

COMMISSION DECISION

of 19 July 1993

on a procedure for the application of the second paragraph of Article 53 of the
EAEC Treaty

(Only the Portuguese text is authentic)

(93/428/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 21 December 1990 from the Empresa Nacional de Urânio SA, a company constituted under Portuguese law, to the Commission,

Whereas :

I. THE FACTS

- (1) The Empresa Nacional de Urânio SA, a company constituted under Portuguese law, hereinafter referred to as ENU, is a mining company which produces natural uranium concentrates in Portugal and which is encountering serious difficulties following the non-renewal of a long-term contract which covers practically three-quarters of its productions.
- (2) The ENU approached the Euratom Supply Agency requesting it to resolve the problem of the disposal of the Portuguese output and to exercise its right of option pursuant to Article 57 of the EAEC Treaty on its output. The Agency tried unsuccessfully to find users prepared to take supplies from the ENU.

By letter of 8 December 1989, the Member States of the Commission responsible for energy and the Euratom Supply Agency indicated that the Agency's supply policy should in his view include a 'special course of action' to enable the Portuguese problem to be resolved. The Agency has continued to try to find buyers for the production among Community users but always without success, as the prices asked by the ENU are not competitive in market terms.

- (3) On 21 December 1990 the ENU formally requested that the Commission, pursuant to the second paragraph of Article 53 and Article 148 of the EAEC Treaty, direct the Agency to restore the machinery established by Chapter VI of the Treaty, to undertake an investigation into the provision of supplies to users from outside the Community, to discuss compensation to the ENU and to require the Agency to adopt a 'special course of action' :

(a) to order the Agency pursuant to Article 53 of the Treaty ... to restore the proper functioning of the machinery established by the Treaty under Chapter VI, requiring compliance with the provisions concerning the common supply policy, etc. ;

(b) that the Commission immediately undertake an investigation and thereafter take action accordingly — to determine how it was possible that, without any check by it under Article 66 of the Treaty, the Community users freely obtain supplies of uranium on foreign markets, despite the availability at a reasonable price of the entire output of the ENU ... and that the Commission, either directly or through the Agency, warn the offending undertakings that it will take action against them if they effect further imports whilst the ENU output remains on sale ;

(c) that the Commission discuss ... with the ENU the amount of the fair compensation which must be paid to the ENU for the damage caused to it by the unlawful failure on the part of the Commission and the Supply Agency to exercise their Community powers ;

(d) to require compliance with the Commission's decision, which was not complied with by the Supply Agency, and to direct that the Agency urgently adopt a "special course of action" so as to achieve an immediate resolution of the problem regarding the disposal of the ENU's uranium and to support it in that regard ;

(e) that the Commission therefore direct the Agency to implement the Decision which it addressed to it, by finding a satisfactory solution to the problem of the ENU, without prejudice to the application of the provisions of the Treaty, in a manner which will make it possible to lessen the effects of any future difficulties.

- (4) By written application addressed to the Registrar on 3 April 1991 ⁽¹⁾, the ENU brought proceedings pursuant to Article 148 of the EAEC Treaty for failure to act (Case C-107/91), claiming that the Court should declare :

⁽¹⁾ OJ No C 125, 15. 5. 1991, p. 10.

'that the Commission has failed to take and address to it the Decision which it had requested of it pursuant to Article 53 of the EAEC Treaty.'

- (5) In its judgment of 16 February 1993 ⁽¹⁾ the Court found that:

'The Commission has failed, contrary to the second paragraph of Article 53 of the EAEC Treaty, to give a decision in respect of the request submitted to it by the applicant under that provision.'

II. LEGAL ASSESSMENT

- (6) Pursuant to Article 149 of the EAEC Treaty, the Commission is required to take the necessary measures to comply with the judgment of the Court.

(a) Point (a) of the ENU's application

- (7) The machinery established by Chapter VI of the EAEC Treaty, such as the European Supply Agency's right of option and its exclusive right to conclude supply contracts, has never been repealed. The procedure provided for in the rules of the Euratom Supply Agency 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 ⁽²⁾, as amended by the Regulation of the Euratom Supply Agency of 15 July 1975 ⁽³⁾, adopted under the sixth paragraph of Article 60 of the EAEC Treaty, provides a mechanism for balancing supply and demand. These rules take account of the prevailing conditions of supply and provide for the Agency to exercise its rights to conclude contracts and its right of option by signing contracts negotiated directly between users and producers.

It is therefore necessary to state in reply to point (a) of the ENU's application that the proper functioning of the machinery established by Chapter VI of the EAEC Treaty is ensured by the abovementioned rules of the Euratom Supply Agency.

(b) Point (b) of the ENU's application

- (8) Article 5a of the rules of the Euratom Supply Agency of 5 May 1960 authorizes Community users to negotiate with the producers of their choice, both within the Community and outside, without

the EAEC Treaty or the abovementioned rules laying down a 'Community preference'.

- (9) Article 66 of the EAEC Treaty does not apply in the present case. It covers only crisis situations in which the Agency is not in a position to supply users except at excessively high prices, with the consequence that users may, under certain conditions, be granted the right to obtain supplies from outside the Community without any intervention whatsoever for the Agency.

It should be noted that the ENU's tenders were at prices which were too high to be competitive and that no Community user accepted them.

- (10) No action should therefore be taken against Community users who obtain supplies from outside the Community and submit their contracts to the Agency for signature for the purpose of their conclusion.

(c) Point (c) of the ENU's application

- (11) A claim for damages is the subject of an action for compensation which was brought before the Court by a written application to the Registrar on 20 October 1992 (Case C-380/92) ⁽⁴⁾, pursuant to the second paragraph of Article 188 and Article 151 of the EAEC Treaty and which is pending.

(d) Points (d) and (e) of the ENU's application

- (12) Points (d) and (e) of the ENU's application both concern the 'special course of action' for the disposal of the Portuguese production and should be dealt with jointly.

The 'special course of action' which, according to the letter of 8 December 1989 from the Member of the Commission responsible for the Supply Agency, should be included in the common supply policy for nuclear fuels should form part of the framework of the EAEC Treaty and the applicable rules. As stated above, the applicable rules authorize Community users to negotiate with the producers of their choice. Neither the EAEC Treaty nor the secondary legislation provide for 'Community preference', and the Agency is therefore not required to order Community users to obtain supplies from Community producers before they can conclude supply contracts with non-Community suppliers.

⁽¹⁾ Not yet published in the ECR.

⁽²⁾ OJ No 32, 11. 5. 1960, p. 777/60.

⁽³⁾ OJ No L 193, 25. 7. 1975, p. 37.

⁽⁴⁾ OJ No C 316, 3. 12. 1992, p. 14.

Against this background, the 'special course of action' can only consist of serious and sustained efforts on the part of the Supply Agency to encourage Community users to obtain supplies from the ENU. The Agency has undeniably been doing this since 1987,

HAS ADOPTED THIS DECISION :

Article 1

The requests submitted by the Empresa Nacional de Urânio in its letter of 21 December 1990 are rejected.

Article 2

This Decision is addressed to :

Empresa Nacional de Urânio SA, a company constituted under Portuguese law,
Urgeirica, Concelho de Nelas,
P-3525 Canas de Senhorim
Portugal.

Done at Brussels, 19 July 1993.

For the Commission

Abel MATUTES

Member of the Commission