OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 November 2001 [1]

1. In this case, the Netherlands has brought an action under Article 230 EC seeking annulment of Point 3 of the Annex to Commission Directive 1999/51 [2] ('the contested provision') which provides that Austria and Sweden may continue to apply — until 31 December 2002 — restrictions on the use of cadmium going further than those laid down in Point 24 of Annex I to Council Directive 76/769/EEC of 27 July 1976 on the approximation of laws, regulations, and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations. [3]

2. The essential legal issue is whether the contested provision was adopted on the correct legal basis. In that context the question arises whether the contested provision may be regarded as an amendment required to adapt Annex I to Directive 76/769 to technical progress.

The relevant legislative provisions

3. Directive 76/769 lays down rules restricting the marketing and use of certain dangerous substances and preparations. According to Article 1(1), the Directive applies to the substances and preparations listed in Annex I. [4] Article 2 provides, as far as is relevant:

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

...'

1 — Original language: English.

2 — Commission Directive 1999/51/EC of 26 May 1999 adapting to technical progress for the fifth time Annex I to Council Directive 76/769/EEC on the approximation of laws, regulations, and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (tin, PCP and cadmium), OJ 1999 L 142, p. 22.

3 — OJ 1976 L 262, p. 201.

4 — Originally, there was only one annex to Directive 76/769. However, that annex was renamed 'Annex I' after amendment by Council Directive 83/478/EEC of 19 September 1983 amending for the fifth time Directive 76/769/EEC, OJ 1983 L 263, p. 33.

4. Article 2a, which was inserted by Directive 89/678,[5] provides:

'Amendments required to adapt the Annexes to technical progress, with regard to substances and preparations already covered by [Directive 76/769], shall be adopted in accordance with the procedure laid down in Article [29] of Directive 67/548/EEC, [6] as last amended by Directive [92/32/EEC[7]].'

5. The procedure laid down in Article 29 of Directive 67/548 as amended follows the system set out in Council Decision 87/373 of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.[8] In accordance with that Decision, Article 29 provides that the Commission is assisted by a committee composed of representatives of the Member States and chaired by a representative of the Commission. The Commission submits to the committee a draft of the measures to be taken and adopts them if they are in accordance with the opinion of the committee. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission submits a proposal to the Council which then acts by qualified majority.

6. Directive 76/769 has been amended on several occasions. A number of dangerous substances and preparations have been added to Annex I,[9] and further restrictions have been placed on the use of substances and preparations covered by that Annex.[10]

7. By Directive 91/338,[11] the Community legislature included the substance cadmium under Directive 76/769, adding a new Point 24 to Annex I. Point 24 prohibits, with regard to a number of specifically mentioned products, the use of cadmium to give colour to finished products (Section 1); to stabilise finished products manufactured from polymers or copolymers of vinyl chloride (PVC, Section 2); and for surface treatment (plating) of metallic products or components (Section 3). For example, under Point 24, Section 2.1, cadmium may not be used as a stabiliser in office or school supplies manufactured from PVC.

5 — Council Directive 89/678/EEC of 21 December 1989 amending Directive 76/769/EEC, OJ 1989 L 398, p. 24.

6 — Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ, English Special Edition 1967(II), p. 234.

7 — Council Directive 92/32/EEC of 30 April 1992 amending for the seventh time Directive 67/548/EEC, OJ 1992 L 154, p. 1.

8 — OJ 1987 L 197, p. 33.

9 — See, for example, Council Directive 89/677/EEC of 21 December 1989 amending for the eighth time Directive 76/769/EEC, OJ 1989 L 398, p. 19.

10 — See, for example, Commission Directive 97/64/EC of 10 November 1997 adapting to technical progress for the fourth time Annex I to Council Directive 76/769/EEC, OJ 1997 L 315, p. 13.

11 — Council Directive 91/338/EEC of 18 June 1991 amending for the 10th time Directive 76/769/EEC, OJ 1991 L 186, p. 59.

8. Article 2 of Directive 91/338 provides:

'Owing to the development of knowledge and techniques in respect of substitutes less dangerous than cadmium and its compounds, the Commission shall, in consultation with the Member States, reassess the situation for the first time within three years of the date referred to in Article 3(1) and subsequently at regular intervals in accordance with the procedure laid down in Article 2a of Directive 76/769/EEC.'

