COMMISSION

COMMISSION DECISION

of 31 October 2002

concerning national provisions on restrictions on the marketing and use of creosote-treated wood notified by the Netherlands under Article 95(4) and (5) of the EC Treaty

(notified under document number C(2002) 4116)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2002/884/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

(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 2002/61/EC [2], establishes rules restricting the marketing and use of certain dangerous substances and preparations. Under Article 1(1) thereof, the Directive applies to the substances and preparations listed in Annex I.

(2) Council Directive 89/678/EEC of 21 December 1989 [3] amending Directive 76/769/EEC inserted in Directive 76/76/EEC an Article 2(a), under which the amendments required to adapt the Annexes to technical progress, with regard to the substances and preparations already covered by Directive 76/769/EEC, are to be adopted in accordance with the procedure laid down in Article 29 of Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances [4], as amended by Council Directive 92/32/EEC [5].

(3) Directive 76/769/EEC has been amended on several occasions. A number of dangerous substances and preparations have been added to Annex I, and further restrictions have been placed on the marketing and/or use of substances and preparations covered by that Annex. In certain cases, restrictions are also placed on the marketing and/or use of products treated with or containing those substances and preparations.

[1] OJ L 262, 27.9.1979, p. 201.
[2] OJ L 243, 11.9.2002, p. 15.
[3] OJ L 398, 20.12.1989, p. 24.
[4] OJ 196, 16.8.1967, p. 1.
[5] OJ L 154, 5.6.1992, p. 1.

(4) European Parliament and Council Directive 94/60/EC amending for the 14th time Directive 76/769/EEC [6], which was adopted on the basis of Article 100a of the Treaty (now, after amendment, Article 95), added to the list of dangerous substances and preparations whose marketing and use are subject to restrictions set out in Annex I to Directive 76/769/EEC, *inter alia*, Section 32, which concerns creosote and similar coal tar distillates, as well as preparations containing them (hereinafter 'creosote'). It laid down restrictions on the marketing and use of creosote intended for wood treatment and of wood treated with creosote.

(5) Under Section 32, creosote was not to be used for wood treatment if it contained Benzo[a]pyrene (hereinafter B[a]P), and water extractable phenols (hereinafter WEP) above certain concentrations. The limit for B[a]P was fixed at a maximum of 0,005 % by mass (= 50 ppm) and the limit for WEP was fixed at a maximum of 3 % by mass (= 30 g/kg). In addition, wood so treated was not to be placed on the market.

(6) However, by way of derogation, the use of creosote for wood treatment was permitted in industrial installations if it contained B[a]P at a concentration of less than 0,05 % by mass (= 500 ppm) and WEP at a concentration of less than 3 % by mass (= 30 g/kg). Creosote complying with those limits could not be sold to the general public and containers had to be labelled with the phrase 'For use in industrial installations only'. Wood treated with creosote in industrial installations which was placed on the market for the first time could be used only in industrial and professional applications, such as on railways, in electric power transmission and telecommunications, for fencing and in harbours and waterways. In certain cases, however, its use was wholly excluded, for example, inside buildings, in contact with products intended for human or animal consumption, in playgrounds and in other outdoor places for public recreation or where there was a risk of skin contact. Old treated wood placed on the second-hand market could be used irrespective of the creosote-type applied except in the cases mentioned above.

(7) In 1999, on the basis of a study on the health effects of creosote [7] and the subsequent review by the Scientific Committee on Toxicity, Ecotoxicity and the Environment (hereinafter referred to as the SCTEE) [8], the Commission started discussions with the Member States with a view to reviewing the provisions of Directive 76/769/EEC regarding creosote.

(8) On 26 October 2001 the Commission, adopted Directive 2001/90/EC [9], adapting to technical progress for the seventh time Annex I to Directive 76/769/EEC (creosote). The second recital in the preamble makes reference to the health effects study, concluding that creosote has a greater potential to cause cancer than previously thought. The third recital mentions the findings of the review of that study, carried out by the SCTEE, indicating that there is a cancer risk to consumers from creosote with a B[a]P content of less than 0,005 % by mass and/or from wood containing such creosote, and that the magnitude of the risk gives clear cause for concern.

(9) Directive 2001/90/EC replaced Section 32 of Annex I to Directive 76/769/EEC, introducing new restrictions on the marketing and use of creosote for wood treatment and creosote-treated wood. According to the provisions of that Section, creosote may not be used in the treatment of wood and wood so treated may not be placed on the market. However by way of derogation, creosote containing B[a]P at a concentration of less than 0,005 by mass (= 50 ppm) and WEP at a concentration of less than 3 % by mass (= 30 g/kg) may be used for wood treatment in industrial installations or by professionals for *in situ* re-treatment. This type of creosote may not be sold to consumers and may be placed on the market only in packaging of a capacity equal to or greater than 20 litres. The packaging has to be labelled with the phrase 'For use in industrial installations or professional treatment only'.

