

## **Position Paper on the Supervision and Control of Shipments of Radioactive Waste and Spent Fuel**

### **1. Introduction**

This position statement presents the views of the nuclear industry on the European Commission proposal for a Council Directive on the supervision and control of shipments of radioactive waste and spent fuel, which was adopted on 12 November 2004.

This proposal is intended to replace the existing Directive 92/3 Euratom of 3 February 1992<sup>1</sup>, which was adopted to establish a system of strict control and prior authorisation of the shipments of radioactive waste. The system applies both to intra-community transfers and to imports and exports of radioactive waste into and from the Community, but the rules it lays down are adapted to take account of these various situations and of the extraterritoriality of some of them.

The Directive has been in force in Member States since 1 January 1994. Although this system has been generally satisfactory, ten year practice have highlighted that some of its provisions need to be adapted and/or improved. In this respect, the European nuclear industry has already contributed by giving its expert opinion on the matter and by making suggestions for improvements within the framework of the SLIM initiative<sup>2</sup>.

The European nuclear industry, therefore, fully recognises the Commission's objective of updating Directive 92/3 to achieve consistency with the latest Euratom Directives and, where appropriate, with relevant international conventions. It also welcomes the efforts made to simplify and clarify the existing procedures (for example, the establishment of an acknowledgment of receipt of the application, the generalisation of the automatic procedure for approval and the adaptation of the rules on the use of languages in the standard document).

However, it appears that some of the issues that had been identified still need to be addressed and that the simplification process could be pushed forward. Based on its extensive experience and expertise in this field, and in line with its previous involvement in the SLIM procedure, the European nuclear industry would like to express its own views.

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<sup>1</sup> Council Directive 92/3/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, OJ L 35, 12.02.1992, p. 24.

<sup>2</sup> In the framework of Simpler Legislation for Internal Market, phase V (SLIM V) initiative, the Commission decided to set up a working group of representatives of Member States and of user groups for reviewing Directive 92/3/Euratom. The SLIM Team started its work in May 2001 and issued its recommendations at the end of September 2001.

## 2. Position of the European nuclear industry

Questions remain open on a few major issues related to the inclusion of spent fuel for reprocessing into the scope of the directive, the issue of transit countries and the practical implementation of several steps of the procedure. Clarification of the stated objectives as well as of some of the notions of the proposal is also necessary.

### 2.1 Preservation of the free movement of spent fuel for reprocessing

The existing Directive currently applies to 'radioactive waste,' which is defined as 'any material which contains or is contaminated by radio-nuclides and *for which no use is foreseen*'. With respect to spent fuel, a distinction has been logically drawn between spent fuel for disposal and spent fuel for reprocessing<sup>3</sup> on the basis of the above definition<sup>4</sup>: spent fuel that will be disposed of, with no further use foreseen, is regarded as radioactive waste and is subject to the provisions of Directive 92/3; spent fuel that is to be reprocessed is regarded as a good that can be reused and, therefore, does not fall within the scope of that directive.

One of the main amendments that the proposal introduces is the extension of the scope of the text to include spent fuel as a whole, without taking into account whether it is intended for reprocessing or disposal.

The European nuclear industry considers that **such an extension combined with the right of prior consent given to transit countries would amount to legitimise the hindrance of the free movement of spent fuel for reprocessing within the Community. This would contradict the principles of the Nuclear Common Market, while not giving any additional benefits in terms of radiation protection**, as suggested by the Commission<sup>5</sup>.

<sup>3</sup> Spent fuel reprocessing is a series of processing operations which aims at recovering 96 % of materials that can be recycled (uranium and plutonium) and packaging the remaining 4 % of final waste.

<sup>4</sup> In fact, this distinction reflects the diversities in the Member States' policies of spent fuel management. Some have decided to reprocess it and to recycle the resulting products. Some have opted for final disposal. Others have chosen to perform interim storage until a decision has been taken on which back-end option to select. This right for each Member State to define and implement its own policy of spent fuel management has always been acknowledged by the Commission. See in particular the Answer by Mrs Bjerregaard on behalf of the Commission to a written question asked by MEP Esko Seppänen on the Long-term storage of spent nuclear fuel (Written Question E-1734/97 of 23 May 1997 and answer of 17 July 1997 OJ C 45, 10.02.1998, p. 92 and 93). 'It is the responsibility of each individual Member State to ensure that spent nuclear fuel resulting from the operation of nuclear reactors on its territory is properly managed...Member States each have their own strategy for the management of spent fuel'.

