OPINION OF ADVOCATE GENERAL TESAURO
delivered on 26 January 1994 *

Mr President,
Members of the Court,

1. The present action concerns the first occasion on which Article 100A(4) of the EEC Treaty, inserted by the Single European Act, has been applied.

The French Republic seeks the annulment of the Commission Decision of 2 December 1992, [1] adopted on the basis of that provision, which 'confirms' the German rules concerning the prohibition of pentachlorophenol ('PCP'), which are more restrictive than the corresponding Community harmonization measures.

2. On 17 December 1989, the Federal Republic of Germany adopted a regulation prohibiting the manufacture, marketing and use of PCP, its salts and compounds in preparations containing more than 0.01% of that substance, and of products which, as a result of being treated with such preparations, contain the substance in question in a concentration exceeding 5 mg/kg (ppm). [2] The German regulation makes it possible, subject to authorization in each case, to derogate from the prohibition laid down in it only for the manufacture and use of PCP and its compounds which are employed in the synthesis of other substances or are obtained as by-products or, finally, for use exclusively for scientific research: in such circumstances, risk-free disposal of waste materials must be guaranteed and adequate safety measures must be taken to protect workers and the environment.

On 21 March 1991, the Council adopted by a qualified majority, under Article 100A of the Treaty, Directive 91/173/EEC amending for the ninth time Directive 76/769/EEC concerning PCP. [3] That directive prohibits the placing on the market of substances and preparations containing PCP, its salts and esters in a concentration equal to or greater than 0.1% by mass. Exceptions are provided for in the case of substances and preparations intended to be used for the treatment of wood, the impregnation of fibres and heavy-duty textiles, as synthesizing and processing agents in industrial processes and for specific

* Original language: Italian.

1 — The essential details of the preamble to the decision, and its operative part, are set out in a Commission communication published in Official Journal 1989 C 334, p. 8.

2 — The text of the regulation is published in BGBl 1989 I, p. 2235.

3 — OJ 1991 L 85, p. 34.

treatments of buildings of historical and cultural interest. The exceptions in question are to be re-examined in the light of developments in knowledge and techniques not more than three years after the entry into force of the directive. The period within which the directive was to be implemented expired on 1 July 1992.

On 2 August 1991, the Federal Republic of Germany, which, together with three other countries, had voted against the adoption of the directive, communicated to the Commission, in accordance with and for the purposes of Article 100A(4), its intention to continue to apply the national provisions relating to PCP.

On 2 December 1992, as I mentioned, the Commission adopted the decision to which the present action relates, 'confirming' the German provisions.

3. Before examining the pleas in law put forward by the French Government as grounds for the annulment of the decision, I think it is appropriate to determine the precise scope of Article 100A(4). The less than crystal-clear wording of the provision raises a number of problems of interpretation, which must be dealt with by way of preliminary. It provides:

' If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this article '.

4. Two preliminary observations of a general nature seem appropriate. The possibility granted to a Member State of continuing to apply its own national rules, even though the matter has been harmonized at Community level, is intended to ensure 'reinforced' protection of certain particularly important interests and, above all, to answer the preoccupations expressed by a number of countries during the negotiations leading up to the Single Act to the effect that any harmo-

nization adopted by a majority vote might result in a diminution of the degree of protection enjoyed by such interests at national level. In other words, the provision represents a 'counterweight' to offset the relinquishment of the principle of unanimity with regard to the adoption of measures necessary for the creation and operation of the internal market, in the cases provided for in Article 100A(1). [4]

Since the provision in question creates an exception to the principles of uniform application of Community law and unity of the market, it must, like all provisions which allow derogations, be strictly interpreted, so as to ensure that it is not extended to cases other than those specifically provided for in it. Of fundamental importance, therefore, is the role which the Commission must play in ensuring the proper application of the machinery created: the Commission must see to it that the requirements and conditions for a State to be able to rely on Article 100A(4) are fulfilled and that the procedure laid down therein for its application is observed.

