COMMISSION

COMMISSION DECISION

of 26 February 1996

concerning the prohibition of pentachlorophenol (PCP) notified by Denmark

(Only the Danish text is authentic)

(Text with EEA relevance)

(96/211/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 100a (4) thereof,

Whereas:

I. FACTS

(1) **Pentachlorophenol**

Pentachlorophenol is a chemical substance obtained by a synthetic process which is recognized as being dangerous. PCP is dangerous for both man and the environment. Its classification and labelling, harmonized at Community level in accordance with Council Directive 67/548/EEC [1], as last amended for the seventh time by Directive 92/32/EEC [2], relating to the classification, packaging and labelling of dangerous substances, are as follows:

— classified as a Category 3 carcinogen, i.e. a substance of concern to man because of a possible carcinogenic effect which, however, cannot be satisfactorily assessed given the information is available. Evidence is available from appropriate studies on animals but it is not sufficient to place the substance in the second category of carcinogens. Such a substance is labelled with the risk phrase 'R 40: Possible risk of irreversible effects',

— classified a very toxic by inhalation and labelled 'R 26: Very toxic by inhalation',

— classified as toxic in contact with skin and if swallowed and labelled 'R 24/25: Toxic in contact with skin and if swallowed',

— classified as irritating to eyes, the respiratory system and skin and labelled 'R 36/37/38: Irritating to eyes, respiratory system and skin',

— classified as dangerous for the environment and labelled 'R 50: Very toxic to aquatic organisms',

— classified as dangerous for the environment and labelled 'R 53: May cause long-term adverse effects in the aquatic environment'.

On the basis of the three criteria of toxicity, persitence and bioaccumulation, PCP is included in List I of Council Directive 74/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community [3], as amended by Directive 91/692/EEC [4].

With the aim of eliminating pollution of the various parts of the aquatic environment which could be affected by discharges of PCP, limit values were fixed by Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC [5], as last amended by Directive 91/692/EEC.

[1] OJ No 196, 16. 8. 1967, p. 1.
[2] OJ No L 154, 5. 6. 1992, p. 1.
[3] OJ No L 129, 18. 5. 1976, p. 23.
[4] OJ No L 377, 31. 12. 1991, p. 48.
[5] OJ No L 181, 4. 7. 1986, p. 16.

Pentachlorophenol contains dangerous impurities including up to 0,1 % of polychlorodibenzodioxins and 1 to 5 % of polychlorinated phenoxyphenols. PCP alone and these two impurities are responsible for the daily emission of dioxins into the environment. Dioxins are emitted when products treated with PCP are exposed to the sun and when they are incinerated at the end of their useful life. PCP in sewage sludge is also a source of dioxins.

PCP is used as:

— a wood preservative (fungicide and anti-blueing agent),

— an agent for the impregnation of industrial textiles (fungicide),

— bactericide in tanning and the paper pulp industry,

— a molluscicide in the treatment of industrial water, in particular cooling water,

and sometimes as

— a sterilizing agent.

Because of its toxicity, PCP has been made subject to various restrictions in more than thirty countries.

II. PROCEDURE

(2) Directive 91/173/EEC

Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (1), as last amended by Directive 94/60/EEC (2), provides for the prohibition and restriction of the use of certain dangerous substances and preparations. Directive 76/769/EEC is regularly amended to add to its Annex new substances which are dangerous for man and the environment.

Council Directive 91/173/EEC, which amends Directive 76/769/EEC (3) for the ninth time, harmonizes completely the marketing of substances containing PCP.

Directive 91/173/EEC prohibits the marketing and use of pentachlorophenol and its salts and esters in a concentration equal to or greater than 0,1 % by mass in substances and preparations. However, four exceptions are given. The use of pentachlorophenol and its compounds in industrial installations is permitted:

(a) for wood preservation;

(b) for the impregnation of fibres and heavy-duty textiles;

(c) as a synthesizing and/or processing agent in industrial processes;

(d) for the *in situ* treatment of buildings of cultural and historic interest (subject to individual authorization by the Member State concerned).

In any event PCP used as such or as a constituent of preparations used on the basis of the exceptions referred to above must have a total hexachlorodibenzoparadioxin (H_6CDD) content of less than four parts per million.

