OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 7 May 1998 *

1. The reference for a preliminary ruling made by the Bayerisches Verwaltungsgericht (Bavarian Administrative Court), Regensburg (Germany), concerns the interpretation of certain provisions of Council Directive 91/173/EEC of 21 March 1991 amending for the ninth time Directive 76/769/EEC 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 [1] (hereinafter 'the directive').

Some of the questions raised by the national court also concern the interpretation of Article 100a of the EC Treaty and, in particular, paragraph 4 thereof. They therefore afford the Court an opportunity to consider, as far as it thinks necessary, the delicate relationship which exists between Community measures aimed at creating the internal market and national derogating provisions, a subject already dealt with in an earlier case [2] which in fact concerned the same German legislation as that which falls to be examined in these proceedings.

Relevant legislation

2. On 12 December 1989, the Federal Republic of Germany adopted a regulation prohibiting the manufacture, marketing and use of pentachlorophenol (hereinafter 'PCP'), its salts and compounds, preparations containing more than 0.01% of that substance, and products which, as a result of being treated with such preparations, contain PCP in a concentration of more than 5 mg/kg (parts per million). [3]

3. On 21 March 1991, the Council adopted by a qualified majority, pursuant to Article 100a of the Treaty, a directive amending Council Directive 76/769 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 [4] (hereinafter 'the basic directive'), and thereby introduced restrictions in relation to PCP.

* Original language: Italian.

1 — OJ 1991 L 85, p. 34.

2 — Case C-41/93 *France* v *Commission* [1994] ECR I-1829.

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

4 — OJ 1976 L 262, p. 201.

More precisely, a new Point 23 was inserted in Annex I to the basic directive prohibiting 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. The same directive provides for a number of specific exceptions which exempt substances and preparations intended to be used in industrial installations for the treatment of wood, the impregnation of heavy-duty textiles, or as synthesising and/or transforming agents in industrial processes. However, the exceptions are conditional, first, on the industrial installation concerned not permitting the emission and/or discharge of PCP in quantities greater than those prescribed by existing legislation, and secondly, as regards the treatment of wood, on the fact that the treated wood is not later used inside buildings or for the manufacture of containers intended to come into contact with materials or products which might affect the health of people and/or animals. The time-limit for transposition of the directive was fixed at 1 July 1992. Member States were required to communicate to the Commission before 31 December 1991 the provisions of national law adopted in the field covered by the directive.

4. On 2 August 1991, Germany notified the Commission, pursuant to Article 100a(4), of the national provisions relating to PCP which it found it necessary to continue to apply. The Commission did not confirm those provisions until 2 December 1992. [5] In proceedings initiated by the French Republic, the Commission's confirmatory decision was annulled by the Court by judgment of 17 May 1994 [6] on the ground that it did not satisfy the obligation to state reasons laid down in Article 190 of the Treaty.

By letter dated 18 May 1994, Germany confirmed to the Commission its intention to continue to apply the German regulation relating to PCP [7] and, by decision of 14 September 1994, the Commission confirmed the provisions of that regulation in accordance with Article 100a(4). [8]

Facts of the case and questions referred for a preliminary ruling

5. The order of the national court states that, on 17 December 1992, the Trade Supervisory

5 — See the Commission's communication in OJ 1992 C 334, p. 8. It is worth mentioning that the communication was later properly classified as a decision by the Court in the judgment cited in the next footnote. See also the Opinion of Advocate General Tesauro in that regard, in particular at point 8.

6 — Case C-41/93 *France* v *Commission*, cited in footnote 2.

7 — On that occasion, Germany informed the Commission that the provisions of 12 December 1989 had been consolidated in two separate legislative instruments: the Regulation of 26 October 1993 (BGBl. I of 30 October 1993, Annex 4, p. 1782) on the production and use of PCP, and the Regulation of 14 October 1993 (BGBl. I of 20 October 1993, p. 1720) on the marketing of PCP.

8 — OJ 1994 L 316, p. 43.

Office (Gewerbeaufsichtsamt), Regensburg, issued an injunction against Mr Burstein ordering the removal of 120 000 boxes of ammunition which he was keeping in premises owned by him until they could be resold. The injunction was issued on the ground that the Trade Supervisory Office found that the PCP content of the boxes exceeded the limit of 5 mg/kg laid down by the German regulation of 1989.

Mr Burstein opposed the injunction arguing that it was incompatible with Community law and, in particular, with the directive which sets less stringent limits. The plaintiff in the national proceedings further argued that Community law took precedence and that this rendered the German PCP regulation inapplicable to the case. Consequently, the injunction was unlawful. The national legislation could only have been applied as from 14 September 1994, that being the date of the second confirmation by the Commission, since the first confirmation (given in December 1992) was annulled by the Court of Justice.

