

OPINION OF ADVOCATE GENERAL
GULMANN

delivered on 15 September 1992 *

*Mr President,
Members of the Court,*

1. The applicant in this case, Empresa Nacional de Urânio SA (hereinafter 'ENU'), produces uranium on a small scale in Portugal. As there are no industrial nuclear reactors in Portugal, ENU is obliged to export its entire production of uranium. For a variety of reasons, the company has experienced difficulties in disposing of its production and has accumulated considerable stocks of uranium.

ENU has brought the present action for failure to act under Article 148 of the EAEC Treaty and it claims that the Court should 'declare that the Commission unlawfully failed in its duty to take and address to the applicant herein the decision which the applicant requested of it pursuant to Article 53 of the EAEC Treaty'. ENU thereby refers to a letter of 21 December 1990 addressed to the Commission in which ENU requested that institution to adopt a range of measures for the purpose of ensuring disposal of ENU's uranium stocks.

The legal background

2. Article 2(d) of the EAEC Treaty provides that the Community shall 'ensure that all

users in the Community receive a regular and equitable supply of ores and nuclear fuels'. Chapter VI of the Treaty contains more detailed rules relating to 'supplies'. Article 52 lays down a principle of equal access to sources of supply and provides for the elaboration of a common supply policy.

Article 52 also provides for the establishment of a Supply Agency with a *right of option* on ores, source materials and special fissile materials produced in the territories of Member States and with an *exclusive right to conclude contracts* relating to the supply of those materials, whether they come from inside the Community or from outside. The purpose behind this centralization of supply and demand is to ensure equal access for all Community users to the materials in question.

The more detailed rules determining 'the manner in which demand is to be balanced against ... supply' are set out in the rules of the Supply Agency of 5 May 1960,¹ as amended by the rules of the Agency of 5 July 1975.² Those rules make it possible, *inter alia*, to apply certain simplified procedures whereby supply contracts may be negotiated directly between consumers and producers. Prior to their conclusion, such contracts must be submitted to the Agency, which may approve them within a certain period.

1 — OJ, English Special Edition 1959-1962, p. 46. These rules were approved by the Commission in its decision of 5 May 1960 (OJ, English Special Edition 1959-1962, p. 45).

2 — OJ 1975 L 193, p. 37.

* Original language: Danish.

The Agency, which has legal personality and financial autonomy under Article 54 of the EAEC Treaty, is subject to supervision by the Commission. Article 53 of the EAEC Treaty, which is of central importance to this case, provides as follows:

“The Agency shall be under the supervision of the Commission, which shall issue directives to it, possess a right of veto over its decisions and appoint its Director-General and Deputy Director-General.

Any act, whether implied or expressed, performed by the Agency in the exercise of its right of option or of its exclusive right to conclude supply contracts, may be referred by the parties concerned to the Commission, which shall give a decision thereon within one month.”

The facts of the case

3. With reference to the Treaty provisions concerning the right of option, ENU wrote to the Agency on 8 October 1987 and offered to sell it 350 tonnes of concentrated uranium. In the absence of a reply to that letter, ENU wrote again to the Agency on 10 October 1988 requesting it to exercise its right of option. A copy of that letter was sent to the Commission's Directorate-General for Energy, which was requested by ENU to assist in seeking a solution to the company's difficulties in disposing of its uranium stocks.

The Agency replied to ENU's request by letter of 8 November 1988 in which it acknowledged that the problem raised by

ENU was serious and affirmed that it would receive all due attention with the object of achieving as satisfactory a solution as possible. In its reply of 14 November 1988, the Commission undertook to examine the problem in order to determine whether an appropriate solution could be found.

In the continuing absence of a solution, ENU wrote once more to the Agency and the Commission on 25 October 1989. In those letters, the company once more drew attention to the serious problems it was encountering in disposing of its stocks, and it requested the Agency to act and the Commission to instruct the Agency to act pursuant to the rules set out in Chapter VI of the Treaty.

On 8 December 1989, the Commission informed ENU that it agreed that a 'special course of action' should be established to resolve problems such as that facing ENU and that it had requested the Agency to implement the measures which it had proposed to apply to such cases.

The Agency subsequently drew up 'outline practical solutions for the "Portuguese uranium" aspect of supply policy'. This was communicated to ENU during one of several meetings between the parties in Brussels. The central feature of this solution was that Community users of uranium should be contacted with the object of securing an agreement under which Portuguese uranium would be sold to those users under a distribution scheme and at a price which would be the subject of more detailed arrangements. ENU was itself involved in these discussions; however, they did not prove successful.

