COMMISSION DECISION

of 26 October 1999

concerning the national provisions notified by the Kingdom of the Netherlands concerning the limitations of the marketing and use of pentachlorophenol (PCP)

(notified under document number C(1999) 3419)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(1999/831/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 95(6) thereof,

Whereas:

I. FACTS

1. Community legislation: Directive 91/173/EEC

(1) 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 Commission Directive 1999/77/EC [2], provides for the prohibition and restriction of the use of certain dangerous substances and preparations. Directive 76/769/EEC is regularly amended to include in its Annex additional substances which are dangerous to man or the environment.

(2) Council Directive 91/173/EEC [3], which amends Directive 76/769/EEC for the ninth time, harmonises the placing on the market and use of pentachlorophenol (in the following: PCP) and its salts and esters. Directive 91/173/EEC prohibits the marketing and use of PCP and its salts and esters in substances or preparations in a concentration equal to or greater than 0,1 % by mass.

(3) However, four exceptions are granted. The use of PCP and its compounds in industrial installations is permitted:

(a) for the treatment of wood. However, treated wood may not be used inside buildings and not for the manufacture of containers intended for growing purposes or packaging which may come into contact with products intended for human and/or animal consumption;

(b) for the impregnation of fibres and heavy-duty textiles not intended for clothing or for decorative furnishings;

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

(d) for the *in situ* treatment of buildings of cultural and historic interest (subject to individual authorisation by the Member State concerned) as a remedial treatment of timber and masonry infected by dry rot fungus and cubic rot fungi.

In any event, PCP as such or as a constituent of preparations used on the basis of the exceptions referred to above must have a total hexachlorodibenzo-paradioxine (H6CDD) content of less than four parts per million. The substances and preparations concerned may not be placed on the market except in packages of 20 litres or more, may not be sold to the general public and must, in addition to the labelling required by other Community provisions, be labelled with the sentence 'Reserved for industrial and professional use'.

(4) The Directive provided that these exceptions had to be reconsidered in the light of changes in knowledge and technology no later than three years after the implementation of the Directive. The first review of the Directive was carried out in the course of 1995. Discussions within the working group on limitations of the marketing and use of dangerous substances and preparations led to the conclusion not to amend Directive 76/769/EEC as far as PCP is concerned, as the group held the opinion that the assessment of possible substitutes had not led to acceptable results and needed further examination.

[1] OJ L 262, 27.9.1976, p. 201.
[2] OJ L 207, 6.8.1999, p. 18.
[3] OJ L 85, 5.4.1991, p. 34.

(5) This examination was concluded in the course of 1998 when a second review led to the adoption of Commission Directive 1999/51/EC [4], which among others, adapts to technical progress the provisions concerning PCP and its salts and esters. According to the amended provisions, PCP and its salts and esters may not be placed on the market and used in substances or preparations in a concentration equal to or greater than 0,1 % by mass. This amounts to a ban on the use of substances and preparations to which PCP and its salts and esters have been added intentionally. The new provisions are to be applied as of 1 September 2000. By way of derogation, France, Ireland, Portugal, Spain, and the United Kingdom may continue to apply the former legislation until 31 December 2008.

2. **National provisions**

(6) The legal system of the Netherlands concerning PCP is established by four different pieces of legislation: the Controlled Substances Act (also referred to as Pesticides Law) of 1962 [5], Chapter IX 'Wood and Cork' of the Regulation on packaging and consumer products from 1980 [6], the Order of 18 August 1992 pursuant to Article 24 of the Law on environmentally hazardous substances from 1992 [7], and the Regulation on pentachlorophenol under the commodities Act from 11 February 1994 [8].

(7) The legislation established by the Controlled Substances Act of 1962 and the executing Decision concerning the composition, classification, packaging and labelling of control substances, adopted on 22 February 1980 (hereinafter called the SIVEB Decision) [9] with its subsequent amendments provides for a general prohibition of the substances concerned combined with an approval system on an individual basis. The Controlled Substances Act covers crop control substances or non-agricultural control substances (Article 1(1)(f)), which may not be supplied, possessed, kept in stock, marketed, or used in the Netherlands unless approved pursuant to the Act (Article 2(1)). Article 3(1) defines the general conditions that a control substance has to meet for permission (*inter alia*, to have no harmful effect on human health, ground water and no unacceptable effects on the environment).

