

SJ-0378/05

KB/JR/jl
D(2005)32280

Brussels, 07 -07- 2005

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LEGAL OPINION

Re: Proposal for a Council Directive on the supervision and control of shipments of radioactive waste and spent fuel (2004/0249(CNS) - COM(2004)0716)

I. Introduction

1. By letter dated 26 May 2005 (annexed), the Chairman of the Committee on Industry, Research and Energy, Mr Giles CHICHESTER, asked the Legal Service for an opinion on the following questions:
 - 1) *"The extension of the scope of [Directive 92/3/Euratom] to include spent fuel as a whole, without taking into account whether it is intended for reprocessing or disposal, (Articles 1 and 3 of the proposal) (...) combined with the right of prior consent given to transit countries (Article 6 of the proposal), would (...) imply a hindrance of the principle of free movement of spent fuel for reprocessing (within the EU)?"*
 - 2) *"The Commission believes that an international convention or Treaty cannot or should not be mentioned in the text of the EU Directive. What is the validity of such an argument, taking into account that the EU will soon be party of [the] Joint Convention through Euratom?"*
 - 3) *"What is the validity of the argument of the Commission that [the] unilateral right to ban the import of foreign spent fuel as radioactive waste is the hindrance of the free movement of spent fuel within the EU and, therefore, violates the principle of free movement of goods of the Treaty on European Union?"*

2. These questions were raised during the exchange of views held in the ITRE committee on 25 May on the draft report by Mr Esko SEPPÄNEN on the proposal for a Council Directive on the supervision and control of shipments of radioactive waste and spent fuel (2004/0249(CNS - (COM(2004)0716))).
3. The Commission has based its proposal on Articles 31(2) and 32 of the Treaty establishing a European Atomic Energy Community, hereinafter the "Euratom Treaty". These articles provide for consultation of the European Parliament and for qualified majority voting in the Council.
4. The aim of the proposal is to establish a uniform system of supervision and control of shipments of radioactive waste and spent fuel, and to repeal Council Directive 92/23/Euratom of 3 February 1992 on the supervision and control of shipments of radioactive waste between Member States and into and out of the Community.¹

II. Treaty and legislative background

a) Treaty establishing the European Atomic Energy Community

5. Article 2(b) of the Euratom Treaty provides:

"[in] order to perform its task, the Community shall, as provided in this Treaty, establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied".

6. Chapter 3 of Title II of the Treaty deals with "Health and Safety". The first of article of this chapter is Article 30, which stipulates:

"[basic] standards shall be laid down within the Community for the protection of the health of workers and the general public against the dangers arising from ionizing radiations.

The expression 'basic standards' means:

- a. maximum permissible doses compatible with adequate safety;*
- b. maximum permissible levels of exposure and contamination;*
- c. the fundamental principles governing the health surveillance of workers."*

7. Article 31 provides for the procedure to adopt such standards:

"[the] basic standards shall be worked out by the Commission after it has obtained the opinion of a group of persons appointed by the Scientific and Technical Committee from among scientific experts, and in particular public

¹ OJ L 35, 12 February 1992, p. 24, hereinafter "Directive 92/3".

health experts, in the Member States. The Commission shall obtain the opinion of the Economic and Social Committee on these basic standards.

After consulting the European Parliament the Council shall, on a proposal from the Commission, which shall forward to it the opinions obtained from these Committees, establish the basic standards; the Council shall act by a qualified majority."

8. Under Article 32 those basic standards may be revised or supplemented:

"[at] the request of the Commission or of a Member State, the basic standards may be revised or supplemented in accordance with the procedure laid down in Article 31.

The Commission shall examine any request made by a Member State."

9. Pursuant to Article 101 of the Euratom Treaty, "*[the] Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements ... with an international organization*". The Euratom shares the relevant competences with its 25 Member States, which means that the competences of Member States, under the Joint Convention,² as contracting parties will not be affected by Community accession to this agreement.
10. The European Court of Justice ruled in Opinion 1/78 that "*[where] it appears that the subject-matter of an agreement or contract falls in part within the power and jurisdiction of the Community and in part within that of the Member States there are strong grounds for using the procedure envisaged by Article 102 of the Treaty whereby such obligations may be entered into by the Community in association with the Member States*".³

b) The Joint Convention

11. The objectives of the International Atomic Energy Agency (IAEA) International Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management⁴ are set out in its Article 1:

"(i) to achieve and maintain a high level of safety worldwide in spent fuel and radioactive waste management, through the enhancement of national measures and international co-operation, including where appropriate, safety-related technical co-operation;

(ii) to ensure that during all stages of spent fuel and radioactive waste management there are effective defences against potential hazards ..."

12. The Joint Convention gives some relevant definitions. Radioactive waste is "*radioactive material in gaseous, liquid or solid form for which no further use is*

² See section b), below.