5. The only reasons for which a State is entitled to continue to apply national provisions after a harmonization measure has been adopted are therefore those specifically indicated in Article 36 of the Treaty, in conjunction with the requirements relating to protection of the working environment and the environment in general. It is not necessary here to consider the precise scope of the interests which a country may invoke in order to enable it to derogate from harmonization measures; indeed, for the purposes of the present case, I believe it need merely be observed that the reasons set out in Article 100A(4) are certainly fewer in number than those considered by the Court in its decisions concerning quantitative restrictions and measures having equivalent effect, starting with the *Cassis de Dijon* case. [5]

That approach is further justified by the fact that the derogations from the principle of free movement of goods upheld by those decisions relate to pre-existing national measures or sectors in which harmonization has not taken place, whereas those which may be based on the provision at issue here actually presuppose the existence of a Community harmonization measure, for the adoption of which account was taken of the 'major needs' invoked by the various Member States.

4 — See, in that connection, Flynn, 'How will Article 100A(4) work? A comparison with Article 93', in *CMLR* 1987, p. 689 et seq.; Ehlermann, 'The internal market following the Single European Act', in *CMLR* 1987, p. 361 et seq.; Gulmann, 'The Single European Act; some remarks from a Danish perspective', in *CMLR* 1987, p. 31 et seq.; Jacqué, 'Les mesures dérogatoires unilatérales dans le marché intérieur: l'article 100A(4)', *Jornades europees de Pasqua*, Patronat Català Pro Europa, p. 64 et seq.; Langeheine, 'Le rapprochement des législations nationales selon l'article 100A du Traité CEE: l'harmonisation communautaire face aux exigences de protection na ionale', *RMC* 1989, p. 347 et seq.; Mattera, 'Il mercato unico europeo', Turin, 1990, p. 168 et seq.; and Rossi, 'Il buon funzionamento del mercato comune', Milan 1990, p. 165 et seq.

5 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

6. It also appears from the decisions on Article 36 that the pursuit of one of the objectives envisaged by that provision is not in itself sufficient to endow with legality national rules restricting intra-Community trade if they do not satisfy the further condition of being necessary and not disproportionate in relation to the aim pursued. According to those decisions, therefore, Member States may take measures to ensure adequate protection of the interest which is invoked and is deserving of protection at Community level, but at the same time they must have the least possible disruptive effect on trade: the State in question must therefore demonstrate that there are no other suitable means of achieving the aim pursued in a manner less restrictive of the movement of goods. [6]

The principle of proportionality, a general principle of Community law, must also be applied in appraising the grounds relied on by a Member State as a basis for continuing to apply its own rules by way of derogation from the harmonization measures. The control entrusted to the Community institutions by Article 100A(4), on the other hand, seems necessarily to be inspired by more stringent criteria than those underlying the provisions of Article 36, in that there is no possibility of not taking account of the standards of protection already laid down by the harmonization rules. In particular, I do not think that a mere finding that the national provisions, of which 'confirmation' is requested, ensure a higher level of protection than the harmonization measure can constitute sufficient justification, in so far as it is precisely that aspect which must be justified. Otherwise, the result would be that those States which were in a minority when the Community measure was adopted would be almost automatically enabled to secure the requested derogation, which in practice would negate the principle of voting by a qualified majority provided for in Article 100A(1).

7. The formal aspects of Article 100A(4) call for only a few observations.

Where a State intends relying on the safeguard clause in Article 100A(4) it must notify to the Commission the national derogating provisions which it intends to apply. It is incumbent upon the Member State to prove that those provisions, which provide a higher standard of protection of the interests expressly indicated by the provision in question than the Community measure, are necessary and proportionate. It then falls to the Commission to confirm the provisions 'after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

8. Having regard to the exceptional character of the power granted to the Member States by Article 100A(4), I believe that the

6 — See in that connection the judgments in Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, in particular paragraph 58, Case 72/83 *Campus Oil Limited* [1984] ECR 2727, in particular paragraphs 37-46, and Case 153/78 *Commission* v *Germany* [1979] ECR 2555, in particular paragraphs 4 and 5.

logic of the system requires it to be offset by particularly incisive powers of review on the part of the Community institutions. The 'confirmation' therefore constitutes in every sense an authorization from the Commission to derogate from the harmonization measure, with the result that a refusal would place the State in question under an obligation to bring its own legislation into line with the requirements decided on by the Council. Logically, therefore, the measure in question assumes the form of a decision within the meaning of Article 189 of the Treaty, against which an action may be brought under Article 173.

