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COMMISSION
OF THE
EUROPEAN COMMUNITIES

General Secretariat

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INTERNATIONAL CONVENTION ON THE PHYSICAL
PROTECTION OF NUCLEAR MATERIALS

(Communication from the Commission to the Council)

COM(78) 148 final.

COMMUNICATION TO THE COUNCIL

Subject : International Convention on the Physical Protection of Nuclear Materials

1. On 21 October 1977, the Commission forwarded to the Council a communication concerning the International Convention on the Protection of Nuclear Materials.

After having pointed out that such a Convention was being drawn up under the aegis of the IAEA, the Commission analysed the draft text and stressed that, although most of its clauses came within the competence of the Member States, other clauses concerned fields in which the Community has responsibilities. These clauses, set out in Article 4 of the draft text, concerned the import and export of nuclear materials. In the Commission's opinion, they raised serious problems for the Community.

To solve these problems, the Commission recommended that all the Member States and the Community should become parties to the Convention. Accordingly, the Commission called upon the Member States that had taken part in the preparatory work on the Convention to make every effort to bring about such participation.

This communication from the Commission was the subject of an exchange of views with the Working Party on Atomic Questions on 3 November 1977.

2. The first preparatory meeting for the purpose of drawing up the Convention was held in Vienna from 31 October to 10 November 1977 on the initiative of the IAEA. Representations of certain member States attended this meeting, as did representatives of the Commission, the latter in the capacity of observers.

Little progress was made at the meeting in drawing up the Convention. The work performed was more concerned with identifying the basic questions that would have to be settled before a text could be prepared.

For this reason, the member States that participated in the work did not consider it necessary, at that preliminary stage, to act on the request that the Commission had made to them with the aim of securing the Community's participation.

3. In the meantime, at the request of the Working Party on Atomic Questions, the Council Legal Service has prepared an opinion on the Community's participation in the Convention (Doc. 1/44/78 JUR 7 - ATO 3 of 10 Febr. 1978). In brief, the conclusions of this study are that the Community's participation is possible but not sufficient, and that it is not necessary.

4. In its turn, the Commission carried out a fresh analysis of the question. This analysis, which was distributed to the members of the Working Party as a "working document" in March 1978, is annexed to this communication (Annex I).

For the reasons set out in this document, the Commission considers:

- a) that, from the legal standpoint, the member States are not in a position to enter into the undertakings contained in Article 4 of the Convention; where transfers of nuclear materials within the Community and imports of such materials from non-member countries are concerned, these obligations could preclude the application of basic principles of the Euratom Treaty;
- b) that, on the other hand, the Community has the powers necessary to undertake these commitments and that it possesses the legal means to implement them;
- c) that, in consequence, the Community's participation in the Convention is not merely possible but necessary.

5. The work done up to now was of preparatory nature. The next meeting the IAEA is organizing from 10 to 21 April 1978 could however be the starting point of a veritable negotiation.

The Commission therefore considers that it would be advisable for the Council to give it instructions, in accordance with Article 101 of the Euratom Treaty, to undertake at the proper time the negotiations necessary for the purpose of ensuring that the Community is a party to the Convention.

For this purpose, a set of draft directives is annexed to this communication (Annexe II).

6. Moreover, with the above-mentioned meeting in mind, the Commission repeats the request that it already made to the Member States which will be taking part in the work, and more particularly to the Member State occupying the Chair, to make every effort to ensure that a clause enabling the Community to accede to the Convention is included.

ANNEX I

PARTICIPATION OF THE EAEC IN AN INTERNATIONAL CONVENTION ON
PHYSICAL PROTECTION IN THE COURSE OF PREPARATION UNDER
THE AUSPICES OF THE IAEA

(Legal Analysis)

A. Introduction

1. In its communication to the Council (Doc. COM/77/520 final), the Commission expressed the opinion that the Member States as such would not, from the legal standpoint, be in a position to enter into the undertaking contained in Article 4 (paragraph 1) of the draft Convention.

Under the terms of this Article, the Contracting Parties would be obliged not to import or export or permit the import or export of nuclear materials unless such materials were at all times during international transfer be subject to the physical protection precautions described in detailed form in that Article.

B. Member States' powers

2. As far as trade within the Community is concerned, this undertaking would entail restrictions on intra-Community trade in nuclear materials which appear to be incompatible with the basic principles of the Treaty. In particular, the Member States could, by virtue of such an undertaking, be obliged to take measures which would have the following consequences :

- (a) free movement would be affected, since certain materials could no longer be transferred from one Member State to another;
- (b) the supply system which, based as it is on the monopoly of the Supply Agency and on the principle of equal access to resources and therefore not compatible with State intervention, would also be affected, since Community users would no longer, by virtue of such intervention, be able to obtain their supplies from producers in another Member State. Moreover, certain producers would forfeit their outlets with users in another Member State;
- (c) the smooth and independent operation of the JRC Establishments would be affected, since they would no longer be able to obtain their supplies from some of the Member States;
- (d) the same would be true of Joint Undertakings, since, for example, a Member State would no longer be able to supply a Joint Undertaking established in another Member State but in which it is participating, nor be able to obtain supplies from that Undertaking itself.

