COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17 December 1982.

PROPOSAL FOR A COUNCIL DECISION ADOPTING NEW PROVISIONS FOR CHAPTER VI, "SUPPLIES", OF THE TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY

EXPLANATORY MEMORANDUM

Document drawn up by the Commission services (*)

(*) N.B. This document, which provides comments, article by article, on the revised Chapter VI, has been referred to by the Commission in its communication COM (82) 732 (cf. in particular page 8, par. 15 at the end of the first part of this communication).

Article 52

This preliminary provision indicates how the Community will carry out, under the terms of the new Chapter VI, the tasks entrusted to it under Article 2 of the Treaty, particularly subparagraphs (d) and (g). These tasks will be performed by means of a common policy, the essential features of which are the principle of the unity of the market, external action on the part of the Community and specific solidarity measures.

In addition a privileged instrument is provided in the form of the Supply Agency to help the Commission to implement this policy.

Unlike the original Chapter VI, which made no distinction as to use, Article 52 expressly limits application of the new provisions to civil and non-explosive purposes. Supplies for explosive purposes, therefore, whether military or civil, so far as they are still legal (they are as a rule prohibited in agreements concluded by the Community and, in the case of non-nuclear-weapon Member States , by the Treaty on the Non-proliferation of Nuclear Weapons (NPT)), will in future have to take place outside the Community framework, as is the current practice. This accords with the civil nature of the Community's task, which is clear from the Preamble and Article 1 of the Treaty, and with current practice as it has become established under the original Chapter VI.

Again by virtue of the Community's civil nature, the same applies to non-explosive military uses which, although banned by the Community agreements, are not covered by the Treaty on the Non-proliferation of Nuclear Weapons.

The new system, on the other hand, applies to all nuclear materials earmarked for civil use, even if they have not been made the subject of a peaceful use commitment. It does not apply to materials which have not yet been allocated to the civil nuclear cycle, whether permanently or even temporarily (i.e., with the possibility of eventual return to the military cycle). Because of the NPT of course, the latter could only take place in the nuclear-weapon Member States . According to Article 52 the new Chapter VI, like the original one, applies to all the nuclear materials covered by Article 197, and therefore includes depleted uranium (apart of course from that used for non-nuclear purposes) and irradiated fuel elements, but excludes waste.

Article 52 concerns only the tasks of the Community

as such, irrespective of national policies which, particularly in some of the Member States, promote in a substantial proportion the supplies of users . It should be the Community's role amongst other things to complement, reinforce and coordinate these policies. In this context the Community's responsibilities, though modified in certain respects, still meet the requirements of Article 2 of the Treaty. Moreover, as regards the basic principles set forth in Article 52, such as the unity of the market, which involve control by a public authority, the Community holds the ascendancy over the Member States.

Section I

The unity of the market

Article 53(1)

This paragraph defines the principle of unity of the market, which is reflected by an overall ban on restrictions of any sort which are likely to affect the transfer, use and storage of nuclear materials unless authorized or adopted at Community level either under the terms of Article 53(2) or under those of the international agreements entered into by the Community.

Unity of the market ensures, amongst other things, that there is no discrimination against any of the users in the Community, who would all be treated on the same footing as far as the use of materials is concerned. The principle of the unity of the market does, however, have a wider compass than that of non-discrimination, in so far as it is incompatible with the barriers in question with regard to users even if they are non-discriminatory.

The abovementioned overall ban applies equally well to measures adopted by the Member States as to the provisions of supply contracts. The restrictions in question are:

(a) barriers to transfers within the Community (e.g. import or export licences, other measures having an effect equivalent to quantitative restrictions, contractual non-retransfer clauses);

(b) barriers to imports from outside the Community (e.g. import licences, quantitative restrictions and measures of equivalent effect);

(c) conditions governing use and storage within the Community (e.g. prior consent for reprocessing, obligation to store in a specific State, obligation to use materials exclusively in a given reactor).

It should be noted that the restrictions in (b) are prohibited because they pose a threat to trade within the Community, given the need to prevent the diversion via other Member States of goods coming from a third State which are prohibited in one of the Member States.

The conditions mentioned in (c) are prohibited even within a Member State so as to ensure an equitable supply to all categories of users in a Member State. It is obvious, however, that this ban cannot affect the industrial choice open to the Member States. Different situations may arise here. For example, one Member State might decide to do without nuclear energy entirely. Another Member State, while adopting a nuclear programme, might dispense with certain lines of development such as fast reactors. In both cases this would be an industrial choice which would have nothing to do with supply and should not therefore come under the new provisions of Chapter VI.

