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COMMISSION RECOMMENDATION

of 4.4.2016

on the application of Article 103 of the Euratom Treaty

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THE EUROPEAN COMMISSION,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 103 thereof in conjunction with Article 106a referring to Article 292 of the Treaty on the Functioning of the European Union,

Whereas:

- (1) One of the tasks of the Community, according to Article 2(h) of the Treaty, is to establish with other countries and international organisations such relations as will foster progress in the peaceful uses of nuclear energy. In order to achieve this task, the Community is endowed, pursuant to Chapter 10 of Title II of the Treaty, with powers in the field of external relations.
- (2) According to Article 101 of the Treaty, the Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State. Pursuant to this provision, Euratom agreements have been concluded with the main supplier countries of the Community.
- (3) Article 102 on the other hand empowers the Community to enter into agreements to which, in addition to the Community, the Member States are also parties. Such agreements can be implemented as regards the Community only by means of a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.
- (4) In accordance with the Treaty, Member States retain, under the conditions foreseen in the Treaty, their treaty-making capacity as actors in the international scene and, consequently, have the right to conclude, at any time, bilateral agreements with third countries that concern matters within the purview of the Euratom Treaty.
- (5) Article 103 of the Treaty plays a central role in reconciling the need to ensure the unity and primacy of Euratom law with Member States' freedom of action in conducting their external relations in the nuclear field. Pursuant to this Article, Member States are to communicate to the Commission draft agreements or contracts with a third state, an international organisation or a national of a third state to the extent that such agreements or contracts concern matters within the purview of the Treaty. If a draft agreement or contract contains clauses which impede the application of the Treaty, the Commission is to make its comments known to the Member State concerned within one-month of receipt of such communication. A Member State is not to conclude the proposed agreement or contract until it has satisfied the objections of the Commission or complied with a ruling of the Court of Justice adjudicating urgently on the compatibility of the proposed clauses with the provisions of the Treaty.

- (6) The Court of Justice of the European Communities, in its Ruling 1/78 of 14 November 1978, ruled that the aim of Article 103 was to ensure that the provisions of the Treaty are not frustrated by agreements or contracts concluded by the Member States with third parties¹.
- (7) An assessment pursuant to Article 103 extends to the compatibility of the draft agreement or contract with the provisions of the Euratom Treaty and the secondary legislation adopted on its basis. It does not extend to the compatibility of the draft agreement or contract with the provisions of the Treaty on the Functioning of the European Union.
- (8) Considerable experience has been gained in the application of Article 103. That experience shows that certain aspects of the Euratom *acquis* are of direct relevance in the context of Member States' external relations. The Commission has had to repeatedly draw attention to specific provisions of Euratom law in its comments to Member States following assessments under Article 103. Guidance is therefore needed on the application of Article 103. The aim of this Recommendation is to recall the main provisions which are of relevance in this context and to provide increased clarity and legal certainty to the Member States when they negotiate their draft agreements or contracts.
- (9) The one-month period referred to in the second paragraph of Article 103 starts to run from the date on which the Commission is in receipt of the communication. Such receipt is to be deemed to have occurred only when the Commission is in possession of the complete notification file.
- (10) Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy provides the Member States with the possibility of seeking the assistance of the Commission in the negotiation of international agreements which fall within the scope of that Decision. That same possibility should be available to the Member States when negotiating agreements or contracts falling within the scope of the Euratom Treaty.
- (11) Nuclear research is within the purview of the Euratom Treaty, as provided for in Chapter 1 of Title II on the 'Promotion of research'. This Commission Recommendation therefore also covers research international agreements, whatever their designation, in the field of nuclear fission and fusion research.
- (12) The basic standards laid down by the Community pursuant to Chapter 3 of Title II of the Treaty, and in particular Council Directive 2009/71/Euratom², Council Directive 2011/70/Euratom³ and Council Directive 2013/59/Euratom⁴, aim to ensure the protection of the health of workers and the general public against the dangers of

¹ European Court Reports 1978, p. 02151.

² Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations, OJ L 172, 2.7.2009, p. 18–22, as last amended by Council Directive 2014/87/Euratom.

³ Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste, OJ L 199, 2.8.2011, p. 48–56.

