OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 25 May 2000 *

1. By an action registered on 23 September 1999 and served on the defendant on 6 October 1999, the European Commission applied to the Court of Justice under Article 181 of the EC Treaty (now Article 238 EC), seeking an order that Hitesys SpA, a limited company incorporated according to Italian law (hereinafter 'Hitesys'), should repay to it the sum paid to Hitesys by the Commission by way of an advance for carrying out the research project provided for in a contract in that connection, which was unilaterally terminated by the Commission due to alleged non-performance by the defendant. Specifically, the Commission sought on the abovementioned ground payment to it by Hitesys of EUR 132 500 by way of capital together with interest in the amount of EUR 61 032.8 (calculated at the annual rate of 8.25%) in respect of the period from 8 January 1994 to 8 September 1999, that is to say a total amount of EUR 194 443.7, together with EUR 30.364 in respect of interest for each further day's delay until settlement. The Commission also sought an order for costs against Hitesys.

Facts

The contract entered into by the parties

2. On 7 December 1993 the European Economic Community, represented by the Commission, entered into contract JOU2-CT93-0417 ('the contract') with a group of companies comprising Irvin Elettronica Spa ('Irvin'), as 'coordinator', Zentrum fur Sonnenenergie- und Wasserstoff-Forschung ('ZSW') and the Department of Chemical Engineering and Applied Chemistry of the University of Aston (hereinafter 'Aston'). The subject-matter of the contract was the technological research and development project described in the work programme in Annex I to the contract, entitled 'Advanced biomass pyrolysis for electricity production using electron beam irradiation', financed by Community contributions within the 'Non-nuclear energy — JOULE II (1991-1994)' programme, adopted by the Council of the European

* Original language: Italian.

Communities in its decision of 9 September 1991. [1]

3. Under Article 2.1 of the contract, the abovementioned research project was to be completed within a period of 18 months from the first day of the month following signature of the contract. Since the contract was signed in December 1993 work commenced on 1 January 1994, with the result that the research was to be completed by 30 June 1995.

4. The obligations assumed by the Commission are described in Article 4 of the contract. It is stated therein that the Commission undertook to finance the research according to an agreed plan which provided for an advance payment of ECU 200 000 and subsequent periodic payments. Under Article 5 thereof, the payments following the first payment were to be made every 12 months after the operative commencement date, that is to say as from 1 January 1994, on presentation by the coordinator of a financial statement of the costs actually incurred and a technical progress report. The Commission undertook to make those payments within two months of approval of the aforementioned statement and report. Finally, the possibility was provided for of withholding 10% of the total contribution, which was to be released after approval by the Commission of all the reports provided for in the contract, and, in particular, the final report on all costs incurred. Also under Article 4, all payments were to be made to the coordinator, that is to say Irvin, who would then transfer the appropriate shares to the other companies in the group (ZSW and Aston).

5. However, as regards the obligations assumed by the other parties, Article 1.4 stipulated that the coordinator was to assume overall responsibility for liaison between the contracting undertakings and the Commission. Therefore it assumed, *inter alia*, the obligation concerning submission of all documentation relating to the contract. More specifically, as from the operative commencement date, Irvin had to submit a progress report every six months describing the activity carried out and the results obtained by all the contractors. In addition a final technical report, in respect of the whole project, was to be submitted within two months of completion of the project. Irvin also had to present the cost statements as mentioned above. In accordance with Article 5 of the contract, Irvin had to present a cost statement every 12 months after the operative commencement date and a final cost statement within three months of termination of the work. The other contractors had to submit their reports to the coordinator who was to append them to his own.

6. Under Article 1.2. the annexes formed an integral part of the contract, in particular Annex I concerning the 'work pro-

1 — Council Decision 91/484/EEC of 9 September 1991 (OJ 1991 L 257, p. 37).

gramme' and Annex II containing the General Conditions.