These exceptions have to be reconsidered in the light of changes in knowledge and technology no later than three years after the implementation of the Directive.

Given the dangers of PCP for human health and the environment, the Commission asked its departments to prepare a report assessing the risks of PCP and leading, if necessary, to legislative proposals in this area.

The Directive was adopted by the Council on 21 March 1991, by qualified majority, under Article 100a of the Treaty. Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 1992 at the latest.

(3) Measures notified

The Danish Permanent Representation informed the Commission by letters of 7 January 1992, 13 March 1992 and 30 June 1992 that Council Directive 91/173/EEC had been transposed into Danish law by the following Orders of the Ministry for the Environment:

— No 582 of 28 November 1977 limiting dioxins in pentachlorophenol, etc (4),

— No 454 of 16 June 1991 restricting the sale and use of certain dangerous chemical substances and products (5) for specific purposes, and

— No 446 of 7 June 1992 amending the Order restricting the sale and use of certain dangerous chemical substances and products for specific purposes (6).

(1) OJ No L 262, 27. 9. 1976, p. 201.
(2) OJ No L 365, 31. 12. 1994, p. 1.
(3) OJ No L 85, 5. 4. 1991, p. 34.
(4) Miljømin.j No D.5100-29.
(5) Miljømin.j No D.817-0012.
(6) Miljømin.j No D. 817-0031/817-0004.

The Danish authorities considered that they had transposed Directive 91/173/EEC correctly, while acknowledging that some of their national measures were stricter than the provisions of the Directive. At the beginning of this procedure, they did not wish to invoke Article 100a (4) of the Treaty in so far as they considered that Directive 91/173/EEC simply represented a minimum rather than complete harmonization and that Member States could therefore adopt stricter provisions concerning the use of PCP.

As this legal point of view was not accepted by the Commission, infringement proceedings for non-conformity of the national implementing measures to Directive 91/173/EEC were initiated with a letter of formal notice of 28 March 1994 addressed to Denmark in accordance with Article 169 of the Treaty (Infringement No 93/2180).

In its letter the Commission noted that

— Article 24 of Order No 454 of 16 June provides for a general procedure for granting exceptions regarding a concentration of PCP equal to or greater than 0,1 % by mass in substances and preparations placed on the market whereas Article 1 of the Directive provides only for four specific exceptions (see point 2),

— Article 5 of Order No 582 of 28 November 1977 stipulates a limit of one part per million of traces of dioxins (H_6CDD) in PCP whereas Article 1 of the Directive fixes this limit at four points per million, and

— the Danish legislation contains no rule on the labelling and packaging of PCP whereas Article 1 of the Directive provides for a series of rules.

After numerous contacts between the Commission and the Danish authorities, the latter declared their readiness to comply with the Directive on the third point mentioned in the letter of formal notice and announced their intention of submitting a request for the application of Article 100a (4) in respect of the points on which they wish to maintain stricter rules.

The Danish authorities made this request by letter of 31 January 1995 from their Permanent Representation renotifying their existing national measures.

The legal position concerning the request from the Danish authorities is as follows:

According to Article 1 thereof, Order No 582 of 28 November 1977 applies to chlorinated phenols and their salts and to H_6CDD and all its isomers. Under Article 3 of that Order, the use of chlorinated phenols and their salts is prohibited in the manufacture of wood preservatives. Article 5 stipulates that the content of H_6CDD in pentachlorophenol and its salts may not exceed one part per million. This fixing of the maximum H_6CDD content has made it impossible in practice to use PCP for other industrial purposes than the production of wood preservatives, which is already expressly prohibited under Article 3. However, Article 7 gives the Danish Environmental Protection Agency general powers to authorize exceptions to these rules, although so far these have never been used.

Order No 454 of 16 June 1991 contains provisions restricting the sale and use of a number of categories of dangerous chemical substances and products. A new Article 14a added the ban on the sale of chemical substances and products containing pentachlorophenol or its salts and esters in concentrations equal to or greater than 0,1 % by mass.