It does not seem to me that that interpretation is undermined by the possibility granted to the Commission and to the Member States by the third subparagraph of Article 100A(4) of bringing the matter directly before the Court of Justice in the event of another Member State's making improper use of the powers provided for by that provision. I consider that the derogation provided for therein from the Treaty-infringement procedure under Articles 169 and 170 is applicable where a Member State, notwithstanding the Commission's refusal, continues to apply its own national legislation or 'makes improper use' of the power of derogation, for example by overstepping the limits of the authorization granted to it.

9. The foregoing considerations suggest a possible solution to a further problem, which, in any event, is of only marginal importance in the present case. I refer to the possibility that a Member State intending to rely on Article 100A(4) might apply its own legislation after the Community harmonization measure has entered into force but before the Commission decision has been taken. However, in view of the nature of that decision, I believe that that possibility must be excluded.

The opposite view, moreover, would not only conflict with the principle of legal certainty, in that doubt would arise as to the legislation applicable in a particular State, but also, and above all, it would call in question the primacy of Community law. The conflict between a Community provision and a national provision should be resolved in favour of the former; and a State which intended in any event to apply its own divergent rules before being authorized to do so would be acting unlawfully and making improper use of the powers granted to it by Article 100A(4). [7]

On the other hand, a Member State which gave notice in due time of the provisions which it intended applying could not be held liable for delay on the part of the Commission in taking the decision required of it. [8]

7 — That applies with greater force where the State fails entirely to notify to the Commission the national rules which it intends applying by way of derogation in accordance with Article 100A(4).

8 — As occurred in the present case, in which Germany had given notice to the Commission well before the time-limit for the implementation in domestic law of the harmonization measures under the directive of its intention to continue to apply the national rules, and the decision to confirm the rules was not made until several months after the expiry of the appointed period.

10. If that is the scope of Article 100A(4), I believe that we have before us all the information needed to dispose of the problems raised by the present case and to decide whether or not the action brought by the French Government is well founded.

The first issue is the admissibility of the application, which all the parties to the procedure have upheld, albeit according to reasoning which did not always coincide. [9]

I do not think any doubts can remain in that regard, it having been recognized that any measure adopted by the Commission under Article 100A(4) has the status of due authorization for the Member State to apply its own rules, by way of derogation from the harmonization measure. It is a measure which without doubt produces legal effects and can therefore be challenged under Article 173 of the Treaty. [10]

11. As regards the substance of the application, the French Government puts forward two pleas in support of its claim that the decision should be annulled. First, it alleges an infringement of Article 100A(4), in so far as the Commission confirmed the German rules despite the fact that the information forwarded by the national authorities was not in fact such as to demonstrate that the almost total prohibition of using PCP was justified by the specific situation existing in Germany. In particular, no proof was given of such a threat to the environment as to render necessary even more stringent rules than those contained in the Community legislation, which already provides a high level of protection. Nor was it proved that the derogating measures are proportional to the aim pursued, having regard to the barriers to intra-Community trade which might result from it.

Secondly, the Commission — according to the French Government — infringed Article 190 of the Treaty, in so far as the statement of the grounds of the contested decision is inadequate and does not clearly show the reasons for its adoption, in particular the fulfilment of the conditions laid down by Article 100A(4) for provisions derogating from the harmonization measure to be allowed.