<sup>5</sup> Similar conclusions could be drawn when analysing the impact of such measures on the free provision of services, amongst them reprocessing and recycling services, within the Internal Market.

As the Commission pointed out in July 2002<sup>6</sup>, Chapter IX of the Euratom Treaty created a Nuclear Common Market in which quantitative restrictions on imports and exports of some products, amongst which the components of spent fuel, had to be abolished. After recalling that Directive 92/3 created derogation to the general principles of the Nuclear Common Market for spent fuel that was not reprocessed but disposed of as radioactive waste, the Commission insisted that for spent fuel not considered as radioactive waste, the general rules of the Common Nuclear Market, amongst which the principle of free movement of goods, were to apply<sup>7</sup>.

The Commission puts forward radiation protection reasons to justify the inclusion of spent fuel for reprocessing into the scope of the directive<sup>8</sup>. The European nuclear industry would like to point out that **shipments of spent fuel for reprocessing**, as rightly underlined by the SLIM Team in its recommendations<sup>9</sup>, **are efficiently covered by appropriate international agreements, Community and national legislation which already include amongst others provisions for protecting the health of workers, the general public and the environment**. The European nuclear industry has also been operating its reprocessing/recycling plants, in full compliance with international, Community and national regulations relating to radiation protection and in particular with the provisions of Directive 96/29<sup>10</sup>, which, as a matter of fact, have been in force for almost five years.

The European nuclear industry considers that **by requiring the prior consent of destination and transit countries for shipments, the new proposal does not as such add any radiation protection requirements or benefits**, to those already applicable under Directive 96/29. On the contrary, **the risk of hindrance of the free movement of such spent fuel for reprocessing within the Community is real**<sup>11</sup>. This results from the combination of the extension of the scope of the directive to spent fuel for reprocessing and the rights given to transit countries.

At last, the accession of the Euratom Community to the International Atomic Energy Agency (IAEA) Joint Convention on the Safety of Spent Fuel Management

<sup>6</sup> Written question raised by MEP Esko Seppänen on 7 June 2002 and answer given by Mrs de Palacio on behalf of the Commission on 11 July 2002 (OJ C 301 E, 05.12.2002, p. 214 and 215).

<sup>7</sup> Furthermore, by implementing a declarative mechanism that makes the Nuclear Supplier Group's obligation compatible with the free movement principle, the 1984 Dublin Declaration states that there can be no hindrance to the movement of fissile material such as high enriched uranium and plutonium.

<sup>8</sup> Although specifically asked about its intention to revise Directive 92/3, the Commission did not consider relevant, in July 2002, to suggest that a similar regime was to apply to spent fuel for final disposal and spent fuel for reprocessing in the framework of this directive (see footnote n° 7).

<sup>9</sup> Report and Recommendations of the SLIM V-Team reviewing legislation on the Shipments of Radioactive Waste, 20.9.2001 (final), see point 4.1, page 8.

<sup>10</sup> Directive 96/29/Euratom of 13 May 1996 lays down basic safety standards for the protection of the health of workers and the general public against the dangers arising from the ionising radiation.

<sup>11</sup> Special consideration should be given to landlocked Member States wishing to have their spent fuel reprocessed but having necessarily for geographical reasons to transit other Member or non-Member States.

and the Safety of Radioactive Waste Management (the Joint Convention)<sup>12</sup> does not imply the extension of the scope of Directive 92/3 to spent fuel for reprocessing. In this respect, it is worth noting that the decision on the accession by the Euratom Community to the Joint Convention, adopted by the Council in January 2005 does not contain any reservation as to the potential non-compliance of the existing regime as laid down by Directive 92/3 with the provisions of this international agreement. This decision does nevertheless contain a reservation, but on a completely different issue<sup>13</sup>.

## 2.2 Specification of the transit control procedure

Directive 92/3 provides for the prior notification and consent of transit countries in the case of intra-community shipments and the importing of radioactive waste. As regards exports, some uncertainties with regard to the transit countries' rights have been identified<sup>14</sup>. More generally, users have indicated that the lack of a definition of the notion of "transit country" has created uncertainty with regard to applying the Directive to maritime and air shipments<sup>15</sup>. They have indeed pointed out that when defining the scope of the rights of transit countries, special account should be taken of the navigational rights and freedoms that are recognised and protected in international law.

