II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 February 1994

relating to a procedure in application of the second paragraph of Article 53 of the Euratom Treaty

(Only the German text is authentic)

(94/285/Euratom)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular the second paragraph of Article 53 thereof,

Having regard to the letter of 20 January 1994 from Kernkraftwerke Lippe-Ems GmbH,

Whereas :

I. THE FACTS

(a) Acts performed by the Euratom Supply Agency

(1) The German company Kernkraftwerke Lippe-Ems GmbH, hereinafter referred to as KLE, operates a nuclear power station and is, in this capacity, a user of uranium. By letter of 25 November 1993, received on 29 November 1993, KLE submitted to the Euratom Supply Agency, hereinafter referred to as the Agency, under Article 52 of the Euratom Treaty, a supply contract for 400 tonnes of natural uranium in the form of uranium hexafluoride (UF_6) between it and British Nuclear Fuels plc, hereinafter referred to as BNFL.

(2) In view of the low price of the nuclear materials concerned and the fact that their country of origin had not been notified, the Agency asked the contracting parties, by letter of 10 December 1993, to let it know the origin of the natural uranium, while drawing their attention to the requirements of the common supply policy particularly with regard to supplies from the Republics of the Commonwealth of Independent States, hereinafter referred to as the CIS.

(3) BNFL replied by letter of 14 December 1993, that the uranium to be supplied under the contract would be from the CIS and probably from Russia.

(4) By letter of 20 December 1993, the Agency — reiterating the reasons given in its letter of 10 December 1993 — expressed reservations, arising from the common supply policy, about the proposed contract and asked the parties to let it know their views before it took a decision.

(5) By letter of 29 December 1993, KLE sent the Agency a copy of a letter addressed to the Commission the same day in which, under the terms of the second paragraph of Article 53 of the Treaty, KLE accused the Agency of 'failure to act'.

(6) On 6 January 1994, the Agency signed the proposed supply contract with the following additional clause :

'The contract is signed pursuant to the attached Decision No 1/94 of the Euratom Supply Agency subject to the condition that the natural uranium to

be supplied under the contract does not, either directly or indirectly, have its origin in a country of the Commonwealth of Independent States (CIS)'.

The signed contract and 'Decision No 1/94 of the Euratom Supply Agency concerning a contract submitted on 29 November 1993 between Kernkraftwerke Lippe-Ems GmbH and British Nuclear Fuels plc for the supply of natural uranium', which was issued on the same day, were delivered to KLE and BNFL on 6 January 1994. The details of the grounds for Decision No 1/94 are given below, in the legal assessment.

(b) **Reference to the Commission**

(7) In its letter of 29 December 1993, referred to in point 5 above, KLE referred the matter to the Commission, under the terms of the second paragraph of Article 53 of the Treaty, giving a detailed explanation of the Agency's 'failure to act' and setting out the legal reasons why, in their view, their claims should be upheld.

KLE accused the Agency of failure to act, on the grounds that, pursuant to Article 5 bis (f) of the Rules of the Supply Agency of the European Atomic Energy Community of 5 May 1960 determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials [1], as amended by the Regulation of 25 July 1975 [2], hereinafter referred to as the Agency Rules, the Agency should have given its decision within 10 working days from the date of receipt of the contract, i.e. 29 November 1993, but had not done so.

(8) By letter of 20 January 1994, KLE referred to the Commission, under the terms of the second paragraph of Article 53 of the Treaty, Decision No 1/94 of the Agency, and requested the Commission:

'1. To order the Euratom Supply Agency to conclude the supply contract for 400 tonnes of uranium in the form of UF_6 between KLE and BNFL, drawn up on 10/22 November 1993 and submitted to the Agency on 29 November 1993;

2. To declare that, in the event that the sales contract referred to in point 1 can no longer be enforced against BNFL, is not effective *vis-à-vis* BNFL, its efficacy is retrospectively challenged or the contractual requirements are not or only conditionally enforceable, as a result of the failure to conclude the contract within the stipulated period or its conditional signature, Euratom be obliged to pay compensation to KLE in respect of the higher purchase price and all additional expenditure, other disadvantages and further costs incurred by KLE in connection with the conclusion of a replacement agreement or with compliance with the contract conditionally signed by the Agency;

3. Alternatively, in the event of rejection of a claim in accordance with point 1, to declare that Euratom shall be obliged to reimburse KLE for the damages suffered by the latter in the form of a higher purchase price, resulting from the fact that KLE in view of the Agency's failure to act in regard to the conclusion of the supply contract within the stipulated period or as a result of the legal uncertainty arising out of the conditional signature of the contract, was only able to make alternative arrangements for supply at a later date, namely at the time of formal notification of a conditional decision on the application by the Euratom Supply Agency in accordance with Article 5 bis (g) sentence 1 of the Agency Rules or the refusal by the Commission to issue an instruction in accordance with point 1.

