II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 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)

(94/95/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 29 December 1993 from Kernkraftwerke Lippe-Ems GmbH,

Whereas as follows:

I. THE FACTS

(1) The German Kernkraftwerke Lippe-Ems GmbH, hereinafter referred to as KLE, operates a nuclear power station and is, in this connection, a user of uranium. By letter of 25 November 1993, KLE submitted to the Euratom Supply Agency, hereinafter the Agency, under Article 52 of the Euratom Treaty, a supply contract for 400 tonnes of natural uranium UF6 between it and British Nuclear Fuels plc, hereinafter referred to as BNFL. The letter was received by the Agency on 29 November.

(2) Before taking a decision under the Agency Rules of 5 May 1960 determining the manner in which demand is to balanced against the supply of ores, source materials and special fissile materials [1] as amended by the Regulation of 15 July 1975 [2], hereinafter referred to as the Agency Rules, the Agency asked the contrating parties by letter of 10 December 1993 to let it know the origin of the nuclear materials concerned. The request was done in the framework of a common supply policy regarding supplies from the republics of the Commonwealth of Independent States, hereinafter referred to as CIS, and aimed at ensuring security of supply for users in the Community.

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

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

(5) By letter of 29 December 1993, received by the Commission on 3 January 1994, KLE referred the matter to the Commission, under the terms of the second paragraph of Article 53 of the Treaty, requesting that the Commission:

1. order the Euratom Supply Agency to conclude the contract of 10/22 November 1993 between KLE and BNFL for the supply of 400 tonnes of uranium;

[1] OJ No 32, 11. 5. 1960, p. 777/60.

[2] OJ No L 193, 25. 7. 1975, p. 37.

2. declare, in the event that the supply contract mentioned under 1, cannot enter into force because of the Agency's failure to act, that the Euratom Supply Agency must compensate KLE by paying it the higher purchase price and all the additional costs arising from the conclusion of a replacement contract,

3. declare, in the event that its request under point 1 is refused, that the Euratom Supply Agency must pay damages to KLE in the form of a higher purchase price, in view of the fact that KLE can procede with a replacement contract only after the Agency has notified its decision under Article 5 bis (g) of the Agency Rules or after the Commission has refused the request made under point 1.;

4. oblige the Agency to pay the costs of the procedure.

(6) These requests were based on the assertion that the Agency had failed to comply with Article 5 bis (f) of its rules by not giving its decision on its conclusion of the contract within ten working days from the date of receipt thereof, i.e. 29 November 1993.

(7) In accordance with its Decision No. 1/94 of 6 January 1994, the Agency has signed the contract that same day, on condition that the uranium to be supplied under the contract would not have its origin, either directly or indirectly, in any of the republics of the CIS.

II. LEGAL ASSESSMENT

(8) Under Article 52 (2) of the Treaty, the Agency has a right of option on ores, source materials and special fissile materials produced in the territories of the Member States and an exclusive right to conclude contracts relating to the supply of such materials from countries inside or outside the Community. The Agency Rules determine the manner in which demand is to be balanced against supply.

(9) Article 5 bis of these Rules provides in particular that:

'(c) The supply contract shall include at least the following information:

1. .....

2. .....

3. .....

4. .....

5. country of origin of the materials to be supplied. If the supplier is unable to provide this information at the time of entering into the contract, he shall give the user and the Agency an undertaking that he will subsequently inform them in writing of the country of origin of each part delivery.'

(.....)

'(f) the Agency shall act, either by concluding or refusing to conclude the contract, within 10 working days from the date of receipt thereof'.

(10) Thus the origin of the materials constitues an important piece of information for the Agency in the exercise of its right to conclude a contract. This knowledge is particularly important in the present situation where natural uranium from the republics of the CIS is being sold on the world market in considerably greater quantities and at prices which bear no relation to production costs in a market economy. This has serious implications for the Community market because such supplies are a threat to the diversification of sources of supply and, as a result, to the objective of regular and equitable supply laid down in Article 2 (d) of the Treaty. Consequently, the Agency, in exercising its right to conclude contracts, ensures that the Community does not become unreasonably overdependent on any one source of supply and that nuclear materials from the CIS are purchased at market-related prices.

(11) In view of the foregoing, and given the large quantities of natural uranium from the CIS for which KLE has already concluded contracts, it was essential for the agency to ascertain the origin of the uranium concerned in this case, before it could make its decision on the conclusion of the contract. Since the items of information listed in Article 5 bis (c) of the Agency Rules are minimum requirements only, the Agency was justified to complete its information on the basis of which it took its decision as it did with the letter of 10 December 1993 to BNFL and KLE.

(12) In its letters of 14 December 1993, BNL provided the information requested. Once it had received this information the Agency was in a position to give its ruling.

(13) The period must be calculated in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [1]. The public holidays for 1993 have been published [2]. Accordingly, the abovementioned period of ten working days thus began on 15 December and the last day was 6 January 1994, the day on which the Agency took its decision.

[1] OJ No L 124, 8. 6. 1971, p. 1.
[2] OJ No C 2, 6. 1. 1993, p. 8.

(14) The requests made to the Commission by KLE are based on the Agency's alleged failure to act. The above considerations show that there was no such failure on the part of the Agency. Accordingly, the requests made by KLE cannot be accepted,

HAS ADOPTED THIS DECISION:

Article 1

The requests made by Kernkraftwerke Lippe-Ems GmbH in its letter of 29 December 1993 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, 4 February 1994.

For the Commission

Abel MATUTES

Member of the Commission