In line with the SLIM Team Recommendations, the new proposal now contains a proper definition of the notion of transit country<sup>16</sup>. This definition does not however specify which notion of territory it refers to. It is unclear whether it refers to land territory only, or/and to maritime and airspace territory also. In international law, the jurisdiction of a state does vary according to the part of territory in question.

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<sup>12</sup> The IAEA Joint Convention was adopted in Vienna on 5 September 1997. Opened for signature on 29 September 1997, it entered into force on 18 June 2001. As of today, all Member States are Parties to it, except 5 (Italy, Estonia, Portugal, Malta and Cyprus). The decision on the Euratom Community's accession to the Joint Convention, which was proposed by the Commission on 15 October 2001, was approved by the Council of Ministers on 24 January 2005 (OJ L 30, 03.02.2005, p.10).

<sup>13</sup> The reservation inserted into the decision of 24 January 2005 related to the non-compliance of Article 12 § 1 of Directive 92/3 (which merely provides for a prior information of the third country of destination in case of exports of radioactive waste from the Community) with the specific requirement in Article 27 of the Joint Convention which requires the consent of the state of destination in the framework of transboundary movements.

<sup>14</sup> Indeed, some inconsistencies between recital 14 and the provisions of article 12 of Directive 92/3 have been identified.

<sup>15</sup> See the SLIM Team recommendations 3.3 and 3.6. For example, as regard shipments between Member States, the existing Directive 92/3 requires prior approval of the country of transit before the authorities of the country of origin can authorise the shipment. One of the questions that have been raised is whether this principle is applicable if the route of shipment passes through the territorial sea of a country without calling at a port and that as a consequence there is no transit through land-territory as such.

<sup>16</sup> A transit country is defined as 'any country other than the country of origin or the country of destination, through which territory a shipment is planned or takes place'.

In 1992, the European Court of Justice declared that the European Community had to respect international law in the exercise of its powers and that, consequently, European legislation had to be interpreted, and *its scope limited*, in the light of the relevant rules of the international law of the sea, in particular<sup>17</sup>. The European nuclear industry, therefore, **urges the Commission to clarify what constitutes the territorial limits of a ‘transit country’**.

Beyond the issue of the territorial limits of a ‘country of transit’, rests the more general question of the extent of transit country’s rights within the framework of the proposal.

The proposal provides for the prior consent of transit countries, irrespective of whether these countries belong or not to the Community. Regarding *third* countries of transit, the proposal seems to go well beyond the territorial competence of the Community. In addition, the implementation of this proposal will undoubtedly face practical difficulties linked to the impossibility to impose on third countries procedural requirements and time limits laid down in the proposal.

In line with the SLIM Team recommendations, the European Nuclear industry therefore **suggests not giving a right to prior consent to *third* countries of transit**.

As regards *Member States* of transit, and, in line with the European Court of Justice’s case law, it should be taken into account that under international law, the jurisdiction of a coastal State is not absolute in some maritime areas<sup>18</sup>. The European nuclear industry considers that **it is necessary to determine the extent of the rights given to *Member States* of transit in compliance with the principles of international law, and especially with the rights and freedoms of navigation that it recognises**.

In this respect, the European Nuclear Industry would like to stress that **the IAEA Joint Convention, in order to ensure the protection of navigational rights and freedoms, clearly distinguishes between countries of destination and countries of transit**. Although this convention requires the prior notification and consent of countries of destination, no such requirement is provided with respect to transit countries. In addition, its Article 27 (3) (i) expressly guarantees *‘the exercise, by ships and aircraft of all States, of maritime, river and air navigation rights and freedoms, as provided for in international law’*.

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<sup>17</sup> See ECJ, 24 November 1992, Case C-286/90, European Court reports 1992, page I-6019, points 9 and 10.

