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EC Directive 91/173 Pertaining to Dangerous Substances: When May a Member State Impose Environmental Restrictions Which are Stricter Than Those Mandated by the European Community?

INTRODUCTION

The 1980s heralded an increased awareness of the scarcity of the earth's natural resources. Environmental groups advocated waste management, pollution abatement, and ecological preservation. As the European Community (EC) continues to suffer from serious environmental problems stemming from its history of industrial development, both environmental groups and citizens are advocating for reform. Concurrent with the rise of environmental concerns, the EC has increased law-making activity as part of the "1992 Program" for an internal market without frontiers. These two trends, rising environmentalism and growing Community power, resulted in the enactment of environmental initiatives which greatly affected many European industries.

On March 21, 1991, the European Commission issued the 9th Amendment to Directive 71/769, more commonly known as the Marketing and Use Directive.¹ Directive 91/173 restricts the marketing and use of certain dangerous substances and preparations, such as pentachlorophenol (PCP).² PCP is a biocide which is used to protect materials such as wood, plaster, and certain textiles from fungal decay.³ PCP is also a cellular poison that can cause bronchitis and may impair renal functioning.⁴ In addition, exposure to PCP has been known to cause comas and heart and lung failure.⁵

The European Commission issued Directive 91/173 to strictly

¹ Council Directive 91/173, 1991 O.J. (L 85) 1; *EC: Euronews Construction—Other Directives*, Reuter Textline, Feb. 19, 1993, available in LEXIS, Nexis Library, Reuter File [hereinafter *Euronews Construction*].

² Council Directive 91/173, *supra* note 1, art. 1.

³ *Euronews Construction*, *supra* note 1.

⁴ *Pentachlorophenol*, MICROMEDEX, 1992, available in LEXIS, Genmed Library, Poison File.

⁵ *Id.*

regulate the marketing of PCP and to ensure adequate protection of public health in the Community. This Directive greatly restricts the use and sale of PCP within the Community.⁶ The Directive limits the amount of PCP which may be used for the treatment of wood and for the impregnation of heavy-duty textiles, and also limits the amount which may be used as a synthesizing or processing agent.⁷ Contractors, however, may use any amount of PCP to treat buildings with cultural or historic significance that suffer from dry rot.⁸

While Directive 91/173 imposes strict controls on the use of PCP, on June 10, 1992, the Commission allowed Germany to impose controls stricter than those mandated by the EC within its own borders.⁹ Citing an article of the EEC founding Treaty,¹⁰ the Commission decided that Germany could ban the use and manufacture of PCP on the grounds of "important requirements" or environmental protection.¹¹ France, Italy, and Greece objected to the Commission's decision. According to these countries, Germany's ban on the use and manufacture of PCP acts as an obstacle to the free flow of goods in the Single European Market.¹² Indeed, on February 24, 1993, France asked the European Court of Justice (ECJ) to annul the Commission's decision to approve the German ban.¹³ The Court's decision is still pending. This case is very important to the EC and to Member States because it is the first challenge to the legality of standards imposed by Member States that are stricter than those mandated by the EC.

Part I of this Comment examines the European Community's authority to enact environmental legislation. Part II describes the use and effects of PCP and examines the provisions of Directive

⁶ See Council Directive 91/173, *supra* note 1, art. 1.

⁷ *Id.*

⁸ *Id.*

⁹ See *Bonn Wins Exemption on Chemical*, FIN. TIMES, June 11, 1992, available in LEXIS, Bankng Library, FINTME File; *EC: Dangerous Substances—EC Commission Authorises Ban on PCP in Germany*, Reuter Textline, Sept. 26, 1992, available in LEXIS, Nexis Library, Reuter File [hereinafter *EC: Dangerous Substances*].

¹⁰ TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 100A (as amended 1987).

¹¹ See *EC: Dangerous Chemicals—German Ban on PCP Gets EC Approval*, EUR. 2000, Aug. 1, 1992, available in LEXIS, Europe Library, AE File [hereinafter *EC: Dangerous Chemicals*].

¹² *Commission Authorises Ban on PCP in Germany*, EUR. INFO. SERV., June 19, 1992, available in LEXIS, Europe Library, LBYPRT File.

¹³ *EC: France Contests Commission's Authorisation for Germany to Ban Use of Pentachlorophenol*, AGENCE EUR., Feb. 25, 1993, available in LEXIS, Europe Library, AE File [hereinafter *EC: France Contests*].