6. The national court expressed doubt as to the compatibility of the national legislation with Community law and suspended the proceedings in order to refer the following four questions to the Court for a preliminary ruling:

'1. Is Council Directive 91/173/EEC of 21 March 1991 to be interpreted as meaning that Member States are bound only in relation to the prohibition on authorising the use of pentachlorophenol and its salts and esters in concentrations equal to or greater than 0.1% by mass in substances or preparations placed on the market, whereas they may set limit values independently in respect of products which have been treated with pentachlorophenol?

2. If the answer to Question 1 is in the negative:

Does that prohibit a more stringent national provision, which was in force before the directive was issued, from being applied until the Commission takes a decision pursuant to Article 100a(4) of the EC Treaty?

3. If the answer to Question 2 is in the affirmative:

May that national provision be applied as from the time when it is confirmed by the Commission, even if the Commission's decision is subsequently challenged before the Court of Justice and declared void as a result?

Does it make a difference if the Commission's decision was annulled on formal grounds only, and subsequently reissued? Does that later decision by the Commission have retroactive effect?

4. If the answer to Question 3 is in the negative:

May the directive be applied in the Member States as directly effective law until such time as a final determination has been made as to the applicability of the national provision?'

7. In referring these questions for a preliminary ruling, what the national court is essentially asking the Court is, first and foremost, for clarification of the scope of the directive (Question 1). In particular, the Court is asked to establish whether the limit set by the directive as a harmonisation measure applies only to PCP, its salts and esters, inasmuch as they are substances and preparations within the meaning of the basic directive, or whether that limit also applies to products treated with such substances or preparations.

Should the Court find that the directive does not apply to products treated with PCP, it would follow that, with respect to such products, Germany was free to adopt different, even more stringent, laws to protect the environment, since a decision to do so, falling outside the field of harmonisation required by the Community measure, would come within the discretion of the national legislative body. If so, there would be no need to answer the remaining questions, which concern the system of derogations operated by the German legislature in pursuance of Article 100a(4) and the direct effect of the directive's provisions.

8. If, however, products treated with PCP were also to fall within the scope of the directive, then the more restrictive national measures would apply in the present case within the limits of the derogation from the harmonisation measure provided for in Article 100a(4). In answering the remaining questions of interpretation formulated by the national court (Questions 2, 3 and 4), the Court would then again [9] be asked to rule on the requirements and effects of Article 100a(4).

9 — As mentioned earlier, the Court interpreted Article 100a(4) for the first time in *France* v *Commission*, cited at footnote 2.

The first question referred for a preliminary ruling

9. In order to answer the first question, therefore, it is necessary to define the scope *ratione materiae* of the directive. More precisely, the Court is asked to clarify whether or not the harmonisation measure relating to PCP, its salts and esters, according to which they 'shall not be used in a concentration equal to or greater than 0.1% by mass in substances and preparations placed on the market' applies also to products treated with PCP.

10. First, it is appropriate to observe that the directive in question was adopted as an amendment to the basic directive of 1976, the general objective of which was the approximation of national laws on the marketing and use of dangerous substances and preparations. Article 1(1) of the basic directive states that its purpose is 'restricting the marketing and use in the Member States of the Community, of the dangerous substances and preparations listed in the Annex'. Article 1(3) offers a legal definition of substances and preparations, defining substances as 'chemical elements and their compounds as they occur in the natural state or as produced by industry' and preparations as 'mixtures or solutions composed of two or more substances'. Annex I to the basic directive contains a list of the substances, groups of substances and preparations regulated by the directive and sets out the restrictions to which they are subject as regards use or marketing.

11. The Annex itself has been the subject of frequent amendment over the years and this has widened the scope of the measure harmonising substances and preparations which are considered dangerous and which are therefore subject to restrictions.

The directive inserted into the Annex Point 23 which relates to 'pentachlorophenol (CAS No 87-86-5) and its salts and esters'. These chemical compounds, as stated earlier, 'shall not be used in a concentration equal to or greater than 0.1% by mass in substances and preparations placed on the market'. There is a system of exceptions to the prohibition, which operate on condition that the substances and preparations containing PCP are intended for use in industrial installations not permitting the emission and/or discharge of PCP in quantities greater than that prescribed by existing legislation and that, in any event, they are used only in certain processes.

12. In my view, the literal wording of the regulation and its underlying purpose preclude its application to products treated with PCP.

