# JUDGMENT OF THE COURT (First Chamber)
22 April 1999 *

In Case C-161/97 P,

**Kernkraftwerke Lippe-Ems GmbH,** a company incorporated under German law, established in Lingen, Germany, represented by Bernd Kunth, Gerhard Wiedemann and Helmut Nicolaus, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Alex Bonn, 22 Côte d'Eich,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber, Extended Composition) of 25 February 1997 in Joined Cases T-149/94 and T-181/94 *Kernkraftwerke Lippe-Ems* v *Commission* [1997] ECR II-161, seeking to have that judgment set aside,

the other party to the proceedings being:

**Commission of the European Communities,** represented by Jürgen Grunwald, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: German.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, D. A. O. Edward and M. Wathelet (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from Kernkraftwerke Lippe-Ems GmbH and the Commission at the hearing on 24 September 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 November 1998,

gives the following

## Judgment

1 By application lodged at the Registry of the Court of Justice on 25 April 1997, Kernkraftwerke Lippe-Ems GmbH ('KLE') brought an appeal pursuant to Article 50 of the Euratom Statute of the Court of Justice against the judgment of 25 February 1997 in Joined Cases T-149/94 and T-181/94 *Kernkraftwerke Lippe-Ems* v *Commission* [1997] ECR II-161 ('the contested judgment'), in which the Court of

First Instance dismissed its applications for annulment of Commission Decisions 94/95/Euratom of 4 February 1994 (OJ 1994 L 48, p. 45) and 94/285/Euratom of 21 February 1994 (OJ 1994 L 122, p. 30), both relating to a proceeding in application of the second paragraph of Article 53 of the Euratom Treaty.

## Legal background

2 Under the second paragraph of Article 1 of the Euratom Treaty, the task of the Community is

'to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries'.

3 Under Article 2(d) of the Euratom Treaty, the Community is to 'ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels'. The implementation of that obligation is the subject of Title II, Chapter 6 (Articles 52 to 76 of that Treaty), which establishes a common system of supplies of ores, source materials and special fissile materials.

4 Under Article 52(1) of the Treaty, 'the supply of ores, source materials and special fissile materials shall be ensured ... by means of a common supply policy on the principle of equal access to sources of supply'. For that purpose, Article 52(2)(a) lays down that 'all practices designed to secure a privileged position for certain users shall be prohibited'.

5 To carry out that policy, Article 52(2)(b) provided for the establishment of a Euratom Supply Agency ('the Agency'), which was given legal personality and financial autonomy by Article 54.

6 In addition, under Article 53 of the Treaty:

'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.'

*Exclusive right of the Agency to conclude supply contracts*

7 Under Article 52(2)(b), in order to fulfil its functions relating to supplies, the Agency has *inter alia* 'an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside the Community or from outside'.

8 Under Article 55, the Member States are to communicate or cause to be communicated to the Agency all the information necessary to enable it to exercise *inter alia* its exclusive right to conclude supply contracts.

9 The supply of ores, source materials and special fissile materials coming from outside the Community is governed principally by Article 64 of the Treaty, which confirms that the Agency, acting where appropriate within the framework of agreements concluded between the Community and a third State or an international organisation, 'subject to the exceptions provided for in this Treaty [has] the exclusive right to enter into agreements or contracts'.

*Procedure for balancing supply and demand*

10 The first paragraph of Article 65 of the Treaty applies to supplies of materials coming from outside the Community the procedure for balancing supply and demand laid down by Article 60 with respect to supplies coming from inside the Community.

11 Article 60 provides:

'Potential users shall periodically inform the Agency of the supplies they require, specifying the quantities, the physical and chemical nature, the place of origin, the intended use, delivery dates and price terms, which are to form the terms and conditions of the supply contract which they wish to conclude.

Similarly, producers shall inform the Agency of offers which they are able to make, stating all the specifications, and in particular the duration of contracts, required to enable their production programmes to be drawn up. Such contracts shall be of not more than 10 years' duration save with the agreement of the Commission.

The Agency shall inform all potential users of the offers and of the volume of applications which it has received and shall call upon them to place their orders by a specified time-limit.

When the Agency has received all such orders, it shall make known the terms on which it can meet them.

If the Agency cannot meet in their entirety all the orders received, it shall, subject to the provisions of Articles 68 and 69, share out the supplies proportionately among the orders relating to each offer.

Agency rules, which shall require approval by the Commission, shall determine the manner in which demand is to be balanced against supply.'

12 The second paragraph of Article 65 provides, however, that 'the Agency may ... decide on the geographical origin of supplies provided that conditions which are at least as favourable as those specified in the order are thereby secured for the user'.

13 The first paragraph of Article 61 of the Treaty, which forms part of Section 2 on materials coming from inside the Community and which should also be referred to in this connection, provides as follows:

'The Agency shall meet all orders unless prevented from so doing by legal or material obstacles.'

14 On 5 May 1960, pursuant to the sixth paragraph of Article 60 of the Treaty, the Agency adopted Rules determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials (OJ, English Special Edition 1959-1962, p. 46, hereinafter 'the Rules').

15 The Rules establish simplified procedures for balancing demand against supply of ores. Thus the first paragraph of Article 5 provides:

'If, in respect of a specific product and where in particular the Agency takes the initiative, the Commission, having heard the Advisory Committee, finds that the situation on the market shows a clear surplus of supply over demand, it may, by means of an appropriate directive, call upon the Agency to apply the simplified procedure ...'

16 Under that simplified procedure, users and producers are empowered to negotiate directly and to sign supply contracts, after the Agency has laid down the general conditions to be satisfied by those contracts. The contracts are then to be communicated 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 receipt of the contracts.

17 Under the final paragraph of Article 5 of the Rules, however, that procedure does not apply to supply contracts relating to special fissile materials.

18 Article 5 *bis* of the Rules, which was inserted by the Agency Regulation of 15 July 1975 (OJ 1975 L 193, p. 37), provides for a new simplified procedure which, while ensuring that the Agency has complete information on the market (indent (b)), authorises users 'to invite tenders directly from the producers of their choice and to negotiate the supply contract freely with the latter' (indent (a)).

19 However, under Article 5 *bis*:

'...

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

1. designation of the contracting parties,

2. quantities of materials to be supplied,

3. annual calendar of delivery dates,

4. nature of the materials to be supplied,

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

6. price and terms of payment,

7. duration of the contracts;

(d) the contract shall, for the purposes of its conclusion, be submitted to the Agency for signature within 10 working days;

...

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

(g) a refusal to conclude the contract shall be notified to the parties concerned in a reasoned decision. This decision may be referred to the Commission in accordance with the provisions of Article VIII(3) of the Statutes of the Euratom Supply Agency;

...'

*Prices*

20 With respect to supplies coming from inside or outside the Community, Article 67 of the Treaty provides:

'Save where exceptions are provided for in this Treaty, prices shall be determined as a result of balancing supply against demand as provided in Article 60; the national regulations of the Member States shall not contravene such provisions.'

21 The first paragraph of Article 68 of the Treaty prohibits 'pricing practices designed to secure a privileged position for certain users in violation of the principle of equal access ...'.

22 Under Article 69 of the Treaty:

'The Council may fix prices, acting unanimously on a proposal from the Commission', while the Agency 'may propose to the users who have placed orders that prices be equalised'.

23 The agreement between the European Economic Community and the European Atomic Energy Community of the one part and the Union of Soviet Socialist Republics of the other part on trade and commercial and economic cooperation, signed on 18 December 1989 and concluded on behalf of the European Atomic Energy Community by Commission Decision 90/117/Euratom of 27 February 1990 (OJ 1990 L 68, p. 2, hereinafter 'the Trade Agreement'), applies to nuclear

matters, in accordance with Article 2(1) thereof. Article 14 lays down that goods are to be 'treated between the Contracting Parties at market-related prices'.

24 Finally, reference should be made to the Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States (OJ 1986 C 241, p. 1), point 5 of which states that 'the energy policy of the Community and of the Member States must endeavour' to achieve

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

...

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

...'

**Facts and procedure before the Court of First Instance**

25 In the contested judgment, the Court of First Instance found as follows:

'1 The applicant [KLE] ... owns and operates a nuclear power station in Lower Saxony, Germany. It states that it follows a medium-term fuel supply policy

and concludes supply contracts at regular intervals to cover its fuel requirements for up to five trading years.

2 In June 1993 it invited tenders for the supply of natural uranium in the form of uranium hexafluoride ($UF_6$). On 10 and 22 November 1993, it concluded a supply contract with the company which had made the most attractive offer, British Nuclear Fuels plc (hereinafter "BNFL"), established in the United Kingdom. Under that contract, 400 tonnes of natural uranium in the form of $UF_6$ were to be delivered by 31 March 1995 at the latest to an enrichment company established within the Community. The purchase price agreed was US $22 per kilogram, excluding VAT. The contract was silent as to the place of origin of the uranium to be supplied, but BNFL undertook to inform KLE and the ... Agency ... of the country of origin on the occasion of each partial delivery at the latest. The contract stated that it was to take effect only with the agreement of the Agency.