This provision was inserted in Order No 454 of 16 June 1991 by Order No 446 of 7 June 1992 in order to transpose the maximum PCP content laid down by Directive 91/173/EEC. Consequently, and by virtue of the fact that Article 24 of the Order of 16 June 1991 allows the Environmental Protection Agency to authorize exceptions to its rules in specific cases, any request to use PCP for industrial or non-industrial purposes must since the date of adoption of Order No 446 (7 June 1992) be made in accordance with this procedure which replaces the procdure for the authorization of derogations provided for in Article 7 of Order No 582 of 28 November 1977, save as regards the H_6CDD content is PCP.

The Danish authorities have indicated their intention to keep this system for the authorization of derogations in force without exempting the four specific exceptions provided for by the Directive which they consider inadequate in terms of the protection of the environment and human health. As no derogation has yet been granted for PCP under this authorization system, it has proved as strict in its application as the system of prohibition in principle provided for by Directive 91/173/EEC, and more restrictive than the system of mandatory exceptions pursuant to that Directive.

Consequently, the request by the Danish authorities to apply Article 100a (4) relates to the first two points of non-conformity with Directive 91/173/EEC mentioned in the letter of formal notice, i.e. the maintenance of a system for the authorization of derogations for the use of PCP and the limit on the H_6CDD content in PCP.

As regards the requirements of Directive 91/173/EEC concerning the labelling and packaging of PCP, the Danish authorities notified a draft order on 14 July 1995 amending Order No 454 of 16 June 1991 to order to comply with the Directive. As a result, the Commission's departments have suspended the infringement proceedings initiated.

On 14 July 1995 the Danish authorities notified a draft 'Order on restrictions on the sale and use of pentachlorophenol', the aim of which is to replace the relevant provisions on PCP by a single legislative act. If it is adopted, this draft will not change the object of the Danish request to apply Article 100a (4) since in essence it represents merely a consolidation of the provisions in force.

It was examined by the Commision's departments as part of the procedure for the notification of new technical rules by the Member States in accordance with Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and Regulations [1], as last amended by European Parliament and Council Directive 94/10/EC [2], insofar as it also lays down provisions on the packaging and labelling of substances and products containing PCP. With these latter provisions, Denmark has complied with Directive 91/172/EEC. Consequently, the Commission's departments have suspended the infringement proceedings initiated.

To back up their request, the Danish authorities sent a report dated 22 July 1994 on human health and environmental concerns of PCP to the Commission. Among other things it gives the background to the industrial use of PCP in Scandinavia, particularly Denmark, as well as the regulatory policy of the Danish Government to counter the damage and risks caused by PCP and dioxins. According to this report, PCP was used in the past by Danish producers as a preservative in mushroom cultivation, the treatment of leather and textiles.

In 1977, most industrial uses were prohibited (by Environment Ministry Order No 582 of 28 November 1977), and this was accompanied by the fixing of a maximum limit of one part per million for dioxins containing PCP and an action plan to limit the effects of dioxins.

Pesticides containing PCP have not been sold in Denmark since 1981. In spite of these measures, the report notes that in a number of cases, PCP has been found in groundwater in Denmark. Much of this unpurified groundwater finds its way into the water supply of the population.

Monitoring programmes have apparently found PCP in groundwater in concentrations (0,1μg/l for individual substances and 0,5 μg/l in total) above the maximum limit laid down for drinking water (in accordance with Order No 515 of 29 August 1988 transposing Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption [3]).

The following table shows the PCP concentrations at various sites in Denmark, which can be as high as 20 μg/l in groundwater below landfills:

Site	PCP (μg/l)
Groundwater, drinking water source	< 0,01 — 0,35
Groundwater below landfill	< 0,1 — 20
Soil covering landfill	0,1 — 10 (μg/kg)
Lake	0,08
Marine sediments	10 — 20 (μ/kg)

Source: Danish Environmental Protection Agency, 1985.

The limit of one part per million of dioxin in PCP was introduced to reduce emissions of dioxins on incineration, in particular, of wooden products treated with PCP.

As the use of PCP to treat wood has often led to environmental contamination through very high concentrations of PCP, the Danish authorities

[1] OJ No L 109, 26. 4. 1983, p. 8.
[2] OJ No L 100, 19. 4. 1994, p. 30.
[3] OJ No L 229, 30. 8. 1980, p. 11.

conclude that allowing the use of PCP for the purposes provided for in Directive 91/173/EEC would not provide adequate protection for human health and the environment.