Physical protection measures on the other hand, would be unaffected by the prohibitions in this paragraph and would be justified on the basis of Article 195, which would continue to apply. It should be remembered that this Article allows limited internal rules to be adopted in connection with public policy and public health.

It would therefore be open to a Member State to adopt physical protection measures which were applicable within that State and did not form a barrier to trade within the Community.

Article 53(2)

There are some conditions relating to the transfer, use and storage of nuclear materials, however, which will be considered to be justified:

- internally, to ensure that public authorities exercise a control over nuclear materials in view of their special nature or to be able to meet any commercial or industrial requirements;
- externally, to be able to reply to the legitimate anxieties of outside suppliers.

It is, however, important that these conditions should only be permitted if they are compatible with the Community's tasks as provided for under Article 2 and that in any case they should only be implemented in a Community framework, so as to avoid any sporadic action on the part of Member States which might be damaging to unity of the market. This Community framework is provided by:

- the procedure laid down in this paragraph[1];
- an international agreement concluded by the Community.

Article 36 of the EEC Treaty, which allows Member States to impose restrictions on trade notably on grounds of public policy, public security and protection of health and life, cannot apply since in the nuclear sector, by its very nature, grounds of public policy, public security or protection of health and life can always be put forward somehow or other without any other justification.

There is a whole set of measures which could be governed by the Community rules provided in this paragraph and which ought not to be limited, so that the Community will be able in the future to respond to any eventuality in the development of nuclear energy.

These measures could, in fact, comprise:

(a) restrictions on imports into the Community;

(b) restrictions on transfers within the Community;

(c) conditions governing use and storage of materials coming from within the Community;

(d) conditions governing use and storage of materials coming from outside the Community.

The Community rules might either authorise the contracting parties in supply contracts (contracts concluded within the Community as well as contracts with outside suppliers) or even the Member States to make provision for such restrictions or conditions, or impose the restrictions or conditions within the Community.

Exports are covered not by this paragraph but by Article 57.

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[1] It should be remembered that internally restrictions could also be introduced under Article 80, a provision which has been inserted in Chapter VII which will be unaffected by the revison of Chapter VI.

As regards conditions or restrictions accepted by the Community in an international agreement, their acceptability stems directly from the conclusion of such an agreement without the necessity for a special implementing procedure: this explains the reference to international agreements in the first paragraph of Article 53. It should also be remembered that the provisions of these agreements, in so far as they are "self-executing", are binding not only on the Community and its Member States but also on persons and undertakings.

Special conditions affecting both transfers within the Community and those coming from outside might be likely especially in the following areas:

- limitation of use to peaceful and non-explosive purposes;
- assurance of adequate physical protection measures;
- application of Euratom and IAEA safeguards;
- in the event of re-transfer out of the Community, obligation to pass on peaceful use and IAEA safeguards commitments agreed with the original supplier;
- special measures concerning re-transfer of materials out of the Community;
- special Community schemes for the use and transfer of plutonium and highly-enriched uranium.

The above conditions are of two different types:

- clauses which are standard in contracts but which have no real legal consequence since the conditions in question, deriving from public law, would apply even in the absence of these clauses (peaceful use, safeguards); inclusion of such clauses might, however, be justifiable on grounds of political expediency;
- conditions which have their own legal consequences (e.g. plutonium scheme, prior consent to re-transfer out of the Community).

To make it easier to implement the new supply system it might prove necessary for a Regulation under this paragraph to enter into force at the same time as the new system and for it to establish an initial set of special conditions, compatible with a regular and equitable supply to all users in the Community.

Other conditions might then be laid down subsequently in accordance with the procedure described in this paragraph.

It should be emphasized, incidentally, that the provision at the end of the existing Article 52 whereby conditions laid down by an outside supplier, even in an ordinary supply contract, are to be accepted in the absence of a Community agreement, has not been retained. On the one hand it did not seem advisable for the Community to discriminate against internal suppliers as compared with external suppliers, and on the other hand the acceptance from outside of disparate conditions, conditions which are not contemplated in an international agreement, might prejudice the establishment of a Community policy in the field. It is quite clear that there is still the possibility of such external conditions being stipulated, but just like the conditions set by the internal suppliers it is now subject to the Community procedure set forth in this paragraph.

The reference to Chapter IX is explained by the fact that the regulation referred to in this paragraph could not derogate from the basic prohibitions concerning restrictions on trade between the Member States (customs duties and quantitative restrictions) which are to be found in that Chapter.