9. Under Article 3(1) of Directive 91/338, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 December 1992.

10. Austria and Sweden acceded to the European Union on 1 January 1995. The Act of Accession [12] lays down transitional provisions concerning the use and marketing of cadmium in those States. Article 69(1) provides that during a period of four years from the date of accession, the provisions referred to in Annex VIII of the Act shall, in accordance with that Annex and subject to the conditions set out therein, not apply to Austria. Article 112(1) grants to Sweden, in identical terms, a derogation from the rules contained in Annex XII of the Act.

11. Annex VIII of the Act of Accession — applicable to Austria — mentions Point 2.1 of the Annex to Directive 91/338, concerning the use of cadmium as stabiliser in products manufactured from PVC, which inserted Section 2.1 of Point 24 of Annex I to Directive 76/769.

12. Annex XII of the Act of Accession — applicable to Sweden — mentions Directive 91/338 and provides that 'Sweden shall, however, maintain throughout the transitional period, with regard to china and ceramic products, including ceramic tiles, the free circulation provided by the provision of its current "ordinance" relating to exemptions from the ban on the use of cadmium for surface treatment or as a stabiliser or as a colouring agent.'

13. Articles 69(2) and 112(2) of the Act of Accession provide, with respect to Austria and Sweden:

12 — Act concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, OJ 1994 C 241, p. 21 as amended by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union, OJ 1995 L 1, p. 1.

'The provisions referred to in paragraph 1 shall be reviewed within that period in accordance with EC procedures.

Without prejudice to the outcome of that review, at the end of the transitional period referred to in paragraph 1, the EC acquis will be applicable to the new Member States under the same conditions as in the present Member States.'

14. On 26 May 1999 the Commission adopted Directive 1999/51 adapting to technical progress, for the fifth time, Annex I to Directive 76/769. [13] Directive 1999/51 was adopted on the basis of Article 2a of Directive 76/769, [14] in accordance with the committee procedure set out in Article 29 of Directive 67/548 as amended.

15. The first recital of the preamble to Directive 1999/51 recalls that 'within the framework of the Act of Accession ... in particular in Articles 69 ... and 112 respectively, it is foreseen that during a period of four years from 1 January 1995 certain provisions of Annex I to Directive 76/769/EEC do not apply to Austria ... and Sweden and shall be reviewed in accordance with the procedures laid down in the EC Treaty'.

16. The fifth recital of the preamble states that 'the Council resolution of 25 January 1988 [15] calls for an overall strategy to combat environmental pollution by cadmium, including measures to restrict the use of cadmium and stimulate development of substitutes; whereas the risks posed by cadmium are being assessed under Council Regulation (EEC) No 793/93 [16] and the Commission will review the restrictions on cadmium in [the] light of the results; whereas as an interim measure Sweden and Austria which apply more far reaching restrictions may retain these'.

17. In accordance with those recitals, Point 3 of the Annex to Directive 1999/51 — the provision challenged by the Netherlands in this case — added the following Section to Point 24 of Annex I to Directive 76/769:

'4. Austria and Sweden, which already apply restrictions to cadmium going further

13 — Cited in note 2.

14 — Cited in paragraph 4.

15 — OJ 1988 C 30, p. 1.

16 — Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances, OJ 1993 L 84, p. 1

than those prescribed in Sections 1, 2 and 3 may continue to apply these restrictions until 31 December 2002. The Commission will review the provisions on cadmium in Annex I to Directive 76/769/EEC before this date in [the] light of the results of risk assessment for cadmium and of development of knowledge and techniques in respect of substitutes for cadmium.'

18. As is apparent from its wording, the new Section 4 did not amend in substance the rules concerning the use of cadmium laid down in Point 24, Sections 1 to 3, of Annex I to Directive 76/769. It had the effect of extending — until the end of 2002 — the validity of the derogations granted to Austria and Sweden in the Act of Accession, thus enabling those States to continue to apply restrictions on the use of cadmium going further than those laid down in Point 24, Sections 1 to 3.

19. Pursuant to Article 3, Directive 1999/51 entered into force on 25 June 1999.

The factual and legislative background

20. Before examining the claims and arguments put forward in the present case, it is useful to set out briefly the circumstances which led to the adoption of Directive 1999/51.

21. It will be recalled that in the Act of Accession Austria and Sweden were granted derogations, valid for five years, from the Community rules on the use and marketing of cadmium laid down in Directive 76/769. In view of those derogations the Commission decided, in accordance with Article 2 of Directive 91/338,[17] to assess whether the use and marketing of that substance should be restricted to a greater extent than provided for by Point 24 of Annex I to Directive 76/769 and to commence the work of drawing up detailed draft proposals for amendment of those provisions.