3 Article 5 *bis* (d) of the Rules ... provides that under a "simplified procedure" a supply contract is, for the purposes of its conclusion, to be submitted to the Agency for signature. Under Article 5 *bis* (f), the Agency then has 10 working days within which to act, either by concluding or by refusing to conclude the contract.

4 On 29 November 1993 the Agency received for signature the contract proposed by KLE and BNFL.

5 By letter of 10 December 1993, received on 13 December 1993, the last day of the period for signature of 10 working days, the Agency asked KLE and BNFL for information as to the origin of the uranium which was the subject of the contract. On 14 December 1993 BNFL informed the Agency that the uranium would come from the Commonwealth of Independent States (CIS), probably Russia.

6 By letter of 20 December 1993 the Agency informed the parties that its policy was to see to it that users in the European Atomic Energy Community (hereinafter "the Community") "[did] not become overdependent on any single source of supply beyond reasonable limits, and that the acquisition of nuclear materials from CIS Republics [took] place at fair prices related to those of the market (i. e. reflecting cost of production and compatible with prices of producers in market economy countries)". The Agency stated that its policy of diversification was aimed at confining the proportion of supplies from the CIS to 20 to 25% of individual Community users' needs. It considered that the contract submitted by KLE might make it too dependent on uranium from the CIS. It calculated that, taking into account total deliveries to KLE during the previous three years, KLE was entitled to acquire about 45 tonnes a year of natural uranium of CIS origin. KLE had, however, already contracted for quantities far exceeding the level of reasonable dependency for several years. Moreover, the proposed prices did not reflect normal production costs and were not comparable with prices charged in market economy countries. The Agency therefore considered that it was not appropriate to conclude the contract, but still asked the parties to submit their comments before it took a final decision.

7 On 29 December 1993 KLE referred the matter to the Commission under the second paragraph of Article 53 of the Treaty, alleging that the Agency had failed to act.

8 On 6 January 1994 it was notified of Decision No 1/94 of the Agency concerning the supply contract submitted on 29 November 1993. Pursuant to that decision, the Agency signed the contract of 10 and 22 November 1993 between KLE and BNFL with the addition of a condition that the natural uranium to be supplied could not come directly or indirectly from the CIS.

9 On 10 January 1994 the Commission informed KLE's representatives that in its opinion the Agency's decision communicated to KLE on 6 January had been taken within the time-limit laid down, so that the reference to the Commission was now devoid of purpose.

10 By letter of 20 January 1994 KLE made additional submissions in the procedure initiated on 29 December 1993, to take account of Decision No 1/94.

11 By another letter of the same date, it referred Decision No 1/94 to the Commission pursuant to the second paragraph of Article 53 of the Treaty.

12 With respect to the first procedure, concerning the Agency's alleged failure to act, the Commission adopted on 4 February 1994 Decision 94/95/Euratom relating to a procedure in application of the second paragraph of Article 53 of the Euratom Treaty (OJ 1994 L 48, p. 45). It rejected the requests made by KLE, which were based on the claim that the Agency had not taken a decision within the time-limit and asked the Commission in particular to instruct the Agency to conclude the contract of 10 and 22 November 1993. The Commission considered that the Agency had not failed to act, since it had been entitled to complete its documentation and the period of 10 working days had therefore not started to run until the date when the additional information requested was received, namely 14 December 1993, and had not expired until 6 January 1994, the date on which Decision No 1/94 was actually taken.

13 With respect to the procedure concerning Decision No 1/94, the Commission adopted on 21 February 1994 Decision 94/285/Euratom relating to a procedure in application of the second paragraph of Article 53 of the Euratom Treaty (OJ 1995 L 122, p. 30). It considered that the Agency's decision was lawful on its merits and therefore rejected KLE's requests.

14 In those circumstances, KLE considered that the supply contract at issue could not be performed. BNFL and KLE did not proceed with it.

15 On 8 and 14 March 1994 KLE and BNFL concluded a new contract for the supply of 400 tonnes of uranium in the form of $UF_6$ at a price of US $27 per kilogram, subject to the condition that the uranium did not come directly or indirectly from the CIS. That contract was concluded by the Agency on 30 March 1994.'

26 Those were the circumstances in which proceedings were instituted in Cases T-149/94 and T-181/94, seeking annulment of Decisions 94/95 and 94/285 respectively, and, specifically in Case T-181/94, an order that Euratom pay KLE damages of DEM 3 511 279.30, with interest at 6% per annum from 7 April 1994.

## The contested judgment

*Case T-149/94*

27 In the proceedings before the Court of First Instance, KLE put forward five pleas in law challenging Decision 94/95.

28 In the first two pleas in law, alleging infringement of Article 5 *bis* (f) of the Rules and breach of the principles of proportionality and legal certainty, KLE complained that the Agency had reserved the right, first, to ask for supplementary information and, second, not to take a final decision until it had completed its documentation, that is, until it had in its possession the minimum information required by Article 5 *bis* (c) of the Rules.

29 On that point, the Court of First Instance held:

'35 The geographical origin of the materials to be supplied is thus one of the principal elements of a supply contract which have to be communicated to the Agency under Article 5 *bis* of the Rules. It is essential for the Agency to know

the geographical origin of the supplies in order to ensure reliability of supply — the aim of the supply policy pursued — as will be shown by the examination of Case T-181/94 (see in particular paragraphs 92 to 94 below).

36 Moreover, it is clear from the actual wording of Article 5 *bis* (c) of the Rules that later communication of the country of origin is permissible only if the supplier was unable to provide that information at the time of entering into the contract.

37 In the present case, it is apparent that KLE and its supplier had agreed, at least implicitly, that the materials would come from the CIS ...

38 By not stating the geographical origin of the uranium in the supply contract, even though it had been agreed between the parties at least implicitly, KLE was itself the cause of the Agency's administrative difficulties in coming to a decision. In those circumstances, KLE was not entitled to rely on Article 5 *bis* (f) of the Rules, which provides for a period of 10 working days within which the Agency must act, for cases which do not present any problems.

39 On the other hand, the Court considers that in the present case the Agency was entitled, before the period provided for in Article 5 *bis* (f) of the Rules expired, to request the parties to provide the missing documentation by communicating to it the origin of the materials to be supplied. Neither Article 5 *bis* (f) of the Rules nor the Treaty precluded such a request, which was on the contrary justified in the circumstances of the case.

40 It appears from the documents in the case that the Agency took its decision on 6 January 1994, which was the 10th working day from 14 December 1993, the date when it received the information it had asked for. Such a lapse of time

was reasonable and did not infringe Article 5 *bis* (f) of the Rules or breach the principles of proportionality and legal certainty relied on by the applicant.

41 Accordingly, the first and second pleas must be rejected as unfounded.'

30 The Court of First Instance, noting that KLE had not pursued the third plea in law, alleging breach of the rules on the division of powers, held in paragraph 43 of the contested judgment that there was no need to rule on whether that plea was well founded.

31 Next, in paragraphs 46 to 51 of the contested judgment, the Court of First Instance rejected the fourth plea in law, alleging failure to state reasons for Decision 94/95, since it considered that the decision clearly and unequivocally disclosed the reasoning followed by the Commission.

32 Finally, in the fifth plea in law, alleging misuse of powers, KLE essentially argued that the Agency and the Commission had no discretion, but were under an obligation to conclude the contract submitted by the applicant. The Court of First Instance held in paragraphs 53 and 54 that KLE had adduced no evidence at all that the Agency and the Commission had pursued an aim other than that of implementing the supply policy.

33 The Court of First Instance consequently dismissed the application in Case T-149/94.

The claim for annulment

34 In the proceedings before the Court of First Instance, KLE put forward five pleas in law challenging Decision 94/285.

35 The first plea in law consisted of four limbs.

36 The first and second limbs alleged an infringement of the Agency's obligation to conclude the contract in accordance with Article 5 *bis* of the Rules and breach of Article 60, the first paragraph of Article 61, the first paragraph of Article 65, and Articles 52(2) and 64 of the Treaty, in that the supply policy, as defined and applied in the case, allowed for the possibility of departing from the operation of supply and demand in the exercise of the exclusive right to conclude contracts for the supply of uranium.