Article 8 of the General Conditions, entitled 'Termination of Contract', provides at paragraph 1 thereof that the contractors, that is to say the entities carrying out the research, may terminate the contract unilaterally by giving two months notice to the Commission if they consider that no further purpose will be served by continuing the work for technical reasons or due to a change in the exploitation potential of the results. Under Article 8.2(a) of the General Conditions, the Commission may terminate the contract, for the same reasons and giving the same notice. In those circumstances, if the Commission considers that the reasons for early termination put forward by the contractors are well founded, they have the right to reimbursement of costs incurred; while, if there is no agreement on this point, they shall have the right to reimbursement only of the costs 'accepted by the Commission'.

Article 8.2(d) concerns termination of the contract for non-performance. It provides that, in the event of non-performance by one or more of the contractors, the Commission may consider the contract to be terminated if, after giving one month's notice in writing requiring that the party or parties in default carry out the contractually agreed research, the breach of contract continues to exist and is not justified on reasonable technical or economic grounds.

Article 8.4 then provides that, in the event of termination by the Commission for non-performance by the other parties, the Commission may require the reimbursement of amounts of its financial contribution actually paid to such extent as may be 'fair' and 'reasonable' given the nature and amount of the work carried out and its usefulness in terms of the overall programme. Such amount may then be increased in respect of late payment, calculated at the rate applied by the European Monetary Cooperation Fund for operations in ECU increased by two percentage points, from the date of receipt of payment by the contractor.

7. Finally, Article 12 of the General Conditions contains the arbitration clause, which confers on the Court of Justice sole jurisdiction in respect of any dispute concerning the contract, and under Article 11 thereof, Italian law is the applicable law of the contract.

Conduct of the contractors

8. Under the terms of the contract, the Commission on 8 December 1993 ordered payment to Irvin of the amount of

ECU 200 000 by way of an advance (see Annex 2 to the application).

9. During 1994, only a few months after work under the contract had commenced, Irvin was on the verge of bankruptcy due to severe financial difficulties, caused by the failure of the majority shareholder (Officine Galileo) following the liquidation of the public body EFIM. For that reason, it changed the structure of the company during the same year and became Hitesys. That company superseded Irvin in the performance of the contract, with the result that all the obligations imposed on Irvin by the contract, including those relating to the duties of coordinator, and in particular, the submission of technical and financial reports, were assigned to Hitesys. For its part, the Commission accepted this amendment to the contract by letter of 19 August 1994 (see Annex 4 to the application).

10. However, Hitesys did not fulfil its obligations correctly. In fact, in a fax to Hitesys dated 21 February 1995 (see Annex 5 to the application) the Commission complained that the first progress report was highly unsatisfactory and, consequently, asked Hitesys to suspend all work and contact the Commission in order to negotiate the transfer to another company in the group the tasks of coordinating the project and administering the funds of the project. In the same fax, the Commission also stated that, in the absence of a reply by 15 March 1995, the Commission would seek repayment of the advance payment and negotiate directly with another company in the group concerning the transfer to it of the role of coordinator.

11. Subsequently, by letter of 27 July 1995, (see Annex 6 to the application), the Commission requested Hitesys to forward to it the documents relating to the progress of the work as provided for in the contract, that is to say the second technical report, concerning progress for the period from June to December 1994, the final report and the cost statement for the period from 1 January 1994 to 30 June 1995. In the same letter the Commission reserved the right to seek reimbursement of the advance after examination of the aforementioned documents.

12. Subsequently, by letter of 3 September 1996 (see Annex 7 to the application), the Commission stated that the failure to forward the documents requested and to reply to the various reminders demonstrated that Hitesys had not carried out any work relating to its contractual obligations and, that consequently, under Article 8.2(d) of the General Conditions, it considered the contract terminated and, accordingly, requested the reimbursement of the advance payment made to Hitesys of ECU 132 500. That amount, as shown in debit note No 96005952 issued by the Commission and appended to the application (see Annex 8), corresponded to the difference between the contribution of ECU 200 000 paid by the Commission to the coordinator and the amounts of

ECU 55 000 and ECU 12 500 paid by the coordinator to the other two companies forming the group of contractors.