As for the procedure for the adoption of the regulation, the solution given in this paragraph (Commission Regulation which can be referred to the Council) entrusts power to issue regulations to the Commission as the institution having the responsibility of ensuring respect of the Treaty and being in a position to arbitrate quickly and impartially when there are differences of opinion and clashes of interest, while maintaining a certain degree of initiative for the Member States.

However, in view of the delicate nature of the measures in question and their possible political repercussions, there is provision for recourse to the Council within a fixed time limit, with the possibility that the Council might repeal the Commission's Regulation if such action is agreed by a qualified majority of Member States, again within a fixed time limit; the Council might even amend the Regulation if it acts unanimously, in accordance with the general institutional system (see Article 119).

Article 54

In pursuance of Article 232 of the EEC Treaty, the competition rules laid down in Articles 85 to 90 of the EEC Treaty apply to the nuclear industry, save as otherwise provided by the Euratom Treaty.

Under the existing Chapter VI, all operations falling within the scope of the Agency's monopoly are exempted from the EEC competition rules.

The abolition of the monopoly brings about an extension of the scope of these rules: the purpose of Article 54 is simply to stress this fact, while reiterating the principle of the precedence of the Euratom Treaty in the nuclear field.

The rules laid down in Article 53 pursue a different aim from that of the competition rules. The fact that a clause of a contract has not been contested under Article 53 therefore clearly does not prevent it from being examined in the light of the EEC competition rules as regards actions which are not covered by the principle of the unity of the market and which do not come within the meaning of Article 53 (e.g. under certain conditions pricing practices, specialization agreements or abuses of dominant position). It is also possible that the special system introduced by Article 53 takes precedence over the EEC competition rules, for example where a condition referred to in a Commission regulation adopted in pursuance of Article 53(2) is at variance with the rules on competition.

There can be no doubt as to the applicability under the new system of the other provisions of the Chapter on competition in the EEC Treaty and especially of Articles 91 to 94 on aids, considering that these provisions, which are not incompatible with the monopoly, already apply under the original system. There is therefore no need for any express mention of this in the new Chapter VI.

Section II

International relations

Article 55(1)

This provision establishes the principle of the competence of the Community to conclude international agreements concerning supplies, this term evidently embracing supplies of both materials and services.

Under the original Chapter VI the Community's competence in this matter is not conferred directly but derived from the prerogatives of the Agency in pursuance of the principle of parallelism between external and internal powers enshrined in Article 101. The abolition of the monopoly brings with it the need to provide for specific rules defining the competence of the Community to conclude such agreements. In the absence of such provisions, the powers of the Community to conclude international agreements would be less in the nuclear field than those in the area of commercial policy under the EEC Treaty. This would be unacceptable. This is a sector where:

- on the one hand, third States tend to impose on the recipients of their supplies conditions relating to the use of the materials in question, which could be contrary to the principle of the unity of the market;

- and on the other hand, the Community dimension can be used to benefit all the Member States and Community operators in the negotiations.

These considerations are all the more significant when one considers that the Community depends on non-member countries for the supply of its nuclear industry.

It should also be added that the Community alone has a safeguards system which can provide third States with the assurance that the materials will be subject to the same conditions during any retransfer within the Community and thus

avoid the conditions, however legitimate, resulting in an unacceptable fractionation of the market.

On the other hand, since a Member State cannot enter into commitments on behalf of third parties, bilateral agreements concluded by Member States should normally provide for restrictions on transfers so as to give the third State supplying the materials the same assurances even within the Community. This would obviously result in an unacceptable fragmentation of the market. It is therefore important that the Community itself should conclude the agreements in question in order to ensure that they respect the principle of the unity of the market.

In accordance with the general principles of the international relations of the Communities, this paragraph does not exclude the conclusion of mixed-type agreements governed by Article 102 of the Euratom Treaty, when the supplies in question are in a context of broader commitments which might equally concern the Member States (e.g. convention on physical protection).

Article 55(2)

This is a procedural provision with its origins in Article 113 EEC on the conclusion of commercial agreements. In view of the technical complexity and political sensitivity of nuclear agreements, it would appear expedient for the Commission to take advantage of the opinions and expertise of the representatives of the Member States when they are being negotiated.

Article 56

This provision enshrines the administrative precedents which have permitted the conclusion of bilateral agreements in areas which in principle are the responsibility of the Community when the latter cannot or does not wish to conclude an agreement.

This Article also covers the somewhat unlikely hypothesis where although a Community agreement with a specific non-member country might exist, this agreement is not adapted to the precise needs of the users in a Member State. This is what the term "appropriate agreement" in the first sentence in Article 56 conveys.