4. On 21 December 1990 ENU sent the abovementioned letter to the Commission.³ In its conclusion to that letter, the company principally requested the Commission:

- (i) to direct the Agency to restore the proper functioning of the machinery established by the Treaty under Chapter VI (point (a));
- (ii) to undertake an investigation and take appropriate action to determine how it is possible that Community users can freely obtain supplies of uranium on foreign markets, even though ENU's entire production is available at a reasonable price (point (b));
- (iii) to take part in discussions on the compensation to be paid to ENU (point (c));
- (iv) to ensure that the Agency complies with the Commission's decision on the implementation of a 'special course of action' to facilitate an immediate resolution of the company's problem (point (d)); and
- (v) to direct the Agency to implement the decision addressed to it by seeking a satisfactory solution to the problem affecting ENU (point (e)).

ENU pointed out in conclusion that it was making its request pursuant to the second

paragraph of Article 53 and Article 148 of the EAEC Treaty.

The subject-matter of the proceedings

5. The first significant problem in this case is to determine the nature of the duty to act which, according to ENU, was imposed on the Commission and with which that institution failed to comply. ENU evidently believes that the Commission is under an obligation to give a decision pursuant to Article 53 of the Treaty. It is less clear, however, what, in the company's view, the content of that decision should be.

In its claim, ENU referred to 'the decision which the applicant requested of the Commission pursuant to Article 53 of the EAEC Treaty'. As mentioned at the outset, ENU is there referring to the letter of 21 December 1990, cited above. That letter, however, contains a wide variety of points and it is not easy to determine which of these form part of the claim. This has become clear from both the exchange of correspondence and the oral procedure, since the conduct of the proceedings by both parties illustrates the considerable degree of uncertainty concerning the definition of the subject-matter of the proceedings.

6. ENU's request to the Commission is founded on the assumption that the Agency has a duty, in a more closely defined manner, to resolve the company's problem in selling its stocks. So far as can be ascertained, ENU bases its view that the Agency has such a duty on two mutually independent arguments.

In the first place, ENU takes the view that the Agency acted in breach of Chapter VI of the Treaty by ceasing to exercise its right of

³ — See Annex XII to the application.

option and to enforce its exclusive right to conclude contracts; this, ENU submits, is the real cause of the company's problems in disposing of its stocks.

ENU argues in this regard that the Treaty rules are based on a principle of Community preference, which implies not merely that producers may sell to non-member countries only in so far as demand on the Community market has been satisfied, but also that users may conclude contracts with producers in non-member countries only to the extent to which their requirements cannot be covered by material produced within the Common Market. As only some 4 500 tonnes of uranium are produced *per annum* within the Community, as against an annual consumption of approximately 15 000 tonnes, compliance with the Treaty rules would, in the opinion of ENU, have the automatic and gradual effect of disposing of the company's stocks. In the situation where ENU's stocks are available at reasonable prices, the Agency is, in the company's view, under an obligation to exercise its right of option and to enforce its exclusive right to conclude contracts for the purpose of ensuring that no contracts are entered into with producers in non-member countries until such time as those stocks have been disposed of.⁴

Secondly, ENU is of the opinion that the Commission adopted a decision stating that a 'special course of action' should be implemented to bring about a satisfactory solution to ENU's problem but that the Agency failed to comply with that decision.⁵

4 — See points (a) and (b) in ENU's letter of 21 December 1990 (Annex XII to the application).

5 — See point (d) in ENU's letter of 21 December 1990 (Annex XII to the application).

It would appear that ENU is thereby referring to the letter of 8 December 1989 sent to the company by the Commissioner responsible, in which the latter stated as follows:

'In my opinion, the Agency's supply policy ought, as from now, to include a special course of action making it possible to resolve such cases. I have requested [the Agency] to implement the draft measures drawn up for that purpose.'

It is not entirely clear what this 'special course of action' is intended to consist of. In its letter of 21 December 1990, ENU expressed the view that the 'special course of action' should be in the nature of an emergency solution capable of resolving immediately ENU's problem. The company's train of thought appears to be that for a satisfactory solution to the problem it is not sufficient merely to wait for general compliance with the Treaty rules to produce the effects outlined above. According to ENU, the emergency solution can be realized only if the Agency exercises its right of option under the Treaty by buying up immediately all stocks held by ENU.⁶

In its reply⁷ and in the course of the oral procedure, however, ENU appears to

6 — At point (d) of its letter of 21 December 1990, ENU, with regard to the 'special course of action', states, *inter alia*, as follows:

'... This measure alone will make it possible to reduce the serious harm which ENU has unlawfully been constrained to suffer up to the present, in view of the fact that the basic solution, following from strict compliance with Community law, has not had all its intended effects.