3. Again, as far as imports from outside the Community are concerned, Article 4 of the draft Convention could not be signed by the Member States either. It would involve a commitment to implement restrictions on such imports which would form an obstacle to the task of the Agency and hinder the provision of supplies to the JRC and to Joint Undertakings.

In particular, the Agency's functions, as regards the supplying of Community users, under the terms of Article 52 and 64 of the Treaty and as regards its right to decide the geographical origin of materials, under the terms of the second paragraph of Article 65, would be affected.

4. The participation of all Member States in the Convention would not empower them to enter into the obligations contained in Article 4.

The Member States would still, even on this hypothesis, have to undertake to subject intra-Community trade to the conditions laid down in the Convention, to monitor compliance with such conditions for specific shipments by a system of licences or authorizations, and even, where appropriate, to prohibit such exchanges. Such an undertaking would, therefore, be incompatible with the principles described in Point 2 : this would be true even if, in practice, supposing that all Member States were to comply with the physical protection obligations deriving from the Convention, the undertaking were only to involve a system of automatically granted authorizations in accordance with the "any licence granted" principle. Such a system would, of itself, constitute an obstacle to the full application of such principles. The Court of Justice has delivered several judgments to this effect (cf-Case N° 41/76 Donckerwolcke, Court Reports 1976, p. 1935; Case n° 68/76 Commission/France, Court Reports 1977, p. 528).

Moreover, the problems relating to imports from outside the Community, referred to in Point 3, would also remain wholly unresolved even if all Member States were to become signatories to the Convention.

C. The Community's powers

5. The Community is, however, endowed with the necessary power to undertake the commitment referred to in Article 4 (1) of the draft text. The provisions of the Treaty on the exclusive right of the Agency to conclude

supply contracts, within the meaning of Articles 52 and 64 of the Treaty, constitute the basis for the internal power of the Community which, under Article 101, is necessary in order to provide the ground for the Community's external powers for the purposes of signing the Convention; this is applicable just as much to intra-Community supplies as to supplies from outside the Community.

The Community would have legal powers to undertake to ensure that supplies from inside or outside the Community which were contrary to the Convention were not delivered.

Article 52 (2) and Article 61 of the Treaty make express provision for the Agency to refuse to exercise its exclusive rights as regards a particular shipment, thus making it legally impossible, if such a shipment is unlawful or otherwise subject to legal obstacles. In practice, the unlawfulness and the legal obstacles affecting a shipment which contravenes Article 4 of the Convention would arise, because of the non-compliance with an international undertaking entered into by the Community and with the physical protection measures to which all the Member States would be committed under that Convention.

6. A doubt could arise as to whether the Community could (in place of the Member States) enter into commitments which might involve restrictions on the free movement of materials within the Community.

Such a situation would not, however, be compatible with the Treaty, since such restrictions would in practice result in limitations on the supply function of the Agency, which would be required to refuse a particular shipment - such restrictions being, as indicated above, provided for by Article 52 (2) and Article 61 of the Treaty.

Nor would it be possible to maintain that the Agency's powers cover only economic or commercial aspects and that other areas are exclusive to the Member States.

The basis of the Treaty precludes such a conclusion. Article 77 (b) creates an indissoluble link between Community activities in the field of supplies (Chapter VI) and of safeguards (Chapter VII). Article 52 makes the activities of the Agency subject to the conditions laid down by external suppliers: the latter would, obviously, impose conditions of a

political nature concerning, in the first place, security as regards materials (e.g., the major co-operation agreements with the United States and Canada). In particular, experience has shown that, in the present circumstances, the requirements which relate to physical protection, such as those imposed by external suppliers (e.g. USA, Canada, Australia), have become an essential precondition for maintaining Community supplies. Thus, unless the Community is, through the activity of the Agency, in a position to guarantee compliance with such conditions, it cannot fulfil the obligations conferred on it by Article 2 (d) of the Treaty, namely, to ensure that all users receive a regular and equitable supply.

The fact that the practical implementation of the Community's commitments would, under the terms of the Convention, require close co-operation between the Commission and the authorities in the Member States within the Community could not in any way affect the Community's ability to sign the Convention. Such co-operation in the implementation of Community law (which is the outward manifestation of concerted policy as between the Community institutions and the Member States) is not at all unusual (levying of customs duties, sanctions, the fisheries sector).

7. It would appear from the foregoing that, as regards intra-Community transfers and imports from outside the Community, on the one hand, Member States have no powers under Article 4 (1) of the draft Convention and, on the other hand, the Community, by virtue of the exclusive rights of the Agency within the common market, is endowed with external authority in this area. Such authority can therefore only be exclusive.