91/173. Part III addresses Germany's reaction to the Directive, and Part IV describes France's appeal to the ECJ. Part V examines the ECJ's options and proposes a manner in which the EC may enact future environmental legislation. This Comment concludes that the ECJ should recommend an amendment to Directive 91/173 which would impose a Community-wide ban on the sale and marketing of PCP.

I. EUROPEAN COMMUNITY AUTHORITY TO ENACT ENVIRONMENTAL MEASURES

The Treaty Establishing the European Economic Community (EEC Treaty) created the European Community in 1957.¹⁴ At this time, European officials did not regard protection of the environment as a necessary Community objective.¹⁵ As a result, the EEC Treaty did not include an explicit reference to the promulgation of environmental laws.¹⁶ Additionally, until 1987, most of the environmental measures enacted by the Commission were based on general provisions of the Treaty.¹⁷ Following the incorporation of the Single European Act (SEA) into the Treaty in 1987,¹⁸ however, the Community assumed the power to address environmental matters by passing new environmental legislation.¹⁹ According to the SEA, the Community's objectives are: 1) to preserve, protect and improve the quality of the environment; 2) to contribute towards protecting human health; and 3) to ensure a prudent and rational utilization of natural resources.²⁰ To further these objectives, the Community asserts that environmental protection requirements must be a component of the Community's other policies.²¹

The EC contends that there are three reasons for including environmental policy within the framework of the EEC Treaty.²² First,

¹⁴ EEC TREATY, art. 100A.

¹⁵ *EC Commentaries*, COOPERS & LYBRAND, Mar. 25, 1993, available in LEXIS, Compny Library, CLE File.

¹⁶ Turner T. Smith, Jr. & Roszell D. Hunter, *The European Community Environmental Legal System*, 22 ENVTL. L. REP. 10106, 10114 (Feb. 1992).

¹⁷ Bryan Harris, *EEC Laws on Environmental Protection*, 137 NEW L.J. 1058, 1058 (Nov. 13, 1987). These provisions included article 100, which provided for the harmonization of Member States' laws when necessary for the functioning of the Common Market, and article 2, which specified the general objectives of the Community. *Id.* at 1058-59.

¹⁸ Single European Act, 1987 O.J. (L. 169) 1, 1.

¹⁹ *Id.*; Smith & Hunter, *supra* note 16, at 10114.

²⁰ EEC TREATY art. 130R.

²¹ See Harris, *supra* note 17, at 1059.

²² *Id.*

the Treaty seeks to improve the working and living conditions of European citizens, and according to the European Commission, this entails improving the environment.²³ Second, if Member States follow different national environmental policies, the disparities of these policies could affect the functioning of the common market by hindering the free movement of goods.²⁴ Lastly, according to the Commission, "pollution knows no frontiers," and the Community is the most appropriate level at which environmental problems can be resolved.²⁵ Therefore, to further its environmental objectives, the European Commission utilizes Title VII, article 130 and article 100A of the SEA to enact environmental legislation.²⁶

Title VII is the environmental title of the EEC Treaty.²⁷ Title VII states that the Community should legislate to the extent that environmental objectives "can be attained better at Community level than at the level of the individual Member States."²⁸ If the European Commission chooses to legislate under Title VII, article 130, the Commission adheres to three principles: 1) preventative action should be taken to avert environmental damage; 2) environmental damage should be rectified at the source; and 3) the polluter should pay for its actions.²⁹ Furthermore, when drafting environmental legislation, the Commission considers the environmental conditions of the various regions, the economic and social development of the Community as a whole, and the balanced development of each region.³⁰

Title VII also states that the measures adopted pursuant to article 130 shall not prevent any Member State from maintaining or introducing more stringent protective measures.³¹ A Member State may introduce more stringent measures if the measures are compatible with the Treaty goals of the free movement of goods and services.³² Thus, Title VII is similar to the European Community's other mechanism authorizing the enactment of environmental legislation, article 100A. Both provisions authorize the adoption of additional meas-

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Smith & Hunter, *supra* note 16, at 10114.

²⁷ *Id.* at 10116.

²⁸ EEC TREATY art. 130R.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* art. 130T.

³² See Smith & Hunter, *supra* note 16, at 10117.

ures so long as these measure do not impede the functioning of the Community as a whole.