A Member State should, in such situations, be able to take whatever steps might be necessary to ensure supplies to its users when, for political reasons, the Community fails to do so (e.g. lack of interest for the Community as a whole in concluding a particular agreement or amending an existing one in a suitable manner).

Since Article 103 is obviously applicable, these bilateral agreements cannot be allowed to hinder the application of the Treaty and in particular the principle of the unity of the market; this is why, in particular, any restriction on transfer to other Member States is illegal, subject to application of the special Community procedure laid down in Article 53(2).

Since this is a derogation from a basic principle of the new Chapter VI, it is important that the option of replacing bilateral agreements with a Community agreement as soon as possible be retained.

For it to be possible for the Community to assume the relevant clauses of these agreements if necessary, in the bilateral agreement this means that the third State must be committed to accept clauses at least as favourable in a possible agreement with the Community and also that there has to be a clause stipulating automatic substitution in such a case of the provisions of the Community agreement for those of the bilateral one whenever they have the same scope. The Member State concerned must, for its part, undertake to ease the task of the Community, particularly in respect of adoption by the Community of such bilateral clauses, in accordance with article 192.

Provided that the above precautions are complied with, Article 56 provides that the Commission shall authorize - this is a legal obligation - the conclusion of a bilateral agreement. The principle of Commission authorization of the conclusion by a Member State of an international agreement, incidentally, is not without precedent in the Treaty (cf. Article 29(2)).

Article 57

The inspiration for this provision comes from Article 59 in the original Chapter VI which generally makes exports of materials out of the Community subject to respect of the general interests of the latter, including exports carried out within the framework of service contracts (enrichment, reprocessing, etc.).

There have, however, been some developments of this principle designed to benefit an efficient application of the system.

These concern:

(a) widening of the scope of the provision to cover all exports, since Article 59 of the original Chapter VI did not apply to the processing, conversion and shaping operations (e.g. conversion, fabrication) referred to in Article 75; incidentally, Article 59 was only applied in practice to the export of materials produced in the Community.

In view of the importance of Community control of exports for supplies and of the possibility of adverse effects in any operation in this area, no provision has been made for exceptions to the rule of Article 57 in order to ensure that the system remains consistent.

(b) the option given expressly to the Commission to make its authorization subject to conditions. Such conditions might for example concern the practical methods of applying them, especially in the case of materials of non-Community origin transferred for treatment in the Community as part of contracts providing for the rendering of services over a long period.

It is obvious that in implementing this Article the Commission will be guided by factors to do with the possible effects of exports on the supply situation in the Community, both as regards the depletion of its resources (exportation of materials and services at times of shortage or risk of loss of materials outside the Community) and as regards external supplies (because of the effect certain exports might have on the attitude of the Community's external suppliers and because of the need to ensure that obligations undertaken in international agreements are honoured).

Furthermore, since there is the possibility that under certain circumstances export might prove generally harmful to the Community's external relations, the Commission should if need be consider other criteria. However, control should not mean the appropriation by the Community of material which is not its property, namely material from outside sources which is treated in the Community.

The Commission should have at its disposal all the information necessary for verifying whether a given export is in conformity with the interests of the Community. To this end it can therefore demand all the information it needs in order to carry out its task

It should also be remembered that in the system of the original Chapter VI the Commission does not have exclusive powers in the matter. Any Member State can set up its own authorization system. This principle remains unchanged in the new Article 57.

Section III

Solidarity Measures

Article 58

This provision embodies the Community's wish to encourage, wherever possible, Community-level cooperation in the construction of industrial-scale installations for the processing of nuclear materials.

The expression "processing" (and "processed" in Article 75(1)) refers to the whole body of industrial operations in this field, including enrichment and reprocessing.

Under the terms of this provision, all plans of this nature, emanating from persons or undertakings within the Community and involving links with other potential Community investors, should be communicated to the Commission. Ensuring where necessary the confidentiality of such plans, the Commission could then inform those persons and undertakings likely to have a legitimate interest in the matter. This would have the effect of restricting the information to those qualified to participate by virtue of their own activities. The Commission would thus facilitate the formation of such links, making sure that there was no discrimination with respect to specific categories of interested party. The original investor would, of course, be free to give concrete form to any such links. No provision of this nature is made in the original Chapter VI, but this may be regarded as an extension of the Commission's prerogatives under the heading of Chapter IV. The provisions of that Chapter, particularly those laying down the obligation to communicate new investment projects to the Commission and the delivery by the latter of its views upon them will obviously not be affected by Article 58.