37 On that point, the Court of First Instance held:

'85 The supply system established by Chapter 6 of the Treaty must be considered in the light of the aims of the Community. In this regard, it is apparent from the structure of the Treaty that the task of the Agency is to guarantee one of the essential aims which the Treaty assigns to the Community, in Article 2(d), namely reliability of supplies, in accordance with the principle of equal access to resources laid down in Article 52(1) of the Treaty. This is clear from Article 52(2)(b) of the Treaty, which establishes that specialised body expressly for that

purpose and confers on it in principle exclusive rights in order to ensure that Community users receive regular and equitable supplies of nuclear materials both from the Community and from non-member countries. Under that provision, the system for ensuring supplies must be operated by the Agency, which, in order to perform its task, has the exclusive right to conclude contracts for the supply of those products from inside or outside the Community (see Joined Cases T-458/93 and T-523/93 *ENU* v *Commission* [1995] ECR II-2459, paragraph 57).

86 In particular, the simplified procedure introduced by Article 5 *bis* of the Rules does not deprive the Agency of its exclusive rights (*ENU* v *Commission*, paragraph 73). Even within the framework of the simplified procedure, the Agency therefore has the right to object to a contract which might prejudice the achievement of the objectives of the Treaty.

87 Moreover, the principle of balancing supply and demand must as a general rule be observed in the exercise of the Agency's exclusive right to conclude supply contracts. That obligation, which applies as a matter of principle, follows in particular from Article 60 and the first paragraph of Article 65 of the Treaty, which concern the balancing mechanism, from Article 67, which states that prices are to be determined by that balancing exercise, and from the second paragraph of Article 65, which provides that if the Agency decides on the geographical origin of supplies from outside the Community it is obliged to secure conditions for the user which are at least as favourable as those specified in the order.

88 The Treaty provides for one specific exception, however, to observance of the principle of supply and demand. Under the first paragraph of Article 61, the Agency is obliged to meet all orders, "unless prevented from so doing by legal or material obstacles". As the Commission rightly submits, the Agency must therefore ascertain in each case whether there are any legal or material obstacles to meeting the order.

89 In the present case, the Commission argues that there were three such obstacles, that is to say, one deriving from the requirements of the policy of

diversification of external sources of supply, one relating to the level of prices stemming from the Trade Agreement, and one deriving from the obligation to ensure equal access to resources.

90 It should be noted to begin with that where decisions concerning economic and commercial policy and nuclear policy are involved, the Agency has a broad discretion when exercising its powers. In those circumstances, review by the Court must in any event be confined to identifying any manifest error of assessment or misuse of powers (*ENU* v *Commission*, paragraph 67).

91 With respect to the first obstacle, the Commission considers that the prices offered in the CIS are so low that Community users are tempted to cover as much of their requirements as possible with nuclear materials from the CIS. It submits that if unlimited imports from the CIS were allowed, Community undertakings would become dependent on that source of supply. There would be a twofold disadvantage. First, continuity of supplies could not be guaranteed in the long term. Second, alternative sources might disappear. The Commission recalls that a policy of diversification was approved by the Council in its Resolution of 16 September 1986. It submits that the risk that massive imports of nuclear materials from the CIS at prices considerably lower than Western prices would imperil the reliability of supplies in the Community is thus an obstacle within the meaning of the first paragraph of Article 61 of the Treaty.

92 The Court considers that the Agency may lawfully bar imports of nuclear materials if those imports are liable to jeopardise the achievement of the aims of the Treaty, in particular by their effect on sources of supply. Such a risk may be regarded as a legal obstacle, within the meaning of the first paragraph of Article 61 of the Treaty, to meeting an order (*ENU* v *Commission*, paragraph 64). To put it differently, in order to ensure geographical diversification of external sources of supply, the Agency has a discretion — exercising its

exclusive right to conclude contracts for the supply of ores and other nuclear fuels so as to ensure reliability of supplies in accordance with the principle of equal access to resources, in conformity with the task conferred on it by the Treaty — to bar certain imports of uranium which would reduce such diversification (*ENU* v *Commission*, paragraph 68).

93 In the present case, with respect to the possible existence of a threat to reliability of supplies, it is common ground that the volume of supplies from the CIS imported into the Community has increased substantially since 1990. The Commission argues that there is a structural deficiency of world production as compared to use of uranium, but KLE does not accept that. According to a diagram of natural uranium production and consumption in the West from 1994 to 2004, submitted by KLE, nominal production capacity will exceed demand in 2000. However, it should be noted that, according to that diagram, demand will still exceed supply between 1994 and 2000.

94 In those circumstances, at the time when the Commission adopted Decision 94/285, the possibility could not be ruled out that ensuring a regular and equitable supply in accordance with Article 2(d) of the Treaty could be jeopardised if imports of nuclear materials from the CIS were permitted to continue in unlimited quantities and replaced supplies from other sources for a certain time without there being any guarantee of continuity of supplies in the long term.

95 The existence of the first legal obstacle relied on by the Commission must therefore be accepted.

96 With respect to the second obstacle, the Commission submits that the supply system established by the Treaty aims at ensuring that nuclear materials are imported into the Community at market-related prices. That principle has in particular been recognised by Article 14 of the Trade Agreement as applicable in relations between the Community, on the one hand, and the USSR or subsequently the CIS States, on the other.

97 As the Commission observes, the Court of Justice has held that an international agreement concluded by the Community may create rights and obligations for undertakings.

98 It held as follows with respect to the Convention on the Physical Protection of Nuclear Materials, Facilities and Transports (Ruling 1/78 [1978] ECR 2151, paragraph 36):

"The tasks to be carried out by the Community will relate in essence to the supply arrangements and the management of the nuclear common market ... The relevant provisions of the Treaty, together with the provisions of the Convention itself, which, once it has been concluded by the Community, will form an integral part of Community law, will provide an appropriate legal basis for the necessary implementing measures."

99 Article 14 of the Trade Agreement thus forms part of Community law. Moreover, by virtue of Article 64 of the Treaty, the Agency must act, where appropriate, within the framework of agreements concluded between the Community and a third State.

100 In order to verify whether Article 14 of the Trade Agreement was applied correctly in the present case by the Agency and the Commission, the available data on prices must be analysed. According to a table annexed to the Agency's annual report for 1993, the average price varied, from 1990 to 1993, between US $29.39 and US $21.17 per pound of $U_3O_8$ for long-term multiannual contracts and between US $9.68 and US $9.05 per pound of $U_3O_8$ for spot market contracts. According to KLE, the actual price set in its contract was US $8.02 per pound of $U_3O_8$; according to the Commission, it was only US $6.93 per pound of $U_3O_8$. Having regard to the fact that, according to its reply to a written question from the Court, KLE attempted to cover not merely occasional requirements but its basic requirements for a 15-month period by the supply contract in question, that contract, concluded at a price which was even lower than the average spot market price, did not comply with the rule that supplies are to take place at market-related prices.

101 The existence of a second legal obstacle within the meaning of the first paragraph of Article 61 of the Treaty must in those circumstances be regarded as proven.

102 With respect to the third obstacle to concluding the contract, allegedly deriving from the obligation to ensure equal access to resources and to prevent one user from being given a privileged position in relation to competitors, it must be considered that, if imports are to be limited, the application of a permissible threshold of dependence, fixed by reference to the state of the market at a maximum percentage of individual users' consumption, is justified in order to guarantee equal access to resources, in accordance with Article 52(1) of the Treaty.

103 The Agency, within the bounds of its broad discretion, fixed the permissible degree of dependence at a maximum of 25%, taking account *inter alia* of the existing long-term production capacity of the CIS and of the fact that that represented some 25% of world production.

104 In the present case, it is common ground that KLE had already bought quantities of uranium from the CIS which exceeded that limit.

105 The Commission was thus entitled to find, in that respect, that there was a legal obstacle within the meaning of the first paragraph of Article 61 of the Treaty.

106 Furthermore, contrary to KLE's assertions, the specific provisions on prices in the Treaty, that is to say Articles 67 to 69, cannot be interpreted as precluding the application of the first paragraph of Article 61 of the Treaty on the ground that in the simplified procedure the Agency or the Commission may not interfere with the prices negotiated except under the conditions laid down in Articles 68 or 69. The aim of Article 61 is in fact to enable the Agency, where there is a legal or material obstacle of whatever kind to meeting an order, to block that order, thus derogating if need be from the balancing of supply and demand, a

principle which applies with respect to prices by virtue of Article 67. Moreover, contrary to KLE's claims, the Agency did not in any way fix the price by inserting in the contract a clause on the origin of the materials to be delivered.

107 For all the above reasons, the Agency did not commit an error of law or manifest error of assessment when it refused to conclude the supply contract in question unconditionally and inserted in that contract a condition that the uranium was not to come from the CIS.

