OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 NOVEMBER 1971[1]

Mr President,
Members of the Court

In the case with which we are concerned today an institution of the Communities and a Member State are in dispute for the first time regarding questions of Euratom law. Before examining these questions the following preliminary observations must be made.

Simultaneously with the establishment of the European Economic Community, the Member States agreed to pool their resources in the field of the development of atomic energy. In the legal system created for this purpose, the Treaty establishing the European Atomic Energy Community, the first provision relevant here is Article 2 (d) which provides that in order to perform its task, the Community shall, as provided in the Treaty, 'ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels'. Title Two, Chapter VI, of the Treaty contains the detailed rules relating to the achievement of this objective which need not be cited in full in the present context. They are characterized by a compulsory centralization of supply of and demand for ores, source materials and special fissile materials. This centralization is achieved by means of a commercial agency, the Supply Agency, a body governed by public law with legal personality and financial autonomy which operates under the supervision of the Commission. This Agency has an option to purchase the products listed in Article 197 of the Treaty; every producer in the Community must offer to it on terms defined in detail the substances that it produces. The Agency also has an exclusive right to conclude supply contracts in respect of these substances with users in the Community, both in relation to supplies from the territory of the Community and to those originating outside the Community. These rules are intended to guarantee equal access to these substances for the users in the Community. The Supply Agency commenced its activities on 1 June 1960, in accordance with a decision of the Commission of 5 May 1960. Apart from the provisions of the Treaty in Title Two, Chapter VI, the Agency is governed by the provisions of a constitution laid down by the Council on 6 November 1958. This provides *inter alia* that the Agency shall function on commercial principles but shall be non-profit-making. In addition the constitution provides for the establishment by the Council of a consultative committee composed of representatives of producers and users as well as of experts. The 'manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials' is governed by rules of 5 May 1960 adopted by the Agency after consultation with the Consultative Committee and approved by the Commission by its Decision of 5 May 1960. We shall come to the details of this procedure later. For the moment, among the numerous relevant provisions of the Treaty I would merely mention in the present context Article 70 whereby the Member States are obliged, with regard to prospecting and mineral reserves, to facilitate the activity of the Community by submitting a report to the Commission each year for their respective territories.

Obviously the development of this new field could not be envisaged clearly at the time when the Treaty was being drafted. Thereafter Chapter VI of Title Two contains in Article 76 (2) the following final provision: 'Seven years after the entry into force of this Treaty, the

1 — Translated from the German.

Council may confirm these provisions in their entirety. Failing confirmation, new provisions relating to the subject-matter of this Chapter shall be adopted in accordance with the procedure laid down in the preceding paragraph'. The present proceedings concern above all the interpretation of this provision.

As we have heard in the course of the proceedings, the Commission had already presented a proposal for the amendment of this chapter of the Treaty to the Council in November 1964. This proposal was discussed at the beginning of 1965 and it was also submitted to the Parliament; however, it led neither to the confirmation of the Treaty provisions in their original version nor to the issue of new provisions. This situation has continued until now; the Council has still not completed its deliberations and, despite seemingly intense activities, the end of the negotiations is not in sight. This has given rise to the difficulties in the present case.

The French Government maintains, in fact, that the validity of the provisions of Title Two, Chapter VI, of the Euratom Treaty was limited to a period of seven years. Since these provisions were not confirmed before the expiry of this period, or shortly thereafter, it contends that it is now only possible to issue new provisions. Until they come into force the original provisions of the Treaty are no longer applicable; it must be assumed, on the contrary, that the Treaty contains a lacuna in this respect. As early as 1964 (*inter alia* at the meeting of the Council of Ministers on 28 November 1964) the French Government drew attention to this possible interpretation and, in any event, to the uncertainty of the legal position. In November 1965, in accordance with its view of the law, it informed French public and private undertakings that the provisions of Chapter VI were no longer applicable (this emerges from a letter dated 10 September 1970 addressed to the Supply Agency from a French undertaking). The French Atomic Energy Commission (CEA) has behaved accordingly. As the Euratom Commission stated, that body 'embodies a range of powers which make it ... the preferred instrument for the use of atomic energy in its various aspects' and it is 'at the same time very close to the Government and, as it were, associated with it although granted a wide freedom of action' (under Ordonnance 45-2563 of 18 October 1945, establishing an Atomic Energy Commission). The CEA Commission in fact concluded (apparently in 1968) contracts for the importation of enriched uranium and plutonium and contracts relating to the supply of enriched uranium directly, without the knowledge of the Supply Agency. Moreover, the CEA did not notify the Agency of the existence of a commitment for the processing of materials imported from South Africa and the quantities involved in the delivery in question. In addition, after 1964 the French Republic no longer submitted to the Euratom Commission the annual reports on the development of prospecting and production, on probable reserves and on investment which had been made or planned in the French territory.

When the Commission learnt of these transactions through inspection reports, its Directorate-General for Energy sent a letter to the French Atomic Energy Commission on 24 April 1969. In this letter the Directorate-General maintained that the direct conclusion of import and supply contracts constituted an infringement of the provisions of Chapter VI of the Euratom Treaty which were still in force. In a letter addressed to the Directorate-General for Energy on 30 May 1969, the CEA expressed the view that Chapter VI had been invalid since I January 1965, and this view was also reiterated in a letter, dated 5 January 1970, from the Interministerial Technical Committee on Questions concerning the Application of the Euratom Treaty to the Director-General of the Supply Agency.