13. In the absence of any response from Hitesys, the Commission sent it a request for payment on 17 July 1997 (see Annex 9 to the application). By a letter of 25 September 1997 (see Annex 10 to the application), Hitesys informed the Commission that it had been faced with serious technical and financial problems inherited from Irvin and that this had prevented it from progressing with the research forming the subject-matter of the contract, and that therefore 'it was impossible to obtain satisfactory technical results'. In the same letter, Hitesys stated that its technical experts were drawing up a technical-economic report on the results obtained by Irvin in order 'to determine whether there were any possibilities of continuing the research' and that this report would be sent to the Commission by 31 October 1997. In those circumstances, it asked that any action against it for the recovery of the advance payment be suspended.

On 17 December 1997 Hitesys sent the Commission 'a report on the costs incurred by the company in connection with carrying out the programme' and expressed the hope that this document could 'demonstrate the basic honesty' with which it had tackled the programme despite the economic and financial difficulties.

14. Meanwhile, as the Commission states in its action, the other contracting undertakings were endeavouring to complete the tasks which they had undertaken, and presented the final report which was accepted by the Commission in February 1997.

15. By a letter of 6 February 1998 (Annex 12 to the application) the Commission confirmed to Hitesys that it was seeking reimbursement, stating that the contract had been terminated on 30 June 1995, and that the company had not fulfilled its contractual obligations since it had not produced the requisite reports within the periods provided for in the contract and, in addition, had not replied to the reminder letters and faxes. In consequence, the Commission stated that it could not take into account any of the costs set out by Hitesys in the annex to its abovementioned letter of 17 December 1997, with a view to a possible reduction in the amount claimed.

16. By letter of 20 April 1998 (see Annex 13 to the application), Hitesys sent to the Commission its technical report, the text of which was not however produced.

17. By letter of 14 July 1998 (see Annex 14 to the application) the Commission confirmed its claim for reimbursement, stating again that Hitesys had not complied with the periods contractually stipulated for the submission of reports on its research and that the documentation sent with the letter

of 20 April 1998 did not enable the Commission 'to amend the initial claim for reimbursement'.

Proceedings

18. The Commission's action was registered at the Court Registry on 23 September 1999. It was served on Hitesys on 6 October 1999 which, however, lodged no defence. Thereupon, the Commission requested the Court, by letter of 10 January 2000, to grant the form of order sought in its application, in accordance with Article 94(1) of the Rules of Procedure.

Admissibility

19. The action is admissible. On 6 October 1999 it was duly served by post on Hitesys, in accordance with Article 94(1) of the Rules of Procedure of the Court. In addition, the applicant, by letter of 10 January 2000, requested the Court to grant the form of order sought by it. It follows that the default on the part of Irvin-Hitesys must be deemed attributable to a choice made by that company and not to a failure to institute proceedings between the parties and that, consequently, the present proceedings are conducted in the form of a judgment by default, as defined in aforementioned Article 94 of the Rules of Procedure.

Substance

20. Since as mentioned above, the defendant did not defend this action, and since the necessary preconditions are satisfied, the proceedings are being conducted in accordance with the special forms and with the special evidentiary rules proper to this type of case. In that connection it should be recalled that, under Article 94 of the Rules of Procedure of the Court, if the defendant does not defend an action, the applicant may apply to the Court for judgment by default and has the right to obtain a judgment in accordance with the form of order sought if the application in that regard 'appears well founded'. It is therefore clear from the wording of this provision that the judicial appraisal of the adequacy of the evidence in regard to the merits of the claim in this type of procedure, in order to be able to uphold the grounds invoked by the applicant, is generally less rigorous than is required in an ordinary case, in which both parties are present and state their own case; this is so because it is reasonable to assume that this appraisal may be conducted on the basis of the documents without, as a general rule, there being any need to call for production of any document which may be considered relevant to the decision. The essentially summary nature of this assessment is justified and offset by the right of the unsuccessful defendant in default to apply for the judgment by default to be set aside

since the (deferred) proceedings between the parties at that stage allows that unsuccessful party to exercise the rights of the defence, including production of documents deemed relevant to the decision, if applicable.