³ ECR [1978] p. 2151, paragraph 34.

⁴ Hereinafter generally referred to as "Joint Convention"

foreseen by the Contracting Party or by a natural or legal person whose decision is accepted by the Contracting Party, and which is controlled as radioactive waste by a regulatory body under the legislative and regulatory framework of the Contracting Party" (Article 2(h)). Spent fuel is a "*nuclear fuel that has been irradiated in and permanently removed from a reactor core*" (Article 2(n)).

13. Disposal is "*the emplacement of spent fuel or radioactive waste in an appropriate facility without the intention of retrieval*" (Article 2(d)).⁵ Storage is "*the holding of spent fuel or of radioactive waste in a facility that provides for its containment, with the intention of retrieval*" (Article 2(t)).⁶ Reprocessing is "*a process or operation, the purpose of which is to extract radioactive isotopes from spent fuel for further use*" (Article 2(l)).
14. The Joint Convention covers the safety of spent fuel management (Articles 4 to 10) and the safety of radioactive waste management (Articles 11 to Chapter 3). It also contains general safety provisions (Articles 18 to 26).
15. Pursuant to Article 3(1), the Joint Convention does not apply to spent fuel held at reprocessing facilities as part of a reprocessing activity "*unless the Contracting Party declares reprocessing to be part of spent fuel management*". Article 10 requires that spent fuel be disposed of in accordance with the rules relating to the disposal of radioactive waste. This means that there is an assimilation of spent fuel for disposal to radioactive waste, at least as regards the legal regime applicable.
16. The preamble of the Convention recognizes to any State "*the right to ban import into its territory of foreign spent fuel and radioactive waste*" (paragraph xii).
17. The International Atomic Energy Agency (IAEA) International Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management was approved by Council Decision 2005/84/Euratom of 24 January 2005.⁷ The accomplishment of the tasks assigned to the Euratom by Article 2(b) and Chapter 3 of the Euratom Treaty is the justification for the Community's accession.⁸
18. Under the terms of Recital 5 "*[when] becoming a party to this Convention, Article 39(4)(iii) of this Convention obliges such an organisation to communicate to the Depositary a declaration indicating which States are members thereof, which Articles of this Convention apply to it, and the extent of its competence in the field covered by those articles*". This was done in the annex to the decision. Euratom is now a party to the Joint Convention.
19. The approval was accompanied by a reservation regarding the non-compliance of Article 12(1) of Directive 92/3 with the requirement in Article 27(1)(i) of the Joint Convention that the state of destination give its consent for transboundary movements of radioactive waste.

⁵ Emphasizes added.

⁶ Emphasizes added.

⁷ OJ L 30, 3 February 2005, p. 10.

⁸ Recital 3 of the Council Decision 2005/84/Euratom and Paragraph 3 of the Declaration of Competence annexed thereto.

c) The Commission's proposal

20. The proposal seeks to repeal Council Directive 92/3, which was also based on Articles 31 and 32 of the Euratom Treaty. This directive was adopted to establish a system of strict control and prior authorisation for shipments of radioactive waste. It covers shipments of radioactive waste between Member States and into and out of the Community.
21. Article 2 of the proposal defines radioactive waste as "*any material which contains or is contaminated by radionuclides and for which no use is foreseen*".
22. The shipment *between* Member States is subject to the authorisation of the country of destination and of the country of transit, according to Article 6. *Imports* of radioactive waste into the Community are also subject to the authorisation of the competent authorities of the Member State of destination, pursuant to Article 10. *Exports* of radioactive waste are subject to the authorisation of the Member State of origin but not the consent of the third country of destination, under Article 12.

III. Legal analysis

a) Preliminary remarks

23. States use spent fuel in different ways. One State's radioactive waste is another State's resource. For those States that reprocess spent fuel, it is a resource. For those which choose to dispose of that spent fuel, it is radioactive waste.⁹
24. As noted above, Directive 92/3 applies to shipments of radioactive waste. Furthermore, it gives a definition of radioactive waste: "*any material which contains or is contaminated by radionuclides and for which no use is foreseen*". On the other hand, the Joint Convention defines disposal as "*the emplacement of spent fuel or radioactive waste in an appropriate facility without the intention of retrieval*". Therefore, spent fuel for disposal falls within the concept of radioactive waste given by Directive 92/3. Shipments of spent fuel for disposal are governed by this directive.
25. Shipments of spent fuel for reprocessing on the other hand are not covered by Directive 92/3. The proposal intends to extend the scope of the directive to all shipments of spent fuel, whether it is intended for disposal or for reprocessing. The Commission sees no radiological justification in excluding spent fuel for reprocessing from the supervision and control procedure laid down in Directive 92/3.