(8) Based on the Controlled Substance Act, the SIVEB Decision (forming a ministerial regulation), provides for the admissible contents of active agents in control substances. This forms the basis for subsequent approvals (licenses) of the competent Minister to use the control substances falling under the Controlled Substances Act. In the case of PCP, the SIVEB Decision provides for a maximum content of certain impurities: hexachlorobenzene 1 g/kg, hexachlorodibenzoparadioxines 10 mg/kg (= 10 ppm), heptachlorodibenzoparadioxines (100 mg/kg), trichlorophenol (1 g/kg), chlorinated dibenzofuranes (500 mg/kg). All approvals granted for the treatment of wood with PCP containing products had expired in 1989. The last remaining approval for the treatment of textiles expired in 1992.

(9) The Regulation on packaging and consumer products of 1980 establishes among others, that wood and cork used as packaging and consumer products must be manufactured by using substances that are specified in the Annex to the Decision on packaging and consumer products [10]. Raw materials and adjuvants may not be used in any way other than specified in the Annex. PCP and its salts and esters are not listed as permitted wood preservatives and therefore cannot be used.

(10) The Order on the basis of Article 24 of the Law on environmentally hazardous substances from 1992 prohibits in general the marketing and use of PCP and its salts and esters for any purpose if their concentration exceeds 0,1 %. Exemptions are given for the use as intermediates in closed industrial processes under the condition that there are no emissions and that the content of hexachlorodibenzoparadioxine is below 4 ppm, and for purposes of laboratory research. The Order further establishes a complete ban on the sale to private consumers, a minimum drum size of 20 litres, and a labelling requirement 'Reserved for industrial and professional use'.

(11) The Regulation under the commodities Act on PCP from 1994 stipulates that goods treated with PCP may not be placed on the market in the Netherlands if they contain more than 5 mg/kg PCP.

3. **Comparison between the national provisions and Directive 91/173/EEC**

(12) When comparing the Community legislation and the Netherlands provisions, it emerges that the national measures are more restrictive in one essential aspect: the placing on the market and use of substances or preparations containing PCP and its salts and esters for the treatment of wood and the impregnation of fibres

[4] OJ L 142, 5.6.1999, p. 22.
[5] Law Gazette of the Netherlands 1962, No 288, as amended by the Act of 25 December 1994, Law Gazette of the Netherlands 1995, No 4.
[6] Law Gazette of the Netherlands 1980, No 18.
[7] Law Gazette of the Netherlands 1992, No 455.
[8] Law Gazette of the Netherlands 1994, No 35.
[9] Law Gazette of the Netherlands 1980, No 43.
[10] Law Gazette of the Netherlands 1979, No 558.

and heavy-duty textiles, which are allowed by the Community Directive, are not permitted in the Netherlands.

(13) On the other hand, the Netherlands provisions are potentially less restrictive than the Community Directive, as the Controlled Substances Act of 1962 does not clearly limit the areas of use for which approvals could be granted. This is done in the individual approvals. The Netherlands authorities could, therefore, approve the use of PCP for applications not allowed by Directive 91/173/EEC. Furthermore the limit value of hexachlorodibenzoparadioxine in PCP (that could theoretically be approved for use) is 10 ppm and thus higher than the limit value of 4 ppm established by the Community Directive.

(14) As already indicated, the provisions of Directive 76/769/EEC regarding PCP have been amended by Directive 1999/51/EC, and shall be applied by the Netherlands as from 1 September 2000. The Dutch legislation, for which approval according to the former Article 100a(4) has been requested, is in line with the new Community provisions.

II. **PROCEDURE**

(15) Directive 91/173/EEC was adopted on 21 March 1991. Member States had to bring into force the national provisions necessary to comply with the Directive before 1 July 1992 (Article 2(2)).

