JUDGMENT OF THE COURT (Sixth Chamber)
21 January 1993 *

In Case C-308/90,

Advanced Nuclear Fuels GmbH, a company governed by German law, established in Lingen, Federal Republic of Germany, represented by Dieter Sellner, Rechtsanwalt, Bonn, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Jürgen Grunwald, of its Legal Service, assisted by Etienne van der Stricht, as expert, with an address for service in Luxembourg at the office of Roberto Hayder, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 90/413/Euratom of 1 August 1990 relating to a procedure in application of Article 83 of the Euratom Treaty (OJ 1990 L 209, p. 27) and of Commission Decision 90/465/Euratom of 20 August 1990 relating to the appointment of a board responsible for implementing Decision 90/413 of 1 August 1990 (OJ 1990 L 241, p. 14),

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini, F. A. Schockweiler, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

* Language of the case: German.

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after hearing oral argument from the parties at the hearing on 15 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 19 November 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 October 1990, Advanced Nuclear Fuels GmbH (hereinafter 'ANF-Lingen'), established in Lingen, Federal Republic of Germany, brought an action under Article 146 of the EAEC Treaty (hereinafter 'the Treaty') for the annulment of Commission Decision 90/413/Euratom of 1 August 1990 relating to a procedure in application of Article 83 of the Euratom Treaty (OJ 1990 L 209, p. 27) and of Commission Decision 90/465/Euratom of 20 August 1990 relating to the appointment of a board responsible for implementing Decision 90/413 of 1 August 1990 (OJ 1990 L 241, p. 14).

2 By its decision 90/413, the Commission placed ANF-Lingen under administration for a period of four months as regards aspects connected with the safeguards mentioned in Chapter VII of Title Two of the Treaty. By its Decision 90/465, the Commission appointed the board responsible for carrying out the tasks of administration from 21 August to 21 December 1990.

3 By order of 7 December 1990, the Court, in response to an application from the Commission, gave immediate effect to Decisions 90/413 and 90/465 and reserved

the costs in respect of that application. By order of 20 March 1991, the Court also (a) rejected ANF-Lingen's request that there be forwarded to it an assessment report drawn up by the administrators and submitted to the Commission on completion thereof, (b) reserved for the final judgment its decision on ANF-Lingen's application for forwarding of the said report to the Court and (c) reserved the costs in respect of those applications.

4 ANF-Lingen's request under (b) above in the meantime became devoid of purpose. The German nuclear supervisory authorities forwarded a copy of the report in April 1991 to ANF-Lingen, which annexed it to its reply.

5 The Commission adopted Decisions 90/413 and 90/465 after being informed by ANF-Lingen that in May 1990 the latter had exported nuclear materials from the Federal Republic of Germany to the parent company, Advanced Nuclear Fuels (hereinafter 'ANF-Richland'), established in Richland, United States of America, without prior declaration of that export operation and without any entry of the transfer of nuclear materials being made in the undertaking's accounting and operating records.

6 That export operation took place as a result of a combination of circumstances which are not contested and are described in the preamble to Decision 90/413 as follows:

'On 8 May 1990, a loading pallet with two containers, each containing two boxes, was moved from the storage area to the material entry lock at the plant for the purpose of removing the box containing uranium pellets enriched to 3.3%.

Once this operation had been completed the pallet, together with its two containers, was mistakenly placed outside, close to the storage area for empty containers, and forgotten about. The two containers on the pallet now only contained three

boxes: one with 49.84 kilogrammes of uranium dioxide (UO2) enriched to 2.7% and the two others, weighing 49.86 kilogrammes and 47.29 kilogrammes respectively, with uranium enriched to 3.95%.

On the morning of 11 May 1990, during preparation of a shipment of 72 empty containers for ANF-Richland, the pallet in question was loaded by mistake by another employee on to a lorry belonging to a normal goods transport company.

The employee in charge of the operation observed that the containers on the pallet were marked with the labels stipulated by national law indicating the presence of radioactive materials. Since the containers were standing in this area, he believed them to be empty and destined for shipment, and removed the labels, replacing them with ones indicating that the containers were empty. On the same day, at 7 p. m., the lorry was unloaded at Luxembourg-Findel airport and the consignment packed for transport by air.

On 12 May 1990, the containers were transported by cargo plane to Seattle (USA), where they arrived at 9.10 p. m. local time.

