



Principles organising the movement of nuclear items within the European Union: a short review of the history of Annex IV

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Before 1994 : When the ECC didn't have a Community export control regime

- **National measures prevailed**

Common market not yet achieved or transformed into a Single market

- **The concept nuclear items as a part of “dual use items” was not yet commonly used**

Appears (firstly) in the nuclear field in 1992 NSG Warsaw Plenary (INFCIRC254/ Part.2)

- **COCOM wording of “Strategic Goods”**
- Essentially understood by Member States as **falling under the free movement exception of article 296 EEC (346 TFUE)**

The arms, munitions and war material exception didn't exclude nuclear items

Most of nuclear items were even included

One exception to the extensive interpretation of article 346 exception : the Nuclear Common Market established by the Euratom Treaty

Article 2

... by the creation of a common market in specialized materials and equipment, by the free movement of capital for investment in the field of nuclear energy ...;

Article 93

*Member States shall **abolish** between themselves, ..., **all customs duties on imports and exports or charges having equivalent effect, and all quantitative restrictions on imports and exports, in respect of:***

- a. products in List A1 and A2*
- b. products in List B*

List A.1

Uranium enriched in plutonium

Uranium enriched in uranium 235

Alloys containing uranium enriched in uranium 235 or uranium 233

Plutonium

Uranium 233

Uranium hexafluoride

Monazite

Thorium ores containing more than 20% by weight of thorium

Urano thorianite containing more than 20% of thorium

Crude or processed thorium

Thorium oxide

Inorganic compounds of thorium other than thorium oxide

Organic compounds of thorium

.....

List B

Artificially separated stable isotopes

Electromagnetic ion separators, including mass spectrographs and mass spectrometers

Reactor simulators (special analog computers)

Remote controlled mechanical manipulators

Liquid metal pumps

High vacuum pumps

Heat exchangers specially designed for nuclear power stations

Radiation detection instruments (and spare parts) of one of the following types, specially designed, or adaptable, for the detection of measurement of nuclear radiation, such as alpha and beta particles, gamma rays, neutrons and protons

Cyclotrons, Van de Graaff or Cockcroft Walton electrostatic generators,

But the understanding of the nuclear common market was not similar for the 12 Member States, in particular after the NPT ratification

For certain Member States the nuclear common market was **not anymore applicable** for others it was still...

Lengthy debate concluded on 20 November 1984 by a **Declaration of Common Policy** adopted by the foreign ministers of the **Community (Dublin Declaration)**.

Dublin Declaration :

Covers in particular arrangements for the transfer between Member States of separated **plutonium** and **uranium** enriched to more than 20% in the isotopes 235 or 233 and the transfer of installations, principal components of crucial importance, **reprocessing or enrichment** technology or the technology of **heavy water**

Principle of transfer notification (not authorisation) of exchanges between Member States

Before the implementation of the Single Market

Three exceptions to the free movement of goods and services within the EC

- **Arms** exception (Article 223 EEC)
- **Nuclear** items exception (Dublin Declaration)
limited to certain categories

Free movement for others nuclear items ?

- **Security** exception (article 36 EEC)

Public morality, public policy or public security; the protection of health and life of humans, animals or plants;....or the protection of industrial and commercial property

Implementation of the single market (January 1993)

- Open *de facto* (if not *de jure*) **free movement** of dual-use items within the EC

Necessity either to harmonise national export control regimes or to adopt a single export control regime

- **No consensus** between MS to consider that dual-use items should be regulated under **133 EC** (Common commercial policy, presently 207 TFEU)

- For certain Member States dual-use items are even falling under the three exceptions and in particular under **296 EC (346 TFUE)**

Member States are competent to define restricting export control principles to third States within the CFSP by Common Action and or Position

Adoption of a dual export control regime of dual use items

- Council **Regulation** 3381/94 defining the procedure and criteria
- Council Common **Action** 94/942/CFSP establishing the list of items and criteria
- **Cross reference** between the Council Regulation and Council Common Position

The dual regime includes four exceptions to the free movement of items within the EC

1. The nuclear items exception

Article 21 of the Regulation

An authorization shall be required for intra-Community transfers of separated plutonium and uranium enriched to more than 20 %, as well as installations, main components of crucial importance and technology related to reprocessing, to enrichment and to the production of heavy water, under the terms of the Declaration of Common Policy of 20 November 1984

2. The national exception

- Established by Article 20 of the Regulation and Annex V of the Common Action


1. For consignments dispatched from one Member State to another of dual-use goods listed in Annex V to Decision 94/942/CFSP, individual authorizations (including, if appropriate, conditions concerning end-use and/or retransfer) may be required by the Member States as indicated in that Annex.