This "special course of action", capable of being implemented rapidly, ought to involve the acquisition by the Agency of the uranium stocks at present held by ENU.

This solution, advocated by ENU, corresponds in any case to the simple exercise by the Agency of its right of option on the purchase of uranium offered to it by ENU ...'.

7 — See page 7 of ENU's reply (French translation).

combine the request for a 'special course of action' with the proposal, set out in the letter of 8 December 1989, for measures which, in so far as I have understood subsequent events, led to the elaboration of the Agency's 'outline practical solutions for the "Portuguese uranium" aspect of supply policy'.

It is not necessary at this point to attempt to determine in greater detail the content of the 'special course of action'.

7. ENU's claim may for those reasons be understood as being to the effect that the Commission unlawfully failed, by way of a decision pursuant to Article 53:

(a) to direct the Agency to comply with the rules set out in Chapter VI of the Treaty (which in the long term would solve ENU's problem in disposing of its stocks); and

(b) to direct the Agency to implement the Commission decision to establish a 'special course of action' (which could lead to an immediate solution of ENU's problem).

8. The above represents, in my view, a reasonable and accurate definition of the subject-matter of the proceedings. However, I believe there is reason to point to a number of circumstances which may give rise to doubts concerning the accuracy thereof. Not the least is the suggestion that ENU, in its reply and during the oral procedure, made certain statements which might indicate a restriction on the subject-matter of the proceedings.

9. *In the first place*, a variety of circumstances prompt the question of how far the case can be assumed to relate *solely* to the Commission's possible *failure to direct the Agency to implement a 'special course of action'*. Point (e) in the conclusion to ENU's letter of 21 December 1990, which in this regard is rather ambiguous, is worded as follows:

'(e) The Commission is therefore requested to order the Agency to implement the decision addressed to it by implementing a satisfactory solution to the problem affecting ENU — without prejudice to the application of Treaty provisions in such a way as to palliate future difficulties.'

In its defence, the Commission treats that point as 'a conclusion to a conclusion', which is in fact an accurate description. The question, however, is whether that conclusion represents a limitation of ENU's request and consequently of its claim in respect of the part concerning the Commission's alleged decision to implement a 'special course of action'. Such an interpretation must, in my opinion, be rejected. Considered in the context of the rest of the letter and the points subsequently made in the application, my view is that this point amounts to nothing more than a request to the Commission that it direct the Agency to resolve ENU's present problem (whether such a solution may be achieved through compliance with general Treaty rules and/or the establishment of a 'special course of action'), in so far as ENU retains the right to rely on the Treaty provisions with a view to resolving problems which may arise in future.

It should be pointed out that, in reply to a request made during the oral procedure by the Judge-Rapporteur that it specify in which points of the letter of 21 December 1990 the Commission, in its opinion, had failed to adopt a decision, ENU referred to 'the entire letter and in particular to point (d)' (point (d) concerns the 'special course of action'). However, ENU also argued during the oral procedure that the Commission was under an obligation to direct the Agency to comply with Chapter VI of the Treaty, and it is for that reason that I do not believe that that statement can be read as supporting the view that the case should relate exclusively to the issue of whether the Commission had a duty to direct the Agency to implement a 'special course of action'. This is so, not least because ENU, at point (d) above, actually deals with the version of the 'special course of action' which consists of an immediate exercise of the right of option conferred by the Treaty. This example illustrates the considerable difficulties in distinguishing between the various 'model solutions' referred to by ENU.

10. *Secondly*, in its reply⁸ and during the oral procedure, ENU made a number of statements which might have given the impression that ENU was subsequently limiting its claim to the purely formal one that the Commission, in breach of its obligations, *failed to reply to ENU's request, whether in a positive or a negative sense.*

In my opinion, that result is unintentional. It appears improbable that ENU should suddenly desire a decision *per se*, rather than a decision containing specific provisions. It is

possible that the statement in question simply originated in the idea that ENU should be in a position to contest what might turn out to be a negative decision by way of an action for annulment. Moreover, ENU continued to argue, both in its reply and in the course of the oral procedure, that the Commission ought to have adopted a decision directing the Agency to resolve the problem facing ENU.