On 14 May 1990, the containers were transported by road to ANF-Richland, arriving on 15 May 1990.

ANF-Lingen was informed that same day by ANF-Richland that, after carrying out a routine dosimetric check, they had established the presence of nuclear material in the two containers which were supposed to be empty. An examination of the seals carried out immediately thereafter revealed that no material could have been removed from the three boxes concerned.

On 16 May 1990, ANF-Lingen notified the Safeguards Directorate at the Commission of the occurrence.

On 17 May 1990, ANF-Lingen also notified the Euratom Supply Agency of the occurrence.'

7 Articles 2 and 3 of Decision 90/413 read as follows:

'*Article 2*

1. Advanced Nuclear Fuels GmbH shall be placed under administration for a period of four months, and only as regards aspects connected with the safeguards mentioned in Chapter VII, Title Two, of the Treaty.

2. The placing under administration shall in no way affect the responsibility of the undertaking under national or international law.

Article 3

1. The task of administration set out in Article 2 shall consist of:

— checking and, if necessary, amending the internal regulations in the field of safeguards,

— supervising their implementation and monitoring their application.

2. In order to perform this administrative task, the person(s) appointed:

— shall have access to all documents and offices,

— shall have the power to give any instructions whatsoever to the management or staff of the undertaking,

— shall have the right to solicit or request any help from outside sources which may be required for the satisfactory performance of the above task.

3. An assessment report shall be presented to the Commission within eight days of the completion of the task.'

8 The Commission stated in the preamble to Decision 90/413 that:

'Given that the determining criterion for application of this Article [83 of the Treaty] is the seriousness of the infringement committed, it is first necessary to carry out both an objective and a subjective analysis of the nature of the offences.

From an objective point of view, it appears that the provisions breached are essential elements of Community legislation in the field of safeguards, and that observance of them is essential if the aim set out in Article 77 of the Treaty is to be attained.

Moreover, the facts established made it impossible for the Commission to carry out the task assigned to it in Article 2(e) of the Treaty, namely to "make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended".

It should be noted here that the Commission attaches particular importance to the control of exports of nuclear materials.

The serious nature of the infringement is further reinforced by the fact that it involved a significant quantity, in terms of weight, of enriched uranium, which could very easily be further enriched to levels where it would be of strategic value.

From a subjective point of view, it seems, however, that there was no intention behind the actions and that these should not be seen as a form of diversion. This is, moreover, reflected in the fact that the report on the full annual check of the inventory of materials held only showed minimal differences between the physical inventory and the book inventory, corresponding to approximately 0, 1% of the total stock or to 0, 023% of the sum of the stock and its variations between 4 August 1989 and 4 July 1990.

They nevertheless constitute a serious infringement, stemming from a series of instances of negligence, both at the operational and the organizational level, which were made possible primarily by the absence of back-up verification measures.

Given the nature of the mistakes made, the Commission regards it essential that all necessary action be taken to ensure that mistakes of this nature cannot recur in the future, all the more so since ANF-Lingen carries out such container transfer operations on a regular basis, and intends to continue doing so.

In order to guarantee that mistakes of this type, which have their origin in the routine nature of the activities concerned, do not recur, the Commission intends to make sure that appropriate measures are clearly drawn up regarding working practices and their implementation.

With this purpose in mind and in view of the serious nature of the mistakes made, the Commission feels that the most effective sanction to impose is that laid down in Article 83(1)(c) of the Treaty.

Only by placing the undertaking under administration can the Commission be sure that the undertaking will meet all its obligations regarding safeguards, since any recourse to the issue of a warning, as provided for in Paragraph 1(a) of that Article, is ruled out by the serious nature of the infringements committed.

Even though ANF-Lingen has notified the appropriate Euratom safeguards authorities that it intends to enforce the new internal regulations covering the management and handling of materials which it has undertaken to communicate, the Commission feels that the length of time during which the undertaking is under administration must be four months from the date of notification of the name(s) of the person(s) appointed to carry out this task. At the end of this period, an assessment report will be drawn up.'