12. I think it is appropriate first to analyse the merits of the second plea and to determine whether, and if so how, the Commission justified maintaining the German rules

9 — The German Government considers that the application is admissible merely because the Commission's 'confirmation' measure has all the characteristics of a decision under the fourth paragraph of Article 189 of the Treaty and therefore constitutes an act of a Community institution for the purposes of the first paragraph of Article 173; this solution would therefore be valid regardless of the reply to be given to the question whether the Commission is entitled under Article 100A(4) to adopt a formal decision.

10 — See the judgments in Case 22/70 *Commission* v *Council* [1971] ECR 263, in particular paragraphs 34-55, Case C-366/88 *France* v *Commission* [1990] ECR I-3571, in particular paragraph 8, and Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, in particular paragraphs 11-20.

in its contested decision. Of importance in that connection are paragraphs 4, 5, 8 and 9 of part II of the decision ('Assessment'), which I think it is appropriate to set out *in extenso*:

' As to the substance, the ban on pentachlorophenol and its salts and esters provided for in the German decree is broader than that provided for in Directive 91/173/EEC. The German decree provides for fewer exemptions in respect of the use of PCP than does the Community directive. It also provides for a permissible level lower than the Community level ... .

The 0.01% limit laid down in the German decree contains a higher safety margin. This limit and the exceptions provided for in the German decree are justified on grounds of major needs referred to in Article 36 or relating to protection of the environment or the working environment.

The ban on the manufacture, marketing and use of pentachlorophenol and its compounds, as provided for in the German decree, creates a barrier to trade.

However, the national provisions apply without distinction to both national and imported products. They are designed to protect public health and the environment and do not seem to be a manifestly disproportionate way of attaining these objectives. Furthermore, they do not appear to be a means of arbitrary discrimination or a disguised restriction on trade between Member States '.

13. The Court has consistently held that the fulfilment by the Community institutions of their obligation to state the reasons on which their measures are based is to be viewed in the light of the nature and content of the measures in question: the statement of grounds must disclose in a clear and unequivocal fashion the reasoning followed by the authority from which the measure emanates, in such a way as to make the persons concerned aware of the reasons for the measure and thus enable the Court to exercise its supervisory jurisdiction. [11]

As regards decisions in particular, whilst it is not generally necessary to specify the often numerous and complex matters of fact and of law which constitute their legal justification, [12] or for case-by-case reference to be

11 — See, *inter alia* the judgments in Case 158/80 *Rewe* [1981] ECR 1805, in particular paragraphs 25 and 26, Case 185/83 *Rijksuniversiteit te Groningen* [1984] ECR 3623, in particular paragraph 38, Case 250/84 *Eridania* [1986] ECR 117, in particular paragraph 37, and Case 350/88 *Delacre and Others* [1990] ECR I-395, in particular paragraph 15.

12 — See for example the judgment in Case 185/83 *Rijksuniversiteit te Groningen*, cited above, paragraph 38, and Case C-213/87 *Gemeente Amsterdam and VIA* [1990] ECR I-221, summary publication.

made to all the questions raised in the course of the adoption procedure, [13] the statement of reasons should nevertheless give the indications necessary to enable the addressees, and other persons to whom they are of direct and individual concern within the meaning of the second paragraph of Article 173, to ascertain whether they are well founded. [14]

The merits of the statement of reasons can then be appraised, as the Court has consistently held, in the light not only of its literal content but also of its context and of all the legal provisions which govern a particular matter: [15] accordingly, a summary statement of reasons may be adequate if the decision reflects consistent practice in decision-making or forms part of a uniform procedure which is periodically repeated, if the persons concerned were involved in the process of drawing it up or, again, if the decision represents the application of an earlier decision. [16] In other cases, it is incumbent upon the Community authority to give an exhaustive statement of reasons for the measure, so that that statement can fulfil the function for which it is required.