This attitude induced the Commission, which was still convinced that Chapter VI had remained, at least provisionally, in force after 1 January 1965, to initiate proceedings under Article 141 of the Euratom Treaty for a declaration that the Treaty had been infringed. In a letter of 12 March 1970 to the French Minister for Foreign Affairs the President of the Commission indicated in detail in what way provisions of the Euratom Treaty had, in the opinion of the Commission, been infringed by the French Republic and invited the French Government to submit its observations. These observations were sent to the President of the Commission in a letter of 20 May 1970 from the French Permenent Representatives. In this letter the French Government reiterated the fundamental view that it had already made known. In addition, it defined its position on each of the various particular complaints. Finally, it maintained that the provisions of the Euratom Treaty in question had not been appropriate *ab initio* for the actual situation and had therefore only been applied purely formally.

On 14 October 1970, the Commission, still convinced of the untenability of the position adopted by France, issued a formal opinion in accordance with Article 141 of the Euratom Treaty. In this opinion the Commission set out once again the alleged infringements and attempted to refute point by point the arguments raised by France in its defence. The opinion concluded with a request to adopt the measures necessary to comply with the opinion within 45 days.

As this was not done the Commission brought the matter before the Court of Justice on 11 March 1971. It continues to maintain that in view of the instructions issued by the French Government already mentioned and the fact that it is responsible for the activities of the French Atomic Energy Commission, France has committed a number of infringements of the provisions of the Euratom Treaty. Its application for a declaration is worded accordingly.

The French Government, on the other hand, considers that the application is inadmissible. It maintains, in addition, that it must in any event be dismissed as unfounded.

I should now like to examine in detail how this dispute is to be resolved. I shall mainly follow the plan that the parties have chosen for their respective arguments, even if this method does not clearly distinguish from one another the problems of admissibility and of the substance of the case.

1. However, in the first instance I must deal with one question of admissibility since it may clearly be distinguished from the substance of the case. This is the opinion, expressed for the first time by the French Government in the rejoinder, that *the application was submitted out of time*. The French Government maintains that this follows from the fact that it had already in 1965 described as invalid the provisions which it is now accused of infringing. Moreover, it has subsequently, by words and conduct, continually made it known that it persisted in this opinion (failure to submit reports under Article 70, failure to submit proposals for the appointment of members of the consultative committee, reservations with regard to the 1967 budget, reservations with regard to a regulation issued by the Commission under Article 74). Thus the Commission could have had the position adopted by the French Government considered earlier, in that it could have obtained clarification of the legal position by submitting an application to the Court; it was not permissible on the other hand only to refer the matter to the Court until five years had elapsed since the commencement of the situation that was now criticised.

In considering this objection it must be observed first of all that the Commission is principally concerned to obtain a declaration of the existence of the infringements which are alleged to have

been committed in 1968 and which consist of the conclusion of importation and supply contracts without the participation of the Supply Agency. It is these facts that have obviously induced the Commission to act because of their particularly noticeable effects on the functioning of the Community supply system. However, if the period is calculated from the discovery of these infringements onwards, if it is further borne in mind that the Commission reacted for the first time as early as April 1969, and finally if the further course of the matter, the periods required for the execution of the necessary preliminary procedure, is also kept in view, there can scarcely be question, in fact, of an impermissible delay in the initiation of judicial proceedings.

Nor should it be forgotten, moreover, and this seems equally important—that Article 141 of the Euratom Treaty does not provide any limitation period for the execution of proceedings to establish an infringement of the Treaty. This is certainly deliberate and is perfectly justified. In fact, this procedure is of a particularly radical nature, an *'ultima ratio'*, as the Court once held with regard to the analogous procedure under Article 88 of the ECSC Treaty (Case 20/59, *Italy* v *High Authority*, Rec. 1960, p. 663 at p. 692). Therefore it would not be reasonable to initiate it immediately on every occasion. To invoke it excessively may in fact detract from its efficacy which is in any case limited because of the absence of any sanctions. Moreover, this procedure naturally puts in issue to a certain extent the prestige of the Member State concerned, even though it is merely an objective procedure intended to clarify the legal situation, without any moral judgment. For these reasons it seems proper to rule out any automatic application, any compulsion to initiate it, and instead to leave to the Commission a discretionary power to decide whether and when the procedure should be initiated. Many different factors may come into play in this respect, for example, attempts to reach an amicable settlement (which may take time) or the fact that—as in the present case—the first intimations from the French Government on the invalidity of the supply provisions of the Treaty had only relatively slight effects that did not justify judicial proceedings. Further considerations may be that in 1965 and subsequently the Community was going through a difficult crisis, the solution of which should not have been aggravated by the introduction of disputes of a minor nature, and in addition, possibly the assumption that new provisions in the field in question might be made in the near future. As long as such considerations can be discerned it may at least be admitted that the discretion has been properly exercised and an inadmissible delay in the initiation of proceedings may be ruled out.