(16) By letter of 21 January 1992, the Netherlands Permanent Representative informed the Commission that the Netherlands considered it necessary to maintain or adopt, in accordance with the former Article 100a(4) of the EC Treaty, national legal provisions, which provide for more restrictive measures on the use of PCP in the treatment of wood and the impregnation of fibres and heavy-duty textiles (sub-points (a) and (b) of point 23 of the Annex of Directive 91/173/EEC) in order to protect the environment and also public health. By letter of 30 March 1992 the Netherlands Permanent Representative notified a draft regulation on PCP under the Commodities Act prohibiting the marketing and use of goods treated with PCP, and requested a confirmation under the former Article 100a(4) to adopt this legislation.

(17) The Commission consulted the other Member States by letter of 27 April 1992, supplemented by a letter of 26 June 1992, with regard to the Netherlands request to apply stricter national provisions on PCP. Seven Member States replied: Ireland, Denmark and Germany support the Netherlands request, whilst France, Spain, Greece and Portugal are opposed.

(18) *Ireland* informs the Commission that it has no objections to the request presented by the Netherlands authorities.

(19) *Denmark* supports the Netherlands' request and agrees with the Netherlands assessment of the danger of PCP to human life and the environment. A total ban on PCP is the only acceptable solution to Denmark. Denmark also reserves the right to apply stricter national rules.

(20) In supporting the Netherlands views, *Germany* refers to its own request under the former Article 100a(4).

(21) *France* contests the Netherlands request. According to the evaluation of the French authorities, the justification submitted by the Netherlands authorities is insufficient, the national provisions do not respect the rule of proportionality, and the economic consequences for the functioning of the internal market and trade with third countries are important.

(22) *Spain* holds the opinion that the restrictions imposed by Directive 91/173/EEC are sufficient to ensure the protection of the environment and consumer health. A positive decision on the Netherlands request would create an imbalance detrimental to the completion of the Internal Market. Spain favours an overall revision of the Directive as the most sensible solution to the problem.

(23) *Greece* considers that Directive 91/173/EEC ought to be implemented correctly by all Member States, as the effects of national measures on the Internal Market would be important. National measures are only justified if it can be shown that environmental or consumer protection as provided for by the Directive are not adequate.

(24) *Portugal* doubts that the Netherlands national measures are in conformity with the principle of proportionality, as the exemptions in the Directive had been deemed necessary due to the non-existence of safer and equally efficient alternatives. Portugal is opposed to a derogation for the Netherlands as the Netherlands authorities have failed to produce any justification that was not known at the moment when the Directive was adopted.

(25) By letter of 23 September 1993, the Commission informed the Netherlands authorities that in its opinion the draft Regulation on PCP under the Commodities Act as notified by the Netherlands on 30 March 1992 was outside the area of harmonisation established by the provisions of Directive 91/173/EEC. The draft Regulation concerned exclusively goods treated with PCP. The

Netherlands expressed their opposition to this interpretation by letter of 4 March 1994. However, the Court supported the position of the Commission in its judgement of 1 October 1998, according to which, 'Article 1(1) of Directive 76/769/EEC, as amended by Directive 91/173/EEC, does not apply to products treated with PCP, its salts and esters or with a preparation produced from that substance, with the result that the Member States remain in principle free to fix limit values for such products independently' ([11]).

(26) By letter of 8 November 1995, the Commission informed the Netherlands authorities that with regards to the notification of 21 January 1992, the Commission was intending to carry out an assessment of the risks to man and the environment of PCP and its substitutes. The assessment was expected to be finalised in 1998 and could, if found necessary, lead to an adaptation of the Community Directive. Under these circumstances, the Commission did not see it opportune to take a final decision on the notification presented by the Netherlands.

(27) The review process was concluded in 1998 and led to an adaptation of the provisions of Directive 76/769/EEC regarding PCP through Directive 1999/51/EC (see Chapter I above). The amending Directive did eliminate in principle the derogation for wood and textile treatment originally included in the Community Directive.

(28) On the 1 May 1999, the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, entered into force. By letter of 22 September 1999 the General Secretariat of the Commission informed the Netherlands authorities of the fact that their notification regarding the placing on the market and use of PCP would be treated in the framework of the new provisions of the Treaty.

III. **ASSESSMENT**

1. **Applicable rules**

(29) The Treaty of Amsterdam has amended substantially the provisions of the former Article 100a of the Treaty establishing the European Community, by replacing paragraphs 3, 4 and 5 of this Article with eight new paragraphs numbered 3 to 10. Due to the new numbering of all articles, the amended Article has become Article 95 of the Treaty establishing the European Community.

