# COMMISSION DECISION

## of 1 August 1990

## relating to a procedure in application of Article 83 of the Euratom Treaty

## (XVII-001 — ANF Lingen)

**(Only the German text is authentic)**

(90/413/Euratom)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 83 thereof,

Having given Advanced Nuclear Fuels GmbH of Lingen (Federal Republic of Germany) the opportunity to express its point of view on the objections raised by the Commission,

Whereas as follows :

### I. THE FACTS

This Decision concerns the undeclared export of nuclear material from the Federal Republic of Germany to the United States of America by Advanced Nuclear Fuels GmbH during the month of May 1990.

Advanced Nuclear Fuels GmbH, hereinafter referred to as 'ANF Lingen', runs a fabrication plant which regularly receives nuclear material from Advanced Nuclear Fuels of Richland (USA), hereinafter referred to as 'ANF Richland'.

Through letters of 18 May, 26 June and 3 July 1990, and the hearing held in Brussels in the offices of the Commission on 13 July 1990, the following facts were established :

— On 8 May 1990, a loading pallet with two containers, each containing two boxes, was moved from the storage area to the material entry lock at the plant for the purpose of removing the boy containing uranium pellets enriched to 3,3 %.

  Once this operation had been completed the pallet, together with its two containers, was mistakenly placed outside, close to the storage area for empty containers, and forgotten about. The two containers on the pallet now only contained three boxes : one with 49,84 kilogrammes of uranium oxide (UO2) enriched to 2,7 % and the two others, weighing 49,86 kilogrammes and 47,29 kilogrammes respectively, with uranium enriched to 3,95 %.

— On the moring of 11 May 1990, during preparation of a shipment of 72 empty containers for ANF Richland, the pallet in question was loaded by mistake by another employee on to a lorry belonging to a normal goods transport company.

  The employee in charge of the operation observed that the containers on the pallet were marked with the labels stipulated by national law indicating the presence of radioactive materials. Since the containers were standing in this area, he believed them to be empty and destined for shipment, and removed the labels, replacing them with ones indicating that the containers were empty. On the same day, at 7 p.m., the lorry was unloaded at Luxembourg-Findel airport and the consignment packed for transport by air.

— On 12 May 1990, the containers were transported by cargo plane to Seattle (USA), where they arrived at 9.10 p.m. local time.

— On 14 May 1990, the containers were transported by road to ANF Richland, arriving on 15 May 1990.

  ANF Lingen was informed that same day by ANF Richmond that, after carrying out a routine dosimetric check, they had established the presence of nuclear material in the two containers which were supposed to be empty. An examination of the seals carried out immediately thereafter revealed that no material could habe been removed from the three boxes concerned.

— On 16 May 1990, ANF Lingen notified the Safeguards Directorate at the Commission of the occurence.

— On 17 May 1990, ANF Lingen also notified the Euratom Supply Agency of the occurrence.

### II. LEGAL ASSESSMENT

#### A. — The legal provisions

By virtue of its activities, ANF Lingen is an undertaking falling within the terms of Article 196 (b) of the Euratom Treaty. It is therefore subject to the provisions of Chapter VII, Title Two, of the Treaty, to Commission Regulation (Euratom) No 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom safeguards [1], as amended by Regulation (Euratom) No 220/90 of 26 January 1990 [2], and to the Commission Decision of 5 June 1985 laying down the particular safeguards provisions for this undertaking.

[1] OJ No L 363, 31. 12. 1976, p. 1.
[2] OJ No L 22, 27. 1. 1990, p. 56.

In accordance with Article 77 of the Treaty, the Commission must satisfy itself that, in the territories of the Member States :

(a) ores, source minerals and special fissile materials are not diverted from their intended uses as declared by the users ;

(b) the provisions relating to supply and any particular safeguarding obligations assumed by the Community under an agreement concluded with a third State or an international organization are complied with.

In addition, the Commission also requires, in accordance with Article 79 of the Treaty, that operating records be kept and produced in order to permit accounting for ores, source materials and special fissile materials used or produced. The same requirement applies in the case of the transport of source materials and special fissile materials.