Article 100A of the SEA authorizes the European Council to enact measures to complete the internal market.³³ These measures may include proposals concerning health, safety, and environmental protection.³⁴ Such measures are designed to afford European citizens a high level of protection. Paragraph 4 of the article states:

[i]f, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs . . . or relating to protection of the environment . . . it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.³⁵

Thus, article 100A affords European citizens a high level of protection by allowing a Member State to impose more stringent environmental restrictions, provided these restrictions do not substantially impair trade. A Member State must choose restrictions which least interfere with intra-Community trade.³⁶ Furthermore, these restrictions may not produce negative effects on trade which are disproportionate to the restrictions' environmental objectives.³⁷

EC officials question, however, whether article 100A allows a Member State to impose *new* stricter environmental restrictions, as opposed to continuing to enforce existing environmental restrictions.³⁸ Article 100A states that a Member State may "apply" national measures, and some EC officials maintain that "apply" means that states

³³ EEC TREATY art. 100A. When legislation is based on article 100A, a cooperation procedure applies. The European Commission's proposal is sent to the Parliament for a first reading, and the Parliament must issue an opinion on the proposal. After the Parliament has issued an opinion and the Commission has made any amendments, the Commission may then, acting as a qualified majority, reach an agreement on the proposal. The proposal then goes to Parliament for a second reading. Parliament may either approve or reject the proposal. If Parliament rejects the proposal, the Commission may nevertheless adopt it by unanimous vote. *Id.* arts. 100A, 149.

³⁴ *Id.* art. 100A.

³⁵ *Id.*

³⁶ See Smith & Hunter, *supra* note 16, at 10116 (citing Case 302/86, Commission v. Denmark, 1988 E.C.R. 4627).

³⁷ *Id.*

³⁸ See *id.*

may enforce only those measures which exist at the time of a Directive's adoption.³⁹ These officials argue that if the drafters desired Member States to have the authority to enact new stricter measures, they would have used the word "introduce" as well as the word "apply."⁴⁰ Other officials contend, however, that "apply" should be construed to authorize the adoption of new stricter environmental laws.⁴¹

II. THE USE AND EFFECTS OF PENTACHLOROPHENOL AND EC DIRECTIVE 91/173

On March 21, 1991, the European Commission enacted EC Directive 91/173.⁴² This Directive greatly restricts the use and sale of PCP within the Community.⁴³ PCP is used in Europe primarily as a wood and textile preservative.⁴⁴ More specifically, PCP is a biocide used to protect wood, plaster, textiles, cellulose products, and industrial waste from fungal decay, and is used widely in the lumber industry.⁴⁵

The European Commission enacted Directive 91/173 to combat the potential harmful effects of the chemical on human health.⁴⁶ PCP is absorbed through the skin, and prolonged or frequent contact with either a PCP solution or dust may cause systemic symptoms.⁴⁷ PCP affects the circulatory system and the heart, and impairs autonomic nervous function.⁴⁸ Additionally, PCP exposure may cause profuse perspiration, high fever, weakness, nausea, vomiting, abdominal cramps, headaches, and intense thirst.⁴⁹ Moreover, extensive exposure to PCP may lead to a progressive coma or cardiac

³⁹ *Id.*

⁴⁰ *See id.* These officials point to the fact that the drafters of article 100A used the word "introduce" in Title VII, thereby granting states the authorization to enact new stricter measures. *Id.*

⁴¹ *See id.*

⁴² Council Directive 91/173, *supra* note 1, art. 1.

⁴³ *See id.*

⁴⁴ *Environmentalists Urge European Ban on Pesticides Dinoseb, Pentachlorophenol*, Chem. Reg. Rep. (BNA), May 8, 1987, available in LEXIS, BNA Library, CHEMRG File [hereinafter *Environmentalists Urge European Ban*].

⁴⁵ *Euronews Construction*, *supra* note 1; Eric Bailey, *Worries Roil Workers in Offices With Tainted Air*, L.A. TIMES, Jan. 12, 1986, available in LEXIS, Nexis Library, LAT File.

⁴⁶ *Euronews Construction*, *supra* note 1.

⁴⁷ *Pentachlorophenol*, *supra* note 4.