22. In that context, the Commission designated, pursuant to Regulation No 793/93,[18] cadmium as a 'priority substance requiring attention' in 1997,[19] and made Belgium responsible for carrying out an evaluation of the risk posed by its use. According to information supplied to the Court, that assessment has not yet been completed. In September 1998 a consultancy firm produced, at the request of the Commission, a report on the risks posed by the use of cadmium (hereafter 'the Atkins

17 — Cited in paragraph 8.

18 — Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances, OJ 1993 L 84, p. 1.

19 — Commission Regulation (EC) No 143/97 of 27 January 1997 concerning the third list of priority substances as foreseen under Council Regulation (EEC) No 793/93, cited in note 16, OJ 1997 L 25, p. 13.

Report'). It is common ground between the parties that that report provides support for the view that the use of cadmium should be restricted to a greater extent than provided for by Directive 76/769. However, it also appears to be agreed that the Atkins Report was not suited to serve as a basis for new Community measures in this area, since its scope was too limited and the results presented not sufficiently final and complete. Moreover, the Scientific Committee on Toxicity and the Environment, which advises the Commission in this context, abstained from adopting a final view on the conclusions to be drawn from the Report.

23. In 1998 the Commission placed before the Working Group on Limitations on Marketing and Use of Dangerous Substances and Preparations (hereafter 'the Working Group') two draft proposals for amendment of Point 24 of Annex I to Directive 76/769.[20] Those draft proposals envisaged, in particular, the adoption of new restrictions on the use of cadmium as a colorant in certain products such as polyamide. Considering however that the results of the pending risk assessment were not yet sufficiently complete, the Commission did not adopt those draft proposals. It placed instead before the Working Group a third draft proposal.[21] That draft proposal did not envisage any new restrictions on the use of cadmium, but provided in effect for an extension until 31 December 2002 of the derogation granted to Austria and Sweden in the Act of Accession. That draft proposal was, with certain changes aimed at meeting objections raised by the Netherlands, submitted for the opinion of the committee under Article 29 of Directive 67/548 as amended. While the representatives of Belgium, Denmark and the Netherlands voted against, the majority of the committee voted in favour of the proposal. Pursuant to Article 29 of Directive 67/548, the proposal was thus adopted by the Commission as Directive 1999/51.

The action for annulment

24. The Netherlands has challenged the validity of Point 3 of the Annex to Directive 1999/51 which added Section 4 to Point 24 of Annex I to Directive 76/769. The Commission contends that the application should be dismissed. The Commission is supported by Sweden. At the hearing, the Netherlands and the Commission presented oral argument.

25. The Netherlands puts forward four pleas in law. In the application those pleas are presented as follows. First, the Commission exceeded its powers by adopting

20 — Annexed to the application.
21 — Ibid.

that provision on the basis of Article 2a of Directive 76/769. Second, the contested provision is contrary to the substantive provisions of Directive 76/769, since it implies that Point 24 of Annex I to the Directive entails an exhaustive harmonisation of the uses to which cadmium may be put. Third, it violates the principle of legal certainty. Fourth, it fails to fulfil the requirements of reasoning, contrary to Article 253 EC.

26. At the hearing the Netherlands Government placed most emphasis on the second of those pleas. However, as the Netherlands Government itself accepted at the hearing, it is appropriate for the Court to examine the pleas in the order in which they were presented in the application.

The first plea: incorrect legal basis

27. The Netherlands presents, essentially, two arguments in favour of its contention that the Commission exceeded its powers when adopting the contested provision. First, it maintains that the contested provision cannot be regarded as an amendment of Annex I to Directive 76/769 required to adapt the Annex to technical progress within the meaning of Article 2a of that Directive. Second, the Netherlands claims that the contested provision touches on the essential aspects of the regulation of the use of cadmium. It therefore goes beyond what can be adopted pursuant to a provision — such as Article 2a — which delegates to the Commission power to lay down rules in cooperation with a committee under the procedure laid down in Article 29 of Directive 67/548 as amended. The contested provision should, for those reasons, have been adopted by the Community legislature on the basis of Article 95 EC.