That being the case, it must be determined whether, in the present case, the claim for the repayment of the advance 'appears' to be well founded on the basis of the documentation produced by the plaintiff. I consider that this question must be answered in the affirmative, for the following reasons.

21. In its action the Commission contends that Hitesys did not fulfil its obligations under the research contract and states that, in those circumstances, it took the initiative of terminating the contract and requesting repayment of the advance.

It should be noted that the General Conditions expressly give the Commission the right to terminate the contract unilaterally if it considers that continuation of the research serves no further purpose, or if one or more of the contractors fails to fulfil his obligations. That is provided for in Article 8.2(a) and (d) of the General Conditions under which, as has already been noted, in such a situation, the Commission can consider the contract terminated, after giving notice to the parties to fulfil their obligations, provided that the breach of contract still subsists one month after receipt of the notice. A slightly different rule is laid down in the General Conditions for termination of the contract by the contractors: they may terminate the contract unilaterally, on giving the Commission two months notice, if they consider that for technical or economic reasons continuation of the research serves no further purpose. An analogous right is also afforded to the Commission under the contract.

The consequences of termination of the contract with regard to the possible payment for research work carried out before termination are very different depending on whether termination occurs in the circumstances referred to in Articles 8.1 and 8.2(a) of the General Conditions or in Article 8.2(d) thereof. In the former case, the contractors are entitled to reimbursement of costs incurred if the Commission considers their reasons to be well founded and 'accepts' the costs stated by them. However, in the second case, that is to say if termination is due to non-performance by one or more contractors, the Commission can request repayment of amounts already paid to such extent as it deems it 'fair' and 'reasonable'. It must therefore be ascertained which of the two situations is applicable in this case.

22. In order to clarify this matter it is necessary to refer to the correspondence between Hitesys and the Commission. It

will be recalled that the research work was to have been completed by Irvin-Hitesys by 30 June 1995 and that the coordinator (Irvin-Hitesys) was under an obligation to submit a progress report to the Commission every six months concerning progress of the work and the results obtained with regard to the activity carried out by all the companies in the group, periodic cost statements corresponding to the progress of the works, the final cost statement and a final technical report.

It may be inferred from the correspondence exchanged between the Commission and Irvin-Hitesys that the company did not fulfil the aforementioned obligations. That is clear in particular from: (a) the fax of 21 February 1995, in which the Commission complained of the unsatisfactory progress of the work and asked Irvin-Hitesys to suspend all work; (b) the letter of 3 September 1996, in which the Commission stated that it considered the contract to be terminated and sought reimbursement of the advance payment; (c) the letter of 17 July 1997 in which Irvin-Hitesys acknowledged that it could not progress with the research work in question and was unable to achieve satisfactory technical results; (d) the letter of 6 February 1998 in which the Commission confirmed that the contract had been terminated on 30 June 1995, and held the company responsible for not fulfilling its obligations since it had not produced the reports required by the contract within the periods laid down therein and did not reply to the various reminders from the Commission.

23. I do not believe that it can be seriously doubted that the overall conduct of Irvin-Hitesys, as is apparent from the aforementioned correspondence, essentially constitutes a more or less total breach of its obligations under the contract. As regards the submission of technical reports and statements, in particular, it appears that Irvin-Hitesys sent the first report six months later than the date scheduled in the contract (that is apparent from the fax from the Commission of 21 February 1995) and that on 27 July 1995, that is when the final date had already passed for completion of the research, it had not by then submitted the technical reports for the period from June to December 1994, or the final technical report, or the cost statements for the period from 1 January 1994 to 30 June 1995. In addition, Hitesys acknowledged in its letter of 17 July 1997 to the Commission that it could not progress with the research work provided for in the contract and was unable to reach satisfactory results. Only in December 1997, following further reminders from the Commission, did Hitesys submit a report on the costs incurred by the company in carrying out the research programme and subsequently in its letter of 20 April 1998, the final technical report.