⁴⁸ *Id.*

⁴⁹ Bailey, *supra* note 45.

arrest.⁵⁰ Indeed, doctors have associated PCP with several deaths throughout the world.⁵¹

In 1988, the United Kingdom cited PCP as one of the twenty-six most dangerous substances polluting the aquatic environment.⁵² Prior to 1991, the EC used PCP extensively, and produced more than 3,900 tons of PCP a year.⁵³ This extensive use, coupled with the chemical's harmful effects, resulted in a coalition of seventy-five Western European environmental organizations calling for a ban on the use and production of PCP.⁵⁴

The European Commission enacted Directive 91/173, the Ninth Amendment of the Marketing and Use Directive, to strictly regulate the marketing of PCP and to reduce citizens' exposure to this biocide.⁵⁵ This Directive prohibits the sale or use of substances containing PCP esters and salts at concentrations equal to or greater than 0.1 percent by mass.⁵⁶ PCP-treated timbers may no longer be used inside buildings, and containers which package products for human or animal consumption may not contain PCP.⁵⁷ In addition, PCP may not be used for the treatment of garment and household textiles.⁵⁸

Directive 91/173 does make exceptions for certain products treated with PCP, however. PCP-treated wood may be used for those structural timbers which are considered part of the external structure of a building.⁵⁹ Thus, PCP still may be used to treat roof trusses, timber frames, joists, exterior window and door frames, and exterior doors.⁶⁰ PCP also may be used for exterior woodwork such as cladding.⁶¹ Moreover, PCP may be used for treatment of wood or masonry found in buildings of cultural, historic, or artistic interest, if

⁵⁰ *Pentachlorophenol*, *supra* note 4.

⁵¹ Bailey, *supra* note 45.

⁵² *Twenty-Six Most Dangerous Substances Announced in Britain*, XINHUA NEWS AGENCY, Aug. 6, 1988, available in LEXIS, Asiapc Library, Xinhua File.

⁵³ *See id.*

⁵⁴ *See Environmentalists Urge European Ban*, *supra* note 44. In calling for the ban, the European Environmental Bureau, which lobbies the EC on behalf of seventy-five environmental organizations located in Member States, noted the availability of safer alternatives to PCP. *Id.*

⁵⁵ *See* Council Directive 91/173, *supra* note 1, art. 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *EC: France Contests*, *supra* note 13.

⁶⁰ *Id.*

⁶¹ *Id.*

such wood or masonry is plagued by dry or cubic rot.⁶² Lastly, PCP may be used for wood or masonry in cases of emergency, such as when a building is in danger of structural failure.⁶³

III. GERMANY'S RESPONSE TO EC DIRECTIVE 91/173

A qualified majority of the EC Member States enacted Directive 91/173 pursuant to article 100A of the EEC Treaty.⁶⁴ Germany voted against the Directive, however, stating that the environmental restrictions imposed on the use of PCP were not satisfactorily stringent.⁶⁵ Subsequently, in 1991, Germany asserted that under article 100A, Germany should be allowed to maintain its national legislation regarding the use of PCP.⁶⁶ In December 1989, Germany enacted legislation that mandated a total ban on PCP-treated products.⁶⁷ Unlike the EC Directive, the German law allowed no exemptions.⁶⁸

On June 10, 1992, the European Commission agreed that Germany could continue to ban PCP under article 100A.⁶⁹ This decision marked the first time the Commission exempted an EC country from legislation designed to create a single market.⁷⁰ The Commission decided that Germany had met its burden of justifying the measure, as Germany had previously cited evidence that PCP releases a highly toxic dioxin into the atmosphere.⁷¹ Moreover, the

⁶² Council Directive 91/173, *supra* note 1, art. 1.

⁶³ *Id.*

⁶⁴ EC: *Dangerous Chemicals*, *supra* note 11. The Directive mandates that Member States implement legislation embodying the Directive's restrictions by December 31, 1991. Council Directive 91/173, *supra* note 1, art. 1.

⁶⁵ EC: *Dangerous Chemicals*, *supra* note 11.

⁶⁶ EC: *Dangerous Substances*, *supra* note 9. The Netherlands and Denmark also joined Germany in claiming that they were justified in maintaining stricter environmental standards. *Netherlands: Netherlands Keep Ban on Pentachlorophenol*, CHEM. BUS. NEWS BASE, May 30, 1992, available in LEXIS, Europe Library, Alleur File. Prior to Germany's assertion, a Member State had invoked article 100A only once in order to impose standards which were more stringent than those required by the European Community. In October 1991, Denmark imposed car pollution standards which were more stringent than the Community's standards. *Moves To Allow Use of Toxic Chemical PCP Could Test EC Treaty*, Reuter Libr. Rep., Mar. 21, 1991, available in LEXIS, Europe Library, LBYRPT File [hereinafter *Moves To Allow Use of Toxic Chemical*]. Before the European Commission could rule on the case, however, Denmark agreed to repeal the restrictions. In return, the Environment Council agreed to tighten emission standards beginning in mid-1992. *Id.*

⁶⁷ EC: *France Contests*, *supra* note 13.