14. If the foregoing principles are applied to the present case, it seems to me to be clear that the applicant's criticism concerning the inadequacy of the statement of reasons for the contested decision must be upheld. It is not inappropriate to draw attention again to the fact that the decision in question represents the first occasion on which Article 100A(4) has been applied and that, precisely because of the novelty of the situation and of the numerous interpretative doubts arising from that provision, an adequate statement of reasons was particularly necessary, *inter alia* to help clarify the conditions surrounding the application of that provision. However, notwithstanding that need, the decision justifies the German rules merely by observing that they are intended to protect the interests provided for by Article 36 or those relating to protection of the environment or working environment; and also that the prohibition of the use of PCP and its compounds, being broader than that provided for by the Community measure, guarantees a greater margin of safety. However, if a reference to those interests is not a sufficient justification for the purposes of Article 36, that is to say in an area which has not been harmonized, *a fortiori* it is not sufficient for a situation governed by Article 100A(4), which presupposes the adoption of a Community measure. Regard also being had to the higher standard of protection of those interests already provided by the harmonization directive, clear details should therefore have been given as to the specific requirements justifying the adoption of even more restrictive measures in Germany. However, nothing is stated in that regard.

Also, as stated earlier, a mere finding that the national rules of which confirmation is sought assure a higher degree of protection than that provided by the Community is not

13 — See the judgment in Joined Cases 209-215/78 and 218/78 *van Landewyck* [1980] ECR 3125, in particular paragraph 66.

14 — See the judgment in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* [1985] ECR 809, in particular paragraph 19.

15 — See the judgments in Case 92/77 *An Bord Bainne* [1978] ECR 497, in particular paragraphs 36 and 37, and Case 185/83 *Rijksuniversiteit te Groningen*, cited above, paragraph 38.

16 — See for example the judgments in Case 185/83 *Rijksuniversiteit te Groningen*, cited above, paragraph 39; Case 102/87 *France* v *Commission* [1988] ECR 4067, in particular paragraphs 29 and 30; Case 213/87 *Gemeente Amsterdam and VIA*, cited above, and Case C-350/88 *Delacre and Others*, cited above, in particular paragraphs 15 to 19.

in itself sufficient to warrant a positive decision on the part of the Commission. Such a finding is a precondition for the application of Article 100A(4), not a justification for the legislation; on the contrary, it is an element which in its turn requires justification, and in the present case no justification appears anywhere in the contested decision.

Neither, with regard to the proportionality of the German measures in relation to the objective pursued, is any support provided for the statement that they 'do not seem to be ... manifestly disproportionate'. In that connection, I think it would have been appropriate for the decision to have specified to what extent the additional protection of health and the environment guaranteed by the German rules justifies the possibility of greater barriers to intra-Community trade; or, again, for it to have examined the consequences of the need to use other products instead of PCP.

Clarifications in that regard would have been even more appropriate in view of the fact that various considerations appearing from the documents before the Court raise doubts as to the real need for more stringent measures than those contained in the directive. If, for example, as the Commission conceded in its observations, no preparations exist on the market containing PCP in a concentration of 0.1% (the Community limit) or 0.01% (the limit fixed in Germany), what additional safeguard is provided by the German rules?

As regards, finally, the verification which the Commission is required to undertake in order to establish that the national derogating rules do not result in arbitrary discrimination or a disguised restriction on trade between Member States, the decision confines itself to slavishly repeating once more the wording of Article 100A(4), without the statements made being in any way supported by any consideration which might justify the Commission's conclusions.

15. I therefore consider that what we have here is a text-book example of an inadequate — indeed a non-existent — statement of reasons: in any event, the grounds for the contested decision do not satisfy the minimum requirements imposed by Article 190 of the Treaty in order to enable the Court to exercise its supervisory jurisdiction in respect of the measure and to enable interested parties to put forward their views regarding the reality and importance of the facts and circumstances alleged to exist.

16. It follows from the foregoing that, in view of the laconic nature of the statement of reasons, it is not possible to examine the first criticism made by the applicant. Even the information needed in order to carry out such an examination is absent.

17. I therefore suggest that the Court uphold the French Government's application and annul the Commission's decision of 2 December 1992 by reason of its defective statement of reasons. The Commission should be ordered to pay the costs and the intervener should pay its own costs.