108 The Commission's decision confirming that of the Agency cannot therefore be declared unlawful.

109 The first and second limbs of the first plea are thus unfounded and must be rejected.'

38 In the third limb of the first plea, alleging infringement of the aims of Article 1 of the Treaty, KLE complained that the Commission and the Agency had been guided only by the interests of producers and had not taken the interests of users into account, and criticised the Agency's policy as giving only feeble protection to producers within the Community, who cover only 20% of the Community's uranium requirements, and benefiting producers in certain non-member countries.

39 The Court of First Instance rejected that complaint on the following grounds:

'113 The Agency seeks to ensure reliability of supplies and to guarantee continuity of supplies to Community users. It is *inter alia* in the interest of the Community nuclear industry that a particular source of supply should not become too large in relation to alternative sources. It is likewise in the interest of the

Community as a whole and consistent with the aim of developing trade with other countries that imports should take place at market-related prices, as shown in particular by Article 14 of the Trade Agreement. As the Court has already stated above, Decision 94/285 thus corresponds to the requirements of the supply policy. It does not therefore conflict with the task of the Community.'

40 The fourth limb of the first plea alleged breach of the rules of the common market in natural uranium, in particular Article 2(g) and Article 92 et seq. of the Euratom Treaty, under which traders are guaranteed the freedom to obtain supplies from a supplier of their choice established in another Member State.

41 The Court of First Instance rejected that complaint on the following grounds:

'117 The freedom of an undertaking to obtain supplies from a supplier of its choice established in another Member State must be exercised within the limits laid down by the Treaty and set out above, in particular in such a way as to ensure that reliability of supplies is not jeopardised. In the present case, KLE's contract came up against certain legal obstacles which, under the first paragraph of Article 61 of the Treaty, restrict that freedom. While KLE's supplier was indeed a company established in the Community, it acted only as an intermediary, the source of the materials to be supplied being the CIS.'

42 In support of its second plea in law, KLE argued that there had been a breach of the principle of legal certainty, in that the Agency's conduct had lacked transparency, a breach of the principle of equal treatment, in that the Agency had not taken account of the small share of the electricity supply in Germany accounted for by electricity of nuclear origin, and a breach of the principle of proportionality, in that the aim of diversification could equally well have been achieved by having recourse

to the second paragraph of Article 65 of the Treaty, or to Articles 70 and 72 of the Treaty concerning support for prospecting programmes and the building up of commercial stocks and emergency stocks.

43 On that point, the Court of First Instance held as follows:

'125 With respect to the allegation relating to the principle of legal certainty, it must be stated that the measures on which the Agency's approach is based, namely the Council Resolution, which sets out in the second indent of point 5(a) the aim of geographical diversification of the Community's external sources of supply, and the Trade Agreement, which provides in Article 14 that prices must be market related, have both been published in the *Official Journal of the European Communities*. The principle of equal access to resources is laid down in Article 52(1) of the Treaty itself.

126 Moreover, in the Agency's annual report for 1992 (see the general survey of the supply situation in the Community), it was stated that imports of natural uranium from the CIS accounted for some 25% of net Community requirements and that contracts had already been concluded for future deliveries of very substantial quantities from that source. The level of supplies of materials from the CIS was regarded as critical by the Agency and the Commission, since if the trend observed from 1990 onwards were to continue, reliability of supplies in the future might be threatened. The report explained that a working group of experts, set up within the Advisory Committee, had concluded that the materials and services from the CIS were being offered on the Community market at prices which were unrelated to production costs in the West. The report stated that the Commission and the Agency considered that corrective measures were justified, based principally on the exclusive right to conclude contracts. It also stated that the Agency's policy had in general been favourably received.

127 Having regard to the existence of easily accessible sources of information which a reasonably diligent trader in this very particular and clearly

identified sector must be taken to know, it cannot be said that there was a lack of transparency.

128 Consequently, the complaint alleging breach of the principle of legal certainty must be rejected.

129 It was the Agency itself which adopted an internal guideline figure relating to the "permissible degree of dependence", a guideline under which each trader in the Community is allowed to cover no more than about 25% of his requirements with materials from the CIS.

130 While that upper limit of permissible dependence was admittedly not published as such, that circumstance cannot make Decision 94/285 unlawful. That threshold was simply an internal assessment criterion which the Agency took into account to ensure equal access to resources for Community users. It was not a strict rule, since the development of the situation on the market in question required a flexible approach. Moreover, in the circumstances of the case, KLE should have understood that, since it had already bought large quantities of materials from the CIS, further imports on its part might be regarded as contrary to the interests of the Community.

131 As to the principle of equal treatment, KLE appears to consider in its written pleadings that the principle is infringed if, in assessing the situation, no account is taken of the varying degree of dependence on nuclear materials from the CIS of undertakings established in the different Member States. At the hearing, however, it argued that the unlawful difference in treatment consisted in the Commission's failure to fulfil its duty of ensuring that all traders submit their contracts for the supply of nuclear materials to the Agency for conclusion. On that point, the Commission replied at the hearing that it knew of no case in which a contract had not been submitted to the Agency.

132 Furthermore, the Agency applies a threshold of permissible dependence in order to ensure equal access to resources for undertakings established in the Community. Such an approach is justified on the basis of Article 52(1) of the Treaty. The Agency and the Commission cannot be required to take account of the particular circumstances prevailing in different Member States. On the other point, KLE has not shown that there were cases in which the Agency and the Commission failed to object to an infringement of Article 5 *bis* of the Rules.

133 In those circumstances, the complaint alleging breach of the principle of equal treatment cannot be upheld.

134 Finally, on the principle of proportionality ...

135 Application of [the second paragraph of Article 65 and Articles 70 and 72 of the Treaty] would not ... have been able to solve the problem, in that the Agency, considering the aims of its supply policy, had to block imports from the CIS at non-market-related prices. Moreover, the contract was approved on condition that the materials did not come from the CIS. Such a condition cannot be disproportionate, for the reasons stated above, in particular in paragraphs 92 to 94.

136 The complaint alleging breach of the principle of proportionality must therefore be rejected as well.'

44 In its third plea in law, alleging breach of the rules on the division of powers, KLE submitted that neither the Agency nor the Advisory Committee is a Community institution within the meaning of Article 3(1) of the Euratom Treaty, that the establishment of the common supply policy is reserved to the Community's political

institutions, namely the Commission and the Council, and that the Agency is responsible only for the commercial aspect of supply and has no power to fix import quotas.

45 The Court of First Instance rejected that plea on the following grounds:

140 On the basis of the analysis above (see in particular paragraphs 85 to 109), it appears that in the present case the Agency followed the path outlined by the Council and Commission and acted within the bounds of its broad discretion to take decisions in the field of economic and commercial policy and of nuclear policy (*ENU* v *Commission*, paragraph 67). In any event, in so far as KLE disputes the Agency's powers, it should be noted that Decision 94/285 was adopted by the Commission. In exercising its power of review of the act of the Agency referred to it by KLE under the second paragraph of Article 53 of the Treaty, the Commission adopted the Agency's assessment as its own. It thus approved the details of the supply policy and its implementation by the Agency, in accordance with the procedure established by the Treaty.'

46 In its fourth plea in law, KLE argued that there had been a breach of the obligation to state reasons, in that Decision 94/285 had not revealed the structural relationship between the powers of the Agency and the Treaty and had not explained why KLE would become dependent on uranium from the CIS or in what respect the purchase price agreed in the supply contract did not correspond to the conditions of the market economy or was not related to market prices.

47 The Court of First Instance rejected that plea on the following grounds:

'144 The Court has already noted (see paragraph 46 above) that the reasons stated for a measure must disclose clearly and unequivocally the reasoning of the Community authority which adopted it, so as to enable the persons concerned to ascertain the reasons for the measure and thus to defend their rights and so as to enable the Community judicature to exercise its supervisory jurisdiction, and that the scope of the obligation to state reasons must be assessed in the light of its context.

145 The Commission made it clear in its decision that the Agency is not obliged to meet orders where there are legal or material obstacles to doing so (point 14 of Decision 94/285). It went on to mention the supply policy, the general objective of diversification of sources of supply and the measures on which it is based, such as the Council Resolution (points 15 and 16). It then referred first to Article 64 of the Treaty, under which the Agency may act within the framework of agreements concluded between the Community and a third State, and second to the Trade Agreement, in particular Article 14 thereof (point 21). Finally, the Commission explained that an increase in the proportion of total supplies from the CIS, which at that time was set at 20 to 25%, would be difficult to reconcile with the Community's long-term supply interests (point 33).

146 In view of the context and of the fact that it was preceded by the letter of 20 December 1993, referred to in paragraph 6 above, and by the decision which was the subject of the first action, Decision 94/285 discloses clearly and unequivocally the principal reasons for the refusal to conclude the contract submitted by KLE.'

48 Finally, KLE put forward a fifth plea in law, namely misuse of powers, submitting that the Agency and the Commission had no discretion but were under an obligation to conclude the contract it had submitted to them.