⁴ Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom, OJ L 13, 17.1.2014, p. 1–73.

ionising radiation, irrespectively of the source of that radiation. They are at the core of the legal system set up by the Treaty and are therefore of central importance in the context of assessments under Article 103.

- (13) Chapter 6 of Title II of the Treaty establishes the Euratom Supply Agency and confers upon it an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside the Community or from outside. In the event that a draft agreement or contract concerned by the present Recommendation includes also provisions on supply matters, its assessment by the Commission pursuant to Article 103 should be without prejudice to the exclusive right of the Agency to conclude supply contracts; co-signature of supply contracts by the Agency on the other hand is without prejudice to the assessment by the Commission of the compatibility of Member States' draft agreements or contracts with the provisions of the Treaty and its secondary legislation.
- (14) One of the key pillars of the European Energy Security Strategy is diversifying external supplies and related infrastructure. In the uranium and nuclear fuel market, the Commission and Member States are called upon to cooperate to diversify supply of nuclear fuel when needed. The Commission undertakes to systematically take into consideration diversification of fuel supplies in its assessment of new nuclear investment projects and new draft agreements or contracts with third countries. The Euratom Supply Agency on the other hand is to ensure that any new investment does not hinder the possibility of fuel supply diversification. This Recommendation contributes to the achievement of these objectives.
- (15) In accordance with the second paragraph of Article 104 of the Treaty, Member States should communicate to the Commission, at its request, all information related to agreements or contracts concluded by persons or undertakings with third states, international organisations or nationals of a third state within the scope of the Treaty.

HAS ADOPTED THIS RECOMMENDATION:

1. 'Draft agreement or contract' within the meaning of Article 103 of the Treaty should be understood to mean any agreement, whatever its designation, that concerns matters within the purview of the Treaty and which is negotiated by a Member State⁵. Draft agreements or contracts amending existing agreements or contracts between one or more Member States and a third State, an international organisation or a national of a third State concerning matters within the purview of the Treaty are also within the scope of Article 103. However, draft agreements or contracts concerning the supply or the processing, conversion or shaping of ores, source materials or special fissile materials which are to be concluded between undertakings and which are to be notified to the Euratom Supply Agency or submitted to it for conclusion in accordance with Chapter 6 of Title II of the Treaty should not be notified to the Commission pursuant to Article 103.

⁵ An "agreement" within the meaning of Article 4 (4) of Council Directive 2011/70/Euratom should however be understood to mean an agreement relating specifically to the use of a disposal facility as specified in that Article.

PART I

Pre-notification stage

2. If a Member State intends to enter into negotiations with a third state, an international organisation or a national of a third state in relation to a draft agreement or contract, that Member State may inform the Commission in writing of its intention. Where the Member State gives the Commission such notice of negotiations, the Member State concerned is encouraged to keep the Commission regularly informed of the progress of the negotiations. The Member State may also request the Commission to provide it with advice on how to avoid incompatibility of the draft agreement or contract with the Treaty.

Member States may also, where they consider it necessary, request the participation of the Commission in the negotiations as an observer.

3. Member States are encouraged to submit a notification pursuant to Article 103 after agreement *ad referendum* has been reached by the parties on all the main elements of the draft agreement or contract but before the draft agreement or contract is concluded.
4. Member States are encouraged to address to the Commission, by electronic means, an advance copy of the notification, including all accompanying documents⁶. Nevertheless, an electronic transmission should be followed by the notification of the complete file in paper form.

PART II

Content of the notification

5. The notification should include, as applicable, all of the following:
 - (a) the text of the draft agreement or contract;
 - (b) any annexes or appendices to the draft agreement or contract;
 - (c) any other agreements or contracts, in the version currently in force, referred to in the notified draft agreement or contract.

PART III

Compatibility of the draft agreement or contract with the Treaty

6. Member States are encouraged to include, in their draft agreements or contracts, an explicit reference to their membership of the European Atomic Energy Community and to the obligations deriving from that membership. It is suggested that they recall that, in case of conflict between the provisions of the draft agreement or contract and provisions of Euratom law, it is the latter that are to prevail. When negotiating their draft agreements or contracts, Member States are to duly take into account the Community's own competences, as well as the principles and fundamental freedoms enshrined in the Treaty in relation to the nuclear common market and any requirements deriving from acts of the institutions adopted pursuant to the Treaty.