4. To oblige the Euratom Supply Agency to pay the costs of the procedure.'

(9) In support of its request, KLE alleges the following:

— Inadmissibility of the Agency's Decision of 6 January 1994 on the grounds that the stipulated time limit had expired,

— Contravention of the Euratom Treaty and of the applicable enabling regulations, in particular Article 5 bis of the Agency Rules,

— Absence of competence of the Agency and a prejudicial effect on the Common Market,

— Contravention of the general principles of Community law,

— Abuse of powers by the Agency,

— No establishment of a 'preferential position *vis-à-vis* other users' as a result of an unconditional conclusion of the contract.

These complaints are, in turn subdivided into individual grievances, the details of which are given in the letter of 20 January 1994.

(10) In its Decision of 4 February 1994, the Commission rejected the requests made by KLE in its letter of 29 December 1993. For further detail, the Commission refers to this Decision.

[1] OJ No 32, 11. 5. 1960, p. 777/60.
[2] OJ No L 193, 25. 7. 1975, p. 37.

II. LEGAL ASSESSMENT

(a) **Preliminary remark and allegation of the expiry of the stipulated time limit**

(11) In its letter of 20 January 1994, KLE referred Decision No 1/94 of the Euratom Supply Agency to the Commission and made four requests. In so doing, KLE's essential argument is that the Decision was issued out of time and, on various grounds, should be considered illegal as to its substance.

(12) Insofar as KLE is again complaining that the Agency acted out of time, the Commission would refer to its Decision of 4 February 1994. In point 13 of this Decision, the Commission stated that the period of 10 working days within which the Agency had to take its decision began on 15 December 1993 and that the last day was 6 January 1994, i.e. the day on which the Agency took its decision and notified KLE and BNFL. This statement is in no way challenged by KLE's new argument.

(13) Insofar as KLE is alleging that Decision No 1/94 is illegal, the grounds for these allegations must be examined.

(b) **Alleged contravention of the Treaty and of the applicable enabling regulations**

(14) As justification for this allegation, KLE asserts that the Agency is obliged, under Article 5 bis of its Rules, to conclude any supply contract which satisfies the formal requirements of that Article. Such a claim finds no support either in the Treaty or in the Agency Rules.

Thus, according to Article 61 of the Treaty, the Agency is not obliged to meet orders where there are 'legal or material obstacles' to doing so. Such a legal obstacle exists in particular if, by meeting the order, the Agency were 'to secure a privileged position for certain users', which is prohibited under Article 52 (2) (a) of the Treaty. In paragraph IV of its Decision the Agency rightly referred to the importance of this prohibition, which is binding on it also.

Nor does Article 5 bis of the Agency Rules require the conclusion of a contract: under paragraphs (f) and (g) of that Article, the Agency also has the right to refuse to conclude a contract if necessary.

(15) KLE also claims that a 'diversification policy' cannot be derived from the Treaty's general rules on supply without an express legal authorization. The Agency would have no competence 'to exercise dirigiste market control' or 'to impose price controls to protect producers resident in the Community'. No 'global powers' are granted to the Agency by Article 2 (d) of the Treaty.

In the Commission's view, this statement by KLE misjudges the importance and scope of the rights which the Treaty confers on the Community, and in particular on the Agency, for implementing a common supply policy within the meaning of Article 52 (1).

(16) First, with regard to the general objective of diversifying sources of supply in the energy sector, it should be pointed out that there has long been agreement on this objective in the Community. Thus the Council, in its Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States [1], emphatically took the view:

'that the energy policy of the Community and of the Member States must endeavour to achieve the following horizontal objectives:

(a) more secure conditions of supply and reduced risks of sudden fluctuations in energy prices through

...

— geographical diversification of the Community's external sources of supply, ...'

(17) With particular regard to the supply of nuclear material, the common supply policy referred to in Article 52 of the Treaty must be directed towards the objectives set out in Article 2 of the Treaty. Under Article 2 (d), the Community must 'ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels'. At the same time the Community is obliged, under Article 2 (c), to ensure the establishment of the basic installations 'necessary for the devleopment of nuclear energy in the Community', and this means taking into consideration the interests of producers.