The first argument

28. The Netherlands Government recalls that under Article 2a the Commission has the power to adopt amendments required to adapt Annex I of Directive 76/769 to technical progress, with regard to substances and preparations already covered by the Annex, in accordance with the procedure laid down in Article 29 of Directive 67/548. In its view, the essential purpose of that provision is to enable the Community authorities to react immediately when damage to the public and the environment is detected, and in particular when cases which have serious consequences for human health are observed, by imposing restrictions on existing uses of dangerous substances and preparations. In the context of cadmium, however, the Netherlands Government submits that

Article 2a must be interpreted in the light of Directive 91/338. It follows from Article 2 [22] and the third recital of the preamble to that Directive [23] that amendments to adapt Annex I to technical progress within the meaning of Article 2a must be understood as such amendments as are made necessary, in particular, by advances in knowledge and techniques regarding substitutes for cadmium.

29. According to the Netherlands Government, it follows that the contested provision cannot be regarded as an amendment required to adapt Point 24 of Annex I to technical progress within the meaning of Article 2a. On the one hand, the contested provision is not based on advances in knowledge and techniques regarding substitutes for cadmium since, as is clear from the fifth recital of the preamble to Directive 1999/51, [24] the assessment of the risk to the environment and to human health posed by cadmium had not been completed at the time the contested provision was adopted by the Commission. On the other hand, advances in knowledge and techniques regarding substitutes for cadmium must by their nature affect equally all of the Member States. The contested provision created, however, a special regime for Austria and Sweden.

30. Moreover, the Netherlands Government maintains that the contested provision aims essentially to prevent the practical difficulties which would have arisen in Austria and Sweden if those countries had been forced, following the expiry of the derogations laid down in Articles 69 and 112 of the Act of Accession, to change their legislation shortly before the introduction of new Community restrictions on the use of cadmium. In those circumstances, the contested provision must be regarded as an amendment of Annex I to Directive 76/769 anticipating a future adaptation of the Annex to technical progress within the meaning of Article 2a.

31. Finally, the Netherlands Government points out that the legislation of certain Member States, including the Netherlands, lays down more severe restrictions on the use of cadmium than provided for by Point 24 of Annex I to Directive 76/769. Those Member States are in a comparable situation to Austria and Sweden and the Commission should therefore, in any event, have granted derogations also to those Member States.

32. The Commission resists those arguments.

33. In its view, Article 2a gives it the power to adopt, in compliance with the committee procedure, amendments of minor significance (*modifications mineures*) of Annex I to Directive 76/769. Contrary to what the Netherlands Government contends, the

22 — Cited in paragraph 8.

23 — That recital states: 'Whereas advances are being made in knowledge and techniques regarding substitutes; whereas it would therefore be advisable systematically to reassess the situation in the light of the results of the scientific and technical studies provided for in [Council resolution of 25 January 1988, OJ 1988 C 30, p. 1]'.

24 — Cited in paragraph 16.

Commission is not precluded from exercising that power in the absence of final and complete scientific studies regarding the risk posed by cadmium and the possibility of replacing it by substitutes. When adopting the contested provision, the Commission took account of the preliminary results of the pending risk evaluation of cadmium, which indicated that there was a need for additional restrictions on its use and that a legislative proposal to that effect was imminent. It cannot therefore be argued that the contested provision was not 'based on advances in knowledge and techniques' and therefore not an adaptation to technical progress within the meaning of Article 2a.

34. The Commission maintains moreover that it would have disappointed the legitimate expectations of Austria and Sweden, and breached the principles of sound administration (*les principes de bonne gestion*), if it had not adopted the contested provision: had it not done so, those States would have been forced — following the expiry of the transitional regime laid down in the Act of Accession on 31 December 1998 — to repeal the restrictions provided for by their legislation, although similar restrictions would most probably be introduced at the Community level within a short period of time. In those circumstances, the Commission cannot be reproached for adopting the contested provision pursuant to the flexible committee procedure laid down in Article 2a.

35. Finally, the Commission argues that in the particular circumstances a special regime for Austria and Sweden, equivalent to that laid down in the transitional provisions of the Act of Accession, was justified. That regime simply reflects the fact that Austria and Sweden are ahead in the area of protection against the risk to health posed by cadmium, and that the strict rules on the use of cadmium laid down in the legislation of those States will, in all likelihood, be adopted at the Community level within the foreseeable future. [25]

36. The Swedish Government puts forward arguments which are substantially similar to those of the Commission.

37. As is clear from the arguments put forward, the essential question is whether a provision which grants to certain Member States a derogation from the provisions laid down in Annex I to Directive 76/769, enabling those States to maintain in force stricter rules on the use and marketing of one of the substances covered by the Annex, can be regarded as an amendment required to adapt the Annex to technical progress within the meaning of Article 2a.