For all these reasons there can also be no question of transposing the judgment of 6 July 1971, in Case 59/70 (*Kingdom of the Netherlands* v *Commission* [1971] ECR 639) to the present case, that is to say, the findings of the Court in the proceedings on the ground of a failure to act brought by a Member State against the Commission because of the conduct of another Member State. It was there held that the matter must be raised with the Commission within a *reasonable time* after the event giving rise to the judicial proceedings has become known, if the right of action is not to be forfeited. I have indicated previously that in principle I regard such considerations as doubtful. My doubts have not been dispelled in the meantime and I am still of the view that it does not seem right by means of case-law to introduce periods of limitation into the system of judicial protection established by the Treaties where the Treaties themselves have refrained from doing so. Apart from this, it may also be noted here that the differences between the two situations preclude the

transposition of the findings in the judgment in Case 59/70 to the present case. That case in fact took the form of proceedings for failure to act brought against an institution because of the conduct of a *third party* (as you know, they concerned governmental measures in favour of the economy of a Member State whose interests naturally had to be taken into consideration) and it is also particularly significant that in those proceedings, when considering the right of action of the applicant Member State, it was possible to refer to its general duty of cooperation laid down in Article 86 of the ECSC Treaty. It hardly seems necessary for me to emphasize that such considerations certainly do not apply in the present case.

In view of the fact that Article 141 of the Euratom Treaty does not lay down any period within which proceedings must be commenced and since, in view of the facts that have been made known during the proceedings, there can be no question of an abuse of discretion on the part of the Commission in its choice of the moment when it commenced proceedings, it must be held that the objection of undue delay raised by the French Government cannot affect the admissibility of the application.

2. The main argument submitted against the Commission, to which I shall now turn, is to the effect that the provisions of Chapter VI of the Euratom Treaty were no longer valid at the time when the French Government is accused of failing to observe them. In this respect the French Government refers to Article 76 (2), the final provision of Chapter VI. According to the French Government it follows from this that the decision regarding the provisions to be applied in the field of supplies had to be made before the expiry of seven years after the entry into force of the Treaty, that is, before 1 January 1965, so that if the original provisions were not confirmed new provisions could come into force on 1 January 1965. The French Government maintains that the most that could be said is that it was still possible to confirm the old provisions for a short period after the expiry of seven years. Since this opportunity had not been taken within a reasonable time, it must be assumed that the original provisions ceased to have effect and that the Council was obliged to issue new provisions (an objective, moreover, which the Commission itself sought to achieve with its proposals of November 1964, and which was evidently in accordance with the intentions of all the Member States). Until the adoption of such new provisions the only conclusion possible is that there was a lacuna in Community law. The Commission emphatically rejects this argument. It contends that it must be assumed that in any event the provisions originally contained in the Treaty were transitionally and provisionally valid beyond 1 January 1965, without any limitation in time, until new provisions had been adopted or the original provisions had been confirmed.

If an attempt is made to resolve this problem first by resorting to the wording of Article 76 (2) it is apparent that according to the German and Dutch versions the solution is fairly clear. In fact, the German version reads: '*Nach Ablauf von sieben Jahren* nach Inkrafttreten des Vertrages kann der Rat diese Bestimmungen in ihrer Gesamtheit bestätigen'. (Dutch: 'Na verloop van zeven jaar . . . kan de Raad . . . bevestigen'.) This means, first, that a period is envisaged that commences on 1 January 1965, and that importance is obviously attached to the fact that the seven-year period mentioned has *expired*. Secondly, *confirmation* is foreseen for the period envisaged. This can only mean the confirmation of *existing* provisions as, moreover, also follows from the fact that a simple majority suffices for confirmation, whereas the adoption of new provisions requires unanimity in the Council. Thus, the German and Dutch versions clearly show that Chapter VI cannot have ceased to apply from 1 January 1965. On the other hand, the

French text which uses the phrase 'à l'issue d'une période de sept ans' and the Italian text which uses the phrase 'allo scadere di un periodo di sette anni' are less clear. They could in fact be understood to the effect that any confirmation should have taken place at the end of the seven-year period, upon its expiry, and that therefore the necessary decisions should have been taken by 31 December 1964. However, weighty considerations arising from the meaning and purpose of Chapter VI may be advanced against this argument. It may be deduced from the preparatory documents that when the Euratom Treaty was being drafted, there was obviously no reliable picture of future development in this new field which involved factors that varied throughout the world, particularly with regard to the problems of supply. Therefore, it was first decided to introduce a provisional system for a limited period and then to fix the definitive system when the necessary experience had been obtained. Thus the purpose of Article 76 was essentially to fix a trial period. However, it is obviously difficult to reconcile the obligation to adopt the decision regarding the definitive system by 31 December 1964, with this trial period and with the intention that was undoubtedly manifest of utilizing it fully. In fact, it should not be forgotten that this necessitated lengthy preparation, that the experience obtained had to be examined and that it was necessary to consider whether it justified the continuation of the system or whether a new system was more appropriate, which required, as you know, the collaboration of several institutions (the Commission, the Council and the Parliament) before it could be introduced. Thus, if this decision had had to be taken by 31 December 1964, the trial period under Article 76 would, in certain circumstances, have been considerably reduced, which, as I have said, did not accord with the spirit of the system. On the other hand, it is not possible either to resort to the fiction of 'stopping the clock', which would have enabled the necessary decision to be taken at the beginning of 1965 and thereby to shorten the trial period merely to an insignificant extent. In my opinion, it can scarcely be assumed that when Article 76 was being drafted, the authors of the Treaty had in mind this unusual procedure which is not universally known and which is certainly open to many objections. Moreover, apart from the problem of retroactive effects, which would have arisen in the event of a new system coming into force on 1 January 1965, it must be remembered that this method had never yet been used for the implementation of Treaty provisions in situations that required a complicated and time-consuming procedure with the participation of almost all the Community institutions. Considerations derived from the meaning and purpose of the provision in question, consequently, do not lead to the interpretation of the French and Italian versions to the effect that the decision to be made under Article 76 (2) had to be adopted at the latest upon the expiry of the period mentioned in that article.