49 The Court of First Instance rejected that plea, holding that:

'149 As already stated above (see paragraph 53), the concept of misuse of powers has a precisely defined scope in Community law and refers to cases where an administrative authority exercises its powers for a purpose other than that for which they were conferred on it. In that respect, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated.

150 KLE has not shown that the Agency and the Commission pursued an aim other than that of implementing the Euratom supply policy.'

50 The Court of First Instance therefore dismissed the claim for annulment in its entirety.

The claim for damages

51 Since it had held that the conduct alleged against the Agency and the Commission's refusal to accede to the requests submitted to it by KLE were not vitiated by any irregularity, the Court of First Instance dismissed the claim for damages as unfounded.

## The appeal

*Admissibility of the appeal as a whole*

52 The Commission submits that the appeal is manifestly inadmissible and asks the Court to dismiss it pursuant to Article 119 of the Rules of Procedure, on the grounds that it constitutes a repetition of the application made at first instance and contains no specific and identifiable legal arguments against the contested judgment. The appeal therefore complies neither with Article 52 of the Euratom Statute of the Court of Justice nor with Article 112(1)(c) of the Court's Rules of Procedure.

53 In its view, the appeal should also be dismissed as inadmissible on the ground that, contrary to Article 112(1)(a) of the Rules of Procedure, it does not mention the appellant's correct address, which, under Paragraph 3(1) of the German law on limited companies, is Lingen/Ems. It is undisputed that the address stated in the appeal is 'Rheinlanddamm 24, D-44139 Dortmund'.

54 Assessment of the merits of the Commission's first argument in support of its plea of inadmissibility depends on detailed consideration of all the pleas adduced by KLE in the appeal. Reference should thus be made to the Court's observations on the substance.

55 As to the question of KLE's address, the fact that the appeal refers to Dortmund, a city where KLE's administrative offices are said to be based, rather than the town of Lingen cannot as such warrant declaring the appeal inadmissible, even if Lingen is to be regarded as the place where the company is established for the purposes of

German law. In the circumstances of the case, such an irregularity is not so substantial as to make the appeal formally inadmissible, since in any event it is apparent from the contested judgment, annexed to the appeal, that KLE is established in Lingen.

56 The second part of the Commission's plea of inadmissibility must therefore be rejected.

*Substance*

57 KLE submits in the reply that the Members of the Court of First Instance did not have personal knowledge of all the documents in the case, but knew them only via the summary, much compressed and sometimes confused, made by the Judge-Rapporteur in the Report for the Hearing. In KLE's view, that constitutes a breach of the principle relating to the direct nature of the procedure and the right to be heard.

58 Quite apart from the fact that this plea was submitted belatedly, it is in any event manifestly unfounded. The purpose of the Judge-Rapporteur's report is precisely to present in summary form the elements of fact and law in the case and the pleas and arguments of the parties, and it is open to the parties before or during the hearing to ask for corrections to be made or to express reservations. Moreover, it is common ground that the judges of the Court of First Instance who took part in the deliberations had access throughout the procedure to all the documents which made up the case-file.

59 KLE puts forward four pleas in law challenging the judgment of the Court of First Instance in so far as it concerns Case T-149/94.

(a) Article 5 *bis* (f) of the Rules and the provisions of Chapter 6 of the Treaty relating to supply

60 In its first plea in law KLE submits that, contrary to the view taken by the Court of First Instance, Article 5 *bis* (f) of the Rules does not authorise the Agency either to make a request for information or to decide to postpone the 10-day period prescribed by that provision, which requires it to conclude or refuse to conclude the contract in question within that period. Furthermore, neither it nor BNFL knew the 'country of origin' of the materials to be supplied when they submitted the contract to the Agency on 29 November 1993. The Agency should have agreed to that information being communicated to it later, and the request for information should not have had the effect of postponing the time-limit laid down in Article 5 *bis* (f) of the Rules.

61 On this point, it must be stated that the Court of First Instance was entitled to find, in paragraph 35 of the contested judgment, that 'the geographical origin of the materials to be supplied is ... one of the principal elements of a supply contract which have to be communicated to the Agency under Article 5 *bis* of the Rules', knowledge of the origin being 'essential ... in order to ensure reliability of supply — the aim of the supply policy pursued'.

62 Under Article 2(d) of the Treaty, the Community is to 'ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels'.

Clearly regularity of supply is closely linked with diversity of sources of supply, as appears from the second indent of point 5(a) of the Council Resolution of 16 September 1986. Article 60 of the Treaty, under which users of raw materials are periodically to inform the Agency of the place of origin of supplies, confirms the importance of knowledge of the geographical origin of supplies for implementation of the common supply policy by the Agency.

63 Under those conditions, the Court of First Instance did not err in law in holding, in paragraph 39 of the contested judgment, that the Agency could request the parties to provide the missing documentation by communicating to it the origin of the materials to be supplied. While Article 5 *bis* (f) of the Rules does require the Agency to take a decision within 10 days, it does not prohibit it, if the contract submitted is incomplete, in particular if it omits to communicate the information available to the parties on the origin of the materials to be supplied, from having recourse to an investigative measure such as that at issue, where the request for information is, as the Court of First Instance expressly stated in paragraph 39, made within the 10-day period.

64 As the Advocate General observes in point 106 of his Opinion, having regard to the importance of the part played by the Agency in connection with external supply, it is not excessive to consider that it has investigative powers, in that such powers are warranted by the concern to exercise its supervisory function more effectively, while giving the parties to the contract a final chance to complete the contract with a view to concluding it.

65 In the present case, the Court of First Instance found that KLE and its supplier had agreed, at least implicitly, at the time of submission of the contract to the Agency, that the materials would come from the CIS, so that the parties were in a position to mention the origin of the uranium in the contract itself; consequently, it held, in paragraph 36, that later communication as provided for in Article 5 *bis* (c) of the Rules of the information on the country of origin was not permissible. Such a finding of fact does not, except where the clear sense of the evidence has been distorted, which has not been established in this case, constitute a point of law

which is subject as such to review by the Court of Justice (see, *inter alia*, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 47 to 49 and 66; the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 36 to 40; and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraphs 18 to 22).

66 KLE submits, however, that the expression 'country of origin' used in Article 5 *bis* (c)(5) of the Rules does not cover a grouping of States such as the CIS.

67 On this point, it suffices to observe that, in view of the importance which knowledge by the Agency of the place of origin of supplies has from the point of view of the need to diversify supply, any information on the origin, even if imprecise, which the parties had at the time of submission of the contract should have been disclosed by them. Their silence as regards that origin thus constituted a legitimate ground for the Agency's request for additional information, so that the Court of First Instance was entitled to find that since the origin had not been disclosed by the parties despite the knowledge they had, the Agency was entitled to seek supplementary information in that respect, even if it would have designated the CIS.

68 KLE also submits that the Court of First Instance was wrong, in paragraph 40 of the contested judgment, to regard as 'reasonable' the period of 29 working days which, because of a mere request for information, came between the submission of the contract on 29 November 1993 and the entry into force of the decision on 7 January 1994, a period nearly three times longer than that prescribed by the Rules. It submits that the Court of First Instance thus infringed the principle of proportionality.

69 This complaint cannot be upheld. The Agency's obligation to decide quickly on the conclusion of a contract exists only if the contract contains all the information needed for it to fulfil its task of supervising sources of supply. That being so, the period referred to in Article 5 *bis* (f) of the Rules does not start to run until receipt

of the complete documentation. Any other interpretation would mean that, in the absence of sufficient information, the Agency would refuse at the outset to conclude the contract, an approach which could in certain circumstances prove excessive, in particular if the information awaited did not justify that outcome.

70 In those circumstances, the Court of First Instance was entitled to hold, in paragraph 40, that the period of 10 working days started to run on 14 December 1993, the date on which the Agency received the information it had asked for, with the result that, taking account of weekends and holidays, Decision No 1/94, which was notified on 6 January 1994, was taken within the period of 10 working days referred to in Article 5 *bis* (f) of the Rules.

71 Finally, KLE disputes the statement by the Court of First Instance in paragraph 38 of the contested judgment that it was itself the cause of the Agency's administrative difficulties in coming to a decision. It submits that the Court had no basis for restricting the accelerated procedure under Article 5 *bis* (f) of the Rules to cases which do not give rise to any problems.

72 As may be seen from paragraph 65 above, the finding by the Court of First Instance that the parties to the contract had agreed, at least implicitly, at the time of submission of the contract that the materials to be supplied would come from the CIS is a question of fact which may not be reviewed by the Court of Justice. It follows that the Court of First Instance was entitled to hold that the Agency could in such a case request additional information from the parties before reaching its decision on the conclusion of the contract.