(4) **Opinions of the Member States and independent expert's report required by the Commission**

A. *Opinions of the Member States*

An acknowledgement of receipt of the Danish notification of 31 January 1995 was sent to its Permanent Representative on 12 April 1995.

The notification was transmitted to the other Member States for their opinions. The Commission has received opinions from Finland, Germany, Sweden, the Netherlands, Luxembourg and Portugal.

Finland considers that the conditions for the application of Article 100 a (4) have been met in this case and that the Commission should confirm the Danish measures. Moreover, Finland has expressed its desire to raise the level of protection provided by Directive 91/173/EEC through common action by the Member States to adapt it to a high level of protection as provided for in Article 100a (3) of the Treaty.

Germany lays emphasis on the Danish Government's intention to maintain in force stricter bans on PCP. Moreover, it is in favour of a total ban on the production, use and marketing of PCP on environmental and health grounds.

Sweden supports the Danish measures which in its opinion are neither a discriminatory measure, nor a disguised restriction on trade between the Member States. In particular, it refers to conclusive tests conducted in Sweden some fifteen years ago when PCP was replaced as a wood preservative.

The Netherlands shares Denmark's opinion that Directive 91/173/EEC offers an inadequate level of protection and refers in this connection to its own request for the application of Article 100a (4).

Luxembourg is in favour of stricter limits on the dioxin content in PCP and on the use of PCP.

Portugal considers that the technical reasons mentioned by Denmark to not prove that the use of PCP in accordance with Directive 91/173/EEC aggravates the situation described regarding the accumulation of the substance in question.

The Portuguese authorities are however ready to accept that the specific situation prevailing in Denmark could justify stricter measures concerning the local treatment of wood. However, they are opposed to any attempt to introduce a future total ban on the use of PCP and its derivatives, particularly in uses where the risks are controlled and where alternative products are still not well known, especially their effects on the environment. Finally, the Portuguese authorities fear that a failure to apply the Directive in full could have very serious economic consequences for those industries using PCP.

B. *Independent expert's report required by the Commission*

The Commission requested the assistance of an internationally recognized expert, Professor Rappe, of the Institute of Environmental Chemistry at the University of Umeå in Sweden, to assess:

— whether there are special circumstances concerning environmental and health protection in Denmark, and

— the commercial effects on the internal market of a possible application of the Danish measures in question.

In his report to the Commission, Professor Rappe analysed the various ways in which PCP could be discharged into the environment (evaporation of PCP from water and agricultural land and from treated products). He referred to the toxicity of PCP (particularly for aquatic organisms where concentrations as low as 0,1 µg/litre may be enough to kill for example certain algae, molluscs, crustaceans and fish) and certain polychlorodibenzodioxins (PCDD) and -furanes (PCDF), which are secondary products or impurities often released during the high temperature incineration of PCP.

In Denmark, the major problem arising from the use of PCP is apparently contamination of groundwater and drinking water supplies. Groundwater is the main source of drinking water supplies for the population. A survey launched in 1985 by the Danish Environmental Protection Agency showed that in some cases, concentrations of PCP in groundwater were as high as 0,35 µg/l, whereas the limit laid down in the guidelines for impurities of chlorinated substances by the Danish authorities

was only 0,1μg/l. At a conference of experts from the Nordic countries (Norway, Sweden, Finand and Denmark) in February 1995, it was observed that drinking water polluted by chlorophenols represented a high cancer risk. This is consistent with the classification of PCP in Community legislation as a Category 3 carcinogen (see description of PCP in point 1).

The data in the report supplied by the Danish authorities confirm these findings. Measurements in 1990 at two sites at different depths (at Gørlev, Zealand at a depth of 12,5 m and Jarbaek, Jutland at a depth of 72 m) also showed concentrations of 0,35 μg/l and 0,28 μg/l (although a specific source of this contamination has not been identified).