It should be pointed out that under the terms of Article 63, the Commission may call for the assistance of the Agency in implementing this Article.

Article 59(1)

This paragraph is basically a re-working of the provision of the first paragraph of Article 70 of the original Chapter VI whereby the Commission may give financial support to prospecting projects. However, the new version extends this possibility to the territories of non-member countries, reflecting the fact that the Community is and will continue to be dependent upon third countries for a great deal of its uranium requirements and that it will consequently have to maintain stable and regular access to external mining resources.

The extension of the option to intervene for the Community will not affect the efforts already made under the heading of the original Article 70 with respect to prospecting within the Community.

Furthermore, the report to be drawn up by the Commission every two years on the actions that have been taken and those envisaged over the following four years will help to ensure that this provision is implemented as well as possible, with the emphasis on continuity and consistency, particularly at financial level, within a multiannual framework.

Article 59(2)

This paragraph is a re-working of the third paragraph of Article 70 of the original Chapter VI. Its aim is to permit the acquiring of knowledge of the current and foreseeable state of Community resources, and also to facilitate implementation of the first paragraph of Article 59. On the other hand, the provision of the fourth paragraph of the original Article 70 is omitted from the Commission's proposal since this refers to the right of equal access which is no longer maintained in the new system. The Commission's general power to make recommendations to the Member States also means that the second paragraph of the original Article 70 can be omitted (as can the original Article 71).

Article 60

The second paragraph of Chapter 72 of the original Chapter VI provides for the constitution by the Commission of central emergency stocks with Community-level financing according to procedures defined by the Council.

This provision is linked with the concept of monopoly which characterizes the present system.

Whilst leaving this possibility open, Article 60(1) of the new Chapter, also provides for the creation of decentralized stocks by the Member States, producers or users on the basis of a Community act imposing an obligation to this effect upon these parties. Such stocks could receive financial support from the Community. These obligations justify a legal act by the Council, acting by a qualified majority, with regard not only to the financing procedures, but to the system as a whole.

The foremost objective in setting up these stocks is that of achieving a position in which it would be possible to cope with any shortages.

The level of these stocks would also be established at Community level within the meaning of Article 60(1); this level could be altered in relation to the market situation according to the same procedure. Accordingly, these stocks

could also, at least in certain circumstances, be used to offset the effect of economic conditions involving overabundance.

Article 60(2) provides for the establishment of procedures for using these stocks. Among other things, these procedures could include the right to draw on these stocks and a compulsory distribution system, without excluding, obviously, forms of assistance and voluntary cooperation between the interested parties, to which the Agency could lend its support.

Lastly, Article 60 would facilitate the creation of a nucleus of regional cooperation which could become part of an analogous system of solidarity to be established at world level. (Cf. the work of the Committee on Assurance of Supply (CAS) under the aegis of the IAEA.)

Article 61(1)

Quite apart from the measures provided for in Article 60, it appears necessary to lay down other specific measures to be taken whenever market imbalance is such as to affect the Community's responsibilities under the terms of Article 2 of the Treaty.

According to the circumstances the Council would be able to decide on, by a qualified majority:

(a) suitable measures with regard to prices, be they maximum or minimum, with the purpose of guaranteeing regular supply;

(b) the geographical origin of supplies: this is a measure designed mainly to diversify the sources of supply in order to ensure them;

(c) the establishment of import quotas for supplies from outside the Community: this is a preferential measure benefiting Community producers.

Article 61(2)

This provision enables the Commission to direct users and producers, respectively, towards the sources of supply and outlets within the Community and to endeavour thereby to achieve a kind of Community preference.

Article 62

In cases where the measures described in Article 61 prove inadequate, the Council can adopt, by a unanimous vote, any other appropriate measure. Unanimity is justified in this case because, unlike Articles 60 and 61, the measures to be adopted by the Council have not been identified beforehand in the text of the Treaty itself.

It should be noted that in addition customs duties on imported material can be established or amended under the provisions of Articles 94 EAEA and 28 EEC and that anti-dumping measures may be instituted under the provisions of Article 113 EEC.

The procedure described in Article 61 and 62 is designed to implement gradual intervention measures when there is any imbalance between supply and demand, with the purpose of supplementing the mechanism established in Article 60.

These provisions do not exist as such in the original Chapter VI. However, in the context of the commercial monopoly accorded to it,

the Agency would have been able to take similar steps as the need arose, implementing a number of provisions, particularly those of Articles 60 and 72 and of Article 65(2) of the original Chapter. The disappearance of the Agency's monopoly makes it necessary to provide for a means of forecasting and offsetting imbalances in the regularity of supply under the heading of Community solidarity, one of the basic elements of the common supply policy.