In the absence of evidence to the contrary, the restrictions imposed by the directive must only be applied to pollutants which are 'substances' and 'preparations' as defined by the basic directive. It follows from this

premiss that products treated with PCP, that is, products to which PCP has in some way been *added* in the course of manufacture, do not fall within those terms. As mentioned earlier, a 'substance' is composed of a chemical element or compound of several chemical elements, whether it is something simple occurring naturally, or the result of a synthesising process. Finished goods, in the ordinary sense of the term, cannot be compared to substances in this sense. A box designed to contain ammunition must similarly be excluded. As to the directive's definition of a preparation, however broad it may be, as indeed the plaintiff observed in the national proceedings, it must always relate to an admixture (a mixture or solution) of two or more chemical elements (substances). Consequently, only an obvious and unacceptable distortion of meaning can bring products, in the sense described above, within it.

13. Indeed, as the plaintiff observed, in specifying the exceptions to the prohibition on the use or placing on the market of PCP, the Annex to the directive mentions certain products (in particular wood) and prohibits certain uses of them when they have been treated with the substance in question, but this is not enough to extend the scope of the directive to products as such or even to wood, pure and simple, even though specific reference is made to it. Generally speaking, even the system of exceptions provided for at Point 23 of the Annex is really concerned with the use of substances and preparations within industrial installations. In particular, the regulation permits their use only in certain production processes (in the treatment of wood, the impregnation of textiles, etc.) and only on condition that the installation does not permit the emission or discharge of PCP in quantities greater than that prescribed by existing legislation. Further, specifically in connection with the treatment of wood, the directive prohibits the use of wood which has been treated with PCP in a concentration greater than that prescribed where it is to be used for certain purposes which are considered especially sensitive.

Another argument which militates against the directive applying to wood treated with PCP or its compounds derives from the wording of the fourth recital in the preamble, which states that 'the Commission will be developing a coordinated Community strategy regarding the placing on the market and use of chemical products used for the preservation of wood'. With the directive, the Community legislature meant to take action only in relation to specific methods of using wood where the risks to the health of people or animals were more obvious, and left for future legislation the adoption of general rules on chemical products, including PCP, used in the preservation of wood.

As is generally the case, the underlying purpose of the system of exceptions described above reflects the need to permit the use of PCP in certain industrial processes whilst at the same time protecting the environment, and in particular the aquatic environment into

which waste from production processes usually flows, from the presence of preparations and substances, as generally defined, which contain PCP. The prohibition on certain specified uses of treated wood does not alter the purpose of the rules as a whole, which remains that of uniformly regulating the use and marketing of substances and preparations containing PCP, its salts and esters.

14. That view finds confirmation, first and foremost, in another provision contained within the same Annex which also refers to the system of exceptions and therefore to the treatment of wood as well. As a general measure, it is provided (at Point 23, fourth paragraph, letter (a)) that PCP used alone or as a component of preparations employed within the framework of the above exceptions [10] must have a total hexachlorodibenzoparadioxin content of less than 4 parts per million. The provision relates exclusively to PCP, albeit when it is employed by way of exception and therefore only in relation to certain specified uses, and does not extend to products to which PCP is applied.

15. In support of his argument that the directive in fact relates both to PCP and to products treated with PCP, the plaintiff in the national proceedings observed that in certain other directives amending the basic directive, generally speaking, products containing the dangerous substance in question are also expressly regulated.

The following directives are of particular significance here: Council Directive 83/478/EEC of 19 September 1983 amending the basic directive for the fifth time (asbestos) [11] and regulating the marketing and use not only of asbestos fibre but also of 'products containing it'; [12] Council Directive 91/338/EEC of 18 June 1991 amending the basic directive for the 10th time [13] and relating to cadmium and its compounds, which prohibits the marketing of finished goods and components of goods manufactured from the substances or preparations listed in the directive and dyed with cadmium, where their cadmium content exceeds a certain percentage; Council Directive 91/339/EEC of 18 June 1991 amending the basic directive for the 11th time [14] and relating to a monomethyl designated by the commercial name Ugilec 141 or Ugilec 121, both the marketing and use of which, even in relation to products which contain it, are prohibited.

10 — In the Italian version of the directive, the word 'regole' (rules) appears instead of 'deroghe' (derogations). As is clear from a reading of the text and from a perusal of the other language versions of the directive, this is simply a misprint.

11 — OJ 1983 L 263, p. 33.

12 — Identical considerations apply, again in relation to asbestos fibre, to Council Directive 85/610/EEC of 20 December 1985 (OJ 1985 L 375, p. 1).

13 — OJ 1991 L 186, p. 59.

14 — OJ 1991 L 186, p. 64.

In all the above cases, Community law has imposed an express prohibition or restriction upon the use and marketing not only of the substance and preparations within the meaning of the definitions given in the basic directive, but also of the products containing the substance or preparations of it. This is evidence of a different and broader harmonisation objective on the part of the Community legislature which sought, in these particular matters, to unify the conditions of use not only of the dangerous substance but also of products different from the substance itself when it figures in their composition. In the case of the directive under consideration, however, Community law makes no reference to the harmonisation of products but merely prescribes methods of using the substance. It must follow from this that the Member States retain complete authority to regulate the characteristics of production, use and marketing of the products, albeit, of course, within the limits set by the directive. The fact that Member States may adopt more stringent laws with regard to matters beyond the scope of the directive does not mean that national legal systems need not comply with other provisions of Community law. In particular, the German regulation relating to products treated with PCP may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States within the meaning of Article 36 of the Treaty.