24. It should be added that, as the Commission observes, a further breach of contractual obligations is constituted by the fact that Hitesys did not ask for an extension to the contract in due time, as allowed by Article 1.7 of the General

Conditions, even though it was aware of the delays which were building up.

25. Since these are the facts which appear from the documents, it was reasonable, it seems to me, for the Commission to consider Hitesys to be in breach of contract with all the consequences which that entails under the General Conditions of the contract. It is true that in its fax of 21 February 1995 the Commission did not invoke Article 8.2(d) of the General Conditions, which concerns termination by the Commission for non-performance; nor, in that fax, does it mention Article 8.2(a) thereof, which allows termination of the contract for technical reasons or if it is impossible to exploit the results of the research, but purely and simply points out to Irvin-Hitesys that it should cease all activity in relation to the research project. In the same way, it should be noted that in the letter of 27 July 1995, the Commission informed Hitesys unequivocally that it considered the contract to have been terminated on 30 June 1995 and requested repayment of the advance. The fact that, in the same letter, the Commission also asked Hitesys to produce the technical and financial reports does not seem to me capable of supporting a different conclusion, that is to say that in this case the contract was terminated not for non-performance but on one of the grounds set out in Article 8.1 of the General Conditions: those reports are in fact documents to which the Commission was entitled to have regard in determining the amount which it could claim back. It should be noted that, under Article 8.4 of the General Conditions, the Commission, in assessing whether to request the reimbursement of all or only part of the advance, must have regard 'to the nature and results of the work undertaken and its use' under the Community programmes.

26. The many instances of non-performance which are discernible from the conduct of Irvin-Hitesys are clearly such as to justify termination of the contract. In its action the Commission relies in that connection on the allegedly mandatory nature of the deadlines laid down in the contract for submission of the various reports. It is inferred that mere failure to observe these deadlines amounts to non-performance of the contract warranting unilateral termination under Article 8.2(d) of the General Conditions. I cannot agree with this argument. Under Italian law, the period of time allowed for performance is considered of the essence when the contracting parties specifically so agree or when it is implicit in the nature and purpose of the contract. [2] In this case there is no such indication in the contract, nor are there any factors to support the view that those deadlines may be implied as being of the essence of the contract because of the type of activity. On this point the Commission, in support of its interpretation of the contract, states that failure to observe the scheduled dates 'may contribute to altering... the outcomes of the

2 — See Civil Cassation 2 December 1997, No 8233.

collateral research and technological development activities... mentioned as related and supplementary in the technical report relating to the project in Annex I' to the contract. However, the reference in question seems to me to be too imprecise to be able to support the inference that the deadlines are of the essence, a matter which requires to be reflected in the clear consensus of the contracting parties.

27. In the present case, however, the legal basis for termination for non-performance is to be found in the General Conditions which, in Article 8.2(d), contain, as has already been seen, a specific termination clause, whose scope is in accordance with the terms of Article 1456 of the Italian Civil Code. In fact, under that provision, where a contract contains a termination clause, the contract is terminated automatically where the contracting party who has observed the obligations notifies the defaulting party that he intends to invoke that clause. Under Article 1458 of the Civil Code, termination has retroactive effect as between the parties, which means that the basis on which the transfer of assets occurred disappears, and the obligation arises for the parties to return amounts received. [3] Therefore, in the present case, once the Commission availed itself of the right conferred on it under the aforementioned clause (in the letter of 27 July 1995, confirmed by the subsequent letter of 3 September 1996), the contractual relationship with Hitesys came to an end, and at the same time, the obligation arose for Hitesys to return the amount received by way of an advance payment. In those circumstances the subsequent submission by Hitesys of the technical and financial reports could not constitute performance of the contract since once the contract is terminated, it is treated as never having existed.