Article 63

Whilst it establishes the principle that the Commission is responsible for ensuring that the solidarity measures are carried out, this measure provides for considerable recourse, depending on the types of measures involved, to the Agency as a specific instrument intended to assist the Commission in its efforts to implement common policy.

Section IV

The Supply Agency

Articles 64 and 65

These provisions are concerned with the setting up of the Agency and with its operations, and are based largely on Articles 53 and 54 of the original Chapter VI.

The following points may be made:

(a) it is advisable to maintain the possibility of referring to the Commission the acts of the Agency (under the terms of Articles 146 and 148 the interested parties obviously have recourse against the corresponding Commission decisions), regardless of the abolition of the monopoly, given that the Agency has certain powers which may affect the legal situation of the persons or undertakings concerned (Articles 63 and 69);

(b) similarly, despite the abolition of its monopoly, it is particularly necessary to preserve the legal personality and financial autonomy of the Agency because of the role that the Agency will be required to play in the case provided for in Article 69 and, if appropriate, pursuant to Article 62 and because of its functions in the economic field (Articles 67 and 68), with regard to which recourse to a public body separate from the Community would appear more appropriate;

(c) the provisions concerning the Agency's capital and commercial management have now become optional as a result of the change in the Agency's functions;

(d) the purpose of the reference to the Advisory Committee is to establish at Treaty-level the existence of this body set up within the system of the original Chapter VI by means of the Agency's Statutes.

The Commission will not fail to propose suitable amendments to the Agency Statutes currently in force in the light of the new provisions, at the appropriate time.

Article 66

This provision summarizes all the Agency functions provided for in the new Chapter VI.

Article 67

This provision states in particular that the Agency shall inform, advise and assist operators.

This activity will be conducted particularly at legal and administrative level (for example, the Agency will advise operators as to whether or not the clauses of contracts conform to Community law, or help them to obtain export licences in non-member states).

The Agency must also endeavour to improve supplies by forestalling situations of imbalance between supply and demand within the Community, encouraging operators to participate in concerted actions.

This will enable the Agency to direct users and producers, respectively, towards sources of supply and Community outlets, and to endeavour, by this means, to achieve a kind of Community preference.

Finally, this provision requires the Agency to inform the Commission and to advise it with regard to the form that solidarity measures should take, or as regards the recommendations referred to in Article 61(2).

Article 68

This Article basically desribes one of the Agency activities as carried out until now on the basis of the regulations implementing Article 60 of the original Chapter VI with regard to the matching of supply and demand. The market surveys constitute a necessary source of information to enable the Agency to accomplish the tasks conferred upon it by this Section.

Article 69

Under the new supply arrangements the Agency is no longer called upon to act in the negotiation and conclusion of supply contracts.

However, it will still have to act if requested to do so by a non-Community supplier, in the context of an international agreement concluded by the Community (e.g. the Agreement between Euratom and the United States).

Furthermore, pursuant to the combined implementation of Articles 62 and 63, the Agency might, in future, be called upon to conclude specific contracts.

Although no specific provision to this effect is required in Chapter VI, since the implementing provisions pursuant to Article 71 should take care of the matter, in acting as a public service the Agency is clearly at the disposal of all users. It could not therefore refuse an order or create any discrimination between users without legal or material obstacles.

Article 70

The first paragraph of this Article repeats the first paragraph of Article 56 of the original Chapter VI: it is designed to ensure that the Agency is in a position to perform its tasks according to procedures established by a Commission regulation in accordance with Article 71.

The second paragraph obliges Member States, persons and undertakings communicate regularly to the Agency the information it requires to supplement the market surveys it carries out in accordance with Article 68. It should be pointed out that this paragraph also provides the Agency with access to certain data (of vital importance to it in carrying out its economic tasks) concerning the execution of supply contracts (particularly as regards quantities and prices pertaining to supplies actually received or delivered), which would not ensue from notification of the contracts under the heading of Article 72. In some cases, these contracts may merely amount to a legal framework in which supplies are provided according to specific conditions to be determined subsequently by the parties concerned.

Article 71

This provision makes it possible to adopt the specific procedures by which to implement all the provisions of Section IV, relating to the operation of the Agency described in the new Chapter VI. If it is appropriate, the Commission will be able to give the Agency responsibility for deciding on certain specific implementing measures (e.g. the drafting of forms to be used for the communications referred to in Article 70).