I would for those reasons subscribe to the definition of the subject-matter as outlined above, since this is in my opinion the most natural definition when a comparison is made of all the submissions and arguments put forward by ENU.

Of course, it is not conclusive in this connection that the Commission, in its procedural documents and during the oral procedure, essentially restricted itself to the facts and made submissions touching on the extent to which it was or was not under a duty to give a decision, irrespective of its content. Needless to say, the Commission cannot restrict the subject-matter of the proceedings merely by concentrating its arguments on this single issue. If the Court should find that the Commission was under a duty to give a decision, it must, on the basis of the arguments put forward by ENU, also be entitled to go one step further and determine whether the contents of that decision ought to be those sought by ENU. This is particularly so in view of the fact that the Commission's procedural documents make it clear that it was in no doubt as to the contents which ENU desired that the decision should have. Thus,

⁸ — See points 16 and 29(b) in ENU's reply.

by way of example, the Commission points out in its rejoinder that ENU 'requested the Commission to direct the Agency to establish a "special course of action"' and 'asked it to direct the Agency to alter its supply policy'.⁹

stated during the case that its application was based exclusively on the second paragraph of Article 53; secondly, the question must be addressed as to whether the acts to which the claim relates are, in purely factual terms, acts which come within the scope of the second paragraph of Article 53.

Admissibility

11. The Commission submits that the application should be dismissed and has raised three objections to admissibility in support of its argument.

So far as the first question is concerned, it has to be confirmed that ENU did in fact make use of the complaints procedure set out in the second paragraph of Article 53. That, however, does not necessarily imply that ENU considered that the decision which, in its view, the Commission is under an obligation to adopt is a decision which must be adopted exclusively pursuant to *the complaints procedure under the second paragraph of Article 53*.

It would appear that the Commission in this regard bases itself on the contention that ENU is claiming only that the Commission has a duty to adopt a decision relating to the provisions covered by the application under the special complaints procedure set out in the second paragraph of Article 53.

In its reply¹⁰ and during the oral procedure, ENU argues that the Commission was already under a duty, by virtue of its status as a *supervisory body with general powers to issue instructions to the Agency*, to direct the Agency to comply with the Treaty rules and with the guidelines which, according to ENU, the Commission had issued to it. ENU thereby contends that the Commission, through its failure to take steps against the Agency, itself acted at variance with the provisions which the Agency had breached.

The Commission points out in that connection that the application fails in two respects to comply with the conditions applicable to a substantive examination of an application based on the second paragraph of Article 53 and argues that it must for that reason be dismissed.

That interpretation raises two questions.

Since the Commission's status as a supervisory body is laid down in the first paragraph

In the first place, one must ask whether the Commission is correct in its view that ENU

⁹ — See point 9 in the Commission's rejoinder.

¹⁰ — See ENU's reply at point 2(a), (b), (d) and (g) and, in particular, at points 19, 20 and 27.

of Article 53 and as ENU refers in its claim to Article 53 in its entirety, rather than to its second paragraph specifically, the company argues that its further understanding of the scope of the application in this regard is compatible with the wording of the claim.

In my opinion, ENU deals in its claim exclusively with the Commission's possible obligation to give a decision pursuant to the second paragraph of Article 53, and we must for that reason consider whether or not the submissions made in the reply concerning a wider interpretation of the company's claim ought now to be rejected as having been brought out of time.

Such a result strikes me as being unnecessarily formalistic. I am in no doubt that ENU has consistently taken the view that the Commission was under an obligation to intervene at its own initiative against the Agency's conduct¹¹ and that the second paragraph of Article 53 has been regarded by ENU as no more than an express method which traders might use to bring about such intervention. It is clear that by invoking the right to refer set out in the second paragraph of Article 53, ENU intended to reinforce its application and not to restrict it.

The fact that the application brought by ENU is thus based not only on the second paragraph of Article 53 but also on the Commission's general duties as a supervisory body *vis-à-vis* the Agency means that the

substantive issues of the case may be examined, provided that the general conditions for bringing proceedings set out in Article 148 of the Treaty have been satisfied, even if it should be established *either* that the acts to which the proceedings relate are not at all covered by the second paragraph of Article 53 *or* that the Commission's formal objections must be upheld in so far as they point to a failure to comply with the provisions governing the admissibility of an application based on the second paragraph of Article 53.

The question whether the acts to which the proceedings relate are covered by the second paragraph of Article 53

12. I have already mentioned that the second paragraph of Article 53 provides that the parties concerned may refer to the Commission 'any act, whether implied or expressed, performed by the Agency in the exercise of its right of option or of its exclusive right to conclude supply contracts'.