73 Consequently, the Court of First Instance did not err in law by stating, in paragraph 40, that the 'lapse of time [within which the Agency took its decision] ... did not infringe Article 5 *bis* (f) of the Rules'.

74 The first plea in law must therefore be rejected as unfounded.

(b) The rules on the division of powers

75 In its second plea in law KLE, referring to the submissions in its application to the Court of First Instance, argues that the power conferred on the Agency to conclude supply contracts is not discretionary and does not authorise it to extend the prescribed period within which it must take a decision.

76 In this respect, it is settled case-law that an appeal which merely reiterates the pleas in law and arguments put forward at first instance in fact constitutes a request for re-examination of the application brought before the Court of First Instance, a matter which falls outside the jurisdiction of the Court of Justice (see, *inter alia*, the order of 26 April 1993 in Case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041, paragraph 10, and *Deere* v *Commission*, paragraph 20). That also applies where the pleas in law and arguments put forward at first instance are repeated purely by reference (Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, paragraph 8).

77 The second plea in law must therefore be rejected as inadmissible.

(c) The obligation to state reasons

78 In its third plea in law KLE submits that in paragraphs 48 and 49 of the contested judgment the Court of First Instance mentioned the reasons stated for Commission Decision 94/95, but not those for Agency Decision No 1/94. Since the measure reviewed by the Commission had been adopted by the Agency, it was the Agency

as the Community authority which issued the act, not the Commission, which was under an obligation to state reasons. The Agency's request for information and its extension of the time-limit, which adversely affected the parties to the contract, both lacked a statement of reasons, in breach of Article 162 of the Treaty and Article 5 *bis* (g) of the Rules.

79 KLE further submits that the Commission's letter of 10 January 1994 also gives no reasons which might justify the extension of the period allowed to the Agency to decide on the contract. Moreover, in Decision 94/95, the Commission dealt with the question of the origin of raw materials in general terms, whereas reference should have been made to the concepts of 'country of origin' and 'sources of supply'. Finally, in that decision it regarded the CIS as a whole as 'one source of supply' which it would be dangerous for the Community to be dependent on, a position which ran counter to the Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Russian Federation, of the other part, signed on 29 December 1994 and approved by Council Decision 95/414/EC of 17 July 1995 (OJ 1995 L 247, p. 1), by which the Community undertook, in Article 15, supplemented by an Exchange of Letters annexed to the Agreement, to consider 'Russia, in particular for the purposes of its supply policy in the nuclear field, as a source of supply which is separate and distinct from other suppliers'. In that respect, KLE asks the Court to order 'production of the negotiating instructions from the Council to the Commission and of the other documents concerning the negotiations with Russia on the partnership and cooperation agreement'.

80 As regards the first part of the plea, concerning the statement of reasons for Agency Decision No 1/94, it must be remembered that the application in Case T-149/94 is directed exclusively against Commission Decision 94/95, of which it seeks the annulment. In those circumstances the Court of First Instance cannot be criticised for restricting itself to consideration of the plea of failure to state reasons from the point of view of Decision 94/95 alone, the purpose of that decision being precisely to approve Agency Decision No 1/94.

81 As regards the second part of the plea, concerning the statement of reasons for Decision 94/95 and the Commission's letter of 10 January 1994, it must be observed that KLE makes no specific criticism of the contested judgment. KLE merely develops the pleas in law and arguments put forward at first instance and relies on a plea alleging that the Commission's letter of 10 January 1994 is insufficiently reasoned, although, as pointed out in the preceding paragraph, the application in Case T-149/94 is directed against Decision 94/95. The Court of First Instance cannot therefore be criticised for not ruling on the reasoning in that letter, and there is no need to consider the question whether that letter is in the nature of a decision against which an action may be brought.

82 The third plea in law must therefore be rejected.

(d) Alleged misuse of powers by the Agency

83 In its fourth plea in law KLE criticises the Court of First Instance for not accepting that there was a misuse of powers on the part of the Agency, when such a misuse was established by the fact that the Agency had departed from its previous practice of acknowledging that all uranium needs could be covered by supplies from the CIS, and that by refusing to conclude the contract at issue the Agency sought to protect Western uranium producers, thus pursuing a purpose other than that for which its powers were conferred.

84 It must be observed that, after pointing out in paragraph 53 of the contested judgment that 'it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated', the Court of First Instance held in paragraph 54 that 'KLE has adduced no evidence at all that the Agency and the Commission pursued an aim other than that of implementing the supply policy'.

85 As stated in paragraph 65 above, the Court of Justice has no jurisdiction to rule on the assessment of the evidence submitted to the Court of First Instance, except where the clear sense of that evidence has been distorted, which has not been argued in the present case.

86 The fourth plea must therefore be rejected as inadmissible.

Case T-181/94

The claim for annulment

87 KLE puts forward eight pleas in law challenging the judgment of the Court of First Instance in so far as it concerns Case T-181/94.

(a) The extent of the Agency's powers and the existence of legal obstacles to conclusion of the contract

88 According to KLE, it is not for the Agency to define the common supply policy, that being a matter for the Community institutions. It submits that the Agency does not have the broad discretion which the Court of First Instance held that it had in the field of supply policy.

89 Furthermore, under the first paragraph of Article 61 of the Treaty and Article 5 *bis* (f) of the Rules, the Agency has not only the right but also the duty to refuse to conclude a contract as a whole, without making any amendments, where it considers that there is a legal obstacle. It does not on the other hand have the right to amend the substance of the contract by adding conditions.

90 KLE submits that, in any event, none of the three legal obstacles recognised by the Court of First Instance as preventing fulfilment of the order has been shown to exist. In KLE's view, there is no legal obstacle based on the requirements of the policy of diversifying external sources of supply, the level of prices resulting from the Trade Agreement, or the principle of equal access to resources, contrary to the findings of the Court in paragraphs 90 to 105 of the contested judgment.

91 On this point, it should be noted that under the first paragraph of Article 61 of the Treaty, the Agency is obliged to meet all orders unless there are legal or material obstacles, the presence of which must necessarily be assessed from the point of view of the aims of the common supply policy as set out in Articles 2(d) and 52 of the Treaty.

92 While Article 61 does indeed form part of Section 2 of Chapter 6 on supplies, headed 'Ores, source materials and special fissile materials coming from inside the Community', and there is no reference in the Treaty to that provision as regards the supply of source materials coming from non-member countries, action by the Agency concerning the latter is nevertheless subject, as the Advocate General observes in point 191 of his Opinion, to requirements similar to those laid down in Article 61, since the Agency is obliged to meet the orders of users while ensuring that certain bounds are not exceeded.

93 Those bounds, to exceed which would constitute a legal obstacle within the meaning of Article 61 of the Treaty, undeniably include compliance with the aim pursued by the Treaty of a regular and equitable supply for Community users, and that obliges the Agency as holder of the exclusive right to conclude supply contracts to ensure, subject to review by the Commission, that certain orders do not affect the diversification of supply or infringe the principle of non-discrimination, whatever the origin of those supplies, whether from inside or outside the Community. In view of that task, the Agency plays an essential role in the common supply policy.

94 Moreover, the Court of First Instance was entitled to hold, in paragraph 86 of the contested judgment, that 'the simplified procedure introduced by Article 5 *bis* of the Rules does not deprive the Agency of its exclusive rights' and that even within that framework 'the Agency ... has the right to object to a contract which might prejudice the achievement of the objectives of the Treaty'.

95 KLE therefore cannot claim that the Agency wrongly assumed the power to determine the common supply policy in breach of the Treaty rules bestowing powers on the Community institutions.

96 In particular, as pointed out in paragraphs 61 to 64 above, it would not be consistent with the aims of the Treaty to limit the Agency's power to take decisions in situations where it is unaware of the origin of the supplies or, as in the present case, it has legitimate reasons to suppose that the origin of the products is liable to affect the reliability of supplies for the Member States of the Community. Moreover, the request for additional information cannot be equated with an amendment to the contract, since its purpose was to enable the Agency to complete its documentation by adding an essential item of information on the origin of the materials to be delivered, which the parties had already agreed upon, at least implicitly.

97 Furthermore, the Court of First Instance was likewise entitled to hold, in paragraph 90 of the contested judgment, that where decisions concerning economic and commercial policy and nuclear policy are involved, warranting an assessment of complex economic circumstances, the Agency has a broad discretion and judicial review must be confined to identifying any manifest error of assessment or misuse of powers.

98 As regards the first legal obstacle recognised by the Court of First Instance, derived from the requirements of the policy of diversifying sources of supply, KLE submits that there is no long-term threat of dependency on supplies from the CIS. It criticises the Court for approving the Commission's analysis which, to show that there was a long-term risk of dependency by the Community, treated the whole of the CIS as a single source of supply without distinguishing between the widely differing production capacities of the successor States to the former USSR.