9 The Commission, relying on Article 83 of the Treaty, penalized the undertaking by placing it under administration, after finding, in Article 1 of Decision 90/413, that ANF 'has infringed Article 79 of the Euratom Treaty as defined in Articles 10, 11 and 24 of Regulation (Euratom) No 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom safeguards (OJ 1976 L 363, p. 1) and in code 1.3.2 of the Commission decision of 5 June 1985 on particular safeguards provisions, through: (a) its failure to give advance notification of an export; (b) its breach of the regulations on recording inventory changes; (c) its breach of the regulations on operating records regarding changes in quantities and changes in the composition of nuclear material'.

10 In support of its application, ANF-Lingen claims, first, that the facts at issue do not constitute a breach of the obligations imposed by Chapter VII of the Treaty. It also maintains that the penalty of placing it under administration is unlawful since it was imposed at a time when any infringement had ceased. Finally, it submits that the penalty imposed is disproportionate and that the Court should substitute the lesser penalty of a warning.

11 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Infringement of the Treaty

12 ANF-Lingen maintains that the inadvertent export at issue, attributable to a straightforward mistake in handling the containers subject to the 'ANF 10.105 handling instructions for the transport of uranium dioxide of 14 October 1987', imposed by the national nuclear supervisory authorities which checked the observance thereof, does not constitute an infringement of those requirements and cannot be classified as a serious breach of the obligations laid down in Article 79 of the Treaty, specified more particularly in Articles 10, 11 and 24 of Regulation No 3227/76 and in code 1.3.2 of the Commission decision of 5 June 1985.

13 ANF-Lingen states, with regard to that code and to Article 24, that the export operation, which had not been planned in advance, took place inadvertently and therefore could not have been notified in advance. As regard the records referred to in Articles 10 and 11, the applicant states that until the export operation was discovered it had not been possible to record any inventory change for each material balance area. Immediately after the discovery of the export the records had been amended. Moreover, the Commission had at all times been in a position to carry out its supervisory tasks since the nuclear fuels in question had at all times been under the authority of ANF-Lingen and ANF-Richland. In those circumstances, the applicant cannot be accused of any infringement of Articles 10 or 11.

14 According to the Commission, Article 24 and code 1.3.2 were infringed because in the present case nuclear materials were exported to the United States without prior notice of that operation having been given to it. Moreover, it had not been possible to determine the book inventory 'at any time' within the meaning of Article 10. Finally, the operating records mentioned in Article 11 did not include for each material balance area the operating data used to establish changes in quantities and composition of the nuclear materials.

15 In that connection it must be stated, first, that Regulation No 3227/76 merely defines the nature and scope of the obligations referred to in Article 79 of the Treaty. It follows that any infringement of any of the obligations laid down by that regulation constitutes an infringement of Article 79 and is therefore liable to lead

to the imposition by the Commission of one of the penalties provided for in Article 83 on the persons or undertakings responsible for that infringement.

16 Furthermore, it is not in dispute that for the period from 11 to 14 May 1990, the nuclear materials mentioned in the accounting and operating records for each material balance area did not correspond to those physically making up the inventory at the ANF-Lingen site, since the inventory changes due to the inadvertent export at issue were not recorded until the export was discovered. Thus, for three days those records did not show all the inventory changes in such a way as to enable the book inventory to be determined at any time or all the operating data used to establish changes in quantities and composition of the nuclear materials. The fact that the nuclear fuels were always under the authority of either ANF-Lingen or ANF-Richland does not alter the fact that the Commission was frustrated in its supervisory task, in breach of the obligations laid down in Articles 10 and 11 of Regulation No 3227/76.

17 Finally, it is likewise not in dispute that the export in question took place without the Commission having been first informed as required by Article 24 of Regulation No 3227/76. The fact that the export took place inadvertently does not affect that finding.

18 It follows from the foregoing that the first plea in law must be rejected.

The plea in law as to the need for an existing infringement

19 ANF-Lingen criticizes the Commission for imposing the contested sanction on it for infringements that had ceased. That sanction is of a coercive nature, intended to remedy an existing illegal situation, and is no longer justified once such a situation has ceased to exist. No infringement was being committed by ANF-Lingen on 1 August 1990, the date of the contested decision. It is common ground that the inadvertent export at issue was an isolated case, only made possible by fortuitous

circumstances. Moreover, the organizational changes made to the system for the handling of transport containers decided on by ANF-Lingen the day after the discovery of the inadvertent export and brought into operation before 1 August 1990 made any recurrence of the incident impossible.