Under Article 10 of Regulation (Euratom) No 3227/76, the undertaking must keep accounting records which show, amongst other information, all inventory changes for each material balance area, so as to permit a determination of the book inventory at any time.

Thus, for all inventory changes, the accounting records must show, in respect of each batch of nuclear material, material identification, batch data and source data. These records must account separately for uranium, thorium and plutonium in each batch of nuclear material. Moreover for each inventory change, the date of the inventory change and, when appropriate, the dispatching material balance area and the receiving material balance area or the recipient, must be indicated.

Article 11 of Regulation (Euratom) No 3227/76 specifies that, for each material balance area, the operating records must include, amongst other information, those operating data which are used to establish changes in the quantities and composition of the nuclear material.

Finally, for export activities, Article 24 of Regulation (Euratom) No 3227/76 lays down that :

(a) persons and undertakings must give advance notification to the Commission of each export of source or special fissile materials. However, advance notification is required only :

  (i) where the consignment exceeds one effective kilogramme (1) ;

  (ii) where the particular safeguard provisions so specify, in the case of installations habitually transferring large total quantities of materials to the same State, even though no single consignment exceeds one effective kilogramme ;

(b) such notification must be given after the conclusion of the contractual arrangements leading to the transfer and in any case in time to reach the Commission eight working days before the material is to be prepared for shipment ;

(c) such notification must be given in accordance with the form set out in Annex V of the said Regulation.

As regards the conditions under which advance notification is required for entry and exit operations, the particular safeguards provisions for ANF Lingen established by the Decision of 5 June 1985 lay down that advance notification is also required for exports of less than one effective kilogramme.

In addition to this notification, and to allow cross-checks to be carried out, Article 32 of Regulation (Euratom) No 3227/76 lays down that any person or undertaking engaged, within the territories of the Member States, in carrying or temporarily storing source or special fissile materials during shipment may accept them, or hand them over only against a duly signed and dated receipt. This must state the names of the parties handing over and receiving the materials and the quantities carried, together with the nature, form and compositions of the materials.

### B. — The infringements established

Following an examination of the facts acknowledged by ANF Lingen, it has been established that the undeclared export of nuclear material to the United States led to the following infringements being committed :

1. Breach of the provisions on the recording of inventory changes laid down in Article 10 (a) of Regulation (Euratom) No 3227/76.

2. Breach of the provisions on operating records laid down in Article 11 (a) of that Regulation, particularly as regards :

   — data on changes in quantities,

   and

   — data on changes in the composition of nuclear material.

3. Fallure to give advance notification of export as laid down in Article 24 of that Regulation, in conjunction with code 1.3.2 of the particular safeguards provisions.

Lastly, there has also been a breach of Article 32 of the Regulation. Since he was not notified by ANF Lingen of the quantity, nature and composition of the nuclear material, the carrier was not able to issue the acceptance receipt by means of which verification is possible.

### C. — The sanction to be applied

Under the terms of Article 83 (1) of the Treaty, in the event of an infringement on the part of persons or undertakings of the obligations imposed on them, the Commission may impose sanctions on such persons or undertakings.

(1) See Article 36 (o) of Regulation (Euratom) No 3227/76.

These sanctions are in order of severity:

(a) a warning;

(b) the withdrawal of special benefits such as financial or technical assistance;

(c) the placing of the undertaking for a period not exceeding four months under the administration of a person or boards appointed by common accord of the Commission and the State having jurisdiction over the undertaking;

(d) total or partial withdrawal of source materials or special fissile materials.

Given that the determining criterion for application of this Article is the seriousness of the infringement committed, it is first necessary to carry out both an objective and a subjective analysis of the nature of the offences.

From an objective point of view, it appears that the provisions breached are essential elements of Community legislation in the field of safeguards, and that observance of them is essential if the aim set out in Article 77 of the Treaty is to be attained.

Moreover, the facts established made it impossible for the Commission to carry out the task assigned to it in Article 2 (e) of the Treaty, namely to 'make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended'.

It should be noted here that the Commission attaches particular importance to the control of exports to nuclear materials.

The serious nature of the infringement is further reinforced by the fact that it involved a significants quantity, in terms of weight, of enriched uranium, which could very easily be further enriched to levels where it would be of strategic value.