As regards the effects on the internal market, Professor Rappe takes the view that these are practically non-existent since estimates of the supplies of PCP in Denmark vary from seven to a maximum of 30 tonnes per year (1984 figures for the period before the virtual ban on the use of PCPs in Denmark). This very small amount would, in the case of the exceptional authorization of the industrial uses of PCP provided for by Directive 91/173/EEC, in any event be imported from third countries (in the absence of Community production of PCP).

III. LEGAL ASSESSMENT

(5) Formal conditions for the application of Article 100a (4)

In accordance with the principle set out by the Court of Justice in its Judgment of 17 May 1994 [1] concerning the Commission Decision of 2 December 1992 confirming the German regulation of 12 December 1989 on the prohibition of PCP in Germany [2], a Member State which intends to continue to apply, after the expiry of the deadline for transposing the harmonization measure referred to in Article 100a (1), national provisions derogating therefrom is obliged to notify them to the Commission.

The aim of the procedure provided for in Article 100a (4) is to ensure that no Member State will be able to apply national regulations which derogate from the harmonized rules without having obtained confirmation from the Commission. A Member State will therefore be authorized to apply the national provisions notified only after having obtained a Commission decision confirming them. In turn, it is the responsibility of the Commission to verify whether the provisions in question are justified by the major needs referred to in the first subparagraph of Article 100a (4) and do not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States. The Commission examined the measures notified in the light of these considerations.

Denmark, which voted against the final adoption of Directive 91/173/EEC in the Council, duly communicated those provisions of its national regulations that it intends to continue to apply after the expiry of the deadline for transposing Directive 91/173/EEC. The first notification of these measures was made before expiry of the said deadline for transposition of 30 June 1992. However, at this stage of the procedure, Denmark did not wish, because of its particular interpretation of the Directive (cf. point II.3 above), to make this a notification based on Article 100a (4) although it has since the outset, as proof of its good faith, indicated that some of the measures adopted were stricter than the provisions of the Directive.

Consequently, the Commission was unable to adopt a position on this matter before Denmark was deemed to be in infringement of the Treaty following expiry of the deadline for transposing the Directive. However, although the formal request for application of Article 100a (4) was not presented before expiry of the deadline in June 1992, the Commission considers that in this case this should not prevent it from being examined. The Danish authorities announced their intention of making formal notification under Article 100a (4) as soon as they were convinced, following discussions with the Commission's departments and the initiation of infringement proceedings, of the soundness of the Commission's argument regarding the nature of the Directive and of the need to notify under the said Article 100a (4) the stricter measures that Denmark intends to continue to apply.

As regard the admissibility of the notification from the point of view of timing, the Commission considers in this case that Denmark has not made abusive use of the notification pursuant to Article 91/173/EEC, given that Denmark notified in good faith the more restrictive provisions of its national legislation that it intends to continue to apply after the period for transposal of the Directive and that it made its formal request for application of Article 100a (4) of the Treaty as soon as it recognized the soundness of the Commission's interpretation of the nature of the Directive.

[1] Case C-41/93 (*French Republic* v. *Commision*), ECR 1994, I-1829.
[2] OJ No L 316, 9. 12. 1994, p. 43.

As regards those points on which the Danish authorities intend to maintain stricter rules than under Community legislation, namely the dioxin content of PCP and the system for authorizing exceptions for the use of PCP, it may be noted that this legislation was in existence before Directive 91/173/EEC. The lower limit for H_6CDD in PCP was introduced by Order No 582 of 28 November 1977 and has remained in force ever since. The system for the authorization of exceptions, although replaced by the provisions of Order No 454 of 16 June 1991, essentially also goes back to the said Order of 1977.

Since the authorization system provided for by the Danish legislation has never led to the granting of a derogation for PCP, it has proved, firstly, to be as strict as the system of prohibition on principle provided for by Directive 91/173/EEC and, secondly, more restrictive than that Directive as regards the system of mandatory exceptions provided therein. In this respect, the Danish provisions may be the subject of a notification pursuant to Article 100a (4). However, since the authorization system for exceptions under the Danish legislation would, in principle, permit the Danish authorities to authorize the use of PCP even for applications not covered by the four exceptions allowed under Directive 91/173/EEC, confirmation of the Danish provisions must be made conditional on the conformity with the provisions of that Directive of any future authorization granted by the Danish authorities concerning PCP.