⁶ To be sent to the address ENER-LUX-EURATOM-ARTICLE-103@ec.europa.eu

7. Member States are to ensure that their draft agreements or contracts do not contain clauses which are in conflict with the basic standards laid down pursuant to Chapter 3 of Title II of the Treaty. These include in particular:
 - (i) the principle of the ultimate responsibility of the Member State for the management of the spent fuel and radioactive waste generated in its territory;
 - (ii) the principle of the ultimate responsibility of the Member State or third country from where radioactive waste or spent fuel is shipped for processing or reprocessing for the safe and responsible disposal of those materials;
 - (iii) the requirement that radioactive waste is disposed of in the Member State in which it is generated, unless the conditions specified in the secondary legislation adopted pursuant to the Treaty are satisfied.
8. When negotiating draft agreements or contracts, Member States are to take utmost account of the requirements of the common supply policy pursuant to Chapter 6 of Title II of the Treaty, and in particular the need to ensure, subject to the right of the Euratom Supply Agency to conclude supply contracts, the regular and equitable supply of ores, source materials or special fissile materials to any user in the Community. Member States are in particular to avoid the inclusion of clauses that would result in any user in their territory becoming excessively dependent on any single source of supply or any single provider of nuclear fuel cycle services or equipment or technology. Likewise, Member States are not to include clauses which have the purpose or effect of foreclosing the market to alternative suppliers or providers or making the emergence of alternative suppliers or providers excessively difficult.
9. It is recommended that Member States recall, in their draft agreements or contracts, that any nuclear material exchanged pursuant to those draft agreements or contracts is subject to the requirements on safeguards pursuant to Chapter 7 of Title II of the Treaty during all stages of its presence on the territory of the Community. Member States are also encouraged to include a reference to the agreement in force between the Community, the International Atomic Energy Agency and the Member State concerned on the application of safeguards, as well as any additional protocols thereto.
10. Member States are not to include provisions in their draft agreements or contracts which have the effect of transferring to the other party or parties to the draft agreement or contract the ownership of special fissile materials which are the property of the Community pursuant to Chapter 8 of Title II of the Treaty.
11. Member States are to ensure that their draft agreements or contracts do not include provisions which make the transfer within the Community, for whatever purpose, of any of the goods or products listed in Annex IV of the Treaty subject to the prior authorisation of the other party or parties to the draft agreement or contract or which prevent compliance with the rules of the nuclear common market.
12. When negotiating a draft agreement or contract, Member States are to take into account, where applicable, any agreements concluded between the Community and the other party or parties to the draft agreement or contract. They are encouraged to make an explicit reference to the relevant Euratom agreement in the text of the draft agreement or contract to be notified to the Commission.

PART IV

The assessment of the notification by the Commission

13. At the conclusion of its assessment, the Commission makes its comments known to the Member State concerned. Those comments should indicate which provisions of the draft agreement or contract impede the application of the Treaty within the meaning of Article 103, and should, where applicable, refer to specific chapters of the Treaty as laid down in Part III of this recommendation.

PART V

Follow-up to the Commission's assessment

14. Member States are encouraged, following the conclusion of a draft agreement or contract notified pursuant to Article 103, to communicate to the Commission the final text of that agreement or contract, as well as any subsequent declaration or agreement, in whatever form, made by either or both parties in relation to the interpretation or implementation thereof.
15. The fact that the Commission, having been notified of a draft agreement or contract pursuant to Article 103, does not find any elements that would impede the application of the Treaty, does not exclude that the implementation of that agreement or contract could give rise to an infringement of Euratom law.
16. It is recommended that Member States provide the Commission, at the latter's request, with information related to the implementation or interpretation of any agreements or contracts which come within the purview of the Treaty and which are in force between them and third states, international organisations or nationals of a third state.

This Recommendation is addressed to the Member States.

Done at Brussels, 4.4.2016

For the Commission
Miguel Arias Cañete
Member of the Commission