16. I am not, however, of the opinion that the exclusion of the German regulation from the directive's scope can be inferred from the last recital in its preamble which states that 'currently Community legislation concerning the possible adoption by Member States of more stringent restrictions on the use of the substances and preparations in question at the workplace remains unaffected by this directive'. Whilst, of course, this is a matter for the national court to establish, it does not appear that the German regulation relating to PCP has the specific goal of protecting health at the workplace, or indeed that the place where the plaintiff kept the boxes of ammunition could be called a 'workplace'. [15]

17. I therefore suggest that the answer to Question 1 referred by the national court should be that the directive is to be interpreted as meaning that Member States may set limit values independently in respect of products which have been treated with PCP, as they are bound only in relation to substances and preparations placed on the market. Of course, if the Court is minded to accept this suggested interpretation of the directive, there will be no need to answer the remaining questions referred by the national court in the alternative.

15 — On this point, the order for reference merely states that the boxes kept by Mr Burstein were stored 'on his premises for resale'.

The second question referred for a preliminary ruling

18. Should, however, the Court wish to adopt a different interpretation of the directive from that suggested above, and find that the directive is indeed binding on Member States also in relation to products which have been treated with PCP, it will be necessary to assess the compatibility of the German regulation with Article 100a(4) of the Treaty. That eventuality calls for the following observations.

19. It is well known that Article 100a was inserted into the E(E)C Treaty by the Single European Act as an instrument designed to assist in achieving the aim of establishing the internal market, as defined in Article 7a. In particular, Article 100a helped overcome barriers to trade arising from disparities between the laws, regulations and administrative provisions of the Member States. Under Article 100a, which derogates from Article 100, the Council may, in accordance with the co-decision procedure set out in Article 189b, reach decisions by a qualified majority, thereby ensuring greater efficiency and democracy in the decision-making process.

The system whereby decisions are taken by qualified majority, which can entail the sacrifice of national interests deserving of protection, is in some way compensated for by a safeguard clause. Under Article 100a(4), if, after the adoption of a harmonisation measure, a Member State deems it necessary to apply national provisions justified by the major (non-economic) requirements referred to in Article 36, or relating to protection of the environment or the working environment, it may do so only if it follows a given procedure and subject to a dual system of supervision, both administrative (entrusted to the Commission) and, where appropriate, judicial.

20. As far as the procedure is concerned, the Member State is required to notify the Commission of the provisions it considers necessary to apply. As to supervision, the Commission is required to verify that the provisions in question are not a means of arbitrary discrimination or a disguised restriction on trade between Member States, and accordingly to confirm them. If a Member State makes 'improper use' of the power of derogation provided for in Article 100a(4), the Commission or any other Member State may bring the alleged infringement directly before the Court, by way of derogation from the procedure laid down in Articles 169 and 170 of the Treaty. [16]

16 — Article 100a(5) also provides for the insertion of future safeguard clauses in the actual text of the harmonisation measure, so as to permit Member States to adopt 'provisional measures subject to a Community control procedure'. This provision is, in any event, irrelevant in the present case, as the directive contains no specific safeguard clause.

21. Ambiguous drafting has made Article 100a(4) difficult to comprehend. Academic writers are at variance and the Court has so far only once had to interpret that provision and on that occasion only certain aspects of it. [17]

The problem raised by the national court in its second question is that of establishing whether national provisions which do not conform to the directive and which the Member State intends to apply once it has notified them to the Commission are directly applicable in national law, or whether their applicability is subject to confirmation by the Commission.

22. To answer the question submitted by the national court, reference must first be made to the purpose underlying Article 100a which is to give the Community institutions a means, one which has proved to be fundamental, for 'the achievement of the objectives set out in Article 7a' and, therefore, of establishing the internal market, with all the freedoms which that implies. Any measure based upon that provision is thus essentially aimed at harmonising conditions within the internal market of the Community, even if it may, indirectly or incidentally, have repercussions in areas such as the environment which are regulated by specific Community policies. [18]

In this context, the 'counterweight' offered by Article 100a(4) must necessarily be interpreted narrowly and must only be allowed to operate under strict conditions, as indeed is the case with all provisions which introduce exceptions to the fundamental principles underlying the process of Community integration. [19] It follows not only that the provision may not be extended to cases other than those specifically provided for, but also that the role the Commission is asked to play in ensuring that the requisite grounds exist for a Member State to invoke the safeguard clause is enhanced.