Therefore, it seems equally erroneous to refer in the present context to the corresponding provision in Article 37 of the EEC Treaty and to claim that the phrase used there, 'when the transitional period has ended' ('l'expiration de la période de transition'), means, according to a decision of the Court (Case 20/64, *Albatros* v *SOPECO* [1965] ECR 29 at page 35), 'at the latest by the end of the transitional period'. In fact, it should not be forgotten that the interpretation given by the Court applies to a situation where a final date was fixed for the progressive fulfilment of obligations imposed on the Member States (the adjustment of monopolies of a commercial character). Thus this interpretation cannot automatically be extended to the provisions of Article 76 of the Euratom Treaty, which is mainly

concerned with the preparation of a new system after the expiry of a certain period. Finally, since the French Government itself admits that the phrase 'à l'issue de' is not completely clear, the only conclusion that can be drawn is that the decisions envisaged in Article 76 (confirmation or adoption of new provisions) could still be taken after 1 January 1965, and therefore that the system applicable initially did not cease to have effect after 31 December 1964, but remained applicable, at least provisionally, beyond that date.

Of course this does not conclude the examination of the questions now at issue. In addition the French Government claims, in fact, that, assuming that Chapter VI remained in force provisionally, it can nevertheless be held that it was only for a *reasonable time*. It maintains that since the original provisions were not confirmed before their expiry they lost their validity. It was then only possible to consider the adoption of new provisions.

In fact, the French and Italian versions of Article 76 (2) may be invoked in support of this interpretation, where, with the phrases 'à l'issue de' and 'allo scadere di', a close connexion between the confirmation decision and the expiry of the seven-year period could have been indicated (whereas such an interpretation may clearly not be derived from the German and Dutch versions). Once again, however, important and substantial objections may be raised against the correctness of this viewpoint. In my opinion it is difficult to reconcile with the elementary principle of legal certainty the notion that certain provisions of the Treaty ceased to have effect after the expiry of a period that is not closely defined and without a clear and express provision for their lapsing, that is, on the assumption that the question of confirmation be decided by an implied negative decision.

Without the simultaneous entry into force of new provisions this would entail, moreover, a break in continuity in a field which is of fundamental importance for the Community and to which the Treaty devotes a very detailed system leading to very far-reaching integration. It would produce nothing less than temporary disintegration. It can scarcely be conceived that the authors of the Treaty could have intended this to occur, especially as Article 2 (d) of the Treaty provides that a *permanent* task and obligation of the Community is to ensure a regular and equitable supply of ores and nuclear fuels for all users in the Community. Nor is it possible to ignore the connexion between the chapter in question here and other chapters of the Treaty the validity of which is not limited in time, in particular the connexion with control of security which is certainly facilitated by a common supply system, including control of the use of the materials supplied (Article 60). Finally, it must also be remembered that the Supply Agency may have concluded long-term contracts the legal fate of which would be quite uncertain if it was held that the relevant provisions ceased to have effect after a certain time and the Supply Agency was thus deprived of its legal basis. In view of these important considerations, it seems, in fact, that the only possible conclusion is that Chapter VI has remained provisionally applicable until the entry into force of new provisions or the confirmation of the original provisions; and this still seems possible, in fact, since it has not been excluded expressly either in 1965 or subsequently (as the Commission has pointed out, its proposal was in any event referred to the Parliament by the Council in 1965 without any pronouncement).

There cannot be raised against this view the seemingly persuasive objection that this would mean in reality recognizing an *implied* decision of confirmation. In fact there cannot be any question of an implied decision because confirmation means the *definitive* preservation of the existing provisions. On the contrary, to keep them in force provisionally does not

have the same effects. In particular, of course, it requires that the conditions to be determined for their application should be formulated in such a way as to impinge as little as possible on the future system. Similarly, I cannot agree with the French Government when it says that it is more appropriate for the interests of the reasonable development of integration to assume the existence of a lacuna in the law which would compel the responsible Community institutions to act energetically than to continue to apply provisions that have, from a very early date, proved to be unsuitable and have never been properly applied. I shall return to this latter remark in detail in another context. For the moment I shall confine myself to the observation that it seems to me scarcely comprehensible to say that a return to national systems with all their disadvantages (for example, those that would ensue from the abolition of regular reports to the Community institutions) would not make more difficult the pursuit of integration that is desired by all. In my opinion such a situation could scarcely be regarded as more appropriate than the provisional retention of a detailed Community system obviously intended in its essential elements to be preserved.