([11]) Case C-127/97, point 31.

(30) The Treaty of Amsterdam does not comprise specific transitional provisions on the rules applicable to the notifications made previously to the time of entry into force of this treaty, like the Netherlands notification, which is the subject of this Decision.

(31) In the absence of specific provisions extending their application, the old provisions of Article 100a(4) of the EC Treaty are regarded as repealed from the day of the entry into force of the new provisions (1 May 1999). Instead, the new provisions of the Treaty apply immediately from that date to the examination of this notification.

2. **Consideration of admissibility**

(32) The notification submitted by the Netherlands authorities on 21 January 1992 intends to obtain the authorisation to maintain national provisions incompatible with Directive 91/173/EEC, which constitutes a harmonisation measure adopted on the basis of the former Article 100a (now Article 95) of the EC Treaty.

(33) Article 95(4) of the Treaty reads as follows: 'If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.'

(34) Directive 91/173/EEC was adopted on 21 March 1991. Member States had to bring into force the national provisions necessary to comply with the Directive before 1 July 1992. The Netherlands notified the provisions of its national regulations that it intended to maintain on 21 January 1992 and thus before the date foreseen for the application of the national provisions transposing the Directive.

(35) The Netherlands provisions in question, namely the Control Substances Act was adopted in 1962. All approvals for application of PCP for wood treatment had expired before 1989. It had been decided on 26 May 1989 that the last approval for the treatment of textiles with a PCP ester was to expire on 1 July 1992. In conclusion, the more restrictive legislation regarding the use of PCP for the treatment of wood and textiles had thus been adopted before Directive 91/173/EEC was adopted (21 March 1991).

(36) It is therefore well justified to consider that in this case the conditions of Article 95(4) of the Treaty are met, according to which the national provisions notified, for which a Member State wishes to obtain approval for maintaining them after the date of implementation of a Community harmonisation measure, must have been adopted before the adoption of that harmonisation measure.

(37) In addition, the Netherlands Authorities notified on 30 March 1992 a draft regulation on PCP under the Commodities Act and requested the authorisation for approval of this draft under the former Article 100a(4). The Regulation was finally adopted on 11 February 1994. However, it has been explained in the previous chapter that the provisions of this national regulation are outside the scope of harmonisation of Directive 91/173/EEC and are therefore not subject to this Decision.

(38) In the light of what precedes, the Commission considers that the request of the Kingdom of the Netherlands for derogation from Directive 91/173/EEC as notified on 21 January 1992 under the former Article 100a(4) is admissible under Article 95(4) of the EC Treaty.

3. **Assessment of merits**

(39) In accordance with the provisions of Article 95 of the Treaty, the Commission has to assure that all the conditions enabling a Member State to avail of the possibilities of derogation provided for in this article are met. The Commission has, in particular, to verify whether the provisions notified by the Member State are justified by the major needs of protection referred to in Article 30, or relating to the environment or working environment. In addition, the Commission has to verify, when it considers that these measures are justified, whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between the Member States, and whether or not they constitute an obstacle to the functioning of the internal market (Article 95(6)).

(40) The Netherlands authorities have based their request on the need of protection of the environment and also human health. In support of their request of 21 January 1992 they submitted a brief analysis on the health and environmental effects of PCP, short summaries in the form of explanatory notes to existing or draft national legislation, as well as the texts of some parliamentary questions and replies concerning the marketing and use of PCP. After numerous contacts with the Commission services and in order to further substantiate its request for derogation from Directive 91/173/EEC the Netherlands Government submitted five additional studies ([12]) by a letter of 26 April 1994.

(41) The Commission mandated a study to an external consultant to examine the situation in the Netherlands concerning the pollution with dioxines and furanes and the use of PCP ([13]). Further studies, which were mandated by the Commission in the framework of similar requests from Germany and Denmark, have also been used. In addition, in the course of the review process of the provisions of Directive 91/173/EEC, the Commission prepared a report on the operation of the Directive and on the substitutability of PCP ([14]), and mandated further studies to external consultants on the risks posed by PCP ([15]) and possible substitutes for the treatment of wood and textiles ([16]). The Commission consulted the Scientific Committee for Toxicity, Ecotoxicity, and the Environment on the basis of the last study on the risks posed by PCP. The Committee adopted its opinion on 27 November 1998.