---

[6] OJ L 365, 31.12.1994, p. 1.

[7] Fraunhofer Institute of Toxicity and Aereosol Research, 'Dermal Carcinogenicity Study of two Coal Tar Products (CTP) by Chronic Epicutaneous Application in Male CD-1 mice (78 weeks)', Final Report, Hanover, Germany, October 1997.

[8] Opinion on 'Cancer risk to consumers from creosote containing less than 50 ppm benzo-[a]-Pyrene and/or from wood treated with such creosote and estimation of respective magnitude', expressed at the eight SCTEE plenary meeting, Brussels, 4 March 1999.

[9] OJ L 283, 27.10.2001, p. 41.

(10) The use of wood so treated which is placed on the market for the first time or re-treated *in situ* is permitted for professional and industrial applications only, such as on railways, in electric power transmission and telecommunications, for fencing, for agricultural purposes and in harbours and waterways. In certain cases, however, its use is wholly excluded, for example inside buildings, in playgrounds, in parks, in gardens and outdoor recreational and leisure facilities where there is a risk of frequent skin contact and in garden furniture or in contact with products intended for human or animal consumption. Wood that has been treated with creosote before Directive 76/769/EEC, as amended by Directive 2001/90/EC, applies may be placed on the second-hand market for re-use, except in the cases listed above where its use is wholly excluded.

2. **National provisions**

(11) The national provisions notified to the Commission take the form of a draft Decree intended to amend the Decision on Coatings Containing Policyclic Aromatic Hydrocarbons *(Besluit PAK-houdende coatings)* ([10]) under the Chemical Substances Act (creosote-treated wood).

(12) Article 1, point B, of the draft Decree inserts a new Section 4(a) entitled 'creosote-treated wood', containing a new Article 8(a), Paragraph 1(a), of which provides that 'as from the date to be determined by Royal Decree, it shall be forbidden to import into the Netherlands, to use, or to supply to others, or to keep available for sale on the Dutch market, creosote-treated wood for applications involving contact with surface water or groundwater'.

(13) Under paragraph 2 of the new Article 8(a), the ban would not apply to creosote-treated wood which was put to use in its application before a date to be determined by Royal Decree, so long as the existing place of application is retained. Two other exceptions from the application of the ban are provided in paragraph 3. They concern creosote-treated wood which:

— has been placed under a customs procedure and is intended for customs transit, placement in a customs warehouse or for temporary admission, in accordance with the provisions of Article 4(16) of Council Regulation (EEC) No 2913/92 ([11]);

— originates from a Member State of the European Union, or an EEA State and is not intended for sale on the Netherlands market.

(14) Article 8b of the new Section 4a would require anyone who imports, supplies, or keeps available for sale on the market, creosote-treated wood that does not come under the ban, to keep a record of that wood and to show if so required that the creosote-treated wood in question is not intended for applications to which the ban relates. Specific minimum requirements are provided for in relation to the record, including:

— the name and address of the manufacturer or supplier from whom the creosote-treated wood was purchased,

— the date on which the creosote-treated wood was delivered by the manufacturer or supplier,

— the field of application for the creosote-treated wood,

— the name and address of the person to whom the creosote-treated wood was made available or delivered,

— the date of delivery of the creosote-treated wood,

— the quantity of creosote-treated wood received or delivered.

3. **Previous notification under Article 95(5) of the Treaty**

(15) The Netherlands had previously notified the Commission of their intention to introduce those national provisions. The notification was submitted on 25 January 2001 and sought to obtain the Commission's approval in relation to the relevant provisions of Directive 76/769/EEC as amended by Directive 94/60/EC. Pursuant to Article 95(6) of the Treaty, by Decision 2002/59/EC ([12]), the Commission approved the draft national provisions.

([10]) Bulletin of Acts and Decrees (Staatsblad) 1996, No 304, as last amended by the Decree of 6 April 1998 (Staatsblad No 235).
([11]) OJ L 302, 19.10.1992, p. 1.
([12]) OJ L 23, 25.1.2002, p. 37.

(16) A detailed description of the arguments put forward by the Netherlands, as supported by the evidence submitted, as well as the main factual and legal elements taken as a basis for the assessment by the Commission is contained in the recitals of Decision 2002/59/EC, to which full reference is made for the purpose of the present Decision. For reasons of clarity, a brief summary is given in recitals 17 to 20.

(17) The Netherlands took the view that new scientific findings concerning the protection of the environment in connection with a problem that had arisen in the Netherlands after the adoption of Directive 94/60/EC justified the introduction of the notified provisions.

(18) The evidence submitted by the Netherlands indicated certain environmental risks posed by creosote compounds, in particular Policyclic Aromatic Hydrocarbons, leaching out from creosote-treated wood in contact with surface water and groundwater. Also, the information submitted highlighted the particularly heavy exposure situation prevailing in the Netherlands with regard to its surface water and groundwater compartments.