In my opinion, it follows from the wording of that provision that parties concerned may refer to the Commission only specific acts of the Agency, and only those specific acts which relate to the right of option or the exclusive right to conclude contracts conferred by the Treaty.

I have already mentioned above that the acts which ENU referred to the Commission by its letter of 21 December 1990 relate in part

¹¹ — See, by way of example, points 45, 46 and 49(3) of ENU's letter of 21 December 1990, along with the conclusions in that letter, in which the company requested the Commission to adopt the measures earlier referred to 'with a view to rectifying the unlawful conduct of the Agency and revising the manner in which the Commission itself examined the question'.

to the Agency's overall supply policy, which, it is claimed, is at variance with Chapter VI of the Treaty, and in part to the Agency's failure to comply with an alleged Commission decision on the establishment of a 'special course of action'.

the second paragraph of Article 53, it is not necessary to reach a decision on the objections to admissibility submitted by the Commission in respect of that provision.

The Commission's objections in respect of the second paragraph of Article 53

The Agency's overall supply policy is not, in my view, a specific act capable of being referred to the Commission under the second paragraph of Article 53. It is perfectly clear that ENU wishes the Agency to amend its supply policy in such a way that it will at some point exercise its right of option to purchase ENU's uranium; however, ENU precisely does not submit that the Agency breached a specific duty to exercise its right of option.¹²

13. In the event that the Court should not agree with this result, I shall set out in brief the following points regarding the objections in question.

So far as concerns the possible failure by the Agency to comply with a Commission decision on the introduction of a 'special course of action', the latter may for present purposes be treated as a specific act. Nevertheless, I do not think that such a failure has anything to do with the right of option or the exclusive right to conclude contracts conferred by the Treaty. This is so, notwithstanding ENU's view that the Agency can give effect to the 'special course of action' simply by exercising its right of option, since that exercise is *sui generis* and to that extent is quite separate from the powers conferred by the Treaty.

In the first place, the Commission has pointed out that ENU did not argue that the Commission failed to issue a legal measure to the company, but rather that it failed to issue a legal measure to the Agency. The fact that the second paragraph of Article 53 enables the parties concerned to refer to the Commission acts performed by the Agency does not, in the Commission's view, mean that the decisions given must refer specifically to those parties. The Commission has argued on that basis that ENU has failed to comply with the provisions set out in the third paragraph of Article 148, under which a natural or legal person may bring proceedings for a failure to act only if 'an institution of the Community has failed to address to that person any act ...'.¹³

In so far as we proceed, along the above lines, on the basis that the acts to which ENU's application relates are not covered by

That objection cannot be accepted. It is in my opinion evident that interested parties, who can refer acts of the Agency to the Commission under the second paragraph of Article 53, must be in a position to institute

¹² — See point 1 of ENU's reply, p. 6.

¹³ — The Commission expressed this opinion in its defence (point 2). However, it is possible that the Commission's rejoinder introduces a modification to this (see point 9(4)).

proceedings before the Court for the annulment of decisions upholding acts of the Agency, or proceedings for failure to act in respect of failure by the Commission to give a decision. The legal interpretation proposed by the Commission constitutes, as I see it, an unacceptable restriction of an individual's opportunity to request the Court to examine decisions which directly affect that individual. The second paragraph of Article 53 establishes a complaints procedure; this means that the Commission is required to address objections brought by interested parties against acts of the Agency and it is precisely towards those parties that the Commission decision must direct the Agency to act in a particular manner with regard to the exercise of its right of option or its exclusive right to conclude contracts.

Apart from the fact that the Commission decision is naturally addressed to the Agency, in the sense that it directs that body to act in a particular manner, it is both reasonable and natural also to treat the parties concerned as addressees of a decision concerning the manner in which the Agency is required to act towards those parties.

The Commission's *second objection* is that ENU failed to meet the procedural requirements governing an action in respect of a failure to act. The second paragraph of Article 148 of the Treaty lays down three requirements of this kind. The institution in question must first have been 'called upon to act' and must not, 'within two months of being so called upon', have 'defined its position'. Thirdly, the action must have been brought 'within a further period of two months'. The Commission has argued that ENU's letter of 21 December 1990 cannot simultaneously constitute a reference to the Commission under the second paragraph of

Article 53 and a request to act under the second paragraph of Article 148. The Commission has referred in particular to the fact that the procedure to be followed when an action is brought in connection with a failure to act cannot be instituted until the Commission, in breach of the Treaty, *has* failed to adopt a decision. Since there can be such an unlawful omission only after expiry of the period within which a decision must be taken under the second paragraph of Article 53, compliance with the procedural requirements laid down in the second paragraph of Article 148 presupposes that a fresh request that it take a decision must have been submitted to the Commission following the expiry of that first period.