In the light of these considerations we should therefore hold that, in a situation that certainly cannot be regarded as satisfactory, the Commission's view of the provisional maintenance in force of Chapter VI of the Euratom Treaty must be preferred to the argument that from a certain date in 1965 there has existed a lacuna in Community law in this respect.

3. If this view is adopted no particular difficulties are encountered in answering the question whether the behaviour of the French Atomic Energy Commission from 1965 onwards, which must undoubtedly be attributed to the French Government, and the behaviour of the French Government itself constitute an infringement of the provisions of Chapter VI and the regulations issued for their implementation.

This applies first of all to the imports of enriched uranium and plutonium carried out without the participation of the Supply Agency. The French Government itself has not maintained that these imports were compatible with the provisions of Chapter VI, as they were originally to be understood. This also applies to the uranium hexafluoride imported from South Africa for the purposes of analysis which should at least have been notified to the Supply Agency according to Article 75 of the Euratom Treaty. With regard to the supply of enriched uranium to an Italian state undertaking, the Commission has shown, without being contradicted, that it was covered by the supply system, even if it was a supply for the purposes of developing marine propulsion. Thus the supply agency ought to have been involved in this transaction. Finally, with regard to the annual reports to be submitted by the Member States to the Commission under Article 70 concerning the development of prospecting and production, the probable reserves and investments in mining made or planned in their territories, the French Government has indeed sought to justify its failure to submit reports by referring to the fact that the reports prepared each year by the CEA have been sent to the Commission. However, a comparison of these reports with previous reports submitted under Article 70 shows not only that the latter were much more detailed (at least with regard to prospecting and production) but also that the Commission's reports contained no information with regard to the investments mentioned in Article 70. Thus they cannot replace the reports prescribed in Article 70 and it is therefore clear that the French Government also failed to comply with this provision.

4. Of course these facts still do not justify a finding that the French Government has infringed the Treaty and that the application must succeed. A number

of other objections, which the French Government regards as relevant, must also be examined.

One of these objections is of particular importance, namely the observation that the provisions of Chapter VI of the Euratom Treaty have never been properly applied, but merely ostensibly and superficially, that they have not had any practical importance, and that there could not therefore be any point in having it established that France has not observed them.

In this respect it should, in my opinion, be stressed first of all that the French Government has not maintained that these provisions have been completely without importance. In any event it was not contended that Articles 70 and 75, which provide for an annual report from the Member States to the Commission or the obligation to notify in certain cases, were never applied. This fact alone is of a certain importance in the consideration of the present case.

For the rest, with regard to the defective operation of Chapter VI, 'supplies', various different aspects must be distinguished. One aspect relates to the system of Article 60 which mainly regulates the balancing of supply against demand for ores, source materials, etc., by the Supply Agency. According to the French Government this system has not been in operation in so far as it was possible to conclude contracts for the supply of natural uranium directly between suppliers and interested buyers and these contracts merely had to be notified to the Supply Agency subsequently; furthermore, contracts relating to special fissile materials have in reality been negotiated directly between the parties and merely given formal confirmation by the Supply Agency; and finally, supply contracts were usually concluded for a period of more than 10 years, which, according to the Treaty, should be the exception.

In this respect it must first be conceded that Article 5 of the Supply Agency Rules of 5 May 1960, provides that the Commission may ask the Agency to apply a simplified procedure if, in respect of certain products, the Commission finds, on the initiative of the Agency and, after consulting the Consultative Committee, that there is a clear surplus of 'supply over demand'. Then, after consulting the Consultative Committee the Agency lays down the general conditions that must be fulfilled by supply contracts concluded according to the simplified procedure. The contracts are negotiated directly between the parties concerned, then notified to the Agency and are 'deemed to be concluded by it if no objection is notified by the Agency to the parties concerned within eight days from the time of receipt of the contracts'. This scheme was applied to natural uranium and thorium. By virtue of a notice issued by the Agency on 23 November 1960, the validity of which has been extended several times, these contracts could be negotiated directly and signed by the parties from 1 December 1960. The general conditions to which they are subject and which were laid down by the Agency were published in the Official Journal of 30 November 1960. They prescribe *inter alia* the information (concerning prices and intended use) that the contracts must contain and the period for which they may be concluded.

When it is inquired whether Article 60 of the Euratom Treaty covers this simplified procedure it must certainly be borne in mind that the supply scheme as a whole represents a compromise between a planned economy and a free-enterprise economy. It is in the nature of such a system to seek to attain the essential aim of guaranteeing equal access to the sources of supply with an administrative apparatus as small as possible and to provide for the intervention of an administrative authority only in so far as it is absolutely necessary. In a situation where there is practically no demand (as was the case in particular in the years 1960 onwards when only contracts for very small quantities were

concluded), that is, with a pronounced buyers' market, it is possible without any doubt to achieve the specified aim without the centralized balancing of supply and demand. This is possible in particular because in view of the market surveys conducted by the Supply Agency and the provision of general information for undertakings regarding supplies, sales, price trends, etc., the application of appropriate market prices seems ensured. In addition, the subsequent supervision by the Supply Agency which, as you know, has a right to object, may contribute to the achievement of the objective in question. Seen in this light, the simplified procedure is perfectly in accordance with the spirit and purpose of Article 60 of the Euratom Treaty. Moreover, it can scarcely be disputed that the establishment of this procedure is covered by the general wording of the last paragraph of Article 60 which merely provides that Agency rules 'shall determine the manner in which demand is to be balanced against supply'. In any event I cannot see how one can speak in this respect of an impermissible relaxing of the system and a breach of the Treaty. Moreover, from what we have heard in the course of the proceedings it cannot be said either that this system was no longer functioning from 1965 onwards. According to the uncontradicted observations made by the Commission, contracts for large quantities of natural uranium were in fact still being concluded on this basis at world market prices in 1967 and 1969.