23. In the face of a harmonisation measure aimed at the establishment or operation of the internal market, the principle of the uniform application of Community law must be

17 — See the judgment in *France* v *Commission*, cited in footnote 2.

18 — See Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 17, and Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 19. The situation is different when the measure is based exclusively upon Article 100a simply for the purpose of complying with the procedural requirements imposed by that provision, whilst from the point of view of the objectives pursued it appears to be based on two distinct enabling provisions: Article 100a and Article 130s. See Case C-300/89 *Commission* v *Council* [1991] ECR I-2867.

19 — In the case of the derogations relating to the free movement of goods provided for in Article 36, the Court has frequently emphasised the need for a strict interpretation: see Case 46/76 *Bauhuis* [1977] ECR 5, paragraphs 5 to 12, and Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraphs 21 and 22. The same considerations apply to restrictions on the free movement of persons: see, generally, with reference to the restrictions contained in Article 55 of the Treaty on freedom of establishment, Case 2/74 *Reyners* [1974] ECR 631, paragraphs 42 to 44.

upheld. Consequently, Member States cannot be allowed to derogate from that measure unilaterally, that is to say, in a way which does not comply with the supervision procedure provided for by Community law. It follows that the decision the Commission is asked to make, after 'verifying' and thus evaluating the national derogations, takes on the character of an authorising provision of a substantive nature, that is to say, a *conditio sine qua non* for the applicability of national provisions which are more restrictive than the Community measure.

Apart from those considerations, which are based on the purpose of the provision and on a comparison of the opposing interests which the rule is designed to protect, there are other considerations of a systematic or formal nature which also support the proposed solution. Title V of Part Three of the Treaty contains, in addition to the provisions of the Chapter on the approximation of laws, the rules of competition, including rules on the grant of aid by Member States. Those rules too are aimed at the establishment of an internal market in which the factors of production operate in similar or at least comparable situations. They include Article 93(3), which establishes, for any newly introduced grant of aid, a system similar to that set out in Article 100a(4): the Member State is required to communicate the aid plan to the Commission so as to enable the latter to submit its comments. If the grant of aid is not compatible, the Commission is required to initiate the procedure under Article 93(2), but it is expressly provided that 'the Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'. Since, here too, as in the case of harmonisation measures, the interest deserving of protection is the unity of the market and undistorted conditions of competition, it is reasonable, in keeping with the view expressed by academic writers, to interpret Article 100a(4) and the safeguard clause procedure in the same way.

Further, whilst the provision does not expressly state that the national provisions notified to the Commission may not be applied until the Commission reaches its decision, Article 100a(4) imposes upon Member States an obligation to 'notify' and upon the Commission an obligation to 'verify' that the provisions so notified do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. 'Confirmation' of the national provisions is dependent upon the successful outcome of such verification.

The obligation upon the Commission to verify the national provisions necessarily implies a duty to evaluate their likely effect upon the functioning of the internal market so as to enable them to be applied only where primary objectives of the integration process are not adversely affected. For that reason, I find that the way in which Article 100a(4) is formulated is difficult to reconcile with the attribution of a purely declaratory value to the Commission's confirmatory decision. If that argument were accepted, operation of the safeguard clause would be left to the Member

State alone which would therefore be able to apply its own national laws once it had notified the Commission.

24. Outside the internal market where the requirements of harmonisation for the purpose of promoting the free movement of goods, persons, services and capital must prevail, any safeguard clauses laid down may operate in a different fashion, and this implicitly confirms the need for a stricter interpretation of Article 100a(4).

Such is the case with any protective measures the Council might adopt, in accordance with Article 130s of the Treaty, to achieve environmental policy objectives. Indeed, in such a case, under Article 130t, any harmonisation measures cannot prevent Member States from 'maintaining or introducing more stringent protective measures'. Member States are merely obliged to notify the Commission of any such measures, which must nevertheless be compatible with the Treaty, no further action on the part of the Community institutions being envisaged. The difference in the procedure, and the greater power accorded to Member States as a result, is justified by the consideration that any more stringent measures adopted by the Member State are aligned with, rather than constituting a derogation from, the objective of the relevant Community provision which, in this case, is not the creation of the internal market but the protection of the environment.

It should not be forgotten, moreover, that because of their typically 'transversal' nature, environmental protection considerations are not unconnected with other Community policies and, in particular, other initiatives aimed at achieving the internal market. Article 100a(3) provides that, in formulating proposals for harmonisation measures, the Commission must, as regards the environment, [20] aim at 'a high level of protection'. At least in the case of environmental protection, therefore, the requirements which a Member State may rely upon if it wishes to avail itself of Article 100a(4) should already have been given ample consideration when the harmonisation measure was being drawn up. There appears to be all the more reason, therefore, for the Commission rigorously to verify in advance the reasons adduced by the Member State to justify the derogating measure.