(6) **Verification that the measures examined are justified on grounds of major needs**

A. *PCP contamination*

The Danish measures in question have the twin aim of limiting release of PCP itself into the environment through a system for the authorization of exceptions for (industrial) use and imposing a stricter limit on the content of dioxins in PCP in order to minimize emissions of these very toxic substances. As regards the dangers from PCP, the expert opinions at the Commission's disposal described above, particularly the report by the independent expert, show that there is a specific risk to groundwater because of high concentrations of PCP. In view of the fact that groundwater is the main source of drinking water supplies in Denmark, very strict controls over any additional infiltration of PCP are required. High concentrations of PCP up to 0,35 µg/l were recorded in groundwater in the mid-80s and even in 1990 despite the cessation of the main uses of PCP as a constituent of pesticides used in farming and as an industrial wood preservative, showing how persistent PCP is in the environment in Denmark.

According to the report presented by the Danish authorities, the high concentration of PCP in drinking water is due to poor absorption by the alkaline soils common in Denmark (the best absorption measured is between 4,6 and 5,1 pH, and there is no absorption above 6,8 pH).

PCP therefore passes rapidly from the surface into groundwater. Furthermore, the PCP in groundwater does not easily degrade at the low water temperatures found in Denmark. Thus the PCP reaching groundwater at high concentrations tends to accumulate. It is this groundwater which is used, unpurified, as the main source of drinking water.

As already discussed, Directive 80/778/EEC on the quality of water intended for human consumption lays down 'maximum admissible concentrations' for certain toxic substances, including pentachlorophenol in the pesticides and related products group which has a threshold of 0,1 µg/l (see Annex I, table D: parameters concerning toxic substances). In the context of this assessment of the justification of the important human health and environmental protection requirements asserted by Denmark, the limit values of Directive 80/778/EEC may serve as a yardstick for the acceptability of Member States' measures, particularly in view of the fact that the first indent of Article 7 (3) of the Directive provides that 'the values to be fixed by the Member States must be less than or the same as the values shown in the "maximum admissible concentration" column'. Since the measurements made in Denmark showed that the maximum admissible concentration of 0,1 µg/l was exceeded by a factor of 3,5 (measured value 0,35 µg/l), there is indeed strong justification for action to improve or at least prevent a deterioration in the quality of groundwater in this context.

PCP is also highly toxic to aquatic organisms (such as algae, molluscs, crustaceans and fish). For example, a concentration of 70 µg/kg PCP was measured in blue mussels in a Danish fjord. It can therefore be concluded that contamination of surface marine water also constitutes a source of intoxication in Denmark.

It is probable that these levels will be reached again and possibly even exceeded if the system of exceptions for industrial uses provided for by Directive 91/173/EEC was allowed (particularly as regards the three cases of industrial use, namely the treatment of wood, impregnation of fibres and heavy-duty textiles and as a synthesizing and/or processing agent in industrial processes; see point (2) above). Under these conditions, the refusal of the Danish authorities to transpose the exceptions set out in the restrictions of the use of PCP under Directive 91/73/EEC may be considered justified on grounds of major needs, given the specific situation in that Member State.

As there is no other means of reducing PCP emissions by industrial uses, this measure is also commensurate with the objective to be achieved.

B. *Dioxin contamination*

The fixing in 1977 of a maximum limit of 1 µg/kg of hexachlorodibenzodioxins (H_6CDD) in PCP and its salts has resulted in the cessation of practically all industrial use of PCP in Denmark due to the fact that it was not technically possible to achieve such a low level of impurities.

As the Danish authorities stated in their report on the dangers of PCP, this measure forms part of an action plan to reduce the effects of dioxins. The reduction in dioxin emissions was a complementary measure to the ban on the use of chlorinated phenols and their salts in the manufacture of wood preservatives.

If the non-inclusion of the industrial uses allowed by Directive 91/173/EEC in Danish legislation is considered justified, there is therefore no reason to refuse the continued application of the maximum dioxin limit which is lower than that provided for in the Directive.

As the Commission has already noted in its decision of 14 September 1994 on the prohibition of PCP in Germany, it (the Commission) considers it reasonable that a Member State should wish to reduce the exposure levels of certain populations at risk.