ANNEX V

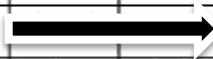
List referred to in Article 6 of the Decision and Article 20 (1) of Regulation (EC) No 3381/94

NB: Xa = exceptions regarding which, at the end of the transitional period, a decision will be taken on whether the goods are to be included permanently within the scope of the rules on dual-use goods.

Xb = exceptions which will be eliminated in the course of the transitional period.



Headings	DK	DE	EL	ES	FR	IT	PO	UKK
0B006						Xa		
0B007					Xa ⁽¹⁾			
0C002						Xa		
0C003					Xa			
0C004						Xa		
0C005					Xa ⁽²⁾			
1A102				Xb	Xb			
1A202					Xa			
1B001				Xb				
1B002				Xb				
1B101				Xb				
1B115				Xb				
1B116				Xb	Xa			
1B226					Xa	Xb		
1B231					Xa ⁽¹⁾			



3. The Community exception : Annex IV

Article 19 and 5 of the Common Action

1. For a transitional period, the following measures shall apply in respect of consignments dispatched from one Member State to another: ...

(b) for dual-use goods listed in Annex IV to Decision 94/942/PESC, authorizations shall be required by all Member States. Those authorizations may not be general authorizations.

Shorter than the present Annex IV

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(These products are also covered by Article 21 of the Regulation) (EC) No /94)

- 0B001 Plant for the separation of isotopes of 'natural uranium' and 'depleted uranium', 'special fissile materials' and 'other fissile materials';
- 0B002 auxiliary equipment for enrichment plants;
- 0B004 heavy water, deuterium or deuterium compound production equipment and components;
- 0B006 plant for the reprocessing of irradiated 'nuclear reactor' fuel elements;
- 0C002 only the following fissile materials:
 - (a) separated plutonium;
 - (b) 'uranium enriched in the isotopes 235 or 233' to more than 20 %.
- 0D001 as it relates to 0B001, 0B002, 0B004, 0B006 and 0C002.
- 0E001 as it relates to 0B001, 0B002, 0B004, 0B006 and 0C002

The national exception (Annex V) and the Community exception (Annex IV) should have been **eliminated** or **reviewed** at the end of the transitional period of three years (1997)

Article 19

*5. The need for the measures provided for by this Article shall be **re-examined within three years** from the date of entry into force of this Regulation.*

Nevertheless the possibility to use article 36 of EC treaty remains valid

Whereas, pursuant to and within the limits of Article 36 of the Treaty, and pending a greater degree of harmonization, Member States will retain the right, both during and after the transitional period, to carry out controls on dual-use goods in order to safeguard public policy or public security;

4. The re-export exception

Article 19 (not transitional)

3. (a) A Member State may require an authorization for the transfer of dual-use goods from its territory to another Member State in cases where at the time of transfer:

- the operator knows that the **final destination** of the goods concerned is outside the Community,*
- export of those goods to that destination is **subject** to a licence pursuant to Articles 3, 4 or 5, and*
- **no processing or working** as defined in Article 24 of the Community Customs Code is to be performed on the goods in the Member State to which they are being transferred*

The dual system (regulation and common action) has been invalidated by two EU Court of Justice case law

- In the **procedure of references for preliminary rulings** a German Court has submitted a question to the Court of Justice about the interpretation of articles 133 and 296 regarding dual-use items
 - Dual-use items should be governed by article **207**(common commercial policy includes export control)
 - Article **346** specifically dedicated to weapons, as defined and listed by the 1958 Council Decision

Adoption of a single regulation organising the export control of dual-use items (Council Regulation 1334/2000 recasted by 428/2009)

Integration without amending fundamentally

The re-export exception and the security exception (36 TFUE and article 4.8 and 8)

Elimination and integration partly into the new Annex

Nuclear items exception and National exception

Integration as an Annex of the Regulation

Community exception

Annex IV of Council Regulation 1334/2000 recasted by 428/2009)

- **Compilation** of the old Annex IV, V and the Dublin Declaration
- **Not transitional**
- **EU law** : legally binding for Member States
- Authorisation is mandatory for all items, **could be general** for certain items listed (Part I)

Two controversial elements

1. Does an transfer authorisation granted on the basis of Annex IV has to be considered as an **authorisation or an notification** ?

Never denied except once

2. Does an authorisation is required for **intangible** technology transfers

The intangible technology are included only in the definition of export and not in the one of transfer which is not defined