25. In its judgment in *France* v *Commission*, the Court has already interpreted Article 100a(4) as meaning that national laws may not be applied until they have been confirmed by the Commission. In that judgment, the Court stated that 'a Member State is not ... authorised to apply national provisions notified by it until after it has obtained a decision from the Commission confirming them', precisely in order to prevent the work of

20 — As in the case of health, safety and consumer protection as well.

harmonising national legislation and thus the creation of the internal market from being unilaterally frustrated. [21]

26. In that case, however, the Court did not address an aspect which must be dealt with here. By this I mean the question whether the prohibition on applying the national, more stringent, provision continues to be an acceptable solution even when, as in the present case, there is unreasonable delay on the part of the Commission, and in any event beyond the time-limit for transposition of the directive, in adopting its confirmatory decision. [22]

I am of the opinion that, as regards that particular aspect as well, the solution must be the same.

Clearly, the system can operate normally where difficulties are not anticipated. As soon as possible after adopting the directive, the Member State must give notice of the provisions it intends to continue to apply. It is then for the Commission promptly to verify those national provisions. Article 100a(4) sets no actual time-limit by which the Commission must approve or reject the national measure concerned. [23] However, the Commission's duty to act promptly so as to avoid any possible uncertainty in identifying which rules are applicable may be deduced from the general duty to cooperate which is imposed, also on the institutions in relation to the Member States, by Article 5 of the Treaty. [24] To be more specific, the deadline for the Commission to fulfil its obligation to evaluate the provisions notified to it could reasonably be identified as the time-limit for transposition of the directive in question. This would prevent uncertainty in that, up until that time, the Member State will have lawfully applied its own national provisions. [25] I believe that is an acceptable solution, particularly if the Member State has, as in the present case, given prompt notice of its own derogating provisions.

21 — *France* v *Commission*, cited in footnote 2, especially paragraphs 29 and 30.

22 — It should be borne in mind that whilst notice was given on 2 August 1991, the Commission did not confirm the German provisions until 2 December 1992, whereas the time-limit for transposition of the directive into national law expired on 1 July 1992.

23 — An express provision will in fact reflect the amendments introduced by the Treaty of Amsterdam. The new text of Article 100a (Article 95 under the new numbering system) provides, amongst many other innovations, that the Commission must approve or reject the national provisions notified to it within six months of notification. In the absence of a decision, the national provisions are deemed to be approved.

24 — The fact that Article 5 imposes duties of sincere cooperation also on the institutions for the benefit of the Member States has already been confirmed several times in the case-law: Case C-2/88 Imm. *Zwartveld* [1990] ECR I-3365, Case C-349/93 *Commission* v *Italy* [1995] ECR I-343, paragraph 13, and Case T-16/90 *Panagiotopoulou* v *Parliament* [1992] ECR II-89, paragraph 51. The same principle of sincere cooperation largely informs the ruling that a reasonable period of two months can be deduced from Article 93(3), within which the Commission must decide upon the compatibility of the aid: Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 11.

25 — It is established case-law that no complaint may be made against a Member State for not implementing a directive before expiry of the time-limit set therein: Case 148/78 *Ratti* [1979] ECR 1629, paragraphs 41 to 45. It is also worth remembering that, recently, the Court reconsidered the legal position of the Member State during the period of time allowed for transposition, linking it to a kind of standstill clause, in the sense that, during that time, it should in any event refrain from adopting provisions which might seriously jeopardise the result prescribed by the directive: Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraphs 45 to 49.

27. Turning to the situation where the system operates imperfectly because of the Commission's failure to comply with the time-limit, I believe the solution lies in the possibility for a Member State which has promptly given notice to apply to the Court for a declaration, in the form referred to in Article 175 of the Treaty, that the Commission has unlawfully failed to act. The Commission would find itself at fault for failing to take a decision in breach of the duty under Article 5 in conjunction with Article 100a(4) of the Treaty. If a Member State which is required not to apply its national legislation anticipates the risk of serious harm being caused to the interests which Article 100a(4) enables it to protect, it may, pending an application to establish the unlawful failure to act on the part of the Commission, request as a matter of urgency the adoption of such interim measures as may be required to protect those interests.

The system does, therefore, ensure adequate protection of the need for the uniform application of Community law, without, however, sacrificing the interests of Member States which, seeking to avail themselves of the safeguard clause provided for by Article 100a(4), must not find themselves irretrievably burdened with the adverse consequences of wrongful delay on the part of the Commission. [26]

26 — There is thus proposed here a solution to the problem already identified by Advocate General Tesauro in the Opinion given by him on 26 January 1994 in *France* v *Commission*, cited above. See, in particular, the end of point 9 and footnote 8.