(19) On 12 June 2001 the SCTEE gave a preliminary opinion ([13]) on the evidence submitted, concluding that the justification of the Netherlands notification is a complex matter and does not directly involve a danger to human health. On 13 July 2001, by Decision 2001/599/EC ([14]), the Commission extended the six-month period referred to in the second subparagraph of Article 95(6) of the Treaty for a further period of six months in order to allow for a thorough evaluation of all evidence submitted. The Decision was notified to the Netherlands on the day of its adoption.

(20) The SCTEE delivered its final opinion on 21 October 2001, shortly before the adoption of Directive 2001/90/EC, broadly confirming the scientific validity of the evidence submitted by the Netherlands. On the basis of that opinion, on 23 January 2002, by Decision 2002/59/EC, the Commission approved the draft national provisions. The Decision was notified to the Netherlands the same day.

II. **PROCEDURE**

(21) Under Directive 2001/90/EC, Member States have to adopt and publish the provisions necessary to comply with that Directive by 31 December 2002 at the latest, and to apply them no later than 30 June 2003.

(22) As indicated in point 16, pursuant to Article 95(6) of the Treaty, by Decision 2002/59/EC the Commission approved the draft national provisions concerning creosote-treated wood notified to it by the Netherlands.

(23) By letter dated 25 April 2002, the Permanent Representation of the Netherlands again notified the Commission, in accordance with Article 95(5) of the Treaty, of the national provisions which the Netherlands intends to introduce, but which are inconsistent with Directive 76/769/EEC as amended by Directive 2001/90/EC, as well as the grounds for introducing them. By letter of 10 July 2002, the Netherlands Permanent Representation informed the Commission that the Netherlands Government also refers to Article 95(4) of the Treaty in support of its position.

(24) By letter of 8 August 2002, the Commission informed the Netherlands authorities that it had received the notification under Article 95(4) and (5) of the Treaty and that the six-month period for its examination under Article 95(6) started on 4 May 2002, the day following the day on which the notification was received.

([13]) Opinion on Creosote — Notification of the Netherlands made under Article 95(5) of the Treaty expressed at the 24th CSTEE plenary meeting, Brussels, 12 June 2001.
([14]) OJ L 210, 3.8.2001, p. 46.

(25) By letter of 8 August 2002, the Commission informed the other Member States of the notification received from the Netherlands. The Commission also published a notice regarding the notification in the *Official Journal of the European Communities* ([15]) in order to inform other interested parties of the draft national measures that the Netherlands intend to introduce.

III. **ASSESSMENT**

1. **Admissibility**

(26) The Netherlands seeks the Commission's approval of national provisions which are incompatible with Directive 76/769/EEC as amended by Directive 2001/90/EC, a harmonisation measure adopted on the basis of Article 95 of the Treaty. Directive 2001/90/EC was adopted pursuant to Article 2a of Directive 76/769/EEC. It replaces Section 32 of Annex I to Directive 76/769/EEC, as amended by Directive 94/60/EC, which was adopted on the basis of Article 100(a) of the Treaty (now, after amendment, Article 95) and harmonises the marketing and use of creosote and creosote treated wood.

(27) The differences between the relevant provisions of Directive 2001/90/EC and the national provisions are summarised in the following table:

	Directive 2001/90/EC	National provisions
Wood treated with creosote containing B[a]P < 0,005 % by mass and WEP < 3 % by mass	Wood treated in industrial installations or retreated *in situ* by professionals can be placed on the market and used for professional and industrial applications involving contact with surface water and groundwater. Wood treated otherwise than above before 30 June 2003 can be placed on the secondhand market and/or (re)used for the above applications	Ban on marketing and use of treated wood for applications involving contact with surface water or groundwater Old treated wood cannot be marketed for reuse or be reused for the applications above if it is removed from the existing place of application
Wood treated with creosote containing B[a]P > 0,005 % by mass and WEP < 3 % by mass	Old treated wood can be placed on the secondhand market for reuse for applications involving contact with surface water and groundwater	Old treated wood cannot be marketed for reuse or be reused for applications involving contact with surface water or groundwater if it is removed from the existing place of application

(28) Overall, the national provisions are more restrictive than those laid down in Directive 2001/90/EC in the following respects:

— the placing on the market and/or use of wood treated with creosote containing B[a]P at a concentration of less than 0,005 % by mass and WEP at a concentration of less than 3 % by mass in industrial installations or re-treated *in situ* by professionals for professional and industrial applications involving contact with (ground)water, which are allowed under the Directive, would be prohibited in the Netherlands;

— the marketing for reuse or the reuse for applications involving contact with surface water or ground water in the Netherlands of old creosote-treated wood is prohibited if the wood is removed from the existing place of application.