25 — The Commission refers in this context to *Communication from the Commission to the Council and the European Parliament — The Review Clause — Environmental and Health Standards four years after the Accession of Austria, Finland and Sweden to the European Union*, COM (1998) 745 Final, which states (at p. 11) that 'The plan is to adopt a Commission Directive that will provide new restrictions on the marketing and use of ... cadmium and thereby deal with the new Member States' issues'.

38. An interpretation of Article 2a taking into account its wording and purpose leads in my view, inescapably, to a negative reply to that question.

39. First, it will be recalled that the text of Article 2a grants the Commission the power to adopt 'amendments required to adapt [Annex I] to technical progress'. To my mind, it is clear that a provision cannot be regarded as an *adaptation* of Annex I *to technical progress* unless it effects a substantive change in the rules on the use and marketing of dangerous substances and preparations laid down in Annex I. The contested provision did not however in any way change the substantive rules restricting the use and marketing of cadmium laid down in Sections 1 to 3 of Point 24 of Annex I. It is difficult, for that reason alone, to accept the Commission's contention that the contested provision falls within the scope of its competence under Article 2a.

40. Secondly, the notion of adaptation to technical progress must, as the Netherlands Government points out, be interpreted in the light of the purpose of Article 2a, which was introduced by Directive 89/678. The first recital of the preamble to that Directive states:

'Whereas the public and the environment are constantly exposed to new risks resulting from the use of chemical products; whereas when damage is detected and in particular when cases which have serious consequences for human health are observed, immediate action is required for the prohibition or limiting of the marketing or use of certain dangerous substances and preparations at Community level'.

41. The third recital states:

'Whereas technical progress makes it necessary to adapt the provisions contained in the Annex to Directive 76/769/EEC promptly; ...'

42. On the basis of those statements, it seems clear that the essential purpose of Article 2a is to enable the Community authorities to adapt Annex I by restricting the marketing or use of certain dangerous substances and preparations at Community level and, through the committee procedure, to do so more easily and swiftly than would be the case if the restrictions were to be adopted on the basis of Article 95 EC. However, the contested provision did not introduce any new restrictions on the marketing or use of cadmium at Community level. On the contrary, that provision granted to Austria and Sweden a derogation enabling them to

maintain, at the national level, already existing restrictions on the marketing and use of cadmium. It is, also for that reason, difficult to accept the Commission's defence in this case.

43. According to the Netherlands Government the contested provision is, furthermore, unlawful because it was not based on technical progress in the field of cadmium substitutes.

44. In my view, that argument rests on an unduly restrictive interpretation of Article 2a. The preamble to Directive 89/678 refers to situations where 'damage is detected' (first recital) and to situations where there has been 'technical progress' (third recital). It seems, therefore, that the Community legislature intended to confer upon the Commission the power to act on the basis of Article 2a not only where knowledge in the field of substitutes has progressed to such an extent that new restrictions on the use of dangerous substances appear to be justified, but also where scientific research reveals that substances covered by Annex I pose a greater danger to the environment and public health than previously assumed and that new restrictions are therefore required.

45. However, it must be accepted that the Commission cannot exercise its powers under Article 2a unless the measures adopted have some basis in science — either in the field of substitutes or in research suggesting that substances covered by Annex I pose new dangers to health or the environment. As the Commission has itself stated in its written pleadings, measures are not and cannot normally be adopted under Article 2a in the absence of complete and final scientific results. It is perhaps possible — and here I again disagree with the Netherlands Government — to envisage circumstances in which it would be appropriate for the Commission to take action in the absence of final scientific results. The essential purpose of Article 2a, which is the protection of the environment and public health against the risks of dangerous substances and preparations, might be jeopardised if the Commission were entirely precluded from taking action, for example, if preliminary scientific results revealed a close connection between a common form of cancer and the use of cadmium in particular products. However, the Commission's power to act on the basis of preliminary results cannot be unlimited. In my view, such action might be justified where the preliminary results in question reveal that there is a pressing need for urgent action at Community level.

46. In the present case, it is common ground that the contested provision was not based on final and complete scientific results. At the time Directive 1999/51 was adopted, the Belgian authorities had not yet completed the risk evaluation for which

they had been made responsible by Regulation No 143/97,[26] nor had the Scientific Committee on Toxicity and the Environment taken a final view on the matter.[27] Moreover, there is no suggestion that the preliminary results relied upon by the Commission — including the Atkins Report[28] — had revealed a pressing need for urgent action at Community level. As the Commission has itself stressed to the Court, it always took the view that new Community restrictions on the use and marketing of cadmium could not be adopted prior to the completion of the risk assessment being carried out by the Belgian authorities.