With regard to the supply of enriched uranium which, like the supply of plutonium, necessarily takes place through the Supply Agency, as there is no simplified procedure in this respect, it must be observed that in this field, at least as far as enriched uranium is concerned, the monopoly of the United States Atomic Energy Commission is crucial and, on the other hand, few undertakings are possible buyers. Thus there is generally no balancing of several offers against applications as provided in the Treaty, and supplies are obviously effected without distinction according to the prices published in the Federal Register. Nevertheless, the intervention of the Supply Agency does not seem to be without significance. First, it should be borne in mind that in the case of plutonium there are other supplier-countries (England and Canada). With regard to enriched uranium, supplies within the scope of the agreement concluded in 1958 between Euratom and the USA (by virtue of a unanimous decision of the Council) must necessarily be effected with the participation of the Supply Agency, that is to say, on the basis of tripartite negotiations. In this respect it may automatically be assumed that here, in a field in which the policy of the State plays a crucial role, the participation of a Community body acting for all users carries considerable weight and exercises a positive influence. Thus the action of the Supply Agency was and is apparently important in the efforts to raise the limit of supplies, and the relevant negotiations were and are influenced decisively by the survey as to demand conducted by the Agency. Similarly, according to the statements made by the Commission, the Agency has collaborated in the preparation of standard contracts, the conclusion of skeleton-agreements and the collection of orders, and also concluded joint contracts regarding enriched uranium. Finally, the activity of the Agency in the execution of supply contracts and the completion of the necessary formalities is also of considerable value. Seen in this light, in my opinion, it is difficult to maintain that the provisions of the supply system of the Euratom Treaty and the intervention of the Agency have been valueless or without importance. This also applies moreover to the period after 1964, for even during this period, as the Commission has stated, without being contradicted, the supply of enriched uranium has been ensured by the Agency (including, apparently, supplies

for French undertakings). I would refer here in particular to all the Commission's general reports, the special documentation relating to the Supply Agency, its turnover figures, the studies of plutonium demand for the years 1967 and 1969 and the relevant negotiations.

Finally, with regard to the fact that the contracts relating to the supply of enriched uranium from the USA have usually been concluded for a period of more than 10 years, it must be pointed out that these derogations from the rule are expressly provided in Article 60 of the Euratom Treaty if the Commission agrees to them. Thus in this respect it is not possible to speak of a failure to observe the Treaty provisions, especially as the Commission has obviously ensured that the supply ceiling was not reached prematurely and that the supply to other users was not compromised. Moreover, the procedure described must be considered in the light of the fact that termination clauses exist. These enable other sources of supply to be sought, if necessary, and thus prevent complete dependence on the American suppliers.

Accordingly, with regard to the first aspect of the allegation with which I have just dealt, that Chapter VI of the Treaty has been applied defectively and purely formally, it may be said that the observations of the French Government, compared with those of the Commission, are scarcely capable of establishing that the provisions in question are of no practical significance.

Moreover, this also applies—to anticipate my conclusion—to the observation of the French Government that the Supply Agency has neglected to build up commercial stocks and that the Commission has not decided to build up emergency stocks, as mentioned in Article 72 of the Treaty. In this respect it should be borne in mind that Article 72 merely contains an enabling provision and only provides for a discretion. If this is not exercised it certainly does not justify the conclusion that Chapter VI has been of no importance in practice.

Finally, nothing can be gained for the purposes of the defence from the objection that for years the Commission has not issued an opinion or recommendation under Article 70 of the Treaty. In this context it must be remembered that according to Article 70 of the Treaty the Member States must submit annually a report to the Commission on the development of prospecting and production, etc., that the reports are submitted to the Council together with an opinion from the Commission and that the Commission can make recommendations to the Member States with a view to the development of prospecting for and the exploitation of mineral deposits. Now it is true that the Commission expressly refrained from giving an opinion when submitting the first two reports covering the years 1958 and 1959 (this emerges from the Council's notes of May 1960 and May 1961) and that it did not become active until later. However, when all the circumstances are taken into account this conduct can scarcely be challenged. First, reference may be made to the declaration made by the Commission at the outset that in view of the measures taken with regard to prospecting, production, the market situation and the probable reserves, an opinion did not seem necessary. Then, as can be seen from a note from the Council in 1962 relating to the reports for the year 1960, the Commission had at this time apparently begun to carry out, together with the Supply Agency, studies concerning long-term supplies, which were still continuing in 1963. Moreover, it should be observed that the Advisory Committee to the Supply Agency did not complete its inquiry regarding a long-term comparison between demand and the quantities available until 1963, thereby enabling the Commission to develop its own views and to prepare measures. This explains why it was not until a Council note of March 1964 that an opinion of the Commission was mentioned. This

opinion speaks of the necessity to undertake prospecting on a wide basis, to adopt measures within the framework of a common supply policy and to organize expert studies the results of which were in fact included in a report produced in 1966. In my opinion, this reveals that the Commission was conscious of its responsibilities and precludes a finding that the powers granted by Article 70 of the Treaty were not exercised.