(42) It has to be noted that, in the light of the time frame established by Article 95(6), which did not exist in the former Article 100a(4) under the regime of which the Netherlands request was notified, these substantial efforts of the Commission to find additional elements for the justification of the maintenance of the Netherlands national provisions cannot constitute a precedent for the future. When examining whether the national measures notified under Article 95(4) are justified by a major need, the Commission has to take as a basis 'the reasons' put forward by the Member State to justify the maintenance of its national provisions. This means that, according to the provisions of the Treaty, the responsibility of proving that these measures are justified, lays on the requesting

([12]) *Integrated criteria document chlorophenols*. RIVM report No 710401013, August 1991.
Assessment of the integrated criteria document chlorophenols. Advisor report by the Committee on Risk Assessment of Substances of the Health Council of the Netherlands.
Basisdocument dioxinen. RIVM report No 710401024, February 1993.
Emissies van dioxinen in Nederland. RIVM and TNO report No 770501003, April 1993.
Besluit luchtemissies afvalverbranding. A General Administrative Order including Explanatory Note.

([13]) C. Rappe, *Concerning Pentachlorophenol and dioxins*. Final report, Institute of Environmental Chemistry, Umea University, Umea, December 1994.

([14]) Report to the Commission on Pentachlorophenol (PCP), Brussels, 14 December 1994. The report was established after consultation of all Member States and other interested stakeholders who had been informed through a note published in the OJ C 315, 12.11.1994, p. 4. Three studies prepared by external consultants have also been taken into account.

([15]) Environmental Resources Management, *Assessment of the Risks Posed by Pentachlorophenol (PCP) through the Exposure of Man and the Environment to Dioxins*, Final Report, London, December 1997.

([16]) The Consultant 'Cabinet Paracelse' has prepared hazard assessments and reports on the suitability as substitutes to PCP in wood and textile treatment for five substances. The Final reports were submitted in September 1998.

Member State. Given the procedural framework established by Article 95, the Commission normally has to limit itself to examining the relevance of the elements which are submitted by the requesting Member State, without having to seek itself possible reasons of justification.

3.1. ***Justification on grounds of major needs***

3.1.1. *PCP — general information*

(43) PCP is a synthetically manufactured chemical substance, which is recognised as being dangerous for both man and the environment. The classification and labelling of PCP are harmonised at Community level in accordance with Council Directive 67/548/EEC of 27 June 1967 relating to the classification, packaging and labelling of dangerous substances ([17]), as last amended by Directive 99/33/EC ([18]), PCP is:

— 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 available. Evidence is available from appropriate studies on animals but it is not sufficient to place the substance in the group of category 2 carcinogens. Such a substance is labelled with the risk phrase 'R 40: Possible risk of irreversible effects',

— classified as 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 50/53: Very toxic to aquatic organisms, may cause long-term adverse effects in the aquatic environment'.

(44) As an organohalogene compound, PCP is included in List I of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community ([19]), as amended by Directive 91/692/EEC ([20]). This list contains substances that are selected mainly on the basis of their toxicity, persistence and bioaccumulation.

(45) 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 ([21]) on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC.

(46) PCP contains dangerous impurities including up to 0,1 % of polychlorodibenzodioxins and 1 to 5 % of polychlorinated phenoxyphenols. PCP alone and these impurities are contributing to 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.

(47) PCP is used as:

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

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

— bactericide in tanning and the paper pulp industry,

— molluscicide in the treatment of industrial water, in particular cooling water, and sometimes as

— sterilising agent.

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

3.1.2. *The position of the Netherlands*

(49) In their notification of 21 January 1992, the Netherlands authorities base the more stringent national measures on major needs relating to the protection of the environment and human health.

(50) According to the Netherlands authorities, PCP (including its esters and salts) is scarcely degradable in the environment and is toxic to man and organisms in the aquatic environment. PCP is relatively mobile end dispersed through all environmental media.