The third question referred for a preliminary ruling

28. The third question referred by the national court is in three distinct parts which, for the sake of clarity, will be examined separately.

In the first part of the question, the national court is essentially asking whether the national provision can apply from the time the Commission takes its confirmatory decision, even if that decision is subsequently challenged before the Court and annulled by it.

In the present case, the national legislation was lawfully applied between 2 December 1992 (the date of the Commission's authorising decision) and 17 May 1994 (the date of the Court's judgment annulling it). France's challenge to the decision, which did not of itself cause the contested decision to be suspended, [27] is irrelevant to the solution of the problem. The judgment of the Court annulling the decision, on the basis of the general provision set out in Article 174 of the Treaty, has retroactive effect, unless the Court specifies which effects of the measure annulled are to be considered definitive.

27 — See Article 185 of the Treaty. France did not seek the suspension of the contested decision.

The judgment of 17 May 1994, which imposes no limitation on the effects of annulment, [28] reversed the first confirmatory decision *ab initio*, that is, from 2 December 1992. It follows that the national provisions which were confirmed must be deemed inapplicable until the subsequent confirmatory decision taken in September 1994. Of course, this does not apply to situations resolved during the period in which the first decision was valid.

29. In the second part of the question, the national court asks whether the fact that the decision was annulled 'on formal grounds only' has any bearing upon its effects. The Commission's decision of 2 December 1992, it will be remembered, was annulled for failure to state reasons, as required by Article 190 of the Treaty, since it did not specify precisely the reasons of fact and law on account of which the conditions laid down in Article 100a(4) were to be regarded as fulfilled in the case in point. [29]

The fact that a decision is annulled because it has been vitiated by a breach of essential procedural requirements [30] does not in any way alter the effects of annulment, given that Article 174 makes no distinctions within or exception to the rules on annulment *ab initio*, save as provided for in the second paragraph. [31] Further, the requirement to state reasons, far from being a mere technical formality, is a guarantee both of the Court's power of judicial review and of the right of the Member States and of the nationals concerned to know the conditions under which the Community institutions have applied the Treaty.

30. In the third part of the question, the national court seeks to determine whether the second confirmatory decision, taken by the Commission on 14 September 1994, has retroactive effect such as to render the national derogating provisions applicable as from the date of the first decision.

The principle of legal certainty, which is a general principle of Community law, excludes, for the most part, retroactive application of Community legislation, except where the objective to be achieved requires it and then only on condition that the legitimate expecta-

28 — The second paragraph of Article 174 of the Treaty confers power upon the Court to limit in time the effects of its annulling judgments only in relation to regulations. For reasons of legal certainty, however, the Court has been led to extend the application of this rule to cases involving the annulment of directives (see Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193, paragraphs 23 to 27) and decisions addressed to all the Member States (see Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689). The same considerations might entail the application of the rule to cases involving the annulment of decisions addressed to a single Member State.

29 — See paragraph 35 of the judgment in *France* v *Commission*, cited in footnote 2.

30 — Failure to state reasons represents, in the classification of defects open to criticism under the second paragraph of Article 173, a typical case of infringement of essential procedural requirements.

31 — At most, want of form as a ground for annulment might perhaps have been considered by the Court as a reason to limit in time the effects of its judgment.

tions of the parties concerned are respected. [32] In the present case, once it has been found that the national derogating provisions do not apply in the absence of a confirmatory decision or indeed after annulment of such a decision, to render the more stringent measures applicable retroactively would, in effect, be tantamount to undermining the legitimate expectations of those who have acted in the belief that the rules in force were the more liberal ones deriving from Community law. [33]

Moreover, a decision having retroactive effect must set out in the grounds upon which it is based, or must at least suggest with sufficient clarity, the reasons which, by way of exception, justify the intention to give it retroactive effect. [34] The confirmatory decision of 14 September 1994, whilst taking formal note of the annulment of the previous decision, is silent as to whether it has retroactive effect, nor does it contain any reference to the need to apply the national provisions to situations which arose in the past. It follows that the decision is not retroactive and that, consequently, the national provisions confirmed apply only to future situations.

32 — See Case 98/78 *Racke* [1979] ECR 69, paragraph 20.

33 — On the other hand, a person who has acted in compliance with the more stringent national provisions would be able to market or use the substance or preparations in any event, given that the PCP content would be within the limits permitted by the directive.

34 — See the order in Case 1/84 R *Ilford* v *Commission* [1984] ECR 423, paragraph 19.

The fourth question referred for a preliminary ruling

31. In its fourth question, the national court seeks to determine whether the directive is to be interpreted as being directly applicable law binding upon a Member State until a decision is taken by the Commission confirming the national provision in question. The national court is essentially asking whether the directive exhibits the characteristic features of direct effect, with the result that its provisions can be relied upon in proceedings before the national court.