The decision on that objection is not entirely straightforward. It would seem obvious at first sight to base oneself on the Commission's interpretation of Article 148, according to which a 'call to act' may be made only once the Commission has already rendered itself culpable through its failure to act.

That is a natural interpretation, since the purpose of the procedure laid down in the second paragraph of Article 148 is to give the institution concerned an opportunity to consider the lawfulness of its inaction and thereby avoid an action for failure to act.¹⁴

14 — See, *inter alia*, judgment in Case 17/57 *Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1959] ECR 1, Opinion of Advocate General Lenz in Case 13/83 *Parliament v Council* [1985] ECR 1513, in particular point 3.1., and the Opinion of Advocate General Darmon in Case 25/85 *Nuovo Campsider v Commission* [1986] ECR 1531, in particular point 6, along with the Court's judgment in that case, at paragraph 8 of which it stated that an action for failure to act must be preceded by formal notice and that 'the subject-matter of that notice must be set out in such a manner as to make clear what decision the Commission *should* have taken under Community law' (emphasis added).

The present situation, however, is peculiar by virtue of the fact that in this particular case it is ENU's reference to the Commission under the second paragraph of Article 53 which imposes on that institution an obligation to act. It strikes me as unnecessarily formalistic in such a situation to require that ENU must, after expiry of one month, inform the Commission afresh of its desire that the Commission should take a decision. ENU outlined in its letter of 21 December 1990 the type of decision which it believes the Commission ought to adopt and referred expressly to Article 148 of the Treaty. Accordingly, the letter must be taken as satisfying the requirement of a 'call to act' laid down in the Court's case-law.¹⁵ The Commission could not at any time have been in doubt that its failure to issue a decision would be criticized by ENU as a failure to act, in breach of the Treaty, and might result in proceedings being brought for failure to act. The legal protection which the second paragraph of Article 148 is designed to confer on the Commission would consequently appear to have been taken fully into account in the present instance.

Furthermore, the above interpretation is, in my opinion, consistent with the wording of Article 148. It can therefore be held without any difficulty: (a) that the Commission was called upon to act under the second paragraph of Article 148; (b) that the Commission failed to act within a two-month period; (c) that the case was brought before the Court within a further two-month period, and; (d) that the action relates to the fact that the Commission, in breach of the Treaty, failed to 'give a decision', since it was evident when the proceedings were initiated that the Commission had failed to give a decision

within the one-month period required under the second paragraph of Article 53.

In so far as the Court should consider it necessary to rule on the Commission's two objections, I would accordingly propose that both those objections should be dismissed.

The question whether ENU has satisfied the conditions laid down in the third paragraph of Article 148

14. I concluded at point 11 above that ENU is not merely contending that the Commission was under an obligation to give the decision requested by the company pursuant to the special complaints procedure set out in the second paragraph of Article 53, but is arguing in addition that the Commission had such a duty by virtue of its position as a supervisory body *vis-à-vis* the Agency (see the first paragraph of Article 53).

The question is therefore whether ENU has satisfied the conditions laid down in the third paragraph of Article 148 in so far as it asserts that the Commission, by virtue of its position as a supervisory body, was under an obligation to issue the desired decision to the Agency. Since the wording of the third paragraph of Article 148 makes the right of an individual to bring proceedings subject to a failure by a Community institution to 'address [an act] to that person', the Court must in principle first examine whether a natural or legal person can bring an action for failure to act under the third paragraph of Article 148 by claiming that the Commission failed to issue a decision which, although addressed to another person, is of direct and individual concern to the applicant.

15 — See the Court's judgment in Case 25/85 *Nuovo Campsider*, cited above, at paragraph 8.

In my opinion, that question has to be answered in the affirmative. Private individuals must, as I see it, have the same opportunity to bring an action for failure to act under the third paragraph of Article 148 as they have to bring an action for annulment under the second paragraph of Article 146.¹⁶ In my Opinion of 8 July 1992 in Joined Cases C-15/91 and C-108/91 *Josef Buckl & Söhne and Others v Commission*,¹⁷ I explained why the third paragraph of Article 175 of the EEC Treaty ought in that respect to be interpreted in the same way as the second paragraph of Article 173 of the EEC Treaty. The same arguments apply with regard to the provisions of the EAEC Treaty, and for that reason I can refer in full to my earlier opinion.