⁹ See preambular paragraph (vii) to the Joint Convention. See also *Handbook on Nuclear Law*, IAEA, available at http://www-pub.iaea.org/MTCD/publications/PDF/Pub1160_web.pdf.

26. The question put by the Chairman of the Committee adds another element for the analysis: the right of prior consent in accordance with Article 6 of the proposal. As noted above, Directive 92/3 did not provide for such consent of the State of destination in the case of the exports of radioactive waste. This led to the reservation put forward by the Euratom Community regarding the non-compliance of Article 12(1) of Directive 92/3 with the requirement in Article 27(1)(i) of the Joint Convention.

27. However, it must be recalled that such consent is already required under Directive 92/3, but only for shipments between Member States. In fact, apart from the different deadlines, Article 6(1) (second subparagraph) of the proposal, which applies to all shipments, and Article 6(1) of Directive 92/3, which applies only to shipments between Member States, are similarly worded. Article 6(1) (second subparagraph) of the proposal provides:

*"[not] later than three months from the date of receipt of the duly completed application, the competent authorities of the country of destination and of any country of transit shall notify the competent authorities of the country of origin of their acceptance or of the conditions which they consider necessary or of their refusal to grant approval."*¹⁰

28. The proposal aims to extend to all shipments the treatment given to shipments between Member States.

29. The procedure of prior consent or authorisation is common in the area of hazardous substances. For instance, Regulation (EC) 304/2003 of the Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals¹¹ provides for this procedure.¹² Pursuant to Article 13(6) (b) of this regulation, the chemicals subject to the prior and informed consent procedure can be exported only if the prior consent of the country of destination has been given.

30. Under the terms of Article 2(2)(b), this regulation also applies to radioactive materials and substances covered by Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation.¹³

31. Directive 96/29 states in its Article 5(1):

"[the] disposal, recycling or reuse of radioactive substances or materials containing radioactive substances arising from any practice subject to the requirement of reporting or authorization is subject to prior authorization."

¹⁰ Emphasizes added.

¹¹ OJ L 63, 6 March 2003, p. 1, hereinafter "Regulation 304/2003".

¹² See third subparagraph of Article 6(2).

¹³ OJ L 159, 29 June 1996, p. 1, hereinafter "Directive 96/29".

32. In Opinion 2/00, the Court considered the prior consent procedure to be a typical instrument of environmental policy, within the framework of the EC Treaty.¹⁴
33. In the proposal for a Council Directive (Euratom) on the safe management of spent nuclear fuel and radioactive waste (CNS 2003/0022), the Commission has agreed to introduce a "prior written informed consent" procedure for shipments of radioactive waste to another Member State or third country.

b) Alleged violation of the principle of free movement of goods set out in the EC Treaty

34. In his first question, Mr Chichester asks whether the inclusion of spent fuel for reprocessing in the scope of the directive, and the right of transit countries to give prior consent to the shipment, amount to an infringement of the free movement of goods in the EC Treaty.
35. First, it must be said that provisions of the EC Treaty can apply to products falling within the Euratom Treaty. Article 305(2) EC states:

"[the] provisions of this Treaty shall not derogate from those of the Treaty establishing the European Atomic Energy Community."

36. In Opinion 1/94, the European Court of Justice cited what is now Article 305(2) EC and concluded that since the Euratom Treaty contained no provision relating to external trade, there is nothing to prevent agreements concluded pursuant Article 133 EC from extending to international trade in Euratom products.¹⁵
37. The Court of Justice has ruled on the relations between the Treaty establishing the European Coal and Steel Coal Community (ECSC) and the Treaty establishing the European Economic Community (EEC), governed by Article 305(1) EC.¹⁶ The case law on this paragraph may be applied by analogy to Article 305(2) EC, given the similar wording of the two paragraphs of this provision. It follows that in so far as matters are not the subject of provisions in the Euratom Treaty or rules adopted thereof, the EC Treaty and the provisions adopted for its implementation can apply to products covered by the Euratom Treaty.
38. The relevant legislation for the present case was adopted under Chapter 3 of the Euratom Treaty, which deals with the protection of the health of workers and the general public against the dangers arising from ionizing radiations. The environment as an independent concept is not covered by the Euratom Treaty or by secondary law under it. However, Recital 11 of the proposal does mention the protection of human health and the environment as interests meriting legal protection.

39. In order to apply the provisions of the EC Treaty or the corresponding case law, it should be observed, from the outset that waste, whether recyclable or not, is to be

¹⁴ Opinion 2/00 ("Cartagena Protocol on Biosafety") [2001] ECR I-9713, paragraph 33.

¹⁵ [1994] ECR I-5267, paragraph 24.