28. It remains to be determined whether the instances of non-performance as noted above can be regarded as justified by technical or economic reasons. In fact, under Article 8.2(d) of the General Conditions, the Commission is not entitled to terminate the contract unilaterally in such a case. It does not seem to me that there are any such grounds in this case. The only explanation provided by Hitesys to justify its inertia was the financial crisis of the group of companies to which Irvin belonged, but plainly a ground of this kind cannot be invoked, because it relates in broad terms to the conduct of the company concerned and cannot therefore result in damage to the body awarding the contract and the other parties involved in the research project.

29. Similarly, account should also be taken of the fact that, as the Commission points out, the justifications relied on by Hitesys in its letters of 25 September 1997 and 20 April 1998 (serious economic and financial crisis following the liquidation of EFIM) are not only irrelevant, for the reasons given, but reveal a further instance of non-performance, since Hitesys was

3 — See Civil Cassation, 12 March 1997, No 2209.

required by Article 1.4 of the General Conditions to notify the Commission without delay of any event or circumstance likely to compromise the performance of the contract, yet only mentioned these matters in correspondence as from September 1997.

In the present case the Commission is seeking reimbursement of the total amount paid by way of advance. On this point, it states in its application that the documentation supplied does not allow 'the activities carried out to be precisely identified, the time taken for implementation or their functional link with the Community project' to which this dispute refers. A similar point was made by the Commission in its letter to Hitesys of 14 July 1998 (see Annex 14 to the application).

30. In those circumstances, I do not believe that it is open to doubt that Hitesys did not fulfil its obligations under the contract and that the unilateral termination of the contract by the Commission is thus justified. Under the General Conditions, the Commission is entitled in such a case to repayment of the advance, which forms the subject-matter of this dispute.

I consider this negative position taken by the Commission to be reasonable, in response to the many instances of non-performance by Hitesys identified and examined above. The delay of several years in submitting information and also its inadequacy fully justifies the line taken by the administration. Moreover, Hitesys itself acknowledges this inadequacy, in particular in its letter of 25 September 1997, in which it admits that, following the liquidation of EFIM, Irvin was compelled to conclude that it was 'impossible to achieve satisfactory technical results'.

It has already been noted that, under the first paragraph of Article 8.4 of the General Conditions, the Commission may claim a reimbursement of a smaller sum than that paid by way of advance and, in making an assessment in that regard, is to take into account the nature and results of the work carried out, and of its use and coherence in regard to the Commission's programmes.

31. In light of all the foregoing considerations, I propose that the claim for reimbursement by the Commission should be upheld in full. The sum to be paid by Hitesys to the Commission in repayment of the advance must include interest accrued on the sum paid by way of advance, calculated from 8 January 1994 (presumed

date of receipt of the advance by Hitesys) to 8 September 1999, and is to be determined in accordance with the criteria laid down in the second paragraph of Article 8.4 of the General Conditions, together with interest accruing until the actual date of payment.

32. Finally, since I propose that the Commission's claim should be upheld, Hitesys should also be ordered to pay the costs under Article 69(2) of the Rules of Procedure, in accordance with the claim on that behalf by the administration.

Conclusions

33. I therefore propose that the Court should:

(1) order Hitesys SpA to pay to the Commission EUR 132 500 by way of capital, together with EUR 61 032.8 by way of interest accrued due at the rate of 8.25% for the period from 8 January 1994 to 8 September 1999, that is to say a total amount of EUR 194 443.7, as well as EUR 30.364 by way of interest for each extra day's delay until actual payment; such amount being in connection with the financing relating to contract JOU2-CT93-0417;

(2) order Hitesys SpA to pay the costs.