<sup>18</sup> See ECJ, 24 November 1992, Case C-286/90, European Court reports 1992, page I-6019, point 25. The Court declared that ‘the **jurisdiction of the coastal State in some of the maritime areas was not absolute**. Thus, although the **territorial sea** falls under the sovereignty of the coastal State, the latter must **respect the right of innocent passage** through it of vessels flying the flag of other States..... As far as the **exclusive economic zone** is concerned, the coastal State must in exercising its powers observe in particular **freedom of navigation...**’. Based on these conclusions, the Court then determined the limits of application of the regulation in question.

In line with the SLIM Team recommendation, the European nuclear industry **invites the Commission to enshrine in the proposal a provision similar to that of Article 27 (3) (i) of the Joint Convention.**

Clarifying the transit control procedure also requires that some limitations are laid down as to the justifications that can be put forward by a Member State to object to a transit.

As the Commission pointed out in 2002, Directive 92/3 created a derogatory regime to the principles of the Nuclear Common Market. As any derogation, this one has to be implemented in a strict way. Although in existing Directive 92/3 states of transit can only object to a transfer for reasons relating to non-compliance with international agreements, Community and national provisions relating to the transport of radioactive material, the Commission proposal tend to extend this right to any infringement of 'a relevant legislation applicable'<sup>19</sup>. This too vague notion does not seem consistent with the principle according to which derogation are implemented and interpreted in a strict way. The European nuclear industry therefore considers that **it would be preferable to keep the current drafting of Directive 92/3 regarding justifications that can be put forward by Member States to object to a transit**<sup>20</sup>.

It is also worth noting that the provisions relating to the export control procedure do not seem to refer to country of transit. It seems appropriate to determine whether this has been deliberate and, if so, why export and import procedures are treated differently.

## 2.3 Clarification of the practical implementation of some procedures

### 2.3.1 Imports control procedure (Article 10)

The internal structure of the Directive has been modified to identify more clearly the different steps of the procedure. A specific article (Article 10) continues to define special rules for imports. The combination of the general rules, laid down in Articles 4 to 8, with the special rules of Article 10 may, however lead to confusion. For example, combining Articles 4, 5 and 6 with the provisions of Article 10 § 1 will result in requiring a Member State of destination to act both as a Country of destination and origin<sup>21</sup>.

The practicality of Article 10 § 2, which refers to imports of radioactive waste from one third country to another that transit through the Community, also requires

<sup>19</sup> Article 6 § 2 combined with article 3 of Directive 92/3 has been redrafted and replaced with the new provisions of article 6 § 3 of the proposal.

<sup>20</sup> These comments also apply to justifications that can be put forward by states of destination as article 6 § 3 of the proposal does refer to both countries of destination and transit.

<sup>21</sup> It appears from the combination of the above mentioned articles that, in practice, the approval of an import of radioactive waste will be sought from and provided by the same competent authority.

some clarification. The reference to the 'person who has the responsibility for managing the shipment' is not very explicit and could cover several operators. The combination of Article 10 § 2 with the rules of Article 12 relating to prohibited exports is also not clear. Is it for the Member State of transit to appreciate whether the third country of destination is able to manage the radioactive waste safely? What would happen if the Member State of transit considers that it is not the case?

The European nuclear industry considers it necessary **that the practical implementation of Article 10 should be clarified**, and suggests that, wherever necessary, **derogation, in Article 10, from the applicability of other provisions of the proposal should be made.**

### 2.3.2 Exports control procedure (Article 11)

With a view to making Directive 92/3 consistent with the provisions of Article 27 of the Joint Convention<sup>22</sup>, the rules for exports from the Community have been amended in the proposal. As Article 11 provides, exports from the Community to a third country will require both the prior information *and* consent of the State of destination, instead of just prior information.

Some uncertainties still exist, however, with regard to the practicality of this new procedure. For example, no specific detail is provided in the proposal on how the consent by the authorities of the third country of destination should be requested and/or given.

Since Article 11 is not self-sufficient, one possibility would be to apply the general rules set up by Articles 4 to 8<sup>23</sup>. However, automatic implementation of these rules does not appear to be compatible with the extraterritoriality of these countries of destination. Indeed, how could mechanisms such as acknowledgement of receipt and timeframe obligations laid down in article 6 be binding on third countries?

The European nuclear industry suggests, therefore, that **the Commission should clarify how it envisages the practical implementation of Article 11.**

## 2.4 Clarification of the proposal objectives (article 1)

Based on Articles 31 and 32 of Chapter III of the Euratom Treaty (Health and Safety), the aim of the proposal for a Directive - as defined in its Article 1 - is to 'provide adequate administrative arrangements so as to guarantee an adequate protection of the population, as well as adequate safeguards of fissile materials...'.