(51) PCP accumulates in fat tissue and thus in the food chain. Its esters and salts break down in PCP and thus have similar effects. PCP and its salts and esters are contaminated with chlorinated dibenzodioxins and dibenzofuranes. These compounds are also formed when PCP is incinerated in waste. Consequently, uses of PCP constitute a significant source of environmental contamination with chlorinated dibenzodioxins and dibenzofuranes.

([17]) OJ 196, 16.8.1967, p. 1.
([18]) OJ L 199, 30.7.1999, p. 57.
([19]) OJ L 129, 18.5.1976, p. 23.
([20]) OJ L 377, 31.12.1991, p. 48.
([21]) OJ L 181, 4.7.1986, p. 16.

(52) The Netherlands authorities recall that the dangers of PCP for the aquatic environment were already acknowledged on European level in 1976: Directive 76/464/EEC provides that the best available technology must be used to prevent emissions of PCP to surface waters.

(53) Paragraph c of Annex 1B to the final declaration of the third North Sea Conference lists PCP as a substance, the use of which in pesticides should be strictly limited or terminated.

(54) The Netherlands authorities also point out that, with regard to drinking water production, the presence of PCP in ground and surface water in concentrations greater than 0,1 pg/l is not acceptable. In this context they refer to the pollution of the Rhine and Meuse, which are also used for the production of drinking water in the Netherlands. Therefore, measurable emissions of this substance to water, soil and air should be avoided through replacement in all cases by other substances.

(55) In 1992, the major emissions of PCP occurred to the atmosphere (48 tonnes per year), mostly originating from treated wood. Approximately 14 tonnes of PCP per year were deposited on soil and water from air, 11,5 tonnes originating from PCP contained in treated wood.

(56) The major use of PCP was as wood preservative. This was banned in 1989, when the necessary approvals were not renewed. Already before that date, in the time period from 1984 to 1987, consumption had declined from 300 tonnes a year to 0,2 tonnes. PCP was used to a smaller extent in glues, textiles, leather, colour, paper, and cooling fluids. PCP was never produced in the Netherlands.

(57) In a letter of 6 February 1995, the Netherlands authorities communicated calculations on the emission of dioxines to the Commission, which showed that in the year 2000 the use of PCP in the past will form the major source of dioxine emissions (20 g out of 58 g from all sources, including waster incineration), assuming the continuation of the existing ban on use. If the use of PCP was to be allowed again, this situation would become worse.

3.1.3. *Evaluation of the position of the Netherlands*

(58) It can be seen from the arguments brought forward in the preceding chapter that the Netherlands authorities base their request for derogation exclusively on arguments concerning the general effects of PCP and the impurities contained in it on health and environment. They do not claim that there is a specific situation in the Netherlands in comparison to the other Member States, which would necessitate the more restrictive national measures.

(59) The study mandated by the Commission to an external consultant ([22]) confirms this by concluding that contrary to the situation in Germany, no special circumstances exist in the Netherlands. The Netherlands national measures could not be justified by a specific need to protect human health as the exposure to PCP in the Netherlands was well below acceptable daily doses. This emerged also from the additional documentation submitted by the Netherlands authorities.

(60) The study also contests the arguments used by the Dutch authorities about the protection of the environment: PCP undergoes volatilisation, photochemical degradation and biodegradation and is thus not persistent ([23]). PCP is excreted in urine and faeces by all animals and thus does not accumulate in fatty tissue and in the food chain. The study also states that the pollution levels of the aquatic environment, as documented in the Dutch documents ([24]) are well below acceptable limit levels. The study could not detect either a correlation between the concentrations of dioxines and furanes in the environment or in breast milk and the use of PCP in the Netherlands. Nor was there a problem in more general terms (no history of PCP manufacture; very little use).

(61) However, the provisions of Directive 91/173/EEC contain a requirement to re-examine the exemptions from the general ban on the use of PCP and its salts and esters in the light of developments in knowledge and techniques. The Community Directive provided for exemptions from the ban only in those areas where suitable or safer alternatives could not easily be identified at the time of adoption. Overall, the risks to man and the environment of PCP had thus clearly been recognised and addressed in the light of the available knowledge.