From a subjective point of view, it seems, however, that there was no intention behind the actions and that these should not be seen as a form of diversion. This is, moreover, reflected in the fact that the report on the full annual check of the inventory of materials held only showed minimal differences between the physical inventory and the book inventory, corresponding to approximately 0,1 % of the total stock or to 0,023 % of the sum of the stock and its variations between 4 August 1989 and 4 July 1990.

They nevertheless constitute a serious infringement, stemming from a series of instances of negligence, both at the operational and the organizational level, which were made possible primarily by the absence of back-up verification measures.

Given the nature of the mistakes made, the Commission regards it essential that all necessary action be taken to ensure that mistakes of this nature cannot recur in the future, all the more so since ANF Lingen carries out such container transfer operations on a regular basis, and intends to continue doing so.

In order to guarantee that mistakes of this type, which have their origin in the routine nature of the activities concerned, do not recur, the Commission intends to make sure that appropriate measures are clearly drawn up regarding working practices and their implementation.

With this purpose in mind and in view of the serious nature of the mistakes made, the Commission feels that the most effective sanction to impose is that laid down in Article 83 (1) (c) of the Treaty.

Only by placing the undertaking under administration can the Commission be sure that the undertaking will meet all its obligations regarding safeguards, since any recourse to the issue of a warning, as provided for in Paragraph 1 (a) of that Article, is ruled out by the serious nature of the infringements committed.

Even though ANF Lingen has notified the appropriate Euratom safeguards authoritie that it intends to enforce the new internal regulations covering the management and handling of materials which it has undertaken to communicate, the Commission feels that the length of time during which the undertaking is under administration must be four months from the date of notification of the name(s) of the person(s) appointed to carry out this task. At the end of this period, an assessment report will be drawn up.

During this period, the task assigned to the person or board appointed by common accord of the Commission and the Federal Republic of Germany will be expressly confined to duties directly connected with safeguards.

It will, in effect, consist of:

— checking and, if necessary, amending internal regulations in this field,

and,

— supervising their implementation and monitoring their application.

HAS ADOPTED THIS DECISION:

*Article 1*

Advanced Nuclear Fuels GmbH has infringed Article 79 of the Euratom Treaty as defined in Articles 10, 11 and 24 of Regulation (Euratom) No 3227/76 of 19 October 1976 and in code 3.1.2 of the Commission Decision of 5 June 1985 on particular safeguards provisions, through:

(a) its failure to give advance notification of an export;

(b) its breach of the regulations on recording inventory changes;

(c) its breach of the regulations on operating records regarding:

— changes in quantities,

and

— changes in the composition of nuclear material.

*Article 2*

1. Advanced Nuclear Fuels GmbH shall be placed under administration for a period of four months, and only as regards aspects connected with the safeguards mentioned in Chapter VII, Title Two, of the Treaty.

2. The placing under administration shall in no way affect the responsibility of the undertaking under national or international law.

*Article 3*

The task of administration set out in Article 2 shall consist of:

— checking and, if necessary, amending the internal regulations in the field of safeguards,

— supervising their implementation and monitoring their application.

2. In order to perform this administrative task, the person(s) appointed:

— shall have access to all documents and offices,

— shall have the power to give any instructions whatsoever to the management or staff of the undertaking,

— shall have the right to solicit or request any help from outside sources which may be required for the satisfactory performance of the above task.

3. An assessment report shall be presented to the Commission within eight days of the completion of the task.

*Article 4*

The appointment of the person or the board, as the case may be, assigned the tasks described in Article 3 shall be carried out by common accord of the Commission and the Federal Republic of Germany by 15 August 1990.

The Commission shall notify the undertaking of the name(s) of the person(s) thereby appointed on the day after their appointment.

*Article 5*

1. This Decision is addressed to Advanced Nuclear Fuels GmbH — Industriepark Süd — Postfach 1465 — D-4450 Lingen (Ems) 1.

2. This Decision shall be communicated to the Federal Republic of Germany.

Done at Brussels, 1 August 1990.

*For the Commission*

António CARDOSO E CUNHA

*Member of the Commission*