Section V

Special provisions

Article 72(1)

In pursuance of this provision all contracts relating to supply which conflict with the principle of unity of the market, the international agreements concluded by the Community or the solidarity measures shall be automatically void by virtue of being incompatible with mandatory rules of law. Since this is a question of nullity ab initio, this provision operates independently of the verification procedure referred to in paragraphs 2 and 3. These contracts cannot, therefore, be relied upon before any national court.

The term "contracts concerning supply" covers all supply contracts including, therefore, the supply of both material and services (this also applies to the whole of Article 72).

Article 72(2)

Given that the monopoly has been done away with and that new arrangements are being implemented, observance of the new requirements must be monitored effectively and in detail at Community level.

Article 72(2) thus provides for communication ex post to the Agency of all supply contracts within 15 days of their having been concluded.

This obligation applies to the contracting parties: above all Community persons and undertakings (and also the Member States should they conclude contracts themselves - though this is very unlikely; it also applies however, to operators pertaining to non-member states.

It should be pointed out that no provision has been made for any exception on the grounds of the impact of certain contracts on Community supply, since infractions of the new arrangements (especially the principle of unity of the market) can be committed in respect of any commercial transaction and can have repercussions for subsequent transactions.

Contracts concluded by intermediaries are thus equally subject to this provision.

This communication is required only for the purposes of the specific system instituted by the new Chapter VI (principle of unity of the market, international agreements concluded by the Community, solidarity measures) and not for any other purpose, such as the verification of the respect of the rules of competition. Accordingly the contracts communicated in accordance with this paragraph will not be transmitted to those responsible for monitoring competition except where the parties concerned make a request to this effect. In this case, however, competition control will be carried out in accordance with the procedures, time limits and follow-up applied for that purpose, without any overlap whatsoever with the checks referred to in Article 72.

Any breach of the obligation to communicate the contracts will be subject to the penalties described in Article 74, regardless of whether or not the contract concerned conforms to Community rules.

On the other hand, a contract conforming to the new provisions of Chapter VI, but not communicated, would not be void under the heading of Article 72(1). Unlike in the case of either Agency monopoly or communication ex ante, communication ex post does not actually interfere with the procedures for concluding a contract (which depend entirely upon the contracting parties) and does not therefore represent an element of public law, which is a vital and integral part of such procedures.

The correct implementation of the new Chapter VI by the Member States as regards acts other than the conclusion of contracts (e.g. laws and regulations conflicting with Article 53) is covered by the general procedures described in Article 141 et seq.

In addition to the carrying out of the monitoring procedure under Article 72(3), the communication of contracts is also designed to enable the Agency to have at its disposal the information on the market situation necessary for it to be able to carry out its tasks in the economics field, especially those devolving from Articles 67 and 68.

Article 72(3)

The procedure referred to in this provision is inspired by the procedure described in Article 103 concerning monitoring by the Commission of the international agreements concluded by the Member States.

Under Article 72(3), should the Commission observe (on the basis of a report

from the Agency to which contracts are communicated in accordance with Article 72(2) and which examines the dossiers[1]) that a contract conflicts with the principle of unity of the market, with the Community's international agreements or with the solidarity measures, it will send its comments to the parties concerned within one month of receiving the contract.

The contracting parties would have the chance to argue their case with the possibility of satisfying the Commission's objections. If, however, the objections were not satisfied, the parties would be under a legal obligation, sanctioned by Article 74, to amend the contract in accordance with the Commission's comments and within the time-limit laid down by the latter.

The decisions adopted by the Commission in implementation of this paragraph could be contested before the Court of Justice pursuant to Article 146, while the interim measures under the heading of either Article 157 (second sentence) or Article 158 would also be applicable. It should be remembered that the Commission's comments under the heading of this paragraph shall not concern compliance with competition rules.

Article 72(4)

Under the terms of this provision a contract will be deemed de jure to be in conformity with the principle of unity of the market, the international agreements concluded by the Community and the solidarity measures (without prejudice to its conformity with competition rules) if the Commission makes no comments, if the Commission's objections have been satisfied or if the contract has been amended at the request of the Commission, pursuant to paragraph 3 and within the time-limits laid down in that paragraph. This amounts to a presumption juris et de jure intended to provide the the interested parties with legal security with regard to the validity of their contracts. Furthermore, this provision will prevent any conflict between the Commission (under the heading of paragraph 3) and the national courts which would be required in future to assess whether a contract is void pursuant to paragraph 1.