20 In that regard, it is sufficient to observe that Article 83 sets out the sanctions which the Commission may impose according to the seriousness of the infringement discovered, without distinguishing between existing infringements and those which have ceased.

21 Moreover, as the Commission rightly pointed out, Article 83 ensures the effectiveness of Chapter VII of the Treaty by granting wide powers to the Commission to impose penalties, including those of a non-pecuniary nature. The aim thereby pursued is in conformity with the intention of the authors of the Treaty to give the Commission the means necessary to carry out, in particular, the tasks of the EAEC described in Article 2(e) of the Treaty, namely to make certain that nuclear materials are not diverted to purposes other than those for which they are intended. In those circumstances, the Commission was entitled to adopt the contested measure, even though the infringement had already ceased.

22 It follows that ANF-Lingen's second plea in law must also be rejected.

The plea in law concerning the proportionality of the sanction

23 ANF-Lingen claims, first, that the Commission exaggerated the seriousness of the infringements of which it is accused, since at no time did they prevent that institution from carrying out its supervisory tasks. Moreover, it must be borne in mind that infringements of Articles 10, 11 and 24 of Regulation No 3227/76 and of code 1.3.2 of the decision of 5 June 1985 notionally overlap, and the incident in question was a single event which infringed several different requirements.

24 Secondly, ANF-Lingen considers that the sanction imposed was unnecessary. Firstly, the Commission is vested by Article 81 of the Treaty with wide supervisory powers enabling it to send inspectors into undertakings in order to check ores, source materials and special fissile materials and to ensure compliance with the provisions of Article 77. Secondly, the measures taken by ANF-Lingen immediately following discovery of the incident made it unnecessary to place the undertaking under administration. Moreover, that sanction involved only four visits to the undertaking by the administrators, who, because of ANF-Lingen's cooperation, confined themselves to issuing a number of recommendations.

25 According to ANF-Lingen, those circumstances provide justification for the Court to substitute for the sanction imposed the less severe sanction of a warning under Article 83(a) of the Treaty.

26 It must be observed that the provisions designed to ensure that nuclear materials are not diverted to purposes other than those declared by their users are fundamental to the accomplishment of the EAEC's tasks, as described in Articles 1 and 2 of the Treaty. In that context, compliance with the rules, overseen by the Commission pursuant to Articles 77, 79, 81 and 83 of the Treaty, is essential. It follows that any infringement of those rules by an undertaking constitutes a serious infringement.

27 The fact that the various infringements of which ANF-Lingen is accused notionally overlap cannot be relied on to justify the imposition of a less severe sanction. On the contrary, it is well established, as is apparent from the approach adopted in certain national legal systems, that in such cases it is appropriate to impose the severest sanction available.

28 Moreover, the necessity for the contested sanction is evidenced by the fact that it enables measures to be imposed to ensure that similar infringements are not committed in the future. Under its terms of reference, the board of administrators may give precise instructions and impose them if necessary against the will of the man-

agement of the undertaking, whereas the Commission's power to send inspectors merely in order to check the accounts is manifestly insufficient in that respect.

29 It must also be observed that the cooperative attitude which ANF-Lingen certainly displayed cannot be invoked in order to challenge the need for the sanction imposed. It has not been established that, without that sanction, the improvements adopted by the undertaking purely on its own initiative would have been adopted to the full satisfaction of the Commission. Furthermore, as is apparent from the administrators' report, the main structural and organization weaknesses in ANF-Lingen's operations were not eliminated until November and December 1990.

30 Having regard to the foregoing considerations, the last plea in law must be held to be unfounded. It follows that the claim that the sanction of a warning should be substituted for the sanction imposed cannot therefore be upheld.

31 Since none of ANF-Lingen's pleas in law has been upheld, the application must be dismissed in its entirety.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are applied for in the successful party's pleadings. Since the ANF-Lingen has been unsuccessful, it must be ordered to pay the costs, including those incurred in connection with the application for immediate implementation of the contested decisions and the applications for the forwarding of the administrators' assessment report.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders ANF-Lingen to pay the costs, including those incurred in connection with the application for immediate implementation of the contested decisions and the applications for the forwarding of the administrators' assessment report.

Kakouris Mancini

Schockweiler Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 21 January 1993.

J.-G. Giraud C. N. Kakouris

Registrar President of the Sixth Chamber