Thus although this may give the impression that the supply system of Chapter VI has not functioned as originally envisaged (when it was assumed that there was a shortage and that there would be a more rapid development of the use of uranium), on the other hand, it by no means leads to the conclusion that the provisions of Chapter VI have remained a dead letter or been applied in a manner contrary to the spirit and purpose of the system. In my opinion, it is clear, therefore, that the application cannot be dismissed on the ground that there is no practical point in having it established that the French Government has committed the infringement of the Treaty provisions of which it is accused.

5. As you know, a further argument that has been put forward with a view to the dismissal of the application is to the effect that the state of the law regarding Chapter VI had been uncertain as from 1956 as a result of the Council's inactivity. It is contended that this obviates a finding that the French Republic has infringed the Treaty, as was held in Case 26/69, *Commission* v *France* ([1970] ECR 565), in which the Commission brought proceedings against France.

In this respect, first of all I shall not deny that doubts may exist as to whether these conclusions can be deduced from that judgment. In so far as they relate to the clarity or obscurity of the state of the law, they seem to proceed from the notion that if the state of the law is confused there may be a mistake of law on the part of the Member State concerned. Thus they apparently introduce as it were an element of culpability into proceedings for a declaration of a breach of the Treaty, since mistakes of law come precisely under the category of fault. If the judgment was actually to be understood in this way, this must certainly be regarded as regrettable. It would in fact entail the unnecessary complications of the procedure under Article 169 of the EEC Treaty and Article 141 of the Euratom Treaty, which are concerned not with guilt and morality but simply with the clarification of the legal position. Moreover, this might mean that the procedure (particularly with regard to the use of Article 171 of the EEC Treaty and Article 143 of the Euratom Treaty) would lose its effectiveness precisely in the cases for which it was originally intended, namely when doubt exists as to the meaning and scope of Treaty provisions.

Quite apart from this, however, it seems to me that the facts in Case 26/69 differ considerably from those in the present case and that this difference precludes the application here of the arguments developed in the judgment in that case. The special feature of facts in that case was that certain legal consequences clearly emerged in an exemption provision contained in a protocol to the Treaty and a declaration of intent annexed to the Treaty but had not been taken into account in the preparation of a special agricultural market regulation. The regulation had not been adjusted in accordance with these provisions, as was required, and in this respect it was possible to hold that there was a lacuna in the law. However, the present case is quite different. No sort of interim confirmation on the part of the Council is here required for the continued application of Chapter VI of the Euratom Treaty, since a reasonable interpretation of the Treaty provisions already leads to this conclusion. Moreover, it is possible to arrive at the interpretation that I have developed above without too much difficulty if the wording of the

Treaty in all the languages is considered and especially if the importance of the fundamental provisions of Article 2 (d) is borne in mind. Finally, it seems significant that both the Commission and the Secretariat of the Council adopted at a very early date the view that Chapter VI had not become ineffective on 1 January 1965, and that the position adopted by the French Government was therefore indefensible.

If all this is considered it is in fact difficult to maintain that the application must be dismissed on the ground that the legal situation from January 1965 onwards was uncertain.

6. As will quickly become apparent, this also applies to the French Government's contention that it has not been proved that its behaviour has damaged the interests of third parties and in particular affected the supply of undertakings in other Member States.

On this point it may be observed first that an essential condition for the application of proceedings under Article 141 of the Euratom Treaty is the failure to comply with Community law, and that no reference is made in the Treaty to any additional element (such as interests prejudiced or any similar condition). Moreover, prejudice to substantial interests of other Member States or of the Community cannot be ruled out in the present case. The terms of contracts concluded without the participation of the Supply Agency, in particular price conditions, are not known in detail, and thus the necessary transparency of the market is absent. Nor can it be stated with certainty that there is no discrimination against other undertakings. Finally, the disadvantages that may ensue in the long run from the inadequacy of the information communicated to the Community institutions in the cases criticized by the Commission must also be borne in mind.

In my opinion, these considerations justify the rejection of this argument of the French Government also as invalid.

7. A final group of arguments advanced by the French Government may be described under the heading 'abuse of procedure'. The essence of these arguments is that in the situation that existed after 1 January 1965, proceedings on the ground of a failure to act should really have been instituted against the Council since this was the only measure that could have hastened the adoption of new supply provisions. On the other hand, the aim of the proceedings brought against France was to confirm the original provisions and this actually delayed the introduction of a new system. On this point the French Government added certain observations, some of which have already been made in another context, for example, that the Commission had not done enough to bring about the adoption of new provisions and that any condemnation of France in proceedings under Article 141 would in any event be of no avail for achieving the essential objective of the adoption of new provisions. Let us now examine these arguments.