(62) Already as early as 1994, the Commission started a review programme dealing with the evaluation of the risks linked to the use of substitutes for PCP, with the aim of tightening the restrictions adopted in Directive 91/173/EEC in the direction of a total ban ([25]). This programme was concluded in 1998 and did result in the

([22]) See footnote 13.
([23]) This is also confirmed by the WHO *Environmental health criteria document 71, pentachlorophenol*, WHO, Geneva 1987.
([24]) See footnote 12.
([25]) This was announced in the Commission Decision 94/783/EC concerning the prohibition of PCP notified by the Federal Republic of Germany (OJ L 316, 9.12.1994, p. 43) and in the notice published in the OJ C 315, 12.11.1994 for consulting the stakeholders before the establishment of the report on PCP.

conclusion that in fact less dangerous alternatives were available.

(63) In addition, the Scientific Committee, in its opinion of 27 November 1998 and based on a large amount of information available in the public domain and the study by ERM ([26]), concluded that in some areas, human exposure continued even where PCP use had ceased. No adequate clean-up treatment has yet been found to remedy contaminated soil. Risks for the aquatic environment from PCP and associated chemicals may occur, at least in 'hot spot' areas, involving local PCP release to the environment.

(64) In the light of the comprehensive review and evaluation of alternatives carried out in the time period from 1994 to 1998, the Commission and the Member States, in their endeavour to reach a high level of protection of health and environment, have considered it necessary to adopt in Directive 1999/51/EC measures for the Community, which are equivalent to the Netherlands provisions. Member States will adopt these Community provisions as from January 2000.

(65) The restrictions of the use of PCP in the Netherlands legislation are considered proportionate in relation to the pursued objective, as the exceptions to the ban of PCP established in Directive 91/173/EEC are no longer deemed to be acceptable if a sufficiently high level of health and environment protection is to be guaranteed. Therefore, it can be concluded that, although there are no specific circumstances in the Netherlands in comparison to the other Member States, the more stringent national measures can be regarded as justified.

3.2. ***Absence of arbitrary discrimination***

(66) Article 95(6) obliges the Commission to verify that the national provisions are not a means of arbitrary discrimination. According to the jurisprudence of the Court of Justice, the absence of discrimination means that no different treatment should be given to similar situations, nor similar treatment to different situations.

(67) The Netherlands regulations apply without distinction to all products, whether they are manufactured in the Netherlands or imported from other Member States. Therefore, there is no evidence that the Netherlands regulations have been used as a means of arbitrary discrimination between economic operators in the Community.

([26]) See footnote 15.

3.3. ***The absence of a disguised restriction on trade***

(68) More restrictive national measures in the area of limitations of marketing and use of products derogating from the provisions of a Community Directive do normally constitute a barrier to trade. Products that can be legally placed on the market in the rest of the Community, cannot be placed on the market in the Member States concerned. The concept enshrined in Article 95(6) is intended to prevent the restrictions based on the criteria of paragraph 4 being applied for inappropriate reasons, and in reality constituting economic measures introduced to impede the import of products from other Member States in order to protect indirectly national production.

(69) The Commission mandated a study ([27]) to analyse the effects on trade and competition of the retention by the Netherlands of its stricter national provisions. The study undertook to collect information on the volume and trade with other Member States which are affected, the interest, if any, which the Netherlands may have in using the national rules to promote a national interest in substitutes to PCP, the interest, if any, which the Netherlands might have in using the national rules to promote a national interest in substitutes to PCP-containing products.

(70) According to the study, neither PCP nor its derivatives are manufactured in any of the Member States of the European Community. Substitutes for the treatment of wood or textiles must be approved according to the same legislation as PCP, whether they are produced in the Netherlands or in other Member States. There is no direct advantage from the national legislation on PCP to the producers of substitutes in the Netherlands.

(71) It was established before that there is a real concern with regards to human health and the environment related to the use of PCP and treated timber. Furthermore the national provisions on PCP are a part of a more general policy on dioxines and furanes. Therefore, there is no evidence that the protection of health and the environment is not the real goal of maintaining the national legislation.

(72) Overall, the Commission considers therefore that there is no evidence of a disguised restriction on trade between Member States provoked by the Netherlands legislation concerning PCP.

([27]) S. J. Davis, *The effects of the retention by the Netherlands of its national rules on pentachlorophenol in place of the rules established by Directive 91/173/EEC*, London (UK), May 1995.