The question is therefore whether ENU is directly and individually affected by the decision which the company claims that the Commission, in breach of its duties as a supervisory body, failed to give.

The Court has consistently held that persons other than those to whom a decision is addressed may claim to be concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them

individually just as in the case of the person addressed.¹⁸

A Commission decision addressed to the Agency, by which the latter is directed to alter its supply policy in accordance with the rules in Chapter VI of the EAEC Treaty, as interpreted by ENU, would not be of direct and individual concern to ENU, but would, on the other hand, have far-reaching legal consequences for all producers and consumers of uranium within the Community.

The Commission's failure to give such a decision cannot accordingly be contested by ENU, and this aspect of the company's claim must therefore be rejected.

So far as concerns the Commission's alleged duty to direct the Agency to introduce a 'special course of action', the position is, in my opinion, different. A decision on the establishment of a 'special course of action' must, whatever its precise content, have as its origin and objective the search for a solution to the special predicament facing ENU. If the Commission in fact addressed a decision to the Agency designed to resolve the company's problem through the introduction of a 'special course of action', ENU must also be regarded as directly and individually concerned by a Commission decision directing the Agency to comply with an earlier decision from the Commission, and ENU must therefore be entitled to institute

16 — The second paragraph of Article 146 of the Treaty provides that 'any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former' (emphasis added).

17 — See points 17 to 19. The Court has not yet delivered its judgment in these cases.

18 — See, *inter alia*, the Court's judgments in Case 25/62 *Plaumann v Commission* [1963] ECR 95 and in Case 75/84 *Metro SB-Großmärkte v Commission* [1986] ECR 3021, at paragraph 20.

proceedings against the Commission for its failure to act by claiming that the Commission neglected to issue such a decision.

I am consequently of the opinion that ENU satisfies the conditions here discussed for the institution by individuals of proceedings for failure to act, in so far as the company claims that the Commission, in breach of its duties as the supervisory body with control over the Agency, failed to direct it to implement the alleged Commission decision on the introduction of a 'special course of action' capable of resolving the problem experienced by ENU in disposing of its stocks.

The question whether ENU's application was brought out of time

15. We must now examine the Commission's *third objection to admissibility*, to the effect that the present application was brought out of time.

The Commission pointed out in this regard that 16 months elapsed between the Commission's letter of 8 December 1989, which according to the Commission approved the position taken by the Agency, and 8 April 1991, the date on which the Commission was informed of the proceedings.¹⁹ In support of its contention that such a period must result in the application being dismissed, the Commission has referred to the Court's judgment in Case 59/70 *Netherlands v Commission*.²⁰

In that judgment, the Court ruled that in view of the requirements of legal certainty and the periods applicable to the institution of annulment proceedings it was necessary that proceedings for failure to act should be brought within a reasonable period of time. In a situation where the Commission had clearly and unequivocally informed the applicant of its views on the problem and 18 months had subsequently passed before the applicant formally requested the Commission to act, the Court held that the application would have to be dismissed as having been brought out of time.

In my opinion, the Commission's letter of 8 December 1989 can scarcely be construed as constituting approval of the position taken by the Agency. Even if, as the Commission argues, that letter expresses approval of the Agency's decision not to exercise its right of option, it does not amount in all the circumstances to an unambiguous declaration. On the contrary, the Commission actually sets out in that letter its opinion that a 'special course of action' ought to be introduced with a view to resolving ENU's problem. Such a statement can scarcely have been expected to induce ENU to institute proceedings for failure to act. In addition, it is in my opinion conclusive that, as ENU points out, there was a large number of personal and written contacts throughout the period in question between the Commission, the Agency and ENU and there was a distinct possibility at certain periods that ENU's problem in disposing of its stocks would be resolved. There was at no time any reason for the Commission to believe that ENU would waive its request that the Commission should resolve the company's disposal problem.

¹⁹ — ENU has argued in this connection that this period must be calculated from 8 December 1989 to 21 December 1990, the date on which ENU submitted its formal request that the Commission take action.

²⁰ — [1971] ECR 639.

I would for that reason propose that the Court should overrule that objection.