(18) In view of these general energy objectives and the special obligations arising from the Treaty which are similarly binding on the Commission and the Agency, the Commission sees no reason to criticize

[1] OJ No C 241, 25. 9. 1986, p. 1.

the Agency's efforts to ensure a geographical diversification of the Community's external sources of supply. This is especially true at the present time, when the situation on the world uranium market presents long-term risks to which the Agency rightly referred in part II of its Decision.

(19) Insofar as KLE is not against the principle of diversifying the sources of supply but is criticizing the way in which this is being legally implemented, the Commission is unable to share KLE's view that such implementation would require an amendment of the Agency Rules, a Council Regulation on the basis of Article 203 of the Treaty or an amendment of Chapter VI of the Treaty.

(20) According to Article 52 (2) (b) of the Treaty, the Agency has the exclusive right, within the framework of the common supply policy, 'to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside the Community or from outside'. Article 64 of the Treaty lays down that:

'The Agency, acting where appropriate within the framework of agreements concluded between the Community and a third State or an international organization, shall, subject to the exceptions provided for in this Treaty, have the exclusive right to enter into agreements or contracts whose principal aim is the supply of ores, source materials or special fissile materials coming from outside the Community'.

Subject to any Commission Directives issued pursuant to Article 53 (1) of the Treaty, the Agency is not only authorized, on the basis of these provisions, to decide whether and with which partners agreements or contracts should be concluded for the supply of ores, source materials or special fissile materials coming from outside the Community but is also authorized to determine the modalities of such supply arrangements which it considers necessary. The fact that the Agency allows producers and users themselves to draw up contracts more easily and directly under a simplified procedure under the sixth paragraph of Article 60 of the Treaty, does not mean that the Agency loses these powers conferred on it by the Treaty. Under Article 52 (2) (b) of the Treaty, the Agency still has the exclusive right to conclude supply contracts for materials coming from outside the Community and is therefore still authorized to exercise its rights under the Treaty in respect of the common supply policy. The validity of these rights does not depend on the Agency Rules, and the exercise of these rights requires neither a Council Regulation under Article 203 of the Treaty nor an amendment to Chapter VI.

(21) As for the rest, with regard to deliveries from the former Soviet Union under Articles 64 and 101 of the Treaty, it must be remembered that in 1990 the European Atomic Energy Community concluded an Agreement with the Union of Soviet Socialist Republics on trade and commercial and economic cooperation (1). Under Article 14 of this Agreement, goods must be traded between the Contracting Parties at market-related prices. Where, in individual cases, supplies are available at prices unrelated to market conditions, thus contravening Article 14, the Agency must take this into consideration when exercising its exclusive right to conclude contracts.

(c) Alleged absence of competence of the Agency and a prejudicial effect on the Common Market

(22) In this connection, KLE alleges that the Agency, in seeking to diversify sources of supply, is pursuing commercial policy objectives, and that it is not competent to take commercial policy measures since these can be adopted only on the basis of Article 113 of the EC Treaty. Such statements show that, in many respects, KLE misjudges the legal scope and independence of the Euratom Treaty. As a sectoral Treaty containing special rules for a common policy, including supplies coming from outside the Community, the Euratom Treaty takes precedence over the general provisions of the EC Treaty. This precedence not only derives from the general legal principle that special rules take precedence over general ones but is expressly stated in Article 232 (2) of the EC Treaty: 'The provisions of this Treaty shall not derogate from those of the Treaty establishing the European Atomic Energy Community'. Moreover, the European Atomic Energy Community and the European Economic Community were established, from a legal, organi-

(1) OJ No L 68, 15. 3. 1990, p. 2.

zational and institutional viewpoint, as two mutually independent Communities and the legal acts of one Community are not subject to the acts of the other. On this basis, any attempt to construe Chapter VI of the Euratom Treaty as *lex imperfecta* and to make the implementation of the Euratom Treaty's common supply policy subject to Article 113 of the EEC Treaty is to be rejected.

(23) Furthermore, the Commission cannot see in what respect measures taken by the Agency to implement the common supply policy can contravene Article 2 (g) or Articles 92 *et seq.* of the Treaty.

(d) Alleged contravention of the general principles of Community Law

(24) As its first point of grievance, KLE asserts that the Agency's action contravenes the principle of legal certainty. KLE maintains that its procurement policy is in line with Article 5 bis of the Agency Rules and that it has complied with all the requirements laid down in those Rules. The Agency, according to KLE, never communicated its supply quotas, so that sufficient transparency was not ensured.