99 KLE further submits that the Commission referred to the present production capacities of the CIS States without assessing their long-term production capacities, although it considered that data to be essential for assessing the Community's dependency in relation to the CIS. It was foreseeable, according to KLE, that the large stocks in those countries would be absorbed in a few years, whatever the uranium deposits and production capacities of the CIS. As those countries' production, according to the Commission, represented some 25% of world uranium production and that percentage at the same time constituted the upper limit of acceptable dependence in relation to supplies from the CIS, the Commission committed a manifest error of assessment by arguing that for an individual supply undertaking to exceed that percentage could lead in the long term to unacceptable dependence by the Community as a whole on supplies from the CIS.

100 According to KLE, it cannot be argued, as the Court of First Instance did in paragraph 93 of the contested judgment, with respect to uranium that there is a 'structural deficiency' of world production compared with demand. In fact, Community production has a 'deficient structure', because Community deposits of uranium are very small. A policy of diversification, however skilful it may be, cannot change that situation, since natural laws mean that the distribution of uranium deposits in the world does not fall within the 'supply policy' of the Agency.

101 KLE also criticises the Commission for taking into consideration the fact that it covered more than 150% of its annual needs by purchasing materials from the CIS on the spot market, whereas users usually cover their basic needs by means of multi-annual contracts and their occasional needs, amounting to about 10% of their annual needs, on the spot market. That assertion by the Commission, which the contested judgment refers to in paragraph 83, is not consistent with the division of powers established by the Treaty and runs counter to the freedom of contract and freedom to carry on a business guaranteed by the German Constitution and the Community legal order. In the legal system set up by the Treaty, no provision imposes an obligation on undertakings to cover the bulk of their needs by means of multi-annual contracts rather than on the spot market. The duration of the supply contracts concluded between the parties remains exclusively a matter for them, even if the Agency has the exclusive power to conclude or refuse to conclude such contracts. The Commission's allegation, set out in paragraph 84, that for KLE to obtain supplies on the spot market, where it enjoys over its rivals unacceptable advantages in terms of price and competition, constitutes an infringement of the principle of equal access to resources or a privileged position within the meaning of Article 52(2)(a) of the Treaty is wrong in law. For that reason too, the contested judgment should be set aside.

102 Still according to KLE, in the context of free market economies, it is inconceivable that a trader should be penalised merely because, assessing market developments more accurately than his competitors, he accordingly declines to conclude long-term contracts.

103 KLE's arguments are inadmissible on two grounds.

104 First, it seeks to contest the facts as found by the Court of First Instance and call into question that court's final assessment both of those facts and of the evidence before it. Except where the clear sense of that evidence has been distorted, which has not been established or even alleged by KLE, that assessment of the facts is not subject to review by the Court of Justice.

105 Second, by restricting itself to reiterating the pleas in law and arguments put forward at first instance, KLE does not indicate precisely the contested elements of the judgment which it seeks to have set aside, or the legal arguments specifically advanced in support of the appeal, thereby failing to comply with Article 112(1)(c) of the Rules of Procedure of the Court of Justice (see, to that effect, *Deere* v *Commission*, paragraphs 18 and 19). On the contrary, the complaints are essentially directed against the Agency and the Commission, without referring to the contested judgment.

106 Since the complaints made against the finding by the Court of First Instance that there was a legal obstacle based on the requirements of the policy of diversifying external sources of supply must be rejected, there is no need to examine whether KLE's criticisms relating to the other legal obstacles held to exist are well founded. Any faults there might be in the reasoning of the contested judgment in this respect would in any event have no effect on its operative part, so that the complaints relating thereto are of no effect and must be rejected (see, *inter alia*, Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraphs 47 to 49).

107 The first plea in law must consequently be rejected.

(b) The aims of Articles 1 and 2 of the Treaty

108 KLE criticises the Court of First Instance for regarding, in paragraph 113 of the contested judgment, the CIS as a whole as a source of supply. Only sovereign States constitute sources of supply. Furthermore, diversification of sources of supply is not one of the aims set out in Article 2 of the Treaty.

109 On this point, it suffices to state that no point of law that is precise enough has been put forward by KLE in support of its argument that the concept of a source of supply is strictly limited to States and excludes groups of States or specific regions of the world. On the contrary, no provision of the Treaty prevents the Agency or the Commission from taking into account in the management of the common supply policy, in particular when the 'place of origin' of supplies has to be determined, a geographical territory which is more or less extensive than a State considered in isolation.

110 As to the requirements of reliability and diversifying sources of supply, they follow directly from the principle of the regular and equitable supply of all Community users set out in Article 2(d) of the Treaty, as already observed in paragraph 62 above.

111 The second plea in law must therefore be rejected.

(c) The principle of legal certainty

112 KLE complains that the conduct of the Agency, which is not subject to any democratic control, lacked transparency, consistency and foreseeability.

113 It submits that Agency Decision No 1/94 does not indicate that the requirement of market-related prices is deduced from Article 14 of the Trade Agreement, in other words, an agreement concluded with a State which has ceased to exist, which the Court of First Instance nevertheless refers to in paragraph 125 of the contested judgment.

114 KLE submits that it could not be bound by the findings made in 1992 by a working party of experts, set up within the Advisory Committee meeting in private, whose conclusions were based solely on production costs in the West which were not the same as market-related prices. Nor was it foreseeable, in KLE's view, that the Agency would conclude, on the basis of the finding made in its annual report for 1992 that imports of natural uranium from the CIS represented about 25% of net Community requirements, that the 'existing long-term production capacities' of the CIS and its share of world production likewise amounted to 25%. Similarly, KLE could not have foreseen that the Agency and the Commission would not comply with the international agreements concluded with the CIS States under which each of those States was to be regarded as a separate source of supplies. As the Agency had previously concluded contracts with KLE and other users also at prices which were not 'market-related', there had been no reason to suppose that the Agency would derive from an internal document a completely different 'common supply policy', which moreover it had no power to determine under Article 52(1).

115 KLE also submits that even an extremely diligent operator could not expect the Agency to consider that reliability of supply for the Community would be threatened in the medium and long term if a single small user such as itself which had

not concluded long-term contracts covered 150% of its annual needs in one year by purchases on the spot market.

116 It appears from paragraph 125 of the contested judgment that

'... the measures on which the Agency's approach is based, namely the Council Resolution, which sets out in the second indent of point 5(a) the aim of geographical diversification of the Community's external sources of supply, and the Trade Agreement, which provides in Article 14 that prices must be market related, have both been published in the *Official Journal of the European Communities* ...'.

117 As the Advocate General observes in point 251 of his Opinion, the Court of First Instance referred, in paragraph 126, to the statements in the Agency's annual report for 1992 on the high level of imports of natural uranium from the CIS and the contracts concluded for future deliveries, the level of prices which were 'unrelated to production costs in the West', and the need perceived by the Commission and the Agency to take corrective measures; it was therefore entitled to conclude, in paragraph 127, that 'having regard to the existence of easily accessible sources of information which a reasonably diligent trader in this very particular and clearly identified sector must be taken to know, it cannot be said that there was a lack of transparency'.

118 Furthermore, KLE has not clearly identified the elements of the contested judgment which it challenges, and has merely submitted and amplified purely factual arguments without putting forward any point of law which could call into question the assessment made by the Court of First Instance.

119 The third plea in law must therefore be rejected.

(d) The requirement of equal treatment

120 KLE complains that the Court of First Instance did not properly consider its allegations that the principle of equal treatment had been infringed.

121 It states that the second sentence of Article 52(2) of the Treaty requires the Agency not to discriminate between users on grounds of the use which they intend to make of the supplies requested. The application by the Agency of its 'internal criterion of assessment' leads it to allocate the same quantities of uranium from the CIS States to large State-owned undertakings as to legally independent small private undertakings, even though the former are able to make much better and longer-term plans than small undertakings such as KLE, which submits that such conduct constitutes discrimination.

122 It must once again be stated that KLE does not specify the reasons why the approval expressed by the Court of First Instance, in paragraph 132 of the contested judgment, of the approach taken by the Agency, namely to apply a threshold of permissible dependence per trader in order to ensure equal access to resources for undertakings established in the Community, is open to challenge in law.

123 The fourth plea in law must therefore be rejected as inadmissible.

(e) The principle of proportionality

124 KLE criticises the Court of First Instance, first, for disregarding the fact that the Agency, acting beyond its powers, itself defined its supply policy without having considered the possibilities available under the second paragraph of Article 65 and

Articles 70 and 72 of the Treaty, and second, for failing to find that the subsequent addition of a clause to the supply contract also constituted a serious infringement of freedom of contract, which is protected by the Community legal order. Such an infringement should have been specially justified, having regard to the principle of proportionality.