47. For those reasons the contested provision cannot in my view be regarded as an adaptation of Annex I to technical progress within the meaning of Article 2a of Directive 76/769.

48. I am encouraged in that view by the fact that in the third draft proposal for Directive 1999/51 the Commission stated:[29] 'It is the view of DG III that ... there is no basis at this time for adapting the cadmium provisions to technical progress. The new draft [proposal for a directive amending Annex I to Directive 76/769], therefore, proposes no change other then to prolong the derogations of Sweden and Austria for cadmium'. While that statement in the draft proposal is not conclusive, I consider none the less that some weight may be given to it. As the Netherlands Government points out, the statement confirms that the contested provision is in essence a measure which *anticipates* an adaptation of Annex I to Directive 76/769 to technical progress within the meaning of Article 2a.

49. That conclusion is in no way affected by the Commission's assertion that it would have disappointed the expectations of Austria and Sweden, and breached the principle of sound administration, had it not adopted the contested provision. The Community legislature is competent, pursuant to Article 95 EC, to adopt measures in the field of dangerous substances and preparations. Measures capable of resolving the problems caused by the expiry of the transitional regime laid down in Articles 69 and 112 of the Act of Accession could, I consider, have been adopted in that way.

50. It may be noted in that context that the Community legislature has already adopted, on the basis of Article 95 EC, a number of other Directives aimed at resolving problems caused by the fact that the review of Community legislation on dangerous substances could not be completed by 31 December 1998, and that the various derogations granted in the Act of Accession

26 — Cited in note 19.
27 — See above paragraph 22.
28 — Ibid.
29 — See above paragraph 23.

to Austria and Sweden thus expired before new and stricter Community measures in the field of dangerous substances were adopted. For example, by Directive 1999/33 [30] the European Parliament and the Council, acting on the basis of Article 95 EC, in effect extended a derogation granted in the Act of Accession to Austria and Sweden, thereby enabling those States to maintain in force until 31 December 2000 stricter rules than those laid down in Directive 67/548 on the labelling of certain dangerous substances. [31]

51. I would, for all of the above reasons, uphold the first argument of the Netherlands Government and annul the contested provision.

The second argument and other pleas

52. In the light of the conclusion I have reached on the first argument under the first plea in law, I do not propose to express an opinion on the second argument or on the other pleas in law invoked by the Netherlands.

The temporal effects of the Court's judgment

53. At the hearing, the Netherlands Government stressed that it does not in any way seek to challenge the right of Austria and Sweden to maintain in force restrictions on the use of cadmium going further than those laid down in Directive 76/769, and it asked the Court, in the event of the annulment of the contested provision on the grounds of incorrect legal basis, to limit the temporal effects of such annulment. The Commission has not stated whether it has objections to any such limitation.

54. It is settled case-law that the Court may, for reasons of legal certainty, indicate which effects of a directive which has been annulled are to be maintained. [32]

55. In the present case, the annulment of the contested provision might cause serious legal uncertainty for Austria and Sweden. I therefore agree with the Netherlands Government that the Court should maintain all the legal effects of the contested provision pending the adoption of new Community measures on a correct legal basis.

30 — Directive 1999/33/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 67/548/EEC as regards the labelling of certain dangerous substances in Austria and Sweden, OJ 1999 L 199, p. 57.

31 — Cited in note 6.

32 — See Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193.

56. I would add that such new measures should of course apply to all Member States without discrimination; thus if for example derogations accorded to certain 'new' member States were to be extended, so as to enable them to continue to maintain more restrictive measures, then in principle the same option should be available to other Member States who are in the same situation. Different treatment of Member States will be lawful only if there are valid reasons for the difference. Thus although the Commission's measure should in my view be annulled on a formal ground, the outcome may also meet the Netherlands' concerns about the substance of the measure.

Conclusion

57. In the light of the foregoing observations, I am of the opinion that the Court of Justice should:

(1) declare Point 3 of the Annex to Commission Directive 1999/51/EC of 26 May 1999 adapting to technical progress for the fifth time Annex I to Council Directive 76/769/EEC on the approximation of laws, regulations, and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (tin, PCP and cadmium) void;

(2) declare that the effects of that provision shall be maintained pending the adoption of new Community measures on a correct legal basis;

(3) order the Commission to pay the costs of the Netherlands;

(4) order Sweden to bear its own costs.