In the first place it should be noted that, according to the wording of Article 5 bis of the Agency Rules, notification of the requisite minimum information about the contract does not, of itself, give the contracting parties any right to have their contract concluded by the Agency. As stated in particular in Article 5 bis (f) and (g), the Agency has the right to refuse to conclude contracts if necessary (see point 14 above).

Similarly, KLE must be aware of the basic principles of the common supply policy, particularly as regards the geographical diversification of sources of supply and the observance of market-related prices for supplies coming from the Commonwealth of Independent States (CIS). Quite apart from the legal acts already quoted in points 16 and 21 above, and published in the *Official Journal of the European Communities*, producers and users of nuclear material in the Community participate, through the Advisory Committee to the Agency, in devising and implementing the common supply policy.

(25) According to Article X of the Statutes of the Euratom Supply Agency of 6 November 1958 [1], as last amended by the Act of Accession of Spain and Portugal [2], which sets up the Advisory Committee to the Agency, 'the members of the Advisory Committee shall be appointed by the Council, acting on a proposal from the Member States and after obtaining the opinion of the Commission, from representatives of producers and users and from highly qualified experts'. According to Article XI(1) of the Statutes, the Advisory Committee acts 'as a link between the Agency on the one hand and users and sectors concerned on the other'. As can be seen from numerous minutes of meetings, questions regarding the common supply policy, relevant for this case, have on more than one occasion been discussed by the Advisory Committee. In addition, the Agency informed users about the common supply policy at a meeting attended by KLE representatives, as is evident from the minutes of that meeting.

(26) As to the rest, there can be no question of supply quotas previously specified and then allocated to different users. Since the Agency alone has the right to conclude contracts for the supply of nuclear material originating outside the Community, it endeavours to meet the orders submitted to it, as far as possible, within the framework of the common supply policy and to refuse or impose conditions upon the conclusion of a contract only when and to the extent that, given the circumstances of the individual case, the conclusion of the proposed contract would secure a privileged position for the user concerned.

(27) KLE further alleges that the Decision of the Agency contravenes the principle of the legality of administrative action. With reference to an example taken from EC agricultural legislation, it puts forward the view that the Euratom Treaty envisages no constitutional, essentially balanced, evenly applied administrative procedures which are transparent for market operators.

The Commission cannot share this view. Indeed, under the simplified procedure provided for in Article 5 bis of the Agency Rules, the Community grants users and producers a maximum of transparency and market economy freedom and limits public intervention to an irreducible minimum which is reasonable under prevailing market conditions. Should it prove, however, that users and producers, within the framework of the Advisory Committee or indeed outside it, are generally in favour of abolishing this simplified procedure and introducing a formal quota system as proposed by KLE along the lines of EC agricultural law, the Agency will be faced with a new situation and will have to consider what appropriate measures to take. In any case, up to now, both the Advisory Committee and users and producers have expressed themselves almost unanimously opposed to such ideas.

[1] OJ No 27, 6. 12. 1958, p. 534/58.
[2] OJ No L 302, 15. 11. 1985.

(28) KLE then alleges that the Agency's action contravenes the general equality principle by taking an 'automatic quota' for each individual user and not allowing for the user's particular circumstances and the terms of the different supply contracts.

As already stated in points 26 and 27 above, we are not at present concerned with the introduction of a general and rigid quota system for all users but with a case-by-case examination by the Agency of the terms of each individual contract (see part IV of the recital of Decision No 1/94).

(29) KLE further alleges that the principle of proportionality has been infringed. According to KLE, the conditional signing of an intra-Community supply contract is unnecessary since, to achieve its objectives, the Agency need only refuse to conclude supply contracts for materials coming from outside the Community, as is its exclusive right. KLE also considers that the refusal to conclude a contract unconditionally is also disproportionate, since the Treaty provides for less injurious supply policy instruments such as building up emergency stocks and taking steps to promote prospecting. KLE further considers that forcing users to purchase supplies of urannium at excessive prices for the sake of a diversification policy is foreign to the purposes of the Treaty, and that it is questionable whether the desired objectives can be achieved only by imposing a ceiling of 20 to 25 % on imports from the CIS.

(30) First, for the sake of maintaining confidence and fair play between contracting parties, the Commission does not believe that the Agency, knowing the origin of the materials in question, should have unconditionally concluded the supply contract between KLE and BNFL and instead refused to conclude the supply contract between BNFL and its supplier.