D. Exports from the Community

8. The Community could equally undertake to prohibit such exports from the Community as would be banned under the Convention. Article 59 of the Treaty subjects the export of materials from the Community to authorization from the Commission, which is obliged to satisfy itself that the operation in question does not adversely affect the general interests of the Community. Hence an export transaction which did not comply with the physical protection commitment undertaken by all the Member States would, automatically, prejudice such general interests.

However, since the authorization referred to in Article 59 is not exclusive (Member States can always prevent an export shipment authorized by the Commission), no legal conditions would exist which would of necessity, as in the case of internal transfers or of imports from non-member countries, require the Community's participation in the Convention as regards exports outside the Community.

E. Operations subject to Article 75 of the Treaty

9. Particular mention should be made of operations covered by Article 75 of the Treaty, since these are not subject to intervention by the Agency or to the other provisions of Chapter VI. As regards intra-Community transfers, since Member States cannot undertake to prevent these because of the principle of free movement, another legal instrument must be found which would allow Article 4 (1) to be applied. This only way of achieving this would be to make provision for a commitment to be undertaken by the Community; this could perhaps involve the application of internal implementing procedures using a Community instrument to be adopted by the Council on the basis of Article 203. Such an instrument could, for example, be restricted to authorizing Member States to adopt a system of monitoring of the transfers in question.

As regards extra-Community operations, insofar as the Commission would not be able to prevent application of Article 75 (operations with countries outside the Community) it would be the Member States which would have to take the necessary measures : this would not entail any legal difficulties, since the principle of free movement would not be at risk and such operations are not connected with supplies.

F. Article 195

10. Article 195 of the Treaty would in no way justify the above-mentioned commitments being undertaken by the Member States in pursuance of Article 4 of the draft Convention.

Since it is a derogatory provision, Article 195 has to be interpreted very strictly : such an approach is all the more imperative in an area such as that of nuclear power, where public safety and health protection are, in

one way or another, always involved. A broad interpretation of Article 195 is also inadmissible because the Treaty already contains strict rulings on areas under the heads of health protection and safeguards.

Not only do the preliminary provisions of the Treaty (Articles 2 (b) and (e)) confer on the Community basic responsibilities in these areas in order for it to fulfil its functions, but in addition the Treaty confers on the Community institutions specific and far-reaching powers which can (Article 80) extend to the requirement that certain fissile materials be deposited in certain circumstances and at the Commission's request.

It is therefore unthinkable that Article 195 could enable a Member State unilaterally to restrict the scope of the Community's basic powers.

It is clear that the Community, by virtue of this provision, is obliged, insofar as they are not incompatible with the mandatory provisions of the Treaty, to comply with national measures which, for reasons connected with public safety or health protection would, within a particular Member State, impose rules (e.g., as regards health protection) relating to the use or transport of nuclear materials.

A Member State would not, however, on the basis of such rules and through restrictions on exports or imports, be able to limit access to materials by nationals of other Member States nor by its own nationals because of external situations (in the case with which we are dealing, non-compliance by other States with physical protection measures which may have been introduced by the Member State in question); in other words, the "national rules and regulations" referred to in Article 195 could only apply to a domestic situation in the Member State in question.

Furthermore, Article 195 could not provide a basis for a Member State having authority to undertake international commitments in fields which fall within the exclusive power of the Community.

From all points of view, Article 195 could not be invoked with any justification in view of the existence of a legal instrument (participation by the Community) which can prevent any unilateral restriction while at the same time making it possible for the desired objectives of physical protection to be achieved.

ANNEX II

DRAFT COUNCIL DECISION

Laying down directives for negotiation of the international Convention on the Physical Protection of Nuclear Materials currently being prepared under the aegis of the IAEA

The Council of the European Community,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular the second paragraph of Article 101 thereof,

Having regard to the draft from the Commission,

Whereas an International Convention on the Physical Protection of Nuclear Materials is currently being prepared under the aegis of the IAEA,

Whereas it is important to reconcile the requirements of this Convention with due observance of the principles of the Euratom Treaty,

Whereas the provisions in the draft text of this Convention include a clause making it binding on the contracting parties not to import or export, or not to permit the import or export, of nuclear materials, unless these materials are made subject throughout the period involved in the international transfer to the physical protection measures laid down by the Convention,

Whereas in the case of exchanges involving the Member States of the Community it is necessary for such a commitment to be endorsed by the Community as such,

Whereas the Community has the necessary powers to endorse such a commitment and to ensure that it is implemented,

Whereas, in consequence, the Community must be a party to the Convention,

HAS DECIDED AS FOLLOWS :

1. The Commission shall enter into the negotiations necessary to ensure that the Community will be a party to the International Convention on Physical Protection.
2. The Community shall be a party to this Convention to the extent necessary to assume the responsibilities conferred to it by the Treaty with respect to the supply of nuclear material to the users of the Community and to safeguard due observance of the provisions of the Euratom Treaty, while enabling the physical protection measures laid down by the Convention to be applied.
3. The resulting commitments may be included in an agreement governed by the provisions of Article 102 of the Euratom Treaty, to which the Community and the Member States will be parties, each to the extent to which it is concerned.