(a) First, with regard to the allegation that the Commission did not display sufficient initiative with a view to introducing a new supply system, it may suffice to refer in this respect to the judgment in Cases 90 and 91/63 *(Commission of the EEC* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1964] ECR 625) where it was held that the failure to fulfil obligations imposed on a Community institution does not release the Member States from the fulfilment of their obligations. Moreover, the accusation of inactivity is scarcely proved, for the Commission has not only made a proposal for the issue of new supply provisions punctually (in November 1964) but has also collaborated actively in the following years in the preparation of a new system. Its representative seems to have made this clear in detail in the oral proceedings when he referred in particular to the numerous contacts that the Commission and its departments have maintained at many levels and in various

committees. Moreover, the Commission alone could not have achieved the more speedy adoption of an amended supply scheme thereby rendering the proceedings unnecessary. The responsibility rests with the Council. As long as the Council has not replaced the existing scheme with regard to hte adoption of a new undoubtedly obliged to ensure the observance of the law in force and if necessary, to bring proceedings under Article 141 of the Treaty for this purpose.

(b) In so far as the French Government further contends that the conduct of the proceedings to establish a breach of the Treaty and the possible condemnation of France can serve no useful purpose with regard to the adoption of a new scheme, that the proceedings will not change the conditions for the adoption of the new scheme and that they are therefore not justified, it may certainly be answered that it is by no means certain that the establishment of the provisional continuance of the validity of the original provisions would not have any influence on the course of the deliberations of the Council. Moreover—and this seems even more important—the object of the proceedings is clearly not at all to accelerate the adoption of new provisions. Its sole purpose is to obtain a declaration that France has failed to observe provisions that are still in force and from all appearances will continue to be of importance for some time to come. The proceedings are undoubtedly justified by this aim.

(c) Finally, with regard to the allegation of an abuse of procedure in the proper sense, that is, the argument that the proceedings are contrary to the Treaty, it appears that in this respect the French Government is proceeding from an incorrect assessment of the *substantive* legal position. As we have seen, it is erroneous to suppose that at present there is merely an obligation on the Council to make new provisions; on the contrary, it must be accepted that the existing provisions remain in force for the time being and that the Council may still confirm them or adopt fresh provisions. Accordingly, two factors must be distinguished: on the one hand, the fact that the Council has not yet fulfilled its obligation to decide on the scheme to be applied in the future; on the other hand, the fact that France has failed to observe the provisions that remain applicable provisionally. In the first case, the appropriate remedy is proceedings against the Council on the ground of a failure to act (which, moreover, may be brought by Member States); in the second case, proceedings by the Commission under Article 141 are the appropriate step. The two procedures obviously differ in their aims, their content and their consequences. I cannot see any interdependence between them whatsoever, in the sense that they are mutually exclusive; on the contrary, it must be admitted that the Commission has a discretion in respect of the exercise of the rights attributed to it. Nor can the fact that the Commission has not taken proceedings against the Council be regarded as a misuse of its powers. In this respect reference may be made in particular to the difficulties that have arisen in recent years which the Commission has described and the fact that other methods have proved to be more effective for encouraging the Council to act is to be taken into account.

Finally, it cannot be said that the proceedings brought against France are in reality intended to achieve a different aim and therefore constitute an abuse. Firstly, in my opinion, such a contention cannot be supported by the allegation that the Commission in reality seeks to obtain *confirmation* of the original provisions and that it is thus asking the Court to exercise a power that is actually reserved to the Council. In my opinion, there is nothing to justify such an assumption. The Commission is obviously not attempting to establish that the original provisions must be maintained definitively. On the contrary, the sole object of the proceedings is to establish the situation that is still applicable *at*

present, and this undoubtedly falls within the jurisdiction of the Court. Secondly, it cannot be maintained that it is sought, by means of this application and any judgment that may grant it, to influence the Council, to sway its deliberations towards the preservation of the existing provisions or a similar system, and to delay the preparation of a new scheme. There is no indication whatsoever of any such intention on the part of the Commission, which has indeed itself submitted a proposal to relax the present system. Moreover—and this seems even more important—the proceedings at present before the Court are *not at all capable*, objectively, of supporting such intentions, since they merely permit a pronouncement on the existing provisional state of the law and thus do not pre-judge considerations of legal policy with regard to a future system.

Thus in whatever light the allegation of abuse of procedure is considered and when all the arguments put forward against the application are examined, there is, finally, no evidence that it is inadmissible or unfounded.

8. I can therefore summarize my views as follows:

The application lodged by the Commission is admissible and well founded.

In view of the fact that after 1964 France refused to submit to the Commission the annual reports on the development of prospecting and production, on probable reserves and on investment which has been made or planned in the French territory;

in view of the fact that the French Atomic Energy Commission has, without the knowledge of the Agency, concluded contracts for the importation of 3 555 kg of 1.15% enriched uranium from the nuclear power station at Kahl, of plutonium from Canada and 116 kg of plutonium from the Ente Nazionale per l'energia Elettrica (ENEL) and for the supply of approximately 2 000 kg of 4.7% enriched uranium to the Comitato Nazionale per l'Energia Nucleare (CNEN);

finally, in view of the fact that the French Atomic Energy Commission has refused to inform the Agency of the existence of an obligation concerning the processing of materials imported from South Africa and the quantities of materials involved in this delivery, it must be held that France has failed to fulfil the obligations laid down in Title Two, Chapter VI, of the Euratom Treaty, in particular Articles 55, 56, 57, 60, 64, 70 and 75, either by not complying with these provisions itself or by not preventing its Atomic Energy Commission from failing to observe them.

France must also be ordered to bear the costs of these proceedings.