schreiber*. [43]

39 — Cited in footnote 33.

40 — Paragraph 10 of the judgment and point 16 of the Opinion of Advocate General Fennelly.

41 — Paragraph 27. It appears that the Dangerous Substances Directive was not invoked by any of the parties.

42 — Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23).

43 — Cited in footnote 34.

72. That case however concerned a product (cedarwood blocks) which was not otherwise subject to Community legislation. The Court accordingly assessed the lawfulness of a Member State's requirement of prior authorisation for the marketing of such products on the basis of Articles 28 and 30 EC. In the present cases by contrast the products concerned are subject to Community legislation. That appears to me to be sufficient to distinguish the present cases from *Schreiber*.

73. The Netherlands Government's concern that the above interpretation would entail the anomaly that a Member State could not regulate biocidal products containing dangerous substances within the scope of the Dangerous Substances Directive but could regulate less harmful biocidal products not containing such products is to my mind misplaced. It is precisely because certain biocidal products, such as those at issue in the present cases, are potentially harmful that they are liable to be the subject of strict, but varying, controls under national law and are therefore most in need of regulation by Community legislation.

74. For the above reasons I conclude that the Dangerous Substances Directive does not permit a Member State to lay down additional conditions for the placing on the market and use of a biocidal product the active substance of which is included in Annex I to that directive.

75. I would make two final points which may alleviate any concerns that the interpretation I propose unduly restricts a Member State's power to take measures to protect its environment.

76. First, it should be stressed that the above conclusion does not mean that a Member State in the Netherlands' position is wholly precluded from setting more stringent standards. In such a case, where a harmonising directive was adopted on the basis of Article 95 EC (formerly Article 100a of the EC Treaty), a Member State wishing to maintain or introduce national provisions which are more stringent than those envisaged by the directive and which relate to, inter alia, the protection of the environment has the possibility under Article 95(4) or (5) EC [44] of notifying the Commission of those provisions and the grounds for maintaining or introducing them. The Netherlands has in fact taken advantage of the procedure provided by Article 95 for certain aspects of its regulation of creosote, although apparently not those at issue in the present cases. [45]

44 — See point 6 above.

45 — See Commission Decisions 1999/832/EC of 26 October 1999 concerning the national provisions notified by the Kingdom of the Netherlands concerning the limitations of the marketing and use of creosote (OJ 1999 L 329, p. 25) and 2002/59/EC of 23 January 2002 concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) of the EC Treaty on limitations on the marketing and use of creosote-treated wood (OJ 2002 L 23, p. 37).

77. Second, since the facts which gave rise to the present cases the conditions in Annex I have been tightened both for creosote and for arsenic compounds: see Directives 2001/90 [46] and 2003/2, [47] the relevant provisions of which are summarised in points 65 and 66 above. Thus the practical effect of the interpretation of the Dangerous Substances Directive for the purposes of the present case will in any event be limited.

Conclusion

78. I accordingly conclude that the question referred by the College van Beroep voor het bedrijfsleven should be answered as follows:

Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations does not permit a Member State to lay down additional conditions for the placing on the market and use of a biocidal product the active substance of which is included in Annex I to that directive.

46 — Cited in footnote 35.
47 — Cited in footnote 37.