¹⁶ See Case 328/85 *Deutsche Babcock Handel* [1987] ECR p. 5119, paragraph 10.

regarded as goods, the movement of which, in accordance with Articles 28 and 29 EC, must in principle not be hindered.¹⁷ This being the case, those "goods" – radioactive waste or spent fuel – dealt with in the proposal fall under Article 28 et seq. EC.¹⁸

40. Article 30 EC reads as follows:

"[the] provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of humans ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

41. The adoption, under Chapter 3 of the Euratom Treaty, of basic standards "[for] the protection of the health of workers and the general public against the dangers arising from ionizing radiations"¹⁹ is in line with Article 30 EC.

42. Such a justification – protection of health of workers and public – seems to be the most suitable one. There is no need for a justification based on the protection of the environment, since in the context of the Euratom Treaty the main objective is the protection of health, with the protection of the environment being a secondary consideration. In the explanatory Memorandum to the proposal for a Council decision approving the Joint Convention this is clearly stated:

"[within] the concept of the European Atomic Energy Community in first place human beings ('workers and the general public') are protected against the dangers arising from ionising radiation and only [then] ancillary aspects of the environment which are conditions for human health as e.g. water, air, soil. The environment as an independent concept, equivalent to human health, is not covered in the Euratom Treaty or, concomitantly, by derived law enacted under it."²⁰

43. The answer to the first question is that any restrictions of the free movement of goods which would arise as a result of the proposed directive may be justified on grounds of protection of the health of workers and the general public.

c) Amendment 7: the right to ban the import of spent fuel

44. As this amendment concerns the free movement of goods and the question of prior consent, it should be addressed next. The amendment aims at achieving consistency with the Joint Convention. Preambular paragraph (xii) of the Joint Convention refers to the right of a Party to ban import into its territory of foreign spent fuel and radioactive waste. The text of the proposed amendment is as follows:

¹⁷ Case C-2/90 *Commission v Belgium* [1992] ECR I-4431, paragraph 28.

¹⁸ *Idem*, paragraph 23.

¹⁹ Article 30 of the Euratom Treaty.

²⁰ Point 4, third paragraph.

"[every] Member State has the right to ban the import into its territory of foreign spent fuel for disposal as radioactive waste." ²¹

45. Thus worded, this amendment would exclude spent fuel for reprocessing, which is not the aim of the Commission's proposal.
46. Article 30 EC allows for "*prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of humans*". The Joint Convention only uses the terms "*right to ban import*" in the preamble. In the operative part, the only reference made is to the "*prior notification and consent of the State of destination*", which, as seen above, is normal in legislation dealing with hazardous substances. In reality, the right to ban the import of a substance or to subject its import to a prior consent procedure would have the same practical effect, that is, of making such import dependent on the State's willingness to admit that substance to enter its territory
47. In response to the third question, the ban on the import of spent fuel considered as radioactive waste would be a hindrance to the free movement of goods which is nonetheless justified on grounds of the protection of health.

d) Amendment 6: reference to the Joint Convention

48. The issue here is whether an explicit reference to the Joint Convention should, or may, be made in Article 6 of the present proposal. The amendment refers to reasons based on the Joint Convention "*or on the European or national legislation implementing that Convention*." The reason the Commission does not wish to accept a reference to the Joint Convention seems to be the fact that if the Euratom is already party to this convention, its content is already Community law. The Commission considers the reference to the compliance with international agreements "redundant", as it notes in the Explanatory Memorandum to the present proposal. According to the Commission, a general reference to the relevant legislation applicable in connection to the reasoning of any refusal of condition suffices to avoid arbitrary decisions.
49. Although the reference to the Joint Convention may not be necessary, it does not in our view infringe any rule of law. ²² In other words, the question of the reference is not a question of validity but of opportunity.

²¹ Both emphasizes added.

²² Point 16.10.4 of the Joint Practical Guide on the drafting of legislation allows for a reference to other acts. Where such a reference is made, this must be a dynamic reference, i.e. one that includes amendments to the provision referred to.

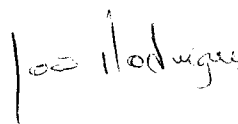
IV. Conclusion

50. In the light of the foregoing analysis, the Legal Service reaches the following conclusions:

- a) Any restrictions of the free movement of goods which would arise as a result of the proposed directive may be justified on grounds of protection of the health of workers and the general public;
- b) The right to ban the import of spent fuel considered as radioactive waste is a hindrance to the free movement of goods justified on grounds of protection of health and life of humans;
- c) The reference to the Joint Convention in the text of the proposed directive, though not necessary, would not infringe any rule of law.

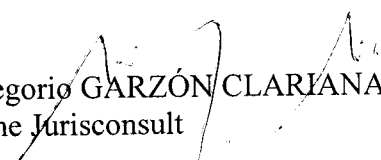


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Annex