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[1] Relations between the Commission and the Agency as regards implementation of Article 72 will be governed by a Commission directive pursuant to Article 64(1).

Article 73

This Article makes provision for the Commission to carry out appropriate verifications to establish whether or not the obligation to communicate contracts is being observed. Laid down in Article 72(2), this obligation is the kingpin of the system of monitoring the conformity of supply contracts to the new arrangements.

This verification system is markedly different form the inspections laid down in Article 81 with regard to safeguards:

(a) the objective is very much narrower (it amounts simply to checking that contracts have actually been communicated);

(b) this is not a question of routine since the check can be made only on the basis of a specific Commission decision; such a decision assumes that there are serious grounds for believing that a breach of Article 72(2) may have been committed.

(c) the Commission officials responsible for making the verification will not be required to fulfil the requirements of Articles 81 and 82 (e.g. the consultation procedure);

(d) the emergency procedure involving application to the President of the Court of Justice, referred to in Article 81, has not been included: the Commission decision ordering such a check could obviously be contested before the Court pursuant to Article 141, Articles 157 and 158 being equally applicable.

It should be pointed out that paragraph 2 which establishes the powers of the Commission officials responsible for verification is inspired by provisions relating to competition control in the EEC Treaty because of the similarity between the two types of check. This similarity does not, however, mean that there should be any interaction between the two systems. They remain completely separate (cf. comments on Article 72(2)).

Paragraphs 3 and 4 also echo the provisions governing verifications relating to competition rules. This verification procedure is intended to be applied only to persons and undertakings. If, under exceptional circumstances, Member States were to conclude supply contracts directly, compliance with the obligation laid down in Article 72 (2) would be ensured in the context of the general procedures described in Article 141 et seq.

Article 74

To ensure that the new system is observed effective sanctions which are appropriate to the seriousness of infringements in this field, which could jeopardize the achievement of the common supply policy, are required. For this reason specific penalties are provided for in Article 74 in the form of fines and penalty payments modelled on the repressive system laid down in the EEC Treaty to deal with infringements in relation to competition.

This provision applies in the case of infringement not only of the rules set out in the new Chapter VI (and, where appropriate, of the law derived therefrom) but also of the agreements concluded by the Community pursuant to Article 55.

It could happen that the actions or behaviour of persons or undertakings may conflict with an international agreement without actually resulting in the conclusion of a contract and without, therefore, being covered by the procedure described in Article 72. Since the Community should always be in a position to ensure that its international commitments are respected, it is essential that there be specific repressive procedures. Under the original system such procedures were unnecessary because of the Agency's monopoly. Following the example of Article 83 with regard to safeguards , this Article applies only to infringements committed by persons and undertakings. Any such infringements by Member States would be dealt with in accordance with the normal procedures pursuant to Article 141.

Any infringement of the competition rules (which would be covered, in fact, by Article 85 et seq. of the EEC Treaty and not by Chapter VI) would clearly be penalized according to the specific rules applicable in this field, and not in accordance with Article 74.

The second paragraph relates to the general treaty system (Articles 36 ECSC, 172 EEC and 144 Euratom), under which the Court always has unlimited jurisdiction in respect of Community sanctions, i.e. it may not only annul a particular sanction, but also amend its effect. The fact that a fresh sanction is instituted by Article 74 means that provision must be made for unlimited jurisdiction of the Court in this case too, thereby extending the scope of Article 144.

The procedure for implementing Article 74 will be established by the Commission by means of a regulation.

Article 75(1)

The purpose of this provision is to exclude from the Community's ownership material imported temporarily into the Community in order to undergo an industrial process (e.g. enrichment, conversion); a similar principle appears in Article 75 to the original Chapter VI. It is worth restating: a property right is not justified because this material is not imported with a view to adding to the Community's supplies. The generic term "processed" as used in Article 75 ("processing" in article 58) covers all industrial operations in this field (conversion, enrichment, fabrication, reprocessing), whereas in Article 75 of the original Chapter VI the expressions "processing, conversion or shaping of ores" can be taken to include reprocessing, but not enrichment.

Article 75(2)

This provision is based on that of the first paragraph of Article 74 of the original Chapter VI, which has never created any special difficulty. On the other hand, the second paragraph of this Article, which is linked with the concept of monopoly, has been omitted.

Article 76

This provision is inspired by the first paragraph of Article 76, of the original Chapter VI.

Should there be any major changes in the supply situation, this Article will make it possible to amend Chapter VI without the need for recourse to Article 204, even after termination of the review procedure following the experimental period referred to in the second paragraph of Article 76 of the present Chapter VI.