3.4. ***The absence of obstacles to the functioning of the internal market***

(73) This condition, which is established by Article 95(6), first subparagraph, is new in comparison to the text of the former Article 100a(4) of the EC Treaty. This requirement cannot be interpreted in such a way that it prohibits the approval of any national measure likely to affect the establishment of the internal market. In fact, any national measure derogating from a harmonisation measure aiming at the establishment and operation of the internal market, constitutes in substance a measure that is likely to affect the internal market. Consequently, to preserve the useful character of the procedure for derogation provided for by Article 95 of the EC Treaty, the Commission considers that, in the context of the Article 95(6), the concept of obstacle to the functioning of the Internal Market has to be understood as a disproportionate effect in relation to the pursued objective.

(74) There have been no producers of PCP in the Community after the last manufacturer closed down in France in 1992. Producers in Germany, who started production in 1978 stopped already in 1985. Due to the restrictions in European and national levels, considerable amounts of PCP for wood treatment are used in three Member States only, and a small quantity for textile treatment for a very limited use in the military area. Use in the EC has decreased from 8 000 tonnes in 1986 to 2 000 tonnes in 1994.

(75) The world-wide production of PCP has decreased from 26 000 tonnes in 1986 to 11 000 tonnes in 1994. Producers are located in the US, India and China.

(76) Imports into the Netherlands had already decreased to around two to four tonnes for wood treatment in 1987, and thus before the expiration of the last approval, and 37,5 of PCP laureate for textile treatment. This represented already a very small part of the overall market in the EC. The study mandated by the Commission ([28]) did conclude that the effect of the Netherlands legislation on the market was practically negligible.

(77) Furthermore, although the Netherlands authorities have continued to apply the national legislation since 1 July 1992 instead of the Community legislation, there has never been a complaint from an economic operator from within or from outside the Netherlands. As in the meantime the Community legislation has been adapted to technical progress and there will be no differences between the Netherlands legislation and the Community legislation from 1 September 2000, the overall effects on the functioning of the internal market are judged to be small.

(78) Taking into account the preceding observations, the Commission considers that there is no evidence that the Netherlands provisions subject to this Decision do constitute a disproportionate obstacle to the functioning of the internal market in relation to the pursued objectives.

IV. **CONCLUSION**

(79) In the light of the above considerations, the Commission is of the opinion that the provisions with regards to the use of pentachlorophenol as notified by the Kingdom of the Netherlands pursuant to the former Article 100a(4) on 21 January 1992 and examined under Article 95(4) and (6) of the EC Treaty:

— fulfil the formal requirements of the said provisions and are to be admitted,

— can be considered justified on grounds of major need of protection of human health and the environment,

— do not constitute either a means of arbitrary discrimination, a disguised restriction on trade between Member States, or a disproportionate obstacle to the functioning of the internal market.

(80) The Commission therefore has reasons to consider that the national provisions notified can be approved.

(81) It has to be noted that the Netherlands provisions concerning PCP comprise an approval system without limiting clearly the areas of possible use. Furthermore, the limit for the impuritird hexachlorodibenzo-paradioxines as laid down in the SIVEB Decision of 1980 is higher than in the Community Directive. Article 95(4) only permits the approval of national legislation on grounds of major needs referred to in Article 30, or relating to protection of the environment or working environment. This means that it is not possible to approve national measures that are less protective than those laid down in the Directive. Therefore, the Netherlands national legislation can only be approved as its application in practice has shown that no product containing PCP was approved for applications not permitted by the Community Directive or containing more hexachlorodibenzoparadioxine than 4 ppm. A

([28]) See footnote 27.

different application of the Netherlands national legislation cannot be approved under Article 95(4).

(82) This Decision is without prejudice to the implementation by the Kingdom of the Netherlands of the provisions of Directive 1999/51/EC,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of the Controlled Substances Act of 1962 are approved in so far as they are applied in such a way that no approvals pursuant to Article 2 of the Controlled Substances Act are granted, which go beyond the provisions of Directive 91/173/EEC with regard to exceptions to the ban on the use of PCP or the content of hexachlorodibenzoparadioxin.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 26 October 1999.

For the Commission
Erkki LIIKANEN
Member of the Commission