⁶⁸ EC: *Dangerous Chemicals*, *supra* note 11.

⁶⁹ See *Bonn Wins Exemption on Chemical*, *supra* note 9.

⁷⁰ *Id.*

Commission ruled that the German legislation is justified under article 100A because it is not an attempt at disguised discrimination or trade restriction. According to the Commission, the ban applies without distinction to both German and foreign companies.⁷²

IV. MEMBER STATES' REACTION TO THE EUROPEAN COMMISSION'S DECISION AND TO THE GERMAN CHEMICAL LAW

France, Italy, and Greece objected to the Commission's decision, arguing that the German regulation would have a negative impact on EC trade.⁷³ Specifically, France and other Member States argued that the measure could adversely affect leather imported into Germany from other Community states.⁷⁴ France also argued that if Germany's law were upheld, other states might enact national-level measures which would create obstacles to the free movement of goods.⁷⁵ Therefore, on February 24, 1993, France asked the ECJ to annul the Commission's decision.⁷⁶ France claimed that the Commission's evaluation of the need for the German measure, as required by article 100A, was very superficial.⁷⁷ In addition, France claimed that the restrictions imposed by EC Directive 91/173 are adequate to ensure that ecological and health protection criteria are met.⁷⁸ The European Commission's decision is currently pending. The Commission's decision will interpret article 100A and will define those instances in which a Member State may apply environmental measures which are more stringent than those imposed by the European Community. Thus, this decision is critically important to Community Members.

⁷¹ See *id.*; *Moves To Allow Use of Toxic Chemical*, *supra* note 66. Germany also noted that its Chemical Law contributed to lower concentrations of PCP in citizens' blood. See *Lower Blood Concentrations of HCB, PCP Reported in East, West By Testing Bank*, Int'l Env't Daily (BNA), Mar. 4, 1993, available in LEXIS, Nexis Library, BNAIED File.

⁷² *Commission Authorises Ban on PCP in Germany*, *supra* note 12.

⁷³ *Id.*

⁷⁴ *Id.* Germany could refuse, for example, to import leather shoes treated with PCP. *EC Court Considers Derogation on Free Movement of PCP*, EUR. ENV'T, Mar. 30, 1993, available in LEXIS, Europe Library, AE File.

⁷⁵ *EC Court Considers Derogation on Free Movement of PCP*, *supra* note 74.

⁷⁶ *EC: France Contests*, *supra* note 13.

⁷⁷ *Id.*

⁷⁸ *Id.*

V. THE EUROPEAN COURT OF JUSTICE'S OPTIONS AND PROPOSALS FOR ENACTING FUTURE ENVIRONMENTAL LEGISLATION

Directives passed pursuant to article 100A of the EEC Treaty are designed to remove non-tariff trade barriers created by inconsistent national standards, and to contribute to the establishment of the EC internal market.⁷⁹ If the ECJ upholds Germany's ban on PCP, the Community's objective of facilitating the free flow of goods will be frustrated. Therefore, because the Commission enacted Directive 91/173 pursuant to article 100A, the ECJ should decide whether Germany selected a means which will least interfere with intra-Community trade. Additionally, the ECJ must decide whether the negative effects resulting from the imposition of the law are disproportionate to the law's objective.⁸⁰

Although Germany provided evidence that PCP is potentially harmful to human lives, Germany has not demonstrated why a total ban is necessary. The Directive greatly restricts the use and marketing of PCP,⁸¹ and Germany has not asserted that enforcement of this Directive will necessarily put human lives at risk. While PCP still will be present in some buildings and products, Germany has not shown that this level of PCP will have harmful effects on citizens. Conversely, France asserts that enforcement of the German ban runs counter to the concept of completing an internal market. France also contends that this ban will restrict the free movement of goods within the Community.⁸² Thus, it seems that the harm resulting from the imposition of the German law is disproportionate to the limited benefits the law provides.

The ECJ, therefore, should pursue one of two courses of action. The Court either should annul the Commission's decision to allow Germany to enforce the German Chemical law, or recommend that the Commission amend Directive 91/173 to provide for a total ban

⁷⁹ See Smith & Hunter, *supra* note 16, at 10107 n.5.