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<sup>22</sup> See footnote n° 13.

<sup>23</sup> Articles 4 to 8 of the proposal regulate the application for shipment authorisation, the transmission of the application to the authorities, the subsequent acceptance or refusal, the authorisation of shipments and the acknowledgement of receipt of the request for authorisation.

However, neither the explanatory memorandum nor the proposal itself reflects this latter objective. In fact, it appears that the objective relating to safeguards of fissile materials is not included in Chapter III but in Chapter VII of the Euratom Treaty. A Safeguards Regulation has already been adopted on this basis and has been recently revised. It includes a number of measures relating to radioactive waste.

**Since the proposal cannot be considered as a substitute for any of the procedures provided by the Safeguards Regulation, the European nuclear industry recommends that any reference to the safeguards objective be deleted from the proposal. Indeed, such reference could suggest that the current safeguards system is not adequate.**

## 2.5 Definition or harmonisation of certain concepts

Some concepts still need to be further defined or harmonised.

Radioactive waste: Article 3 § 1 introduces a new definition of radioactive waste, which is presented as being in line with that of the IAEA Joint Convention. In fact, there are a few differences that change the meaning of that definition and create confusion: this is particularly the case when defining which country decides as to whether a shipment is radioactive waste or not. We therefore suggest sticking to the Joint Convention definition or to the current definition of Directive 92/3.

Technical specification: Article 9 refers to the concept of "technical specification" under which the shipment was approved, even though such specifications are not identified in the proposal. Considering that regulations applying to the transport of radioactive waste and spent fuel also refer frequently to this, we suggest that clarification of the exact scope of this notion be provided.

State of dispatch: Article 9 also refers to "state of dispatch". We believe that this reference should be replaced by "state of origin".

Authorisation, acceptance, approval and consent: There are a number of references in the proposal<sup>24</sup> to "authorisation", "acceptance", "approval" and "consent". As these phrases imply different levels of sanction or consent, we consider that a standardisation of the use of such references would help interpret the proposal.

Reason for isolating shipments by rail: Article 13 § 6 specifically refers to shipments by rail, without referring to other modes of transport (road, sea, air...). We would like to know why this is so.

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<sup>24</sup> See in particular Articles 4 to 7 as well as Articles 10, 11 and 13 of the proposal.

### 3. Conclusion

To conclude, the European nuclear industry supports the intention of the Commission to update Directive 92/3/Euratom to achieve consistency with other Euratom Directives and, where appropriate, with relevant international conventions. We also welcome the efforts made to clarify and simplify the procedures laid down in that Directive.

However, we consider that these objectives have not been fully achieved when it comes to defining the transit control procedure. Beyond the issue of the territorial limits of a country of transit, rests the more fundamental question of the extent of transit country's rights within the framework of the proposal. The European nuclear industry suggests not giving a right to prior consent to third countries of transit and defining in a stricter way the rights given to Member States of transit. In this respect and in line with the European Court of Justice's case law, the preservation of rights and freedoms of navigation enshrined in international law should be ensured, as provided for in the IAEA Joint Convention. Justifications that can be put forward by Member States to object to a transit of a shipment through their territory should also be circumscribed in order to take into account the derogatory nature of Directive 92/3 when compared to the general principles of the Nuclear Common Market.

In addition, we believe that the extension of the scope of the directive to spent fuel for reprocessing goes beyond what is justified by the Commission's stated objectives. The European nuclear industry is in fact most concerned that such extension would lead to legitimise hindrances to the free movement of spent fuel for reprocessing throughout the Community. This would, therefore, contradict the Euratom and European Community Treaties' principles of free movement of goods and free provision of services, while not bringing any additional benefits when it comes to radiation protection.

As previously pointed out, shipments of spent fuel for reprocessing are already significantly covered by international, Community and national regulations, the efficiency of which should not be undermined.

Finally, we believe that the proposal must not be considered as a substitute for any procedures provided by the existing Safeguards Regulation, and that, in this respect, clarification of the proposal's objectives is required. The new import and export procedures also need substantial clarification as to their implementation practicalities.