(29) Directive 2001/90/EC replaces all the provisions on creosote-treated wood which had been introduced into Directive 76/769/EEC by Directive 94/60/EC and in relation to which the Netherlands had obtained authorisation to introduce the national provisions in question. The differences between the relevant provisions of Directive 76/769/EEC as amended by 94/60/EC, as amended by Directive 2001/90/EC and the national provisions in question are summarised in the following table:

([15]) OJ C 188, 8.8.2002, p. 2.

	Directive 94/60/EC	Directive 2001/90/EC	National provisions
Wood treated with creosote containing < 0,005 % by mass and WEP FEA < 3 % by mass	No restrictions on marketing or use of treated wood for applications involving contact with surface water and groundwater No restrictions on marketing or use of old treated wood for applications involving contact with surface water and groundwater	Wood treated in industrial installations or re-treated *in situ* by professionals can be placed on the market and used for professional and industrial applications involving contact with surface water and groundwater. Wood treated otherwise than above before 30 June 2003 can be placed on the second-hand market and (re)used for the above applications.	Ban on the marketing and use of creosote-treated wood for applications involving contact with surface water or groundwater Old treated wood cannot be marketed for re-use or be re-used for applications involving contact with surface water or groundwater if it is removed from the existing place of application
Wood treated with creosote containing B[a]P in the range of 0,005 to 0,05 (0,005 < B[a]P < 0,05) and WEP < 3 % by mass	Wood treated with creosote in industrial installations can be placed on the market and used for professional and industrial applications involving contact with surface water and groundwater. Old treated wood can be placed on the second hand market for re-use for the above applications.	First placing on the market of creosote-treated wood totally banned Wood treated before 30 June 2003 can be placed on the second-hand market for re-use in applications involving contact with surface water and groundwater.	Ban on marketing and use of creosote-treated wood for applications involving contact with surface water or groundwater Old treated wood cannot be marketed for re-use or be re-used for applications involving contact with surface water or groundwater if it is removed from the existing place of application
Wood treated with creosote containing B[a]P > 0,05 % by mass and WEP < 3 % by mass	Placing on the market of creosote-treated wood totally banned. Old treated wood can be placed on the second-hand market for re-use for applications involving contact with surface water and groundwater.	Placing on the market of creosote-treated wood totally banned. Old treated wood can be placed on the second-hand market for re-use for applications involving contact with surface water and groundwater.	Placing on the market of creosote-treated wood totally banned. Old treated wood cannot be marketed for re-use or be re-used for applications involving contact with surface water or groundwater if it is removed from the existing place of application

(30) It is evident from that table that, with the exception of the rules on the marketing and use of wood treated with creosote containing B[a]P at a concentration of greater than 0,05 % by mass previously placed on the market, which remain unchanged, the relevant provisions introduced by Directive 2001/90/EC are more restrictive than those introduced by Directive 94/60/EC. However, the national provisions notified by the Netherlands, and previously notified and approved by the Commission, continue to be stricter than those of Directive 2001/90/EC.

(31) In their letter of 25 April 2002, notified to the Commission on 3 May 2002, and complemented by their letter of 10 July 2002, the Netherlands makes reference to both Article 95(4) and/or (5) of the Treaty in support of its notification.

(32) 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.'

(33) Article 95(5) of the Treaty provides that 'If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.'

(34) Those Treaty provisions distinguish between situations where the national provisions notified by Member States are to be maintained and situations where they are to be introduced, each situation being subject to specific conditions for the application of the derogation provided for in the key provisions of Article 95. While the applicability of the conditions laid down in Article 95(4) presupposes that the national provisions in principle exist before the adoption of the harmonisation measure, the conditions established by Article 95(5) apply where the national provisions are in principle notified at the draft stage.

(35) It appears from the submitted documentation that the national provisions exist only in draft form. They are not in force, nor were they adopted before the adoption of Directive 2001/90/EC. However, certain specific circumstances have to be taken into account in order to establish whether the notification submitted by the Netherlands has to be considered in the light of the conditions provided for in Article 95(4) of the Treaty or has rather to be assessed in the light of those specified in Article 95(5).

(36) In particular, the national provisions were first notified to the Commission on 23 January 2001, that is to say, before the adoption of Directive 2001/90/EC, and they were approved by Decision 2002/59/EC. According to established case-law, a Member State is not authorised to apply national measures derogating from a harmonisation measure until the Commission has decided thereupon ([16]). In addition, neither the environmental concerns nor the specific problem pointed out by the Netherlands were taken into consideration at the time of adoption of Directive 2001/90/EC. Acknowledgement of those concerns and their specificity to the Netherlands occurred after the adoption of that Directive. This in turn led the Commission to approve the national provisions while at the same time to declare its intention of reviewing the newly adopted Directive ([17]).