⁸⁰ See *supra* notes 36-37 and accompanying text; Smith & Hunter, *supra* note 16, at 10116 n.90 (citing Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4627). If Germany were seeking to introduce a new environmental restriction, there would be some question whether article 100A grants Germany the authority to do so. See *supra* note 38 and accompanying text. Because Germany seeks to apply an already existing restriction, however, the EC must try to ascertain the effects of implementing this restriction. See *id.*

⁸¹ See Council Directive 91/173, *supra* note 1, art. 1.

⁸² *Commission Authorises Ban on PCP in Germany*, *supra* note 12. In addition to refusing to import leather treated with PCP, for example, Germany could also refuse to import PCP-treated wooden transport palettes. *EC Court Considers Derogation on Free Movement of PCP*, *supra* note 74.

of PCP. If the Court annuls the Commission's decision, the Court will restrict Germany's sovereign power to enforce its own laws. While this option may be permissible under EC law, this option is not wholly desirable.⁸³ Thus, even though it has not been clearly demonstrated that the environmental effects of PCP use necessarily warrant a complete ban on the manufacture and use of the biocide, the Court should nevertheless recommend that the Commission amend the Directive to impose a Community-wide ban. The exceptions to the PCP restrictions which are presently included in the Directive will be withdrawn in July 1995.⁸⁴ Although eliminating these exceptions now may hurt some industries, intra-Community trade will not suffer, and health concerns regarding PCP will be allayed.

By recommending an amendment to the Directive to impose a Community-wide ban, the ECJ will make a forceful statement without setting precedent. The Court will emphasize the benefits of amending the Directive, and will allow the Commission to decide the issue. The Commission is the authority which should make such a decision, as it is a legislating body which takes into account EC policy considerations. Therefore, such a recommendation by the Court will allow the Court to take a stand, but will also allow the Court to defer authority.

In the future, environmental concern should not hinder freedom of movement or any other main objective of the internal market.⁸⁵ The European Commission should avoid introducing environmental legislation which impedes intra-Community trade. To do this, the Commission should introduce environmental restrictions which set standards as high as possible given current technologies.⁸⁶ The Commission also should establish new target standards to reflect the highest level of protection which can be expected in the future.⁸⁷ In this way, environmentally-conscious Member States will not feel compelled to set environmental norms which are more stringent than those established for the rest of the Community, and intra-Community trade will flourish.⁸⁸

⁸³ Given the current hostility exhibited by some Member States toward the Community, any measure which would greatly infringe on a State's sovereign power to enforce its own laws would contribute to more hostility and possibly to the breakdown of the Community.

⁸⁴ *EC Commentaries*, *supra* note 15.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

CONCLUSION

In the European Community, both environmental groups and citizens continue to promote environmental reform, as the Community suffers from serious environmental problems which are the product of the Community's history of industrial development. On March 21, 1991, the European Commission enacted Directive 91/173. Directive 91/173 greatly restricts the use and marketing of PCP, a biocide which can cause chronic and sometimes fatal ailments. Even though the Directive imposes strict controls on the use of PCP, the Commission has allowed Germany to impose controls within its borders which are stricter than those mandated by the EC. France, Italy, and Greece objected to the Commission's decision, and on February 24, 1993, France asked the ECJ to annul the Commission's decision to approve the German ban.

The ECJ could either annul the Commission's decision, or recommend that the Commission amend the Directive to include a Community-wide ban. If the Court annuls the Commission's decision, the Court will restrict Germany's sovereign power to enforce its own laws. Such an action could cause widescale protest among Member States, and could lead to increased hostility toward the EC. Therefore, the Court should recommend that the Commission amend the Directive to impose a Community-wide ban. By choosing this course of action, the Court would make a positive statement regarding a Member State's ability to impose laws which are stricter than those mandated by the EC, and would also defer authority to the legislative body, the Commission. If the Commission amends the Directive, health concerns regarding PCP will be allayed and intra-Community trade will not suffer.

In the future, the Commission should enact environmental restrictions which set standards as high as possible given current technologies. The Commission should also set new target standards to reflect the highest level of protection which can be expected in the future. In this way, the Commission will enact restrictions which will allay concerns of environmentally-conscious Member States, and will also not impinge upon intra-Community trade.

Stephen C. Dwyer