It is well known that, in the absence of harmonising rules after the expiry of the time-limit for implementing the directive in question, individuals may rely on its provisions on condition that their prescriptive content is sufficiently clear and precise and, further, not such as to require the adoption of further measures. [35] In the present case, Annex I to Directive 76/769, as amended by Directive 91/173, provides at Point 23 that pentachlorophenol, its salts and esters, 'shall not be used in a concentration equal to or greater than 0.1% by mass in substances or preparations placed on the market'. The prohibition is stated to be inapplicable where the substance

35 — There is consistent case-law on this point: Case 8/81 *Becker* [1982] ECR 53; Joined Cases 231/87 and 129/88 *Carpaneto Piacentino* [1989] ECR 3233; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357; Case C-236/92 *Regione Lombardia* [1994] ECR I-483.

and preparations are intended for use in industrial installations not permitting the emission and/or discharge of PCP in quantities greater than that prescribed by existing legislation, provided, however, that they are used only in certain specifically identified processes.

When faced with a rule of that kind, I believe its clear and unconditional nature is indisputable: the rule permits the use of the substance and preparations in question on condition that PCP, its salts and esters, are not present in concentrations of 0.1% or more by mass. Individuals may, therefore, avail themselves of Community law which confers upon them the right to carry on production under less restrictive conditions than those laid down by national law. [36] However, there is a further aspect to the question of the direct effect of the directive, since the Court is being asked to clarify whether Community law also imposes an obligation upon individuals to carry on production within the tolerance threshold for PCP set by the directive. The national court is essentially asking whether any obligation can devolve upon individuals under a directive which is clear, precise and unconditional, but which has not been implemented in due time.

We have seen that, in the case-law of the Court, the theory of the direct effect of directives is based not so much upon the intrinsic qualities of Community law itself as on a response to the failure on the part of a Member State to transpose a directive correctly and in due time, as it is required to do. Thus, on the basis of the actual wording of Article 189, which expressly provides that directives are binding only upon Member States, the Court has affirmed that directives cannot create obligations for individuals in the absence of implementing measures. [37] It follows that the State cannot subject the legal position of the individual to constraints by deriving obligations from a provision of Community law which it has itself failed to transpose into national law. [38]

36 — Direct effect can only be relied upon against a Member State which has failed properly and promptly to implement a directive, or against organisations or bodies which are subject to the authority or control of the State or which have powers beyond those derived from the rules which apply to relations between individuals. It cannot be invoked against individuals. This is known as vertical direct effect (Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 18; Case C-91/92 *Faccini Dori* [1994] ECR I-3325). In the present case, the plaintiff invoked before the national court the provisions of the directive as against a German public authority and thus clearly relied upon the direct effect of Community law in a vertical relationship.

37 — Case 152/84 *Marshall* [1986] ECR 723, and, in particular, Case 14/86 *Pretore di Salò* [1987] ECR 2545 in which it was held that 'a directive which has not been transposed into the internal legal order of a Member State may not therefore give rise to obligations on individuals either in regard to other individuals or, *a fortiori*, in regard to the State itself' (paragraph 19).

38 — That conclusion is indisputable on the basis of the existing trend in the case-law on the matter. However, I admit to sharing the misgivings which the theory of the direct effect of directives arouses in numerous academic writers, especially in view of the fact that the distinction between vertical and horizontal direct effect can lead to different treatment.

Conclusion

32. On the basis of the foregoing, I therefore suggest that the Court answer the questions referred by the Bayerisches Verwaltungsgericht, Regensburg, as follows:

(1) Council Directive 91/173/EEC of 21 March 1991 amending for the ninth time Directive 76/769/EEC 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 is to be interpreted as meaning that Member States are bound only in relation to the prohibition on authorising the use of pentachlorophenol and its salts and esters in concentrations equal to or greater than 0.1% by mass in substances or preparations placed on the market, whereas they may set limit values independently in respect of products which have been treated with pentachlorophenol.

If the Court adopts a different solution from that suggested at (1) above, the remaining questions should be answered as follows:

(2) Directive 91/173 precludes a more stringent national provision, which was in force before the directive was issued, from being applied until the Commission takes a decision pursuant to Article 100a(4) of the Treaty.

(3) The national provision in question may be applied only from the time when it is confirmed by the Commission, but if such confirmation is annulled, the retroactive effect of annulment prevents application of that legislation until a new confirmatory decision is taken. In that connection, the fact that the Commission's decision was annulled for failure to state reasons is irrelevant. The new Commission decision does not have retroactive effect.

(4) Directive 91/173 may be relied upon by an individual in a dispute with the public authorities in order to prevent the application of national legislation. The directive may not impose any obligations upon individuals.