The substance

16. With regard to the substance of the case, the Commission has primarily put forward submissions in support of its contention that it was not obliged to give a decision under the second paragraph of Article 53.²¹

As will become apparent from the above, I do not believe that the case makes it possible to decide this matter, since ENU's claim, to the effect that the Commission was under an obligation, by reason of its position as the supervisory body, to direct the Agency to implement the Commission's decision on the introduction of a 'special course of action', is in my opinion the only one which can be addressed in an examination of the substance of the case.

21 — The Commission *first of all* claims that ENU failed to comply with Article VIII(3) of the Statutes of the Agency, which provides as follows:

'Any act of the Agency referred to in the second paragraph of Article 53 of the Treaty may be referred to the Commission by the party concerned within fifteen days of notification being received, or, failing such notification, within fifteen days following publication. Failing both notification and publication, the period shall run from the day on which the party concerned learns of the act.'

The Commission has pointed out that the Agency did not refer any act to the Commission within the 15 days prior to ENU's letter of 21 December 1990, since the last letter from the Agency was dated 8 November 1988. As there was accordingly no act which could have been referred to the Commission, the latter was not under any obligation to give a decision. The Commission went on to point out that in so far as ENU considered the original reply from the Agency to be a negative decision, that decision ought to have been referred to the Commission within the prescribed periods.

Secondly, the Commission has argued that inasmuch as the Agency's act must, according to ENU, be treated as a permanent act, the same permanent legal effect must be attributed to the Commission's letter of 8 December 1989 and for that reason the Commission cannot be required to give a fresh decision.

So far as this part of ENU's claim is concerned, I feel that the Court ought to find in favour of the Commission, in view of the fact that it has not been established that there was a binding Commission decision concerning the introduction of a 'special course of action'.

Admittedly, the Commissioner responsible did state in his letter of 8 December 1989, to which I have already referred, that: 'in my opinion, the Agency's supply policy ought, as from now, to include a special course of action making it possible to resolve such cases. I have requested [the Agency] to implement the draft measures drawn up for that purpose.'

In my view, however, that statement is no more than an informal declaration of intent, being a brief statement expressing the opinion of the Commissioner in question. Furthermore, as I have discussed above at point 6, even the procedural documents submitted by ENU do not make it entirely clear what the content of this 'special course of action' ought to be. On the available facts, the letter of 8 December 1989 cannot, in my view, be interpreted as being anything other than a request to the Agency that it make an effort to resolve ENU's problem, something which the Agency, according to the information provided in the case, did in fact attempt to do, albeit unsuccessfully. I do not believe that the Commission, by making such a statement, should be precluded from subsequently deciding that it was not possible to resolve ENU's problem.

Summary

To summarize, I can accordingly conclude that my analysis of the case has led me first of all to hold that ENU's claim relates to the

Commission's failure to give a decision directing the Agency (a) to comply with the rules set out in Chapter VI of the Treaty, as interpreted by ENU, and (b) to implement a decision given by the Commission in respect of the introduction of a 'special course of action'.

Secondly, I have found that ENU's claim does not relate to acts covered by the special complaints procedure set out in the second paragraph of Article 53 and that it is therefore unnecessary to examine the objections to admissibility submitted by the Commission with regard to that procedure.

In so far as ENU bases its claim on the general duties which the first paragraph of Article 53 imposes on the Commission as the body charged with supervision of the Agency, I have reached the conclusion that the part of the claim which relates to the Agency's overall supply policy and compliance with Chapter VI of the Treaty must be

dismissed on the ground that ENU cannot be regarded as being directly and individually affected by a decision on those matters.

In contrast, ENU must be regarded as being directly and individually affected by a decision directing the Agency to implement a 'special course of action' and the company thus satisfies the conditions governing the institution of proceedings based on a claim that the Commission unlawfully failed to give such a decision. Since the Commission's objection that the application was brought out of time must be rejected, I believe that there are good reasons to deal with this part of ENU's claim in the examination of the substance of the case.

Finally, I have reached the conclusion that this point should be decided in favour of the Commission on the ground that it did not give a decision on the introduction of a 'special course of action', the implementation of which it might subsequently have been under an obligation to ensure.

Conclusion

I accordingly propose that the Court should:

- (1) dismiss that part of ENU's claim which concerns the Commission's duty to give a decision directing the Agency to comply with the rules set out in Chapter VI of the Treaty;
- (2) rule in favour of the Commission with regard to that part of ENU's claim which concerns the Commission's duty to direct the Agency to implement the Commission's decision on the introduction of a 'special course of action'; and
- (3) order the applicant to pay the costs of the proceedings.