(37) It is clear that by notifying national provisions which had already been notified before the adoption of Directive 2001/90/EC, the Netherlands 'deems it necessary to maintain [those] national provisions', which have been approved by the Commission, within the meaning of Article 95(4). Conversely, the renewed notification does not appear to fulfil the conditions of Article 95(5) because it was not 'after the adoption by … the Commission of a harmonisation measure' that the Netherlands deemed it necessary to introduce the national provisions, but well before the adoption of Directive 2001/90/EC.

(38) It should be noted that under Community law a Member State is not allowed to apply national measures derogating from a harmonisation measure until the Commission has approved them. It should also be noted that Article 95(4) EC is concerned with national measures that a Member State wishes to maintain after the adoption of a harmonisation measure, in other words measures that are already applicable in that Member State. On 23 January 2002 the Commission approved the draft national measures that the Netherlands wishes to introduce and which from a point of view of environmental protection derogated from Directive 94/60/EC. However, Directive 2001/90/EC was adopted on 26 October 2001. The draft national measures, thus authorised by the Commission under Article 95(5) EC, derogate from Directive 2001/90/EC and accordingly, the Commission needs to approve that they may be applied. Hence, the Netherlands proceeded to a second notification of the same national provisions that it had previously notified and which the Commission has already approved. It is under these specific circumstances that the Commission concludes that the Netherlands wish to 'maintain' the same national provisions, which from a point of view of environmental protection are more restrictive than those laid down in Directive 2001/90. The notification submitted by the Netherlands has therefore to be assessed in the light of Article 95(4) EC.

([16]) See e.g. Case C-319/97: *Kortas*, ECR [1999] I-3143, para [28].
([17]) See Commission Decision 2002/59/EC, recital 98.

(39) It has to be noted that Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community ([18]) applies to the placing by a person of creosote-treated wood into surface water ([19]). However, that Directive is concerned with the prior authorisation of all discharges into, *inter alia*, inland surface water, territorial waters, internal coastal waters and does not cover the placing on the market of creosote-treated wood, nor does it provide for a general ban on the use of creosote-treated wood in contact with surface water. Therefore, the Netherlands provisions under consideration, in providing for a total ban on the marketing and/or use of creosote-treated wood for applications involving contact with surface water, go beyond the measures provided for in Directive 76/464/EC and are incompatible with Directive 2001/90/EC.

(40) Furthermore, Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances ([20]) covers the placing by a person of creosote-treated wood into direct contact with ground water if polycyclic aromatic hydrocarbons (hereinafter referred to as PAHs) leaching out from treated wood are found in quantities or concentrations of concern. In those circumstances, the use of creosote-treated wood in contact with groundwater is prohibited under that Directive. However, that Directive does not provide for a total ban on the use of creosote-treated wood in contact with groundwater nor does it cover the placing on the market of creosote-treated wood. Consequently, the Netherlands provisions under consideration, in providing for a total ban on the marketing and use of creosote-treated wood for applications involving contact with groundwater, go beyond the measures provided for in Directive 80/68/EEC and are incompatible with Directive 2001/90/EC.

(41) The notification submitted by the Netherlands contains an explanation of the grounds relating to the protection of the environment which, in their opinion, justify the national provisions notified.

(42) In the light of the foregoing, it can therefore be concluded that the Netherlands notified the Commission of the actual wording of the national provisions approved by Decision 2002/59/EC but incompatible with Directive 2001/90/EC, which they intend to maintain, as well as an explanation of the reasons which, in their opinion, justify the maintenance of those provisions.

(43) The notification submitted by the Netherlands in order to obtain approval of the draft national provisions, which were approved by Decision 2002/59/EC under Article 95(5) EC and remain unchanged, concerns measures more restrictive than those adopted by Directive 2001/90/EC. The notification is therefore to be considered admissible under Article 95(4) of the Treaty to the extent that the relevant provisions of Directive 2001/90/EC are not identical with those laid down in Directive 94/60/EC.

2. **Merits**

(44) In accordance with Article 95(4) of the Treaty, the Commission must ascertain that all the conditions enabling a Member State to avail itself of the possibility of derogation provided for in that Article are fulfilled. In particular, the national provisions have to be justified by the major needs referred to in Article 30 of the Treaty or relating to the protection of the environment or the working environment. Also, the possibility of derogation provided for in Article 95(4) requires the existence of a problem specific to the notifying Member State in connection with the grounds invoked by that State.

([18]) OJ L 129, 18.5.1976, p. 23.
([19]) European Court of Justice's judgment of 29 September 1999, case C-232/97 — ECR [1999] I, p. 6385.
([20]) OJ L 20, 26.1.1980, p. 43.

(45) In addition, pursuant to Article 95(6) of the Treaty, where the Commission considers that such national provisions are justified, it must check whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.

2.1. **Creosote — General information**

(46) Creosote is a complex mixture of over 200 chemical compounds, predominantly aromatic hydrocarbons, as well as phenolic and aromatic nitrogen and sulphur compounds. It is a mid-heavy distillate of coal tar (boiling point approximately 200 to 400 °C).