According to the Nordic experts at their February 1995 conference, a daily dose of 5 pg/kg of body weight would be acceptable for their countries. It should be pointed out in this connection that there is no international consensus or agreement at present at Community level on the permissible daily dose of dioxins. The limit fixed by the Nordic countries is half-way between that recommended by certain Member States such as the United Kingdom and Germany (1 pg/kg) and certain third countries such as Canada (10 pg/kg).

The available data show a wide variation in the concentration of dioxins in blood and in contamination of people in the Scandinavian countries, including Denmark. Experts from Scandinavia have concluded that certain population groups are likely to show dioxin uptake levels approaching or even exceeding the permissible daily dose (5 pg/kg) in some cases. The Danish authorities mention an estimate in this connection according to which babies being breast-fed receive a dose 50 times higher. Hence, according to the experts, any additional exposure to dioxins through contaminated food in particular should be limited as far as possible.

According to Professor Rappe, it would be fully in keeping with those recommendations to limit the contamination of industrial products by PCDDs and PCDFs as far as possible. Moreover, having examined all the facts and circumstances surrounding the Danish measures, the Commission does not have any expert findings that would enable it to conclude that less stringent measures are available which would achieve the same level of protection.

(7) **Verification that the measures examined are not arbitrarily discriminatory in nature**

The exclusion of any arbitrary discrimination as provided for in the second subparagraph of Article 100a (4) is intended to prohibit any material discrimination which, in line with Court rulings, consists either in giving different treatment to similar situations or similar treatment to different situations.

The Danish legislation applies without distinction to all substances and preparations containing PCP, whether they are made in Denmark or supplied by other Member States. With regard to the application of the legislation, since no derogation pursuant to Article 24 of the Order of 16 June 1991 has been authorized, the Commission has no evidence that this instrument has been used as a means of arbitrary discrimination between economic operators in the Community.

In view of the above, the Commission considers that the measures examined do not constitute a means of arbitrary discrimination in trade between Member States.

(8) **Verification that the measures examined do not constitute a disguised restriction on trade between Member States**

This concept, enshrined in the second subparagraph of Article 100a (4), is intended to prevent the restrictions based on the criteria of the first subparagraph being applied for inappropriate reasons, and in reality constituting economic measures introduced to impede the import of products from other Member States in order indirectly to protect national production.

PCP is no longer produced in the Community and the expert report by Professor Rappe states that PCP imports in the past have not exceeded 30 tonnes per year. The effects of the legislation on trade between Denmark and the Member States of the Community are therefore very small. The Member States consulted during the examination of the application were not opposed to the Danish measures. Nor has the Commission received any complaints from industry.

Moreover, the stricter system for authorizing exceptions for the use of PCP is likely to restrict economic activities principally in Denmark insofar as exceptions for industrial use are not possible there. As far as the various possible substitutes are concerned, mainly in the principal industrial sectors, treatment of wood and textiles, Denmark has no particular economic interests in their development, production or export.

The Commission therefore considers that there is no evidence of a disguised restriction on trade between Member States.

IV. CONCLUSION

In the light of the above, the Commission is of the opinion that the provisions notified by Denmark pursuant to Article 100a (4):

— should be considered justified on grounds of the major needs of protection of life and health of humans and animals referred to in Article 36 of the EC Treaty and environmental protection, that they are necessary given the special circumstances in that Member State in relation to these requirements and are not disproportionate to the aims pursued, and

— do not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States,

HAS ADOPTED THIS DECISION:

Article 1

1. The provisions of Environment Ministry Orders No 582 of 28 November 1977 limiting dioxins in pentachlorophenol etc., No 454 of 16 June 1991 restricting the sale and use of certain dangerous chemical substances and products for specific purposes and No 446 of 7 June 1992 amending the Order restricting the sale and use of certain dangerous chemical substances and products for specific purposes, notified by Denmark, are hereby confirmed.

2. No derogations pursuant to Article 24 of the Order of 16 June 1991 shall be granted which go beyond the provisions of Directive 91/173/EEC with regard to exceptions to the ban on the use of PCP.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 26 February 1996.

For the Commission

Martin BANGEMANN

Member of the Commission