125 KLE submits that, under the first paragraph of Article 61 of the Treaty, the statutes of the Agency, and Article 5 *bis* (f) of the Rules, the Agency is authorised only to conclude or refuse to conclude as a whole a contract submitted to it, not to add a new clause to it. Only the second paragraph of Article 65 of the Treaty gives the Agency the right to intervene in the contractual relationship in order to determine the geographical origin of the supplies. Even in that case, however, the Agency can act only if it secures for the user conditions which are at least as favourable as those specified in the order. Application by analogy of the second paragraph of Article 65 is excluded because in the present case the conditions of supply were altered to the detriment of the parties to the contract, so that only the obligation under the first paragraph of Article 61 applies. Since there was no legal or material obstacle to performance of the contract, the Agency was obliged to conclude it. If there really had been a legal obstacle to performance of the contract, the first paragraph of Article 61 would have required the Agency to refuse to conclude it. KLE submits that by nevertheless concluding it and adding a condition to it, the Agency exceeded its powers.

126 It appears from paragraphs 92 to 94 of the contested judgment that to continue importing nuclear materials from the CIS could have jeopardised the requirement of a regular supply, which is a finding of fact not subject to review by the Court of Justice. The Court of First Instance gave sufficient reasons why the condition as to origin imposed by the Agency was lawful having regard to the principle of proportionality, citing the need to acknowledge that the Agency has power to object to imports of uranium where they affect geographical diversification of sources of supply.

127 As regards the argument alleging that the Agency lacks power to impose a precondition for the conclusion of a contract and that there were no obstacles to its performance, reference is made to paragraphs 61 to 64 above.

128 KLE's fifth plea in law must therefore be rejected.

(f) The rules on the division of powers

129 KLE considers that the Court of First Instance disregarded the arrangement of powers under the Treaty by acknowledging that the Agency had the right to determine the common supply policy, whereas it has only 'quasi-notarial functions' and powers of a purely commercial nature.

130 This sixth plea must be rejected on the same grounds as those stated in paragraphs 63 and 91 to 95 of this judgment.

(g) The obligation to state reasons

131 KLE submits, first, that the Court of First Instance failed to comply with its obligation to state reasons, by not ruling on the complaint that the Commission did not establish a structural relationship between the powers of the Agency and the Treaty and by not setting out the reasons why KLE would become dependent on supplies from the CIS and why the purchase price agreed in the contract did not correspond to market conditions.

132 It submits, second, that Decision 94/285 does not explain what is meant by protection of 'long-term' Community interests, sets the Agency's 'internal assessment criterion' at a figure varying from 20% to 25% and relates that criterion not to the production capacity of the CIS States but to total supplies, including the using up of old stock.

133 KLE submits, third, that contrary to the Court of First Instance's assertion in paragraph 146 of the contested judgment, the application relates not to the reasons for the Agency's refusal to conclude the contract but to the Commission's reasons for not exercising the right conferred on it by the second paragraph of Article 53 of the Treaty.

134 First of all, the part of the plea which argues that Commission Decision 94/285 lacked a proper statement of reasons, with reference to the criterion based on the production capacity of the CIS States, must be rejected as inadmissible. That part of KLE's argument is, as the Commission and the Advocate General in point 275 of his Opinion have observed, directed against Decision 94/285 and does not call into question the contested judgment. Furthermore, KLE's argument relates purely to matters of fact in the case-file and raises no questions of law.

135 Next, as regards the allegedly defective statement of reasons in the contested judgment, it must be observed that the Court of First Instance stated, in paragraph 145, that 'the Commission made it clear in its decision that the Agency is not obliged to meet orders where there are legal or material obstacles to doing so (point 14 of

Decision 94/285)' and that the Commission had referred to 'Article 64 of the Treaty, under which the Agency may act within the framework of agreements concluded between the Community and a third State ... (point 21)'.

136 In thus referring clearly to Article 64 of the Treaty, the main object of which is to give the Agency the exclusive right, within the framework of agreements with a third State or an international organisation, to conclude contracts for supplies coming from outside the Community, the Court of First Instance addressed the argument concerning the powers conferred on the Agency by the Treaty. Moreover, the reference in the contested judgment to legal or material obstacles which are the basis of the Agency's power to refuse to meet orders for supplies constitutes a further implied, though clear, reference to Article 61 of the Treaty, which applies also to materials coming from third countries, as is apparent from paragraph 92 above.

137 Moreover, as regards the question whether the Court of First Instance expressed a view on the Commission's reasons for considering that KLE would become dependent on supplies from the CIS, it must be stated that, by summarising and repeating the main points of Decision 94/285 in paragraph 145 of the contested judgment, the Court adopted the Commission's statement of reasons and thus rejected the applicant's complaints.

138 It is true that the Court of First Instance did not expressly reply to KLE's argument that the Commission had failed to state the reasons why the price agreed in the contract did not correspond to the conditions of the market economy or was not related to market prices. However, in paragraph 145 of the contested judgment, the Court referred to Article 14 of the Trade Agreement, under which trade between

the Community and the USSR was subject to the requirement of market-related prices. Moreover, in paragraph 146, it considered that the reasons stated for the Commission's decision, as set out in paragraph 145, disclosed 'clearly and unequivocally the principal reasons for the refusal to conclude the contract submitted by KLE', and was therefore able, as the Advocate General observes in point 279 of his Opinion, to dispense with explicit consideration of the complaint relating to the level of prices.

139 The seventh plea in law must therefore be rejected.

(h) Misuse of powers

140 KLE criticises the Court of First Instance for failing to ascertain, before examining whether the Agency had used its powers for the purpose for which they were conferred, whether the measures taken by it were indeed within the scope of its powers under the Treaty.

141 KLE submits that, by failing to distinguish between the Agency and the Commission when stating that KLE had not established that either of them had pursued an aim other than implementation of the supply policy, the Court of First Instance obscured the fact that KLE sought in that plea to complain of the Commission's failure to use its right to veto the Agency's exceeding of its powers under the Treaty, in accordance with the first paragraph of Article 53 of the Treaty. According to KLE, it appears from the Agency's letter of 20 December 1993, referred to in paragraph 6 of the contested judgment, that the motive behind the Agency's decision was indeed the protection of Western producers, contrary to its powers under the Treaty. The Court's own findings thus disclosed a misuse of powers on the part of the Agency which the Commission should have penalised.

142 The allegation that the Court of First Instance did not review the exercise by the Agency of its powers must be rejected. It suffices here to refer to paragraphs 85 and 89 to 106 of the contested judgment, in which the Court expressed its view on the nature and extent of the Agency's powers and the lawfulness of the Commission's decision with respect to those powers, in particular by ascertaining that the three obstacles relied on by the Commission to justify the condition concerning origin were valid.

143 As to the allegation that the Court of First Instance did not distinguish between the Agency and the Commission in the part of its judgment rejecting the plea of misuse of powers, it suffices to state that KLE has not put forward any legal argument capable of calling into question the Court's assessment that KLE had failed to establish that the Agency and the Commission had pursued an aim other than that of implementing the Euratom supply policy.

144 With respect, finally, to the reference by the Court of First Instance to the Agency's letter of 20 December 1993, it must be pointed out that, besides the fact that paragraphs 149 and 150 of the contested judgment do not mention that letter, this argument aims to call into question the assessment of the evidence at first instance, which is not admissible in an appeal unless the argument is capable of establishing that the clear sense of that evidence has been distorted.

145 The eighth plea in law must consequently be rejected.

The claim for damages

146 KLE submits that, by dismissing the claim for damages on the ground that the conduct of the Agency and the Commission's refusal to accede to KLE's requests were not vitiated by any irregularity, the Court of First Instance disregarded the

fact that the claims for annulment related solely to the Commission's decisions. The claim for damages sought compensation for the damage suffered as a result of the Agency's illegal conduct, on which the Court should thus have ruled.

147 As the Commission observes, this plea cannot be accepted, because by holding that the conduct of the Agency and the Commission was consistent with Community law in the context of its examination of the claims for annulment of the Commission's decisions, the Court of First Instance implicitly but necessarily accepted that the Agency's decisions were lawful.

148 In the absence of any illegality attributable to the Commission or the Agency, the claim for damages must therefore be dismissed.

149 It follows from all the foregoing that the grounds relied upon by KLE in support of its appeal are either inadmissible or unfounded. In those circumstances the appeal can only be dismissed.

## Costs

150 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has asked for costs against KLE and the latter has been unsuccessful, KLE must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber),

hereby:

**1. Dismisses the appeal;**

**2. Orders Kernkraftwerke Lippe-Ems GmbH to pay the costs.**

Jann Edward Wathelet

Delivered in open court in Luxembourg on 22 April 1999.

R. Grass P. Jann

Registrar President of the First Chamber