(31) As regards the building-up of emergency stocks pursuant to the second paragraph of Article 72 of the Treaty and financial support for prospecting programmes pursuant to Article 70 of the Treaty, KLE's argument does not affect the legality of the Agency's actions, as these are responsibilities of the Commission and of the Council and not of the Agency. Pursuant to the first paragraph of Article 72, the Agency is responsible only for building up commercial stocks, and in any case in view of the current supply situation the conditions for the application of this provision are not met.

(32) As regards the claim that the Agency is forcing the user to purchase uranium at 'excessive prices', part II of the recital of the Agency's decision does not defend purchasing at excessive prices, but refers to 'market-related prices', that is prices which reflect production costs and are consistent with the prices charged by producers in market-economy countries.

(33) As regards the doubt about the appropriateness of deliveries from the CIS States accounting for 20-25 % of total deliveries, the Commission would point out that the Community has concluded multiannual supply agreements with a number of third countries. The common supply policy must also take account of relations with these trading partners and with other supplier countries, so a further increase in the proportion of supplies coming from the CIS States would be difficult to reconcile with the Community's long-term supply interests.

(e) Alleged abuse of powers

(34) KLE's allegation on this point relies on polemical assertions regarding the Agency's motives, which the Commission firmly rejects. Insofar as KLE makes specific claims in this respect, these have already been refuted and rejected (see in particular points 14, 15, 16 and 22).

(f) Allegation that a 'preferential position *vis-à-vis* other users' would not be established as a result of unconditional conclusion of the contract

(35) This final complaint by KLE comprises a series of separate complaints, which KLE summarizes under the following headings:

(i) Ensuring fair distribution by means of freedom to conclude contracts in accordance with Article 5 bis of the Agency Rules,

(ii) No competence to act based on illegal Agency practice *vis-à-vis* other users,

(iii) Invalidity of the isolated application of Article 52 (2) (a) of the Treaty,

(iv) Historically incorrect application of Article 52 (2) (a) of the Treaty,

(v) No infringement of the right to equal access,

(vi) Failure by the Agency to implement its 'diversification policy' throughout the Community.

(36) The assertions made at (i) and (ii) essentially repeat claims made earlier, which have been rejected at points 14 ff above. However, where KLE concedes that 'Article 52 (2) (a) of the Treaty, in addition to the provisions enumerated in Article 5 bis of the Agency Rules, allows a margin for monitoring abuse of the system', it approaches the interpretation of the Agency and also of the Commission in one important respect (see point 26 above). Likewise, KLE's observation that the Agency may in the past have been able, 'by exercising its right to conclude contracts, to impose on a single user or a substantial proportion of all users the "diversification policy" which it is allegedly pursuing,' shows that there is in practice no basis for KLE's claim that the Agency's role is 'quasi notarial' (see (iii)). That this claim has no legal basis has been demonstrated above (see in particular point 14).

Whether and to what extent Aricle 52 (2) (a) refers, 'by virtue of its legal origin, to a quite different case', as KLE claims at (iv), is irrelevant, as pursuant to Article 208 the Treaty is concluded for an unlimited period and its provisions remain binding under changing conditions.

The claim made at (v) likewise repeats an earlier complaint which has been rejected at point 30 above.

At (vi) KLE admits that it 'would secure a privileged position only to the extent that the Agency was able to impose its "diversification policy" on all users under identical conditions'. Insofar as 'individual users established in the Community are bypassing the Agency', as KLE claims without elaborating any further, KLE cannot rely on the purported illegal behaviour of third parties in its complaint against the Agency.

The CIS States' 20-25 % share of supplies, which is criticized as being imprecise, is in the Commission's opinion beyond reproach, as it allows the circumstances of individual cases to be taken into account more easily than would be the case with a fixed percentage.

III. CONCLUSION

(37) As is demonstrated above, none of the complaints made against Agency Decision No 1/94 is founded. As the examination of the case has revealed no grounds for questioning the validity of Decision No 1/94, KLE's application cannot be granted,

HAS ADOPTED THIS DECISION:

Article 1

The applications made by Kernkraftwerke Lippe-Ems GmbH in its letter of 20 January 1994 are hereby rejected.

Article 2

This Decision is addressed to Kernkraftwerke Lippe-Ems GmbH, Rheinlanddamm 24, D-44139 Dortmund, Federal Republic of Germany.

Done at Brussels, 21 February 1994.

For the Commission

Abel MATUTES

Member of the Commission