(47) Creosote can contain over 30 different polycyclic aromatic hydrocarbons (PAHs) with a possible total PAH content of 85 %. The most important ones are:

— acenaphthene,

— naphthalene,

— phenanthrene,

— anthracene,

— fluorene,

— fluoranthene,

— chrysene,

— triphenylene,

— benzo[a]anthracene,

— benzo[b]fluoranthene,

— benzo[k]fluoranthene,

— benzo[a]pyrene.

(48) Benzo[a]pyrene (B[a]P) is one of the most thoroughly investigated PAHs and the B[a]P content is used as an indicator or marker substance for classification purposes and does not, in itself, reflect the total PAH content of creosote. Depending on the type of creosote concerned, the B[a]P content may vary between 0,003 and 0,3 % by weight (30 to 3 000 ppm). A refined distillation of coal tar and selection of the fractions can lead to lower B[a]P or phenol contents. Different industry standards have been developed by the Western European Institute for Wood Preservation, characterised mainly by different contents of specified distillation fractions and, most important in this context, different contents of B[a]P. Limit values for classification standards are 500 ppm and 50 ppm.

(49) Modifications to both the physical and chemical properties of creosote are possible if they are required for use or environmental purposes. It is possible to create a lower viscosity product, better suited to brush application, by incorporating components with a lower boiling point, which is sometimes called *carbolineum*. Directive 2001/90/EC does not make a distinction: it covers and treats in an identical way a whole range of different coal tar distillates, each of them specified by name, Einecs- and CAS number.

(50) Creosote is principally and almost exclusively used as a wood preserving agent. Large-scale industrial and professional applications are by far the most important ones: railway sleepers, poles for electricity transport, hydraulic engineering (bank protection), fences, stakes for agriculture and fruit production. Creosote and similar products are also used by individual consumers for wood preserving purposes.

(51) The most important properties of creosote are:

— high fungicidal efficacy,

— high insecticidal efficacy,

— long-term persistence,

— resistance to leaching and weathering.

(52) A very small quantity of creosote is used in medicinal products for the treatment of certain skin diseases, such as psoriasis.

Ecotoxicological effects

(53) Environmental contamination by creosote has been reported in a number of countries, with old wood treatment facilities often being the source of the contamination. In fact, most information on the fate of creosote in the environment has been obtained from industrial creosote spills and from contamination left from disused creosote plants. Environmental contamination has been traced by an analysis of selected PAH compounds, notably B[a]P.

(54) Creosote is toxic to certain organisms in the soil and highly toxic for aquatic organisms (with 96h LC-50 values often below 1 mg/l). Many of its components are bioaccumulating.

(55) The main characteristics of PAHs in the environment are:

— PAHs bind strongly to soil organic matter;

— the rate of degradation of PAHs in soil and other environmental compartments is usually slow. Creosote residues can persist for many years in the environment (> 20 to 30 years),

— the main breakdown processes are photodegradation (under irradiation from the sun) and microbial degradation (by certain bacteria). Microbial degradation can occur under aerobic and anaerobic conditions. PAH compounds with four rings and more may be poorly degradable,

— PAHs reaching watercourses are rapidly transferred to sediment,

— in watercourses, most of the lower molecular weight PAHs are removed primarily by microbial degradation and the higher molecular weight compounds by photooxidation and sedimentation. Microbial degradation of the more water soluble PAHs occurs under aerobic and anaerobic conditions. The PAH constituents have been shown to bioaccumulate in aquatic species.

(56) Emissions of PAHs into air, water and soil can occur during the impregnation process and storage at the impregnation site, as well as during the use of treated wood. However, the PAHs found in the various environmental compartments originate from a variety of sources (all combustion processes, traffic and so on) and it is often difficult to ascribe their levels to any particular source such as creosote treated wood.

(57) A study ([21]) published in Sweden has shown that after 40 years in soil, creosote impregnated poles had lost some of the compounds contained in creosote, especially those with the lowest boiling point (< 270 °C). The part of the poles above the ground lost the larger amount. However, mobility of the leached compounds was very low as they could only be detected in the soil in close contact with the poles. This is consistent with the observation that the mobility of PAHs in soil is extremely low due to their strong absorption to organic matter.

(58) The presence of elevated levels of PAH in aquatic environments has often been attributed to the presence of creosote-treated wood. Migration of creosote components from treated wood into water is higher into fresh water than into seawater and has been proven in many studies. Migration seems to be more limited in seawater; in one study, after ten years in the sea, marine pilings retained 93 % of the original composition of creosote compounds ([22]). The pollution of sediments by creosote leaching from waterbank protection has been documented in the Netherlands ([23]) and also in studies on pollution from former impregnation facilities.

([21]) S. Holmroos, *Analys av kreosotstolpar i Simlångsdalen efter 40 års exponering i fält*. Rapport nr. M205-252.092. Älvkarleby: Vattenfall Utveckling. 1994.

([22]) L.L. Ingram *et. al.*, Migration of Creosote and Its Components from Treated Piling Sections in a Marine Environment, Proc. Ann. Meet. Am. Wood Preserv. Assoc. 78, 1982, p. 120. See also footnotes 8 and 18.

([23]) BKH Consulting Engineers, Foundation of the appeal against the EC-directive on creosote, Final report, Delft, 1 July 1995.

(59) More recently, on the basis of a study carried out in the Netherlands ([24]), the SCTEE ([25]) highlighted the environmental risks associated with the use of creosote-treated wood in the aquatic environment (surface water and groundwater) even at very low concentration of BaP contained in the creosote used for wood treatment.

(60) As for human exposure via the environment, actually measured data on environmental pollution by PAHs originating in creosote are scarce.

2.2. **The position of the Netherlands**

(61) The Netherlands takes the view that the national provisions are justified by the need to protect the aquatic environment from the risks posed by creosote-treated wood in contact with surface water and groundwater and by the specific exposure situation prevailing in the Netherlands.

(62) The Netherlands refers to the evidence submitted in support of their previous notification as well as the findings of the review carried out by SCTEE ([26]). A detailed description of the relevant documentary evidence referred to by the Netherlands is contained in Decision 2002/59/EC, to which reference is made for the purposes of the present Decision. Furthermore, the Netherlands points out that Directive 2001/90/EC is exclusively inspired by human health protection requirements and does not take into account either environmental concerns or the specific exposure situation prevailing in the Netherlands

2.3. **Evaluation of the position of the Netherlands**

2.3.1. *Justification with regard to the need to protect the environment*

(63) The evidence referred to in the Netherlands notification highlights the risks to the aquatic environment from PAHs leaching out from creosote-treated wood in contact with surface water and groundwater. The assessment of the risks carried out by the Netherlands authorities addresses both wood treated with creosote containing B[a]P at concentration of less than 0,05 % by mass (hereinafter standard creosote) and that with a B[a]P content of less than 0,005 % (hereinafter modified creosote). In both cases, creosote-treated wood is reported to result in the maximum admissible concentrations of most of the selected PAHs in surface water, groundwater and sediment being considerably exceeded.

(64) In its opinion of 21 October 2002, the SCTEE broadly confirms the environmental concerns pointed out by the Netherlands. However, as far as wood treated with standard creosote is concerned, the SCTEE observes that the environmental risks could be even greater than indicated by the Netherlands authorities. As for modified creosote, the SCTEE observes that this does not result in a substantial reduction of the levels of other PAHs and concludes that controls based on B[a]P alone are not adequate.

([24]) Centrum voor Stoffen en Risicobeoordeling, CSR Adviesrapport: 08196A01, *Creosoot — Milieurisico's ten gevolge van de toepassing van gecreosoteerd hout in contact met water en bodem* — Auteurs: M.H.M.M. Monforts, E.W.M. Roex, and J.P. Rila, 5.12.2000 — RIVM (Research for man and environment) Rijksinstituut voor volksgezondheid en milieu (National Institute of public health and the environment).

([25]) Opinion on creosote. — Notification of the Netherlands made under Article 95(5) of the Treaty expressed at the 24th CSTEE plenary meeting, Brussels, 12 June 2001.

([26]) Opinion on creosote. — Notification of the Netherlands made under Article 95(5) of the Treaty expressed at the 24th CSTEE plenary meeting, Brussels, 12 June 2001.

(65) Directive 2001/90/EC, which was adopted before the SCTEE delivered its opinion, merely reduced the B[a]P content permitted in creosote from 0,05 to 0,005 and thus does not adequately address the environmental risks pointed out by the Netherlands. It is exclusively inspired by human health protection requirements and, pending the evaluation by the SCTEE, does not take into consideration the environmental concerns pointed out by the Netherlands. Furthermore, in Decision 2001/59/EC, by addressing those environmental concerns and announcing its intention of reviewing those provisions accordingly, the Commission acknowledges the limitations of Directive 2001/90/EC.

(66) The documentation referred to in the Netherlands notification also shows that a specific problem exists in the Netherlands due to the high level of exposure to PAHs from creosote-treated wood of the Netherlands surface water and groundwater areas.

(67) In its opinion of 30 October 2001, the CSTEE recognises that creosote-treated wood in contact with waterways is used extensively in the Netherlands as riverbank protection and that the subsequent risks for the aquatic environment within the Netherlands are likely to be extensive. Further comparative information ([27]) indicates that the extensive use of creosote-treated wood for riverbank protection in the Netherlands represents a major problem by comparison with other Member States. Furthermore, a recent estimate ([28]) of the general concentration level of PAHs in the Netherlands surface water areas confirms that the exposure scenario prevailing in the Netherlands is particularly intensive.

(68) Likewise, in the light of the data showing the considerable extent of low-depth groundwater areas in the Netherlands combined with the extensive use of creosote-treated wood in applications susceptible to contact with groundwater, it can reasonably be concluded that a particularly high level of exposure to PAHs from creosote-treated wood can also be expected with regard to groundwater.

(69) In the light of the foregoing, the Commission considers that the national provisions notified by the Netherlands are justified by the need to reduce the exposure of the Netherlands aquatic environment and are proportionate to the objective pursued.

2.4. **Absence of arbitrary discrimination or of any disguised restriction on trade between Member States and of any obstacle to the functioning of the Internal market**

2.4.1. *Absence of arbitrary discrimination*

(70) Article 95(6) obliges the Commission to verify that the envisaged measures are not a means of arbitrary discrimination. In order for there to be no discrimination, similar situations must not be treated in different ways and different situations must not be treated in the same way, is a general principle in Community law.

(71) The national provisions are general and are intended to apply to both national and imported creosote-treated wood for the applications concerned. As a result, there is no evidence that they can be used as a means of arbitrary discrimination between economic operators in the Community.

([27]) BKH Consulting Engineers, Foundation of the appeal against the EC-directive on creosote, Final report, Delft, 1 July 1995.
G. Grimmer, *Study on the Justification in Scientific Terms of Allowing The Netherlands to retain its National Laws on Creosote in Place of Council Directive 94/60/EC*. Final report, Biochemisches Institut für Umweltcarcinogene, Großhansdorf (Germany), December 1995.

([28]) Centrum voor Stoffen en Risicobeoordeling, CSR Adviesrapport: 08196A01, *Creosoot — Milieurisico's ten gevolge van de toepassing van gecreosoteerd hout in contact met water en bodem* — Auteurs: M.H.M.M. Monforts, E.W.M. Roex, and J.P. Rila, 5.12.2000 — RIVM (Research for man and environment) Rijksinstituut voor volksgezondheid en milieu (National Institute of public health and the environment).

2.4.2. *Absence of a disguised restriction on trade*

(72) National measures which restrict the marketing and use of products to a greater extent than a Community Directive would normally constitute a barrier to trade, in so far as products that could be legally placed on the market in the rest of the Community could not be placed on the market in the Member State concerned. The pre-conditions laid down in paragraph 6 of Article 95 are intended to prevent restrictions based on the criteria set out in paragraphs 4 and 5 thereof from being applied for inappropriate reasons, and constituting in effect economic measures to impede the importation of products from other Member States, that is to say, a means of indirectly protecting national production.

(73) However, it has already been established that there is real cause for concern as regards the aquatic environment, because of the specific overall exposure situation in the Netherlands. The true aim of the national provisions appears, therefore, to be the protection of the environment, not the creation of disguised barriers to trade.

(74) The national provisions provide for an exemption for creosote-treated wood intended for export. However, that exception is in line with Directive 76/769/EEC as amended by Directive 2001/90/EC, and, hence, is not concerned with this decision.

(75) It must be concluded that there is no evidence to indicate that the envisaged national provisions are a disguised restriction on trade between Member States.

2.4.3. *Absence of obstacles to the functioning of the internal market*

(76) This condition cannot be interpreted in such a way that it precludes the approval of any national measure likely to affect the establishment of the internal market. Indeed, any national measure derogating from a harmonisation measure aiming at the establishment and operation of the internal market will constitute in substance a measure likely to affect the internal market. Consequently, in order to preserve the useful character of the procedure for derogation provided for by Article 95 of the EC Treaty, the concept of obstacle to the functioning of the internal market must, in the context of Article 95(6), be understood as a disproportionate effect in relation to the pursued objective.

(77) In the light of the environmental concerns identified and also taking into account the specific exposure situation in the Netherlands, it must be concluded that there is no evidence to indicate that the envisaged national provisions constitute an obstacle to the functioning of the internal market.

IV. **CONCLUSION**

(78) In the light of the foregoing, it can be concluded that the notification by the Netherlands of the national provisions derogating from Directive 2001/90/EC with regard to creosote-treated wood, as notified on 3 May 2002, is admissible and fulfils the conditions established by Article 95(4) of the Treaty.

(79) Furthermore, the national provisions do not constitute a means of arbitrary discrimination, or a disguised restriction on trade between Member States, or a disproportionate obstacle to the functioning of the Internal Market.

(80) The national provisions can therefore be approved in accordance with Article 95(6) of the Treaty. In accordance with Article 95(7) of the Treaty, the Commission is currently considering an adaptation of the provisions of Directive 76/769/EC, as amended by Directive 2001/90/EC, on the basis of all available scientific evidence.

HAS ADOPTED THIS DECISION:

Article 1

The national provisions relating to the placing on the market and use of creosote-treated wood, which the Netherlands notified to the Commission on 3 May 2002, are approved.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 31 October 2002.

For the Commission

